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The Normalization of Saudi Family Law

by Chibli Mallat*

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Abstract

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

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

I. Introduction

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

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

With the fall into obsolescence of slavery in the 20th century,² family law was restricted to the categories mentioned above. This is true for all schools of law, including the Hanbalis who are now well represented by the Qatar Family Law.³ Tiny Qatar is particularly interesting for the Saudi neighbour, because it is the only other independent state in the world which professes to be Hanbali. Qatari judges are asked by the law to apply the Hanbali school precepts before turning to the other four schools.⁴ The Qatari law is divided in five books: marriage⁵ (book 1), separation⁶ (book 2), a short two-article book on capacity and guardianship⁷ (book 3), a book on gifts and wills⁸ (book 4), and a final book on inheritance⁹ (book 5).

Hanbalism in family law is dented by the now century-long tradition of eclecticism in the codification process between the four Sunni schools.¹⁰ The Qatar Family Law of 2006 owes as

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

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

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

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

⁵ *nikah*.

⁶ *firqa*.

⁷ *ahliyya wa wilaya*.

⁸ *al-hiba wal-wasiyya*.

⁹ *irth*.

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

much to the long comparative effort that culminated in a model Arab Family Code of 1986, as it owes to purely Hanbali dispositions.¹¹ Saudi Arabia could easily follow in the steps of its Qatari neighbour,¹² but the Saudi scene is marginally complicated by a significant minority of Shi'is in the Kingdom.¹³

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

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

At first instance, the court consists of one judge, who is mentioned here. In cassation there are usually three judges, whose names are mentioned only when the first instance judge's decision is reversed. Other judicial bodies or quasi-judicial bodies often include the names of the judge or judges, or the mufti in some cases. The parties are never named in the Saudi decisions. Sometimes the date mentioned in the heading is not the same as the one found in the text. The slight discrepancy is probably due to the difference between the decision and the writing up of the case, which can take place a few days after it was issued. The decision is usually read in the presence of the parties, and the judge explains the appeals' procedure, important especially with regard to divorce cases because the decree of divorce is final only upon confirmation in cassation. For the first time in the history of the country, the lawyer, litigator, judge, law professor, can look at disputes and the way judges ground their judgments to solve them in everyday life. The *Mudawwana* is particularly alluring as a compilation because the decisions are selected from all Saudi regions, with cases almost invariably starting in first instance

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

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

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

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

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

jurisdictions across the vast country. The language of the Mudawwana reports is often raw. Saudi decisions give a strong flavor of real disputes, almost as if the reader were in the midst of a reality television show. Litigants speak their mind in open court before the judge with their words reported often verbatim. The parties' behaviour, as well as that of the witnesses and the qadi/judge, are richly documented in the decisions.

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

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

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

¹⁶ *tamyiz* in the Levant, *naqd* in Egypt. In 2007, a comprehensive law (Nizam al-qada', 19.9.1428/1.10/2007) reformed the judicial system, introducing a three-tier structure including courts of first instance, courts of appeal, and a supreme court, *al-mahkama al-'ulya*, (Art. 9). The change has been implemented slowly.

¹⁷ *tadqiq*.

¹⁸ Until the publication of the first volume of the Mudawwana in 2007, case-law reporting was inexistent, except for a few registers of mostly uninteresting cases in Diwan al-Mazalem around 1980. Typed, photocopied decisions circulated only amongst prominent law offices looking for precious precedents and examples. Since 2007, a determined effort by the Ministry of Justice, together with the courts' administration, has resulted in series of reported judgments, including the Mudawwana and Diwan al-Mazalem's *Majmu'at al-ahkam wal-mabade'* (Collection of decisions and principles), which is available on the internet on the Diwan's site, www.bog.gov.sa, and in the paper publication by the Diwan's technical department of six annual sets of decisions covering the Hegire years 1427-1432 (2006-2012, the latest set for 1432/2012 published in 1436/2015). The Diwan has been the main commercial and administrative court of the Kingdom, but it has no jurisdiction in family law matters. Starting around 2012, the Ministry of Justice started publishing a large number of cases from the courts across the Kingdom. This includes *Majmu'at al-ahkam al-qada'iyya*, a massive collection of court decisions in 30 volumes bearing the date 1436/2015, which was made available by the Ministry of Justice for decisions issued in 1434/2013 and posted on the internet on <https://beta.moj.gov.sa/ar/SystemsAndRegulations/Pages/System1434.aspx>. [Herein Ahkam, followed by the volume and the pagination]. Unlike the Mudawwana, Ahkam reports do not mention the name of the judges.

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

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

II. Marriage and marital life

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

The situation being as described, and considering her request to be treated well and justly with his other wife in both residence and travel inside the Kingdom, and her request for him not to be absent without excuse; and since it appears that the defendant lives with his other wife in Hufuf, the place where the plaintiff resides, and since he stated that he did not treat the plaintiff well, and expressed his readiness to stay in the plaintiff's house in... [location omitted], night after night, and to travel with her like he travels with his other wife; and since he doesn't accept her leaving [him] and since she is ready to return home; and considering what the scholars' opinion in the section on the treatment of women, which requires for each spouse to treat the other well and in pleasant companionship, to reject any harm, to provide for each other generously, and to not deflect this [generosity] with mendacity or harm; and since each of the spouses is bound to improve his companion's character and be kind to him and prevent harm from affecting him; and since the man who has two wives or more must divide his stay night by night. Night sets the standard because a human being repairs at night to his house and takes comfort with his family and usually sleeps in his bed with his wife. His livelihood is by day, and it is forbidden for him to go to another [woman] during the day except for a special need such as paying maintenance owed or visiting for health reasons or asking about something he needs to know, or visiting because he has been away for a long time. And the husband can travel with one of his wives only after a draw of lots²² or if the other wives agree to that, for God has ordered to 'treat them fairly', and to give 'wives the good they deserve as well as the good they owe';²³ 'Aisha [said to be the favorite wife of Prophet Muhammad] is reported to have said: 'The Prophet used to divide matters between us justly.' (M.1.78-9)

This is powerful literalism by the judge in favour of the wife left behind.²⁴ Judge 'Unayzan's decision does not reveal why the defendant husband did not simply repudiate his first wife, instead of undergoing all this timesharing exercise she was requesting. The matter of his children living with her appears to have weighed in favour of the defendant husband

²⁰ M.1.76-81. Decided 20.1.1419/16.5.1998, confirmed in cassation on 16.2.1419/11.6.1998.

²¹ Qur'an 4: 129.

²² *qur'a*.

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

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

remaining in the first marriage, or, more cynically, he may have been reluctant to divorce because she had more means to spend on the children than he could afford for their upkeep as a divorced father.

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

Before the Riyadh judge, the plaintiff was a daughter insisting on her right to get married against the opposition of her father, and succeeding in persuading the court that he was unreasonable.²⁶ In the particulars of this unusual case, a woman aged 28, and formerly married with two children, brought a suit to the general court of Riyadh against her father, who was refusing to let her marry a local religious leader of good reputation and acceptable means. The father appeared in court to defend his decision because of the suitor's lack of courtesy towards him. He also explained that he asked around about the suitor nonetheless, and concluded that the suitor lacked social standing to marry his daughter.²⁷ Clearly unnerved by his daughter's case against him, he reluctantly stood before the court to make this argument, saying he was not ready to appear again, and suggesting that this one court appearance as defendant against his daughter was humiliating enough. And since he was so unhappy to show up as a defendant in a case brought by his own daughter, he concluded that he was ready to abide by the court decision, however it turned, to avoid returning to the defendant's box. He then put his arguments in writing, repeating points put orally to the judge in a previous *ex parte* meeting, on the inadequacy of the suitor's social standing and personal behaviour. He also reiterated in writing his wish not to be bothered any further.

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

²⁵ M.3.46-51. Decided 13.1.1422/7.4.2001, confirmed in cassation on 30.1.1422/24.4.2001.

²⁶ M.1. 378-84. Decided 14.6.1427/11.7.2006, no appeal.

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

There were further attempts from the court to bring the parties together, to no avail. Finally, the judge found that the father was being excessive in the matter,²⁸ on no less an authority than ibn Taymiyya (d. 1328) and ibn Qudama (d. 1123).²⁹ He ruled that the court would substitute itself in the father's role as his daughter's guardian, and ended up marrying the frustrated couple over the father's obstinate refusal. The father did not avail himself of his right to appeal. The judgment concluded as follows:

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

*Maintenance.*³⁴ Of note in the set of cases on marriage is a maintenance case which appears as a surviving evidentiary and procedural practice found in pre-modern courts, and allows the parties to use the court for purposes of registering an already agreed settlement.³⁵ The case was initiated by the father of a woman living at his house with her three children, and he appeared as her representative in court against her husband. Before the judge, he pleaded for adequate maintenance by the defendant, including a separate marital home for her and the children, and the return of the equivalent of 10,000 riyals in gold that he had paid in the last years for her and her children's upkeep. The defendant husband agreed on the spot on all facts and demands, and requested a grace period of nine months to secure housing, also committing to pay back

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

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

³⁰ *al-wali al-aqrab*.

³¹ *'adalaha*.

³² *hakem*.

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

³⁴ *nafaqa*.

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

the maintenance debt in monthly instalments effective immediately. The agreement is simply recorded by the court, and dated. With no mention of an appeal, this suggests that the arrangement had been reached by the parties before the case was brought before the judge, and that the court was simply used to register it more effectively than if the agreement had just been concluded privately.

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

III. Separation

1. Cases of Marital Disputes

Saudi courts adjudicated several cases of marital disputes in which an unhappy wife sought a divorce in court, and almost invariably prevailed. In one instance before the general court of Riyadh, a Palestinian wife requested the divorce³⁷ from a Palestinian husband who, a year after the marriage, had not had sexual intercourse with her, and treated her shabbily, being 'profligate with insults'.³⁸ The defendant husband appeared in court, denying his bad behavior but confirming the absence of sexual intercourse. He immediately agreed to the divorce, on condition that the dower he had paid for the marriage be returned to him, 10,000 riyals and some gold. Judge Ibrahim al-Khudayri acquiesced to the common request, making the husband repudiate his wife in court in return for the dower, and registered the divorce.

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

Building on the above, considering Article 34/10 of the Law of Procedure,⁴¹ what the scholars have decided, the Prophetic saying on 'no harm',⁴² and what the scholars stated in *Zad al-Ma'ad* (4/11), *al-Rawd al-Murabba'* (p. 134), *al-Mughni* (p. 576), *al-Muqni'* (30/318, 'if he

³⁶ M.1.283-6. Decided 21.12.1426/21.1.2006, Agreement in the Riyadh court recorded before judge 'Abd al-Rahman al-Dahash. Quote at 286.

³⁷ *khul'*

³⁸ M.1.92-4. Judge Ibrahim al-Khudayri, 29.7.1425/14.9.2004. No appeal. 'Profligate with insults, *shadiid al-sabb wal-shatm'*, at 93.

³⁹ M.1.136-9. Decided 26.11.1424/18.1.2004, confirmed in cassation 17.1.1425/9.3.2004.

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

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

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

goes away and does not provide her with maintenance and she is unable to have access to his money or borrow against it, then she has the right to divorce.)⁴³ Divorce is not allowed without a decision from the judge,⁴⁴ and it is an irrevocable divorce according to the [Hanbali] school.⁴⁵ This is supported by Shafi'i and Ibn al-Mundhir, and reported back to 'Umar and 'Ali and Abi Hurayra; it was also said by Ibn al-Musayyab and al-Hasan and Malek and Ishaq and others; 'Umar was asked about men who went away from their wives, and he ordered them either to provide maintenance or to divorce.

Considering the evidence in the case, the situation of this woman and her needs for care and probity,⁴⁶ and her insistence on the rescission of her marriage, and since the objectives of the law⁴⁷ are for marriage to secure abode,⁴⁸ purity and probity, and this is not achieved in the case of this woman plaintiff, the conditions for rescission are met. We explained to her that she has the choice between rescinding her marriage, and exercising patience and persistence. She chose divorce. It is clear to me that the wife is harmed by remaining under her missing husband's control,⁴⁹ so I granted her the divorce.⁵⁰

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

Divorce was also granted to another Palestinian woman who had been abandoned for three years by her husband.⁵³ She knew he was in Morocco, and tried to track him down for

⁴³ Rescission of the marriage, *faskh*.

⁴⁴ *hakem*.

⁴⁵ *madhhab*.

⁴⁶ *siyana wa 'afaf*.

⁴⁷ *maqased al-shari'a*.

⁴⁸ *sakan*.

⁴⁹ *'isma*.

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

⁵¹ M.2.60-66, decided 17.4.1426/26.5.2005, confirmed on cassation 20.5.1426/27.6.2005.

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

⁵³ M.1.206-12. Decided 17.3.1426/26.4.2005, Judge Naser Jarbu', general court of Riyadh.

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

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

Judge Jarbu' was unfazed. He answered that the Executive Note for the Law of Civil Procedure⁵⁶ had not made a difference between a case of divorce and other cases involving an absentee defendant. In case the husband returned, he was entitled to make his case regardless of the nature of the divorce. As for notification, four months had already passed since the judgment was rendered, and there had been no answer from the husband. Delay only added to the plaintiff's harm. (M.1.211-2) The court of cassation confirmed without commenting further.⁵⁷

The court of cassation would not be as tolerant of another judgment confirming the power of women over the termination of their marriage.⁵⁸ The first instance judge in that case, Hasan Aal Khayrat, had to confront three successive reviews of his decision by the court of cassation to see his decision in favour of the aggrieved wife finalised. In the particulars, the woman plaintiff appeared before the court on 16.6.1425/2.8.2004 to claim a divorce from a husband whom she accused of cursing and beating her, taking her money, and not caring for the ten children she had from him. She reminded the judge that she had come to him earlier to complain informally about the situation. All of this, she said, to no avail. She now requested a divorce because she was unwilling to live with him any longer,⁵⁹ and demanded further that he return her belongings after she left the marital home to live at her mother's. She also asked for custody over those amongst her children who were under age.

⁵⁴ *faskh*.

⁵⁵ Decision of cassation on 9.8.1426/13.9.2005 at M.1.211. Because the divorce granted by the lower court was 'final', the cassation judges objected that the husband's right had been breached. By this they probably meant that the decision could be final only when the cassation court had said so. Also, since the defendant was abroad, his notification required more than the two months mentioned by Jarbu' at first instance.

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

⁵⁷ Decision in cassation on 6.9.1426/9.10.2005.

⁵⁸ M.1.306-25. Decided 17.8.1426/21.9.2005. No exact date for cassation, see below.

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

The husband denied the allegations of ill treatment, and said he did not beat her 'except in self-defense.' (M.1.309) He did not want to grant the divorce, but intimated he would acquiesce to it upon certain conditions. A longish period of mediation requested by the judge followed, with two designated arbitrators⁶⁰ concluding in a report to the court that their marital life could not be saved, that the marital and personal property should be distributed in a detailed way they prescribed, in addition to making arrangements for the children's custody. The judgment cites in full the report of the two arbitrators, reached on 30.7.1426/4.9.2005. Their conclusion reads as follows:

First: the separation takes place between them with the wife being content with her dower.⁶¹ The husband is not obligated to add anything to it. Second: the husband accepts the wife forfeiting what is left on the dower in return for the separation. He does not receive back what [the immediate dower] he already paid. Third: the jewelry owed by the husband [as deferred dower] is considered equivalent to the money he claims from his wife. She acknowledges this against the husband surrendering the property deed of his house following the annulment of that agreement and the agreement [of the two parties] not to pursue its course. Fourth: the wife receives all the above mentioned furniture as agreed by the spouses. Fifth: Order the two abovementioned daughters, or one of them, to be with one of the parents under the oversight of the judge, and with God helping us to success, we [the arbitrators] note that both parties, as mentioned, want the separation which therefore just needs to be registered and adopted. This is what the two arbitrators found, signed 1-... [withheld name of first arbitrator] 2- ... [withheld name of second arbitrator], issued Sunday 30.7.1426/4.9.2005.

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

A week later, on 9.8.1426/13.9.2005, judge Khayrat issued his first judgment:

I decide as follows:

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

Second: I decide that the children who are of custody age stay with their mother so long as she does not remarry, and I rule that maintenance must be paid to them by their father in accordance with the relevant custom [i.e. relative to the social situation of the father], estimating payment of 200 riyals for each child monthly. As for the children over 7, in case

⁶⁰ *hakaman*.

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

⁶² *faskh al-nikah*.

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

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

they are girls they go with their father and in case they are boys they are asked to choose between the parents. They stay with the one they choose, and they are not prevented to visit the one with whom they choose not to stay. The girls who go with the father visit their mother once a month. (M.1.315)

The husband did not agree and appealed to the court of cassation. Here was the start of a painfully repetitive process where the court would reject some arrangements decided by the lower court, judge Khayrat would take the requested changes on board, another appeal would be lodged, and the cassation court would disagree again and send the judgment back to Khayrat for yet another review. This took place three times until the decision became final on 6.8.1427/31.8.2006.

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

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

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

In the first cassation judgment, issued on 18.10.1426/10.11.2005, the reproach is that the first instance judge was not precise enough:

We have decided to return the case to the judge in charge [Khayrat] to note the following: 1- His Honour⁶⁵ ruled that the marriage should be annulled and did not annul it. He needs to annul it first and then follow with the consequences in the judgement. Alternatively he could allow the wife to decide whether to end her marriage, and if she so chooses then he can rule on the consequences accordingly. 2- HH's disposition in the second paragraph of the decision is overly general, for he did not mention the names and ages of the children. The judgment should be straightforward and clear. 3- HH mentions that the son is made to choose between his parents, but it is he who should make him choose before deciding, so that he can draw the proper legal conclusions on the choice. 4- HH ruled that the father of the children must pay the maintenance in accordance with custom in a case like this, and mentioned that it is estimated at 200 riyals for each. The basis used for this estimate, and whether the father's income and support to the family and his means were taken into account, does not appear in the document. These must be taken into account. 5- The judgment on the visitation rights is not specific enough. The ruling should be clear and easy

⁶⁵ Literally His Virtue, *fadilatuh*.

to implement. 6- HH mentioned that the separation period starts after the judgment becomes final. In fact, it starts from the time of the rescission.⁶⁶

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

Back to the drawing board for judge Khayrat. He duly obliged, told the sons that they need not choose since they were adults, and struck out the 'premature' judgment. Unfortunately, this was not the end of the matter, for he received on 7.5.1427/4.6/2006 another 'note'⁶⁸ from the court of cassation. The judges reminded Khayrat that the husband had mentioned a number of property deeds, and told him he could not finalize the judgement without properly ascertaining what these deeds said in order to consider whether they were related to the case. They also suggested he revisit the matter of the kids 'and do what was necessary for the benefit of the children because they are at the center of the case.' (M.1.323) He duly obliged again, but could only find some of the deeds, and concluded they were not related to the case. It is not clear what he did 'for the benefit of the children', but the spouses seem to have agreed on some deal, with the wife helping the husband to complete building a house against his readiness to accept 100 riyals monthly allowance if he could not pay the 500 riyals, which had been decided after the first revision. (M.1.323-4) Still, the husband decided to appeal the Khayrat revised decision of 6.8.1427/31.8.2006. (M.1.323)

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

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

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

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

⁶⁸ *mu'amala*.

⁶⁹ M.1.324-5, date not specified.

⁷⁰ *nafrat*.

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

⁷² *faskh*.

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

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

The case starts with the husband as plaintiff requesting his wife to return to the marital home from her stay with her parents. Upon being questioned by judge Nayef al-Hamad at the general court of Riyadh acting as substitute for judge Khaled al-Luhaydan, the wife responded bluntly: 'I am staying at my parents, I hate him and I do not like him.' (M.2.29) She had previously asked for divorce,⁷⁵ but her husband effectively undermined the request by divorcing her in a sole repudiation. He then had her return to him. 'A month after I uttered the first repudiation, I asked her back because I love her and I want her back, but she did not return. We have no children, and I think she is inhabited by an evil eye, and I uttered a single repudiation so that the bad eye is removed. So the husband stated.' (M.2.30)

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

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

⁷⁴ M.2.28-35. Judge Nayef ibn Ahmad al-Hamad at the general court of Riyadh, 13.2.1428/2.3.2007, confirmed in cassation 4.4.1428/22.4.2007.

⁷⁵ *khul'*.

⁷⁶ '*ja-imsak bi ma'rufaw tasrih bi-ihsan'*, Qur'an 2: 229, M.2.31.

⁷⁷ *fitan*.

⁷⁸ *adrar baligha*, at M.2.34.

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

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

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

While the aggrieved wife seems to invariably get her way, obvious forms of inequality remain, including the husband's right to unilateral divorce in simple utterances of repudiation, and the compensation paid to him, usually by way of the return of the dower by the wife. This unilateral, extra-judicial termination by repudiation⁸⁸ remains distinct from the judicial termination⁸⁹ achieved by the wife after an elaborate trial. But the two parties appear generally equal in the possibility to terminate the marriage they are unhappy about. 'I hate him' is sufficient grounds for the judge to grant divorce to the wife who simply considers the continuation into the marriage as harmful to her happiness. The main difference is that she cannot terminate the marriage at will, as her husband remains capable of, albeit with constraints of registration of the divorce before the court. She must get the court to decree it. This general pattern conforms with Muslim family courts across the Middle East.

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

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

⁸¹ *shurri'a*.

⁸² *'ayb*.

⁸³ M.3.60-68, decision of judge Hamad ibn Hasan al-Hammad, head of courts of Aflaj, 26.1.1427/7.3.2005, court of cassation confirmation on 13.2.1427/13.3.2006, quote at 68. This is an interesting case for the sociology of drugs in Saudi Arabia. To appreciate the phenomenon in Saudi society, see full 5 volumes of decisions (out of the 28 volumes of *Ahkam*) on drug-related court cases. *Ahkam*, vol. 17 to vol. 22.

⁸⁴ *faskh*.

⁸⁵ M.3.68-75. Decision by judge Ahmad ibn 'Abdallah al-Ja'fari in General Court, 6.4.1428/23.4.2007 of Ras Tannura confirmed in cassation 9.5.1428/26.5.2007.

⁸⁶ *nushuz*.

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

⁸⁸ *talaq*.

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

⁹⁰ M.2.46-59. Decision dated 14.6.1392/25.7.1972.

The substantive issue was less important than the procedural one. The issue of substantive law was whether the three-time repudiation formula said in quick succession – ‘you are repudiated’⁹¹ repeated three times – leads to a full divorce, or whether it amounts to just one utterance and some time needs to pass between each instance of repudiation. The practical consequences are important. If a man utters the talaq formula three times in one full swoop, often the expression of a moment of extreme anger, the wife is considered divorced ‘irrevocably’.⁹² To return to her former husband, she needs in traditional Sunni law to complete the three-month waiting period,⁹³ then remarry a stranger, get a divorce from him and complete again another three-month waiting period. Only then can she remarry her former husband. Should the three-talaq formula be considered as only one, then the divorce is not complete; it is a revocable repudiation.⁹⁴ The husband may get his wife back at will, and the revocable repudiation is considered not to have taken place.

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

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

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

The debate is not new, and most Middle Eastern countries have chosen to give marriage a chance by holding, like ibn Baz, that the three-time divorce uttered as one unit should be considered as just one of the three utterances required for an irrevocable divorce.⁹⁵ Time must elapse between each of the three utterances, during which husband and wife may not have sex. If the husband expresses his wish to have her back, or if they have sexual relations, the previous one or two repudiations are considered no longer effective. The latest family law codification, in Hanbali Qatar, takes this view. In the Qatari family code, the three-time talaq in one unit is tantamount to just one utterance, and therefore a talaq of the revocable type.⁹⁶

⁹¹ *anti taleq*.

⁹² *talaq ba‘en*.

⁹³ *‘idda*.

⁹⁴ *talaq raj‘i*.

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

⁹⁶ Art. 108.4 QFL considers that ‘talaq does not take place... when successive or numbered in word or writing or by signal [since it is considered] as one utterance.’ Numbered means that the husband, instead of repeating the formula of

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

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

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

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

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

This makes sense in the legal system of Saudi Arabia, even if it underlines the two orders of authority fighting each other's competence. A different answer would have dramatically undermined the authority of the Grand Mufti on the most outrageous premises, a case where

repudiation three times in full, says '*anti taleq bil-thalath*, I repudiate you thrice.' Art. 88c of the Family Law of Bahrain of 2009 includes a formula mentioned 'numbered' but not 'successive'. However the repudiation must take place in court to take effect (Art. 91).

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

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

⁹⁹ *muqallid*.

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

the fatwa had been initially requested by the married couple. Turning later to the qadi to undermine the Mufti so directly appears to be simply unconscionable.

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

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

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

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

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

¹⁰¹ *'ammi*.

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

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

¹⁰⁴ *amr ta'mimi*.

¹⁰⁵ *batt*.

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

¹⁰⁷ *al-rajeh fil-madhhab*.

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

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

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

The last case cited, the one decided by judge Mukhallaf, is interesting for additional reasons, as it sheds light on two thorny issues. The first, and most important, is the illegality of a repudiation made during the last days of a deceased person, and the court casting doubt on the sanity of the husband in such an instance. Quoting both ibn Qudama and a common Ottoman Majalla principle,¹¹¹ the judge considered that the repudiation, which was pronounced three days before the husband's death in addition to having been said on his deathbed,¹¹² was intended to deprive the wife from her share in the inheritance. It was therefore vitiated, and the classical jurists mention several examples in which the repudiated wife is still considered to

¹⁰⁸ M.3.32-39. General court of Madina, decided 5.4.1425/25/5/2004, confirmed in cassation 20.12.1425/31.1.2005.

¹⁰⁹ *li-anna al-talaq waqa'a mukhalifan*, M.3.35-6.

¹¹⁰ *haythu nusiba ilayh al-talaq thalathan bi-lafz wahed wa hiya al-talqa al-ula*, M.3.36. See also the case of a three-time repudiation conditioned on the wife not going to hajj with her parents. It can be rescinded if the husband thought that the condition had been met whereas it was not. The explanation is confused. M.3.56-59, decision of *hay'a qada'iyya*, ibn Jubayr presiding, 8.4.1393/11.5.1973.

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

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

be in the revocable period when this happens. She is not considered therefore to have been divorced, and inherits her share as if she was still married to the deceased. (M.3.37)

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

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

IV. Children

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

1. Custody

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

In a typical case, judge Sulayman Ibrahim al-Hadithi at the court of Riyadh held for the 'right of the ward',¹¹⁸ an eleven-year old girl whose father was claiming custody rights based on her age.¹¹⁹ The particulars of the case resemble estranged parents' fight over their minor children

¹¹³ *sakk hasr wiratha*, M.3.34.

¹¹⁴ *wilaya*.

¹¹⁵ *hadana*.

¹¹⁶ See MALLAT, IMEL, 357-8.

¹¹⁷ *Id.*, 393-5.

¹¹⁸ *haqq al-mahdun*.

¹¹⁹ M.1.192-99, 9.2.1426/19.3.2005, confirmed in cassation, 3.3.1426/11.4.2005.

the world over. The parents had divorced a decade earlier, and their daughter grew up with her mother, who did not marry so long as the girl was with her. At age eight, following Hanbali custody (generally set at 7 years for boys and girls), her father took her to his house, where he lived on his own. He did not allow the mother to visit. Two years later, the mother waited for her daughter at the door of the school and took her home. When the mother succeeded in physically keeping her at her house, the father claimed his right to custody in court.

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

The interest of the child, as shown in most jurisdictions in the Middle East, appears to have become the key consideration of judges in such cases. Saudi Arabia is no different when the situation appears to the judge as worrisome for the child. In this case, the father seemed unstable, invoking the death of his own mother as a spell on the family,¹²¹ and living jobless alone with his daughter, whilst preventing her from seeing her mother. At one point the judge mentioned the rule of the mother losing custody if she remarries, and it transpires from the report that the mother did remarry for a couple of years between the surrender of custody to the father when the girl turned eight and the snitching episode which gave way to the court case brought by the father. However, despite what might have appeared as grounds for loss of custody, the judge remained severe with him, rejecting his claims outright and requesting that he exercise his right of visitation only upon a new judicial request. The girl must have made a damning deposition against her father in the *in camera* interview.

In contrast, sometimes the situation is so unfavorable to the mother that she is denied custody even when the children are minor. This was the case of a Russian mother who was married to a Saudi man who divorced her in 1426/2005. She had borne him two sons, in 1998 and 2002 respectively. He took them to Jordan, where the court granted him custody despite their young age. The wife did not live in Jordan, and a procedural device was used to assert the husband's custody over his small children. It was the husband's mother who brought the case in Amman demanding custody over her grandchildren against her son. With that 'fake' lawsuit, the husband was probably able to avoid notifying his previous wife, while engineering with his mother a phony case that would consolidate his effective custody over his sons. It worked, and the Amman court granted the father custody by denying the grandmother's (his own mother) request, 'who was demanding for the children to be surrendered over to her, and feared that the plaintiff woman [i.e. the mother bringing in the subsequent case in Riyadh her request for custody] would take the two sons to Russia, a country which was not Muslim; and the woman

¹²⁰ M.1.197.

¹²¹ *sithr*, at M.1.196.

does not pray nor fast, and I [the husband] fear for the sons from her and for their beliefs [not to be impaired by their mother in that non-Muslim country].¹²²

So judge Sulayman ibn 'Abdallah al-Majed, in the general court of Riyadh, confirmed the judgment of his peers in Jordan by rejecting the mother's stronger rights under classical law for the protection of her infant children. He invoked their higher interest, namely to be brought up by their Muslim father.¹²³ In his conclusions, the Riyadh judge mentioned 'the agreement of the majority of Maliki, Shafi'i and Hanbali scholars that the father has the right [of custody] in this case, including ibn Qudama in the *Mughni*, vol. 8 p. 193 – if the country to which the father had moved was secure and the road to it secure, then the father has a better right than others, whether he resides in it or he moves.' (M.1.377)

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

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

2. Filiation

A fair amount of filiation decisions appears in Saudi courts.

In one case, the judge accepted a filiation for a son born 18.1.1429/27.1.2008 almost two years after his father's death (22.2.1427/23.3.2006), on account that all the heirs had accepted it, and that the lapsed period remained within the maximum laid by ibn Qudama.¹²⁷

In another case, following divorce, the filiation of a daughter was confirmed against the 'doubt' of the father.¹²⁸ The daughter was born during the marriage, but the father was seized with a

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

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

¹²⁴ M.1.392-395, decision confirmed in cassation on 27.6.1427/24.7.2006.

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

¹²⁶ In another case where the parents lived in different cities, custody went also to the father in a dispute where the mother of two boys, aged 11 and 13, had refused a judicial settlement requesting the father to deliver the boys to their mother during the weekend, and for a week during the holidays. M.1.296-99. The judge mentioned that 'the jurists had decided that if the home of the two parents differed, custody goes to the father but the children cannot be prevented from visiting their mother.' (at 298). Note the concept of '*hadana murtaja'a*', i.e. the possibility of new requests when circumstances change, such as change in the residence of the divorced parents. This is also the case for visits of children to their divorced parents, which the court deems always subject to being reviewed for changed circumstances, see case M.3.50-55, at 55. Decision of 18.4.1391/13.6.1971 by *hay'a qada'iyya* presided over by Muhammad ibn Jubayr.

¹²⁷ M.3.40-44. Decided 25.2.1429/4.32008, confirmed in cassation 3.4.1429/10.4.2008. In *al-Mughni*, 9, 180, ibn Qudama mentions in special circumstances the acceptance of filiation up to two years, in some reports even four, after the father's death.

¹²⁸ Decision of judge 'Abd al-Rahman Aal 'Atiq, Riyadh, dated 21.3.1428/8.4.2007, confirmed by cassation 19.3.1428/6.4.2007, at 68-75.

strong sense of doubt as to his paternity, and brought a case in court to reject her filiation. Marriage and divorce documents were produced and ascertained by the court, including by depositing a plethora of witnesses. Against the father's doubt, the authority of Ibn Qayyim's *Zad al-ma'ad* was invoked: 'To the one whose wife gave birth to a child who could have been from him, the child is considered his if birth has taken place after half a year from the moment sexual intercourse was possible.' (M.2.74) This having been the case here, the father's denial of paternity failed.

In a third, unusual paternity case, the plaintiff came to court ten years after the divorce to claim as his son the boy who was born to his former wife ten months after their separation.¹²⁹ He had seen the evidence 'in his dream.' The court responded patiently with a long string of citations from classical jurists vindicating the wife's claim that having her period after the divorce was evidence that the son could not be the first husband's, as well as a rejection of his 'dream' as evidence. Both classical scholars Shatibi and ibn Taymiyya were quoted to dismiss proof by dream. In a reference prefiguring the Cartesian *malin génie*, the court quoted 'Shaikh al-Islam ibn Taymiyya R.I.P.':

The one who sees a dream is often a liar. To appreciate his (dis)honesty, the one who might have brought the dream to him could well be Satan, and the pure vision that carries no proof as to its veracity cannot be used as evidence for anything by common scholarly accord. The verified sayings¹³⁰ of the Prophet establish it: 'The vision is of three types, a vision of God, a vision of what the person herself asserts, and a vision of Satan.' So if the vision is of three types, it is necessary to distinguish each. End of ibn Taymiyya's quote.¹³¹

The judge concluded: 'The vision of non-prophets will not be used in a court of law in any way, except if it confirms already existent legal rules. If it does so, it is accepted and applied, if not it must be dismissed and avoided.'¹³² 'Silence of the claimant for over ten years is a strong sign of the invalidity of his claim'. (M.2.84) The claim was dismissed. The doubting father's appeal in cassation was summarily rejected.

V. Succession and trusts

One is not likely to find many cases on inheritance. The field has been well circumscribed following a common hadith emphasizing the importance for jurists to be acquainted with the 'science of shares'.¹³³ Sunni and Shi'i rules differ vastly, but the mathematical exercise that judges have mastered early on from the disjointed verses of the Qur'an is solid in both cases. In contrast to marriage and divorce, changes to the classical system in the modern world are limited, and the inheritance judge treads on firm grounds.¹³⁴ It is therefore on peripheral issues that disputes over inheritance tend to emerge.

¹²⁹M.2.76-86, judge Nayef ibn Ahmad al-Hamad, court of Nafi, decision of 4.11.1415/16.9.1994, decision of the court of cassation 25.11.1415/24.4.1995.

¹³⁰*sahih*.

¹³¹M.2.84, quoting ibn Taymiyya, *Majmu' al-fatawa*, 27, 458.

¹³²M.2.84-5, quoting Shatibi, *I'tisam*, 1, 260.

¹³³'ilm al-fara'ed. The Prophetic saying appears in various forms, including 'ta'allamu al-fara'ed wa 'allimuh fa-innahu nisf al-'ilm (Learn the sciences of shares/inheritance and teach it, for it is half of all science.)'

¹³⁴See for a summary of basic rules MALLAT, IMEL, 358-60.

One such case is a conflict mixing inheritance and marriage issues. The plaintiff, a woman repudiated after 25 years of marriage, appeared before judge Ahmad al-'Arini to request the annulment of a repudiation uttered a year earlier.¹³⁵ She argued that the repudiation was null because her husband had AIDS and cancer. She also claimed that the objective of the repudiation was to deprive her from her inheritance, and to deprive her nine children from benefits they are entitled to. The unsaid legal principle was the 'illness of death',¹³⁶ which allows the questioning of a donation because of the sick man's sanity that death illness may have impaired.

The defendant admitted to the cancer but did not mention AIDS. Following his statement, the court requested and received a long medical report quoted in full in the decision. The medical report confirmed that he had both AIDS and cancer, but also suggested that he was being treated effectively for it. (M. 1.303)

The judge asked the husband why he had repudiated his wife. He explained that he could not live with her any longer, and that he was committed now to another, previous wife, with whom he also had several children. The court also asked about his job. He was still working. This allowed the judge to conclude that illness had not impaired his sanity, especially since the repudiation had taken place over a year earlier. The defendant was then asked whether he would consider the return of the repudiated wife. He responded that was firmly opposed to taking her back. Judge 'Arini could only confirm that 'death illness' did not apply:

Since the plaintiff confirms that the defendant continues to work, and considering that a full year has passed since the divorce, and the defendant remains alive and well, what the plaintiff stated is not persuasive, because the classical jurists¹³⁷ are of the view that death illness prevents a person from working. In view of all the above, I rejected the defendant's case and explained to her that her husband's repudiation remained valid and effective.¹³⁸

The court of cassation rejected the wife's appeal. The consequence on her inheritance was stark. She had become estranged from her previous husband and from any entitlement to inherit his estate.

Hereditary trusts are also an area rife for disputes over succession. Waqfs (Arabic plural *awqaf*) are trusts of two kinds in both classical and modern law, and remain so in the countries where they still survive: the family or hereditary trust,¹³⁹ and the charitable trust¹⁴⁰ designated for non-kin beneficiaries at large, usually the poor and disenfranchised. Waqf rules are complex, and the institution plays a significant economic and social role in the history of the Middle East. Where, as in Saudi Arabia, the waqf survives as an institution, its regulation is also complex. To the traditional system is increasingly superposed the commercial law of trust in its Western model, as in companies with trustees as fiduciaries. In company law, the fiduciary dimension adds a significant layer of complication.

¹³⁵ M.1.300-5. Decided 30.12.1426/30.1.2006, confirmed on cassation 14.2.1427/15.3.2006.

¹³⁶ *marad al-mawt*. See above n. 112.

¹³⁷ *fuyaha*'.

¹³⁸ M.1.305.

¹³⁹ *waqf dhirri*.

¹⁴⁰ *waqf khayri*.

Waqf terms are honored by Saudi courts, and judges are considered the ultimate trustees of a waqf. In a case reported in Ahkam, the terms of a waqf established as far back as 1279/1862 in the city of Madina were upheld.¹⁴¹ With time however, the revenue from the waqfs, which is a condition for its effectiveness, may dry up, setting in complex dismantlement rules of changing the waqf into a disposable property.¹⁴²

Normally, a person may dispose of property at will during lifetime or as specified upon death. A first case revolved over the difference between a will and a waqf. It came to the HJC from the first instance court of Jeddah by way of the Ministry of Justice.¹⁴³ The question was whether the deceased could have willed the third of his estate, the third being the maximum portion allowed for a will in the Islamic law of succession, to the benefit of 'the poor of village x in Hadramut.'¹⁴⁴ More specifically, was the distribution of that portion of the estate outside Saudi Arabia tantamount to a trust, in which case it would be forbidden on account of a statute prohibiting trust benefits to be spent outside the Kingdom?

The HJC allowed the will to stand. Despite language that looked like a trust, it argued, this was a will rather than a trust, and because of this, there was nothing to prohibit it from benefiting heirs abroad.

Free disposal of property by way of waqf was confirmed in another decision, issued in 1426/2005, for an important family trust established over fifty years earlier, on 1.12.1362/28.11.1943.¹⁴⁵ The case is complex, for the trust had been established in the form of a will dated 8 dhu al-hujja 1361/16.12.1942, which a probate judgment¹⁴⁶ acknowledged only on 11.9.1425/20.12.2004. Part of the trust had been respected by the heirs, some of it had been substituted over the course of time, but there emerged two outstanding issues which the court had to rule on: the claim by the children of the founder's daughters to a share in the inheritance, and the equality in trust benefits by the sons and daughters of the testator/founder in accordance with the waqf. The first claim did not seem serious, considering the rules on inheritance, which do not give any share of the estate to such distant relatives. The second claim, on the equality of male and female offspring in accordance with the trust deed, was more serious.

Therefore I decided as follows: first, I explained to the daughters' children who intervened in the trial that they have no right in the trust which is the subject of this case. Second I explained to the trustee¹⁴⁷ defendant that he must divide the benefits of the trust in accordance with the wishes of the founder, equally between sons and daughters, and between the children of his sons but not the children of his daughters. The daughters' children have nothing for them in the trust. Third, I explained to the daughters x and y of the founder that they are entitled to bring a case against their brothers to reclaim, if they so wish, the difference between what they are owed and what they were given in the past,

¹⁴¹ Ahkam, 9, 5-29. Decided 28.10.1433/15.9.201, confirmation on appeal 11.3.1434/23.1.2013.

¹⁴² This is called substitution *istibdal*.

¹⁴³ HJC, *hay'a qada'iyya 'ulya*, four judges headed by Muhammad ibn Jubayr, M.2.18-21, decision dated 30.3.1392/12.5.1972.

¹⁴⁴ M.2.19. Hadramut is a province in Yemen.

¹⁴⁵ M.1.214-23. Decision of Ahmad ibn Sulayman al-'Arini, General Court of Riyadh, 25.5.1426/2.7.2005, confirmed in cassation on 5.9.1426/8.10.2005.

¹⁴⁶ *hasr al-irth*.

¹⁴⁷ *nazer*.

because what they were deprived from contradicts the terms¹⁴⁸ of the trust. This is what appears to me [right] and I have ruled accordingly. (M.1.232)

On substance therefore, and with textual support found in authoritative Hanbali sources such as ibn Qudama's *Mughni*, the decision paves the way to inheritance arrangements by way of trust that make heirs equal irrespective of the intestate rules of 'two shares for a male, one share for the female.' (Qur'an 4:11) This is a remarkably enlightened decision resting on the sanctity of the trust founder's choice.

Also in the matter of waqf, the Judicial Council had issued a judgment, which, despite its brevity, may constitute a significant precedent on the totally opposite side of the sanctity of the trust.¹⁴⁹ In this brief case dated 1390/1970, a radical substitution ended¹⁵⁰ the waqf altogether.

The case arose upon the succession of children to a father who died insolvent without any property left to his children, yet had established a trust over four properties he owned in Mecca. The heirs were completely deprived from their inheritance by the trust, as the only property of the father was included in the waqf deed. Despite the established sanctity of the waqf as principle, the judges decided otherwise. After taking cognizance of the trust deed,¹⁵¹ which had been authorized by the previous head of the Mecca court, the Judicial Council simply allowed it to be voided: 'Since the trust deed did not declare that the founder had not left behind any other property than the one he put into the trust, and considering the opposition of the heirs without anyone arising to confront them, the Council does not see an objection to hear the heirs' opposition to the validity of the trust, and do with it what the law dictates.' (M.2.24) The trust was dismantled.

VI. Conclusion

The span of judgements examined in this article provides a fair sample of how family law disputes are adjudicated and solved in Saudi Arabia. Overall, the litigants appear to get a fair hearing in court, and judges are attentive to their pleas irrespective of gender. The readiness for judges in matters of marriage to let a woman prevail over her father in choosing her husband, to let a wife get out of a difficult marriage because 'she hates her husband', to make the best interest of the child weigh in favour of a divorced mother, and to allow a family trust to give equal shares to daughters and sons if the founder of the trust has so chosen, all these judgments show pugnacious women seeking their day in court and prevailing. The language is simple, and the parties are heard clearly in the reports. Judges look into the tradition, quote classical scholars, and listen to the pleas of the litigants intently. They often defer to expert committees, whether legal as in the opinion of muftis, or medical when mental impairment or the affliction of AIDS need to be ascertained for the purpose of the trial. Procedurally, the report shows a simple process and an effective mode of operation. The timeframe between the first appearance in court of the litigants and the end of the generally two-tiered judicial system

¹⁴⁸ *shart*.

¹⁴⁹ M.2.22-24, decision of the Judicial Council, *al-hay'a al-qada'iyya*, of 14.8.1390/15/10/1970, probably the same High Judicial Council which issued the judgment of 1392/1972 discussed above at M.2.18. The report mentions at M.2.23 that it was the 'scientific council', *al-hay'a al-'ilmiyya* which issued the judgment, but does not give precisions on its composition.

¹⁵⁰ *inha'*.

¹⁵¹ *sakk al-waqfiyya*, or *waqfiyya* simply.

is reasonable. Judges are interventionist and conciliatory, and do not hesitate to suggest compromises to the litigants, with a high degree of didacticism as they explain their rulings and court regulations to the parties at various stages of the trial, and propose to them their legal options.

Still, the discrimination prevailing at the root of the legal system is not challenged. Polygamy, the husband's absolute right to repudiate his wife, or intestate rules giving two shares for females as opposed to their counterpart males are the preserve of a traditionalist, pre-modern understanding of the law as unequal between genders. Here Saudi courts follow an established pattern common to most Muslim/Middle Eastern jurisdictions.

In the normalization of law as the article posits it, Saudi judges appear no different from their counterparts elsewhere in the world. In the massive majority of cases, their decisions are just and balanced, albeit within a legal system where women's equal rights are impaired. Normalization also operates, for the first time in the country in a hundred years, through the emergence of stable and consistent case-law, made finally available to the larger public. Even without a comprehensive family code, the Saudi citizen can now ascertain his and her rights and obligations precisely enough.

Takaful – Foundations and Standardization of Islamic Insurance

by Joel El-Qalqili *

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Abstract

*The Islamic Finance industry grew from a socio-economic movement to a global industry. The enabling mechanism was a rather legalistic interpretative approach towards Islamic prohibitions such as *riba*, *maysir* and *gharar*. The emergence of an Islamic kind of insurance, i.e. *takaful*, shows how this process was driven by socio-economic and political factors. Today, one of the central claims often raised in discussions around Islamic Finance in general and *takaful* in particular is that of standardization. In order to grow and further develop, the claim goes, Islamic Finance requires standardized legal frameworks and products. Although such standardization appears to be difficult given the diverse and pluralistic nature of Islamic law and its interpretation, it also appears to make sense, at least with a view to insurance, an industry particularly dependent on scale. Examining this claim ultimately requires an economic analysis. Assuming standardization would indeed further the growth of the *takaful* industry, the (legal and political) question arises, how, i.e. through which mechanisms, such standardization is currently supported. In conventional finance, standardization is often achieved through soft law norms produced by (private or public) international regulatory bodies. To examine whether similar processes can be found in Islamic finance, this article applies a framework by Charles Brummer, which looks at the central actors and main coercive forces of soft law norms, to the *takaful* industry.*

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I. Introduction

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

II. The Development of Islamic Finance

With the introduction of European inspired legal frameworks came the demise of the role traditional Islamic institutions such as the *Shari'a* courts and the *Mujtahids* had played before.¹ Nonetheless, Islamic law still played an important role in that it was taken seriously as a moral guideline for individuals.² The imposition of secular law on the largely Muslim societies of the Arab states inspired political movements, often concerned with social and economic progress based on traditional, i.e. Islamic values.³ Among the first experiments aiming at empowerment and inclusion of the poor by providing financial services compliant with Islamic law was the Egyptian bank Mit Ghamr, which operated without charging any interest, profiting only from engaging in trade and business directly or in partnership with others.⁴ Such socio-economic approach⁵ based on Islamic values, although not openly marketed as such, created tensions with the government's policies of largely secular modernization,⁶ and ultimately, Mit Ghamr was shut down by the Egyptian government.⁷

¹ HALLAQ WAEL, *Shari'a: Theory, Practice, Transformations*, Cambridge 2009, at 445; HOURANI ALBERT, *Arabic Thought in the Liberal Age*, Oxford 1970, at 350.

² BÄLZ KILIAN RUDOLF, *Versicherungsvertragsrecht in den Arabischen Staaten*, Karlsruhe 1997, at 39. Officially, Islamic law was marginalized to the sphere of personal status law, and even there secularization took place (HOURANI, *supra* n. 1).

³ HEGAZY WALID, *Contemporary Islamic Finance: From Socioeconomic Idealism to Pure Legalism*, Chicago Journal of International Law, Vol. 7 (2007), No. 2, Article 13, at 583.

⁴ WARDE IBRAHIM, *Islamic Finance in the Global Economy*, Edinburgh 2010, at 73-74.

⁵ The term socio-economic approach is borrowed from HEGAZY (see HEGAZY, *supra* n. 3, at 582).

⁶ See for example BÄLZ, *supra* n. 2, at 40.

⁷ HEGAZY, *supra* n. 3, at 589; Warde mentions other accounts according to which Mit Ghamr was closed due to severe financial problems (see WARDE, *supra* n. 4, at 74).

With exploding oil revenues the demand side of Islamic finance changed drastically by the 1970s.⁸ This and the rise of political Islam led to an increased political interest in Islamic finance.⁹ By that time the academic debate had already created the theoretical foundation for what would ultimately become today's Islamic finance industry. A legalistic approach, as Hegazy describes it, towards Islamic banking rather than the original socio-economic approach was most prominently proposed by Muhammad Baqir as-Sadr.¹⁰ As-Sadr understood Islamic economics as a dogma (not a science),¹¹ the essence of which must be discovered starting from the law, i.e. the rules derived from the four legal sources of Islamic law¹² – not from observations of reality. Yet, while As-Sadr built his propositions for an Islamic kind of banking acknowledging the proscriptive nature of the dogma, he acknowledged the absence of a general theory of economics (or even banking) in Islamic law, and also a certain degree of contextual realism as he argued that in order to succeed in an environment where conventional competition exists, Islamic banks had to offer similar economic incentives for customers, such as guaranteed deposits and a fixed rate of return on deposits.¹³ Simplifying his model, an Islamic bank – like a conventional bank – serves as an intermediary for capital providers and those seeking capital, albeit – different from conventional banks – not earning profits from an interest differential, but in exchange for its intermediation service only (a fee consisting of fixed and variable components).¹⁴ Without going into detail at this point, As-Sadr managed to build in features such as guaranteed deposits and a *de facto* fixed return on deposits by considering the applicable Islamic contracts (with the rights and obligations thereunder) governing the relations between the three parties and then structuring the transaction in a way that formally avoids triggering central prohibitions under Islamic law.

Based on this formal premise Islamic Finance grew rapidly, regional growth engines being Kuala Lumpur on the one hand and the Gulf countries on the other.¹⁵

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

Traditionally, insurance had been widely considered impermissible under Islamic law. The prohibition of insurance under Islamic law had long been controversial when around 1960 Egypt was going through a process of modernization and nationalization,¹⁶ and

⁸ HEGAZY, *supra* n. 3, at 602; Warde describes this phase as “The First Aggiornamento” of Islamic finance (see WARDE, *supra* n. 4, at 74 to 78).

⁹ HEGAZY, *supra* n. 3, at 589.

¹⁰ HEGAZY, *supra* n. 3, at 583.

¹¹ MALLAT CHIBLI, *The renewal of Islamic law*, 122, 123 referencing As-Sadr; see also BÄLZ, *supra* n. 2, at 56 referencing Muhammad Abu Zahra.

¹² MALLAT, *supra* n. 11.

¹³ HEGAZY, *supra* n. 3, at 593; MALLAT, *supra* n. 11, 166-167.

¹⁴ MALLAT, *supra* n. 11, at 169-171. The moral dimension becomes apparent as As-Sadr stresses the bank would need to deal with honest and capable entrepreneurs (MALLAT, *supra* n. 11, at 171).

¹⁵ The Malaysian model and the Gulf model differ as the Malaysian model follows the *Shafi* school while the Gulf model follows the *Hambali* school. For a description on the development of Islamic finance in Malaysia see WARDE, *supra* n. 4, at 123-128. This paper focuses on the Gulf region.

¹⁶ BÄLZ, *supra* n. 2, at 40.

different views surfaced, ranging from liberal – justifying conventional insurance¹⁷ Islamically – to conservative – prohibiting insurance generally. The nationalization extended to foreign insurers, and Egypt’s European inspired civil law provided the legal basis for this business allowing conventional insurance.¹⁸ Egypt’s leading jurists sought to reconcile the new Egyptian civil law with the country’s long Islamic tradition.¹⁹ To facilitate such reconciliation they brought about remarkable reforms resulting in a systemic shift towards abstraction as opposed to a traditional *numerus clausus* of contracts.²⁰ The radical shift those jurists now (successfully) proposed towards contractual freedom, only limited by certain Islamic legal principles instead of a formal *numerus clausus* of contracts, was accompanied by a change of the mode of the legal debate.²¹ Traditionally, questions of Islamic law had been answered through *fatawa*, which were non-binding and employed on a case-by-case basis.²² Now conferences were held, where Islamic jurists not only searched for general solutions, but also began to look more closely at the actual insurance techniques and economics.²³ With the momentum of the oil boom and political Islam’s rise during the 1970s an Islamic form of insurance evolved based on the formal approach considering the applicable Islamic contracts governing the relations among the insured as well as between them and the insurer, and structuring the transaction in a way that avoids triggering central prohibitions under Islamic law.

III. Prohibitions of Islamic Law against Conventional Insurance

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

1. Maysir and Gharar

In various instances the Quran prohibits *maysir*.²⁴ *Maysir* may be understood as games of chance or pure speculation in which final sales of wholly unknown values are made.²⁵

¹⁷ For the purposes of this article, conventional insurance comprises proprietary and mutual insurance. Whereas in proprietary insurance the risk of the insured is transferred from the insured to the insurer in exchange for premiums, mutual insurance does not involve such risk transfer, but instead a risk sharing between the insured. Both forms are seen as impermissible under Islamic law.

¹⁸ The insurance contract was regulated for the first time in Articles 747 to 771 of Egypt’s civil code of 1948 (for details please see BÄLZ, *supra* n. 2, at 72-82).

¹⁹ BÄLZ, *supra* n. 2, at 55.

²⁰ BÄLZ, *supra* n. 2, at 46.

²¹ BÄLZ, *supra* n. 2, at 43.

²² BÄLZ, *supra* n. 2, at 28. The *fatwa* was provided by a *mufti* on demand. According to Schacht the *mufti*’s “authority was based on his reputation as a scholar, his opinion had no official sanction, and a layman could resort to any scholar he knew and in whom he had confidence” (SCHACHT JOSEF, *An Introduction to Islamic Law*, Oxford 1964, at 74).

²³ BÄLZ, *supra* n. 2, at 44.

²⁴ “O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone altars [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful” (Quran 5:90), or “Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?” (Quran 5:91).

Often *maysir* is seen as the broader concept from which *gharar* is derived.²⁶ *Gharar* is widely understood as uncertainty, risk or speculation.²⁷ It is rooted in various *hadiths* around which legal doctrine primarily evolved.²⁸ Such *hadiths* stipulate for example

“do not buy fish in the sea, for it is *gharar*”, or “the Prophet forbade sale of what is in the wombs, sale of the contents of the udders, sale of a slave when he is a runaway, ... and sale of the stroke of the diver”, or “whoever buys foodstuffs, let him not sell them until he has possession of them”, or “He who purchases food shall not sell it until he weighs it”.²⁹

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

Vogel classified the *gharar-hadiths* according to how central *gharar* was to the transaction.³⁰ The resulting spectrum ranges from “Pure Speculation” on one end of the spectrum to “Uncertain Outcome” to “The Unknown Future Benefit” to “Inexactitude”.³¹ The *hadiths* mentioned above could be understood in a way that they only bar risks affecting the existence of the object as to which the parties transact, rather than the risk regarding the price. Such risk can arise (1) because of the parties’ lack of knowledge about that object, (2) because the object does not now exist, or (3) because the object evades the parties’ control.³² Vogel recommends scholars might use one of these three characteristics to detect *gharar* in transactions.³³

All of those three elements are present in conventional insurance: (1) the parties lack knowledge about the object of the insurance transaction, which is the payment upon occurrence of the insured event (i.e. the performance of the insurer), since such payment is uncertain at the time of the conclusion of the contract; (2) at the time of the conclusion of the contract the object does not yet exist, because such payment is subject to occurrence of the insured event; (3) finally, the payout being conditional upon the occurrence of an uncertain event, is beyond the parties’ control. In conclusion, conventional insurance is prohibited under Islamic law due to its conflict with *gharar* and *maysir*.

²⁵ VOGEL FRANK/HAYES SAMUEL, *Islamic Law and Finance: Religion, Risk, and Return*, Boston 1998, at 16, 88.

²⁶ WARDE, *supra* n. 4, at 58; EL-GAMAL MAHMOUD, *Islamic Finance: Law, Economics, and Practice*, Cambridge 2006, at 58; SCHACHT, *supra* n. 22, at 146; BALALA MAHA HANAAN, *Islamic Finance and Law: Theory and Practice in a Globalized World*, Vol. 5 (2011), 36.

²⁷ WARDE, *supra* n. 4, at 56.

²⁸ NETHERCROTT CRAIG/EISENBERG DAVID, *Islamic Finance: Law and Practice*, Oxford 2012, at 45.

²⁹ VOGEL/HAYES, *supra* n. 25, at 16, 88.

³⁰ VOGEL/HAYES, *supra* n. 25, at 88-91.

³¹ VOGEL/HAYES, *supra* n. 25, at 16, 88.

³² VOGEL/HAYES, *supra* n. 25, at 90.

³³ VOGEL/HAYES, *supra* n. 25, at 90.

2. Riba

The prohibition of *riba* is mentioned several times in the Quran, such as

*“Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, “Trade is [just] like interest.” But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein.”*³⁴

As with *gharar* the Quran does not specify what *riba* actually is. However, the *hadiths* provide some specification for sales and loan contracts. With respect to sales contracts a famous *hadith* states *“Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, like for like, equal for equal, hand to hand. If these types differ, then sell them as you wish, if it is hand to hand”*³⁵. With regard to loan contracts a famous *hadith* states *“Every loan that attracts a benefit is *riba*”*³⁶.

The majority of scholars understand *riba* as including all of the mentioned forms of *riba*, in the words of Warde, as any unlawful gain derived from the quantitative inequality of the countervalues.³⁷ With respect to conventional insurance *riba* leads primarily to restrictions regarding the insurer’s investment business. To avoid *riba* insurance companies have to refrain from investments in interest bearing instruments or prohibited sectors (e.g. alcohol, pornography, weapons, pork). Shares in companies that pay interest on their debt or generate profits from prohibited (*haram*) industries are usually accepted as long as certain thresholds are not exceeded. For example, companies with debt of 33 % or more of twelve-month average market capitalization could be screened out.³⁸ Where income nevertheless stems from illicit activities, it must be purified, i.e. given to charity.³⁹ On the product side late payments of premiums may not be sanctioned in the form of interest.⁴⁰

3. Earlier Alternative Views

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

³⁴ Quran 2:275.

³⁵ Muslim, according to Vogel and Hayes (VOGEL/HAYES, *supra* n. 25, at 73).

³⁶ According to Vogel and Hayes this *hadith* is related by the most respected scholars only to the authority of Companions, not the Prophet himself (VOGEL/HAYES, *supra* n. 25, at 73).

³⁷ WARDE, *supra* n. 4, at 58.

³⁸ WARDE, *supra* n. 4, at 152.

³⁹ WARDE, *supra* n. 4, at 152; see also IFSB Standard 6 – Guiding Principles on Governance for Islamic Collective Investment Schemes, Nr. 11, 41, p. 5, 14, available at: <http://www.ifsb.org/standard/ifsb6.pdf>, last accessed 29 November 2015.

⁴⁰ WARDE, *supra* n. 4, at 147.

Al-Zarqa argued that given the law of large numbers the degree of uncertainty is very low, and therefore – viewed in the aggregate and as an institutional form – insurance could not constitute *gharar*.⁴¹ The performance owed by the insurer, he argued, was not the payout upon occurrence of the insured event, but the guarantee granted.⁴² Such guarantee exists upon contracting, and hence there is no uncertainty beyond the ordinary business risk.⁴³ Thus, according to al-Zarqa insurance contracts are permissible under Islamic law.⁴⁴

Sanhoury stressed the difference between minor *gharar* (*gharar yasir*) and major *gharar* (*gharar khatir*), only the latter of which leads to the concerned contract's voidance.⁴⁵ He argued that the determination of *gharar* being major or minor depends on the circumstances of the time at which such determination is made.⁴⁶ In modern times the degree of uncertainty involved in insurance contracts is seen as minor by Sanhoury.⁴⁷ According to Bälz, Sanhoury arrives at this finding through the application of the concept of (public) need (*haja*).⁴⁸ According to Sanhoury (conventional) insurance would be permissible under Islamic law.

With respect to *riba*, some argue that only real interest – as opposed to nominal interest – qualifies as *riba*.⁴⁹ Or, only *riba al-jahiliya*, i.e. a pre-Islamic practice in which the lender gives the borrower upon maturity the choice between settling the debt or doubling it,⁵⁰ is subject to the prohibition, whereas other forms of *riba* (*riba al fadl*, and *riba al nasi'a*) may be overcome in cases of need (*haja*).⁵¹

As every set of abstract rules knows exceptions for specific cases, Islamic law does so, too, for example necessity (*darura*) and public need (*haja*).⁵² Applying them to allow conventional insurance had been discussed, especially in the 1960s, i.e. at a time of socio-economic focus and prior to the widespread adoption of the legalistic approach. However, this endeavor was never widely accepted.⁵³ Nonetheless, those substance-oriented

⁴¹ AL-ZARQA MUSTAFA AHMAD, *Nizam al-ta'min*, as referenced Mustafa Ahmad al-Zarqa, *Nizam al-ta'min* (Damascus: Matba'at Jami'at Dimashq, 1962) as referenced in VOGEL/HAYES, *supra* n. 25, at 151.; BÄLZ, *supra* n. 2, at 50, 51.

⁴² BÄLZ, *supra* n. 2, at 51.

⁴³ BÄLZ, *supra* n. 2, at 51.

⁴⁴ BÄLZ, *supra* n. 2, at 50; VOGEL/HAYES, *supra* n. 25, at 151.

⁴⁵ BÄLZ, *supra* n. 2, at 51.

⁴⁶ BÄLZ, *supra* n. 2, at 51.

⁴⁷ BÄLZ, *supra* n. 2, at 51.

⁴⁸ Bälz differentiates between *darura* in a narrow sense, and *darura* in a broader sense (*haja*). According to BÄLZ *darura* in a narrow sense requires a state of emergency and allows the individual under certain circumstances to breach Islamic prohibitions, whereas *haja* considers general social and economic factors (BÄLZ, *supra* n. 2, footnote 202). This paper uses the terms *darura* and *haja*, both of which will be introduced below.

⁴⁹ BÄLZ, *supra* n. 2, 53.

⁵⁰ BÄLZ, *supra* n. 2, 53.

⁵¹ BÄLZ, *supra* n. 2, 53 referencing Sanhoury.

⁵² Technically, *darura* and *haja* are sometimes considered in interpreting a rule, sometimes they are seen as exceptions from a rule. There are various other conduits of flexibility in Islamic law, e.g. *urf* or *maqasid* (for a good overview see: KAMALI MOHAMMAD HASHIM, *Istihsan and the Renewal of Islamic Law*, Islamic Studies 43, No. 4 (2004), available at: <http://www.iais.org.my/e/index.php/publications-sp-1447159098/articles/item/16-istihsan-and-the-renewal-of-islamic-law.html>, last accessed 29 November 2015).

⁵³ Nonetheless, *darura* and *haja* are used to allow conventional insurance where an Islamic alternative is not available, for example in non-muslim countries or with respect to reinsurance (according to Hodgins and Jaffer the permissibility of conventional reinsurance for *takaful* providers is controversial, see NETHERCROTT/EISENBERG, *supra* n. 28, at 292).

concepts illustrate the diversity of opinion in Islamic law and contrast with the current models of *takaful*, the religious justification of which relies on a rather formal approach.

Darura and *haja* are not defined in the Quran. *Darura* is based on specific exceptions mentioned in the Quran, most of which relate to forbidden food and allow its consumption under certain circumstances.⁵⁴ Numerous *hadiths* stipulate such exceptions under specific circumstances. *Haja* constitutes a lesser degree of necessity and differs with respect to its prerequisites and effects.⁵⁵

Both types of exceptions require – cumulatively – some specifics and that no Islamic alternative (which would provide the same benefit as relying upon the exception) is available. While Quranic passages and *hadiths* mention cases involving the fear of death,⁵⁶ modernists argue a genuine fear of injury to one of the five fundamental values (life, religion, property, reason, and offspring) suffices.⁵⁷ Such fear, some argue broadening *darura's* scope of application, might similarly be caused by compulsion, aggression, or change in circumstances in contracts.⁵⁸

Public *haja* may be applied to remove hardship and difficulty.⁵⁹ *Haja* was specifically employed to sanction certain transactions in the economic life of the people.⁶⁰ To differentiate between cases of *darura* and *haja* some distinguish between preventive prohibitions (when *haja* may apply), and definitive prohibitions (when only *darura* may apply).⁶¹ According to this theory *haja* refers to what is prohibited as a preventive measure (*sadd al-dhari'a*), but may become permissible, whereas *darura* relates to what is prohibited with definite purpose.⁶² In other words, according to this logic, the determination of whether a prohibition is preventive or definitive depends on the exposure of the protected value vis-à-vis the behavior addressed by the prohibition. If the behavior addressed by the

⁵⁴ Quran 2:173; 5:3; 4:119; 6:145.

⁵⁵ MUSLEHUDDIN MOHAMMAD, *Islamic Jurisprudence and the Rule of Necessity and Need*, Islamabad 1975, 61-63. Muslehuddin refrains from clearly distinguishing, while Al-Mutairi does (AL-MUTAIRI MANSOUR, *Necessity in Islamic Law*, Edinburgh 1997, 16).

⁵⁶ Al-Mutairi refers to Abu Bakr al-Jassas from the *Hanafi* school who defined necessity as follows "The meaning of necessity, here, is the fear of injury (damn to one's life or some of one's organs) if one refrained from eating" (AL-MUTAIRI, *supra* n. 55, at 11). Zarkashi, al-Siyuti and al-Hamawi al-Hanafi defined necessity as follows: "It is a situation in which one reaches a limit where if one does not take a prohibited thing, one will die or be about to die" (AL-MUTAIRI, *supra* n. 55, at 11) Al-Dardir from the *Maliki* school said: "Necessity is preserving lives from being lost or from being greatly injured" (AL-MUTAIRI, *supra* n. 55, at 11) Ibn Qudamah has given a similar definition: "Permitting necessity is the state in which one fears losing one's life if one abstained from eating". Yet, when those scholars explained their "definitions" they went beyond those subject matters, touching upon very different ones, for example financial matters or the preservation of property (AL-MUTAIRI, *supra* n. 55, at 11); AL-MUTAIRI puts it as an open question why the classical definitions of *darura* were so narrow compared to the wider usage of the concept. Mawil Izz Dien offers an explanation: he writes that the methodology of definition by example was common among Arabic writers in general and not only among legal writers. He also mentions the metaphorical nature of the Arabic language and culture, but then states "this methodology seems to be deliberate on occasions, with a view to avoiding the hypothetical definition which could deviate from the meaning of the text in order to serve non-existent cases" (see AL-DIN MU'IL YUSUF 'IZZ, *Islamic Law: From Historical Foundations to Contemporary Practice*, Notre Dame 2004, at 83).

⁵⁷ AL-MUTAIRI, *supra* n. 55, at 15.

⁵⁸ AL-MUTAIRI, *supra* n. 55, at 15.

⁵⁹ AL-MUTAIRI, *supra* n. 55, at 17.

⁶⁰ MUSLEHUDDIN, *supra* n. 55, at 62.

⁶¹ MUSLEHUDDIN MOHAMMAD, *Insurance and Islamic Law*, Lahore 1969, 102-103.

⁶² ZAKARIYA LUQMAN, *Legal Maxims and Islamic Financial Transactions: A Case Study of Mortgage Contracts and the Dilemma for Muslims in Britain*, Arab Law Quarterly 26, No. 3 (2012), at 277.

prohibition does not by itself constitute an injury of the protected value, but may be expected to lead – in connection with a typical development of events – to such injury in the future, then such prohibition is of preventive nature. In such cases *haja* may apply.

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

Public *haja* is present where a whole community faces hardship due to certain social benefits being neglected. A functioning insurance market generally represents social benefits.⁶³ Neglecting such benefits, one might argue, could be seen as hardship for the community.

4. Summary

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

IV. The Emergence of Takaful

Although there was no Islamic equivalent of conventional insurance, some scholars argue that there had been certain precursors in pre-Islamic times that later were accepted by the Prophet.⁶⁴ According to Billah it was an ancient practice among the tribal Arabs that upon the killing of a member of the tribe, the tribe responsible for such killing had to pay blood money to the heirs of the killed.⁶⁵ The name for this practice was '*aqilah*, a reference to the heirs who would receive the blood money.⁶⁶

The religious foundation for an Islamic form of insurance, *takaful*, was provided by various *fatawa*. For example, a *fatwa* was issued in 1977 by the Secretariat General of the Supreme Council of the Senior Ulama of the Kingdom of Saudi Arabia.⁶⁷

⁶³ The positive effects of wide-spread insurance coverage on economic development has been studied extensively and is recognized widely (see for example FEYEN ERIK/LESTER RODNEY/ROCHA ROBERTO, *What Drives the Development of the Insurance Sector? An Empirical Analysis Based on a Panel of Developed and Developing Countries*, Journal of Financial Perspectives 1, No. 1 (2013), available at:

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

⁶⁴ BILLAH MOHD. MA'SUM, *Applied Takaful and Modern Insurance: Law and Practice*, Petaling Jaya, Selangor, Malaysia 2007, at 5.

⁶⁵ BILLAH, *supra* n. 64, at 5; AYUB MUHAMMAD, *Understanding Islamic Finance*, Hoboken 2007, at 420.

⁶⁶ MUSLEHUDDIN, *supra* n. 55, at 62; AYUB, *supra* n. 65, at 421.

⁶⁷ See Appendix 1.

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

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

3rd: The fact that the contributors in cooperative insurance ignore to define the benefit they gain does not harm, because they are donors. Therefore, there are no risks or gambling, and it is different from commercial insurance which is a contract of commercial financial transactions.”⁶⁸

Another fatwa was issued by the Islamic Fiqh Academy in 1985:⁶⁹

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

Second: The alternative contract, which conforms, to the principles of Islamic dealings is the contract of cooperative insurance, which is found on the basis of charity and cooperation. Similarly, is the case of reinsurance based on the principle of cooperative insurance”.⁷⁰

Those *fatawa* spell out very clearly the key principles of *takaful*, i.e. the principle of donation-based contributions (*tabarru*), mutual ownership and assistance (*ta'awun*), and the prohibition of *riba*. Where *tabarru* and *ta'awun* are preserved, the prohibitions of *maysir* and *gharar* do not apply.⁷¹

Tabarru describes a unilateral declaration of intent, whereby the donor provides a benefit to the recipient without seeking any specific consideration in return.⁷² Since the prohibition of *gharar* is applicable only to bilateral contracts, structuring premium payments as unilateral donations, i.e. *tabarru*, circumvents the prohibition of *gharar*.

⁶⁸ See Appendix 1.

⁶⁹ See Appendix 2.

⁷⁰ See Appendix 2.

⁷¹ NETHERCROTT/EISENBERG, *supra* n. 28, at 279.

⁷² IFSB, Guiding Principles of Governance for Takaful (Islamic Insurance) Undertakings, December 2009, 5, available at: <http://www.ifsb.org/standard/ED8Takaful%20Governance%20Standard.pdf>, last accessed 29 November 2015. For a more detailed description of different views on what constitutes *tabarru'*, see NOORDIN KAMARUZAM, The Implementation of *Tabarru'* and *Ta'awun* Contracts in the Takaful Models”, available at: http://repository.um.edu.my/36472/1/Islamic_ch07_091-112.pdf, last accessed 29 November 2015. According to Noordin, *tabarru'* is just a generic term under which various specific contracts may be subsumed. Among those specific contracts, Noordin argues in favor of the *hiba bi shart al-'iwad*, which – according to him – allows for a conditional donation and makes enforceable claims to the risk fund as well as a distribution of the underwriting surplus to the policyholder permissible (see NOORDIN, at 8, 20).

While *tabarru* governs how the *takaful* fund generates its funds, *ta'awun* governs how the payouts are made upon occurrence of the insured events. Under the concept of *ta'awun* the policyholders agree to compensate each other mutually for losses arising from the specified risks.⁷³ As owners of the *takaful* fund the policyholders are generally entitled to their share in the surplus of the *takaful* fund. To clarify this the mentioned fatwa from 1977 states that the cooperative insurance group does not make a profit from the money of others (meaning that there is no difference between the providers and the (ultimate)⁷⁴ owners of the funds). Such surplus exists where an underwriting surplus and profits from investment activities outweigh all payouts and costs of the *takaful* fund.

Against the background of the two conventional forms of insurance, namely mutual insurance, which offers risk sharing (i.e. spreading the burden of loss between all participants involved⁷⁵), whereas proprietary insurance offers risk transferring (risk is transferred contractually to a counterparty rather than shared among participants), *takaful* developed as a third form of insurance.

The relation between the *takaful* fund and the *takaful* operator depends on the specific *takaful* model. The most common *takaful* models are the *wakala* model, the *mudaraba* model, a combination of both (the *wakala-mudaraba* model).⁷⁶

1. Wakala Model

In the *wakala* model the *takaful* operator acts as agent (“*wakil*”) for the *takaful* fund. The *wakil* is remunerated either on the basis of a fixed management fee or a fee calculated as a percentage of either the assets under management⁷⁷ or the volume of contributions (e.g. 30%⁷⁸).⁷⁹ The fee is fixed annually and in advance.⁸⁰ Depending on performance a part of the underwriting surplus may be distributed to the operator as well.⁸¹ This is controversial, since the surplus should remain with the policyholders.⁸²

2. Mudaraba Model

In the *mudaraba* model the *takaful* operator acts as *mudarib*, i.e. as entrepreneur, while the participants act as *rab al mal*, i.e. capital provider. The *takaful* operator is remunerated only with his share in the investment profits (participation in the underwriting surplus is

⁷³ IFSB, Guiding Principles on Governance of Takaful (Islamic Insurance) Undertakings, available at: <http://www.ifsb.org/standard/ED8Takaful%20Governance%20Standard.pdf>, last accessed 29 November 2015.

⁷⁴ Of course, the policyholders are not owners of the funds, but owners of shares.

⁷⁵ The risk remains to some extent with the insured, who is bearing his share of it as a part of the collective.

⁷⁶ NETHERCROTT/EISENBERG, *supra* n. 28, at 287.

⁷⁷ NETHERCROTT/EISENBERG, *supra* n. 28 at 283.

⁷⁸ AYUB, *supra* n. 65, at 424.

⁷⁹ ARCHER SIMON/KARIM RIFAAT AHMAD ABDEL/NIENHAUS VOLKER, *Takaful Islamic Insurance: Concepts and Regulatory Issues*, Singapore 2009, at 13.

⁸⁰ AYUB, *supra* n. 65, at 424.

⁸¹ AYUB, *supra* n. 65, at 424.

⁸² AYUB, *supra* n. 65, at 426. For further criticism of performance related *wakala* fees see: ARCHER/KARIM/ NIENHAUS, *supra* n. 79, at 14.

widely seen as impermissible), out of which he has to cover his expenses.⁸³ The relatively small amounts of investment profits in general takaful make this pure mudaraba model practically useless.⁸⁴ The mudaraba model is often criticized for not being shari'a compliant. For example, contributions are supposed to be donations, yet serve as mudaraba capital.⁸⁵ Also, in a mudaraba the invested capital is to be returned along with the profits – if any – whereas in takaful contributions are donations.⁸⁶ Moreover, the provision of qard hasan is in conflict with the profit-and-loss-sharing idea of mudaraba.⁸⁷

3. Wakala-Mudaraba Model

The blended *wakala-mudaraba* model combines both models. The *takaful* operator acts as *wakil* with respect to the underwriting business and as *mudarib* with respect to the investment business.⁸⁸ This way he may be remunerated for the underwriting business as a *wakil* (i.e. primarily on a fixed-fee basis) and – as a *mudarib* – also entitled to participate in the investment profits.⁸⁹ The issues mentioned above for the *wakala* and the *mudaraba* model apply here as well.

4. Conclusion

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

⁸³ NETHERCROTT/EISENBERG, *supra* n. 28, at 287.

⁸⁴ ARCHER/KARIM/NIENHAUS, *supra* n. 79, at 14.

⁸⁵ AYUB, *supra* n. 70, at 426.

⁸⁶ AYUB, *supra* n. 70, at 426.

⁸⁷ AYUB, *supra* n. 70, at 426.

⁸⁸ ARCHER/KARIM/NIENHAUS, *supra* n. 79, at 15.

⁸⁹ NETHERCROTT/EISENBERG, *supra* n. 28, at 285-286.

V. Prospects for Growth Through Harmonization

Today, Islamic finance is a global industry of approximately US\$ 2 trillion, of which *takaful* is a relatively small part with only around US\$ 26 billion.⁹⁰ A lack of standardization and regulatory harmonization is often seen as one of the key challenges to further growth of *takaful* and, indeed, Islamic finance as a whole.⁹¹ As was shown in the first part of this paper, the current forms of *takaful* developed through an uncoordinated process driven by various factors, which were political and economical in nature, falling on the fertile ground of a formal, legalistic interpretative approach. Other approaches had been, and still are, around, but they are not “mainstream”.⁹² Today, further growth is expected to come with the internationalization of Islamic Finance through standard setting. For that purpose international bodies have been set up, such as AAOIFI. Looking at AAOIFI’s organizational design and norms may help understanding to what extent its standards may be seen, and are effective, as soft-law tools for international harmonization and further growth

1. Islamic Standard Setters vs. Conventional Standard Setters

While those standard setting bodies resemble their conventional counterparts (since they all work towards coordinating their different legal frameworks)⁹³ they differ with respect to the nature of their coordination process: Islamic finance and its regulation involves an additional layer of coordination: the coordination of Islamic law and secular law.

The coordination process of international standard setting bodies in Islamic finance can be described as a two level process. On a first level the central question of what is *shari’a* compliant must be answered.⁹⁴ This first level coordination may be international (meaning it might be answered by a group of scholars of different nationalities), but it needs to be thought of as a separate level of coordination, because it is not political, i.e. beyond a “wordly give and take”. The coordination of Islamic law and modern finance requires interpreting Islamic law, which is primarily a process of discovery, and applying it to

⁹⁰ See for example <http://www.mifc.com/index.php?ch=28&pg=72&ac=106&bb=uploadpdf>, last accessed 29 November 2015.

⁹¹ As a recent example please see Standard & Poor’s 2016 Industry Outlook for 2016 available at: https://www.globalcreditportal.com/ratingsdirect/renderArticle.do?articleId=1466521&SctArtId=347908&from=CM&ns_l_code=LIME&sourceObjectId=9373552&sourceRevId=1&fee_ind=N&exp_date=20251018-15:03:29&sp_mid=60153&sp_rid=33734 (last accessed 27 November 2015).

⁹² See above (III.).

⁹³ While Drezner refers to regulatory coordination as a codified adjustment of national standards in order to recognize or accommodate regulatory frameworks from other countries (DREZNER DANIEL, *All Politics Is Gobal: Explaining International Regulatory Regimes*, Princeton 2007, at 11), coordination is referred to in a broader sense here in that it refers to processes which aim at eliminating contradictions of different rule-based frameworks rule-based frameworks.

⁹⁴ According to Bälz developments in Islamic financing transactions must be integrated with and adapted to the overall legal and regulatory framework of the prospective jurisdiction in which the transactions will take place, and also with the needs of the respective Muslim communities they serve (see BÄLZ KILIAN RUDOLF, *Islamic Finance for European Muslims: The Diversity Management of Shari’ah-Compliant Transactions*, Chicago Journal of International Law, Vol. 2 No. 2 Art. 11, available at: <http://chicagounbound.uchicago.edu/cjil/vol7/iss2/11>, last accessed 29 November 2015. Bälz argues that regarding first level coordination (i.e. the question of what is *shari’a* compliant) the specificities of local Muslim communities must be taken into account especially for retail transactions (as opposed to „big ticket“-transactions which are subject to global standards such as those issued by AAOIFI). This paper does not deal with such local specificities and their implications for the standardization of Islamic finance.

conventional finance. Islamic scholars apply their efforts at discovering the right answer based on the sources and methodologies of Islamic law. In that sense it is a rather technocratic process, not a political one in which the ideal result would be defined by a maximum amount of economic and power benefits. It is the second level of coordination where national or international legal frameworks must be coordinated with Islamic law – as discovered on the first level. This second level process is inherently political as it involves choices of the “rulers”.⁹⁵

2. AAOIFI

The main international body engaging in standard setting is Islamic Finance AAOIFI.⁹⁶ AAOIFI is based in Manama, comprises around 200 member bodies from 40 countries, including central banks and Islamic financial institutions.⁹⁷ Its standards have, according to AAOIFI, been adopted in the Kingdom of Bahrain, Dubai International Financial Centre, Jordan, Lebanon, Qatar, Sudan and Syria.⁹⁸ Regulators in Australia, Indonesia, Malaysia, Pakistan, Kingdom of Saudi Arabia, and South Africa have issued guidelines based on AAOIFI’s standards and pronouncements.⁹⁹

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

⁹⁵ Warde describes national interest considerations as including domestic factors and national circumstances among which he mentions indigenous forms of Islam (see WARDE, *supra* n. 4, at 85-86). Here Warde describes the various aspects which inform countries’ political decisions regarding the design of their legal frameworks for Islamic institutions. This does not contradict the distinction between a technocratic process of discovering what is *shari’a* compliant and a political process of integrating such discoveries into national or international law.

⁹⁶ Other organizations include for example the International Islamic Rating Agency (IIRA), the Islamic Financial Services Board (IFSB) and the International Islamic Liquidity Management Corporation (IILM).

⁹⁷ See <http://www.aaofi.com/en/about-aaofi/about-aaofi.html>, last accessed 29 November 2015.

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

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

The Shari'a Board is appointed by AAOIFI's members (through the Board of Trustees,¹⁰⁰ which is appointed by the General Assembly,¹⁰¹ the primary forum for all members).¹⁰² The Shari'a Board is composed of up to 21 members, who are appointed for a four-year term from among *Fiqh* scholars including those from member financial institutions and member regulators.¹⁰³ Neither the Board of Trustees nor any of its sub-committees may interfere directly or indirectly with the work of the Shari'a Board or direct it in any manner.¹⁰⁴ While the members of the Shari'a Board are appointed by the Board of Trustees, which is itself appointed by the General Assembly, i.e. by the members, this power to appoint appears to create little influence on the Shari'a Boards work, which is (supposed to be) free of any influence by the members, and which is provided free of charge.¹⁰⁵ Based upon this organizational design the interpretative processes of AAOIFI are designed as technocratic processes allocated to an expert body, which operates free of direct political influence.

To coordinate Islamic law, i.e. the sphere of the jurists, and the state law, i.e. the sphere of the ruler, a doctrine was developed during the Umayyad dynasty according to which the rulers' sphere of administrative law (*siyasa shari'a*) was restricted by the limits of Islamic law, i.e. it was not allowed to contradict Islamic law.¹⁰⁶ The task of interpreting Islamic law, and thereby marking the limits of the rulers' sphere of administrative law (*siyasa shari'a*) was with the Islamic jurists.

On a national level, today's second level coordination finds an expression in constitutions of modern states with Muslim majorities.¹⁰⁷ Various constitutions describe the *shari'a* either as a source of law or the source of law, Saudi Arabia declares it the constitution of the state.¹⁰⁸ In practice coordinating Islamic law and national law proves to be difficult (not

¹⁰⁰ Article 37/1 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed 29 November 2015.

¹⁰¹ The General Assembly is the primary forum for all members, although not all members are granted voting rights. There are five kinds of members: founding members, associate members, observer members, supporting members and members representing regulatory and supervisory authorities (that supervise Islamic financial institutions). Founding members, associate members and members representing regulatory and supervisory authorities enjoy a right to vote on matters within the General Assembly's responsibilities (Article 3 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed 29 November 2015).

¹⁰² Not all members have voting rights. The number of voting rights per member depends on the "membership fee or the multiple thereof, but shall not exceed twenty votes", Article 10/3 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed 29 November 2015.

¹⁰³ Article 37/1 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed 29 November 2015.

¹⁰⁴ Article 18/2 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed 27 November 2015.

¹⁰⁵ Article 42 and 32 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed on 27 November 2015.

¹⁰⁶ SCHACHT, *supra* n. 22, at 53. Schacht ties the development of this doctrine to a saying of the Umayyad caliph 'Abd al-'Aziz: „No one has the right to personal opinion (*ra'y*) on points settled in the Koran; the personal opinion of the caliphs concerns those points on which there is no revelation in the Koran and no valid *sunna* from the Prophet after ours, and no holy book after ours, what Allah has allowed or forbidden through our Prophet remains so forever; I am not one who decides but only one who carries out, not an innovator but a follower.“

¹⁰⁷ Of course, this is not the case for all countries with Muslim majorities (see footnote 76 in RABB INTISAR A., 'We the Jurists': Islamic Constitutionalism in Iraq, University of Pennsylvania Journal of Constitutional Law, Vol. 10 (2008), No. 3, 572, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263354, last accessed 29 November 2015).

¹⁰⁸ For example Iraq's constitution designates Islamic law as a source of law (Ibid.); Islamic Law shall be a main source of legislation in Kuwait (Art. 2 constitution of Kuwait, available at:

only) in the realm of finance. Sovereign wealth funds are an example. Huge amounts of capital belong to sovereign wealth funds of Muslim majority countries.¹⁰⁹ Yet, most of those sovereign wealth funds tend to invest conventionally as opposed to Islamically.¹¹⁰ The tensions between the investment requirements and such countries' self-image as expressed, for example, in their constitutional choices, are eased by on the one hand utilizing exemptions embedded in Islamic law and on the other hand by promoting the growth of the Islamic Finance industry through institutions such as AAOIFI.

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

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

Brummer suggests concentrating on three central actors of soft law in the field of financial regulation. Those actors are national financial authorities, international standards and agenda setters, and international financial institutions.¹¹¹ According to Brummer, international agenda setters, are institutions that are geared towards large organizations

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

¹⁰⁹ According to numbers of the Sovereign Wealth Institute the following sovereign wealth funds are believed to hold the following assets under management (in billions): The Abu Dhabi Investment Authority (ADIA) around US\$ 773; SAMA Foreign Holdings (Saudi Arabia) around US\$ 671.8; Qatar Investment Authority around US\$ 256.

¹¹⁰ Sovereign wealth funds' investments in conventional financial institutions may serve as an example, such as Qatar Investment Authority's investment of around CHF 6 billion in Credit Suisse in 2011, Kuwait Investment Authority's investment of around US\$ 800 million in Agricultural Bank of China in 2010, Mubadala Investment Company's (United Arab Emirates – Abu Dhabi) investment in Engine Financing Air Berlin of around US\$ 100 million in 2010, Oman State General Reserve Fund's investment in Petrovietnam Insurance Co PVI.HN, of around US\$ 42.3 million in 2010, Qatar Investment Authority's investment in Barclays PLC of around US\$ 2.9 billion in 2008, Qatar Investment Authority's investment of around US\$ 140 million in Deutsche Bank in 2013 (data obtained from SovereignNet, The Fletcher Network for Sovereign Wealth and Global Capital of the Fletcher's Institute for Business in the Global Context).

¹¹¹ BRUMMER CHRIS, *How International Financial Law Works (and How It Doesn't)*, Georgetown Law Journal, Vol. 99 (2011), 275, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542829, last accessed 29 November 2015.

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

According to Brummer those key actors interact against the background of three coercive forces: market discipline, reputational constraints and institutional sanctions.¹¹⁷ From his analysis Brummer concludes that while being soft law international financial regulation shows hard-law-like characteristics.¹¹⁸ Applying Brummer’s framework may help to learn more about the effectiveness of AAOIFI’s standards as well as its potential as a driver for further standardization, particularly with a view to *takaful*.

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

a) Market Discipline and Reputational Constraints

Generally, market participants react to how other market participants comply or defect from regulatory soft law.¹¹⁹ In efficient markets firms will be rewarded for complying with practices that are viewed by investors as contributing to profitability.¹²⁰ Shareholders, potential counterparties to financial transactions, as well as analysts will likely have more faith in well-regulated companies, contributing to higher valuations of those firms.¹²¹ AAOIFI’s *shari’a* standards and *fatawas* are widely accepted as market standard. They create a strong and internationally recognized label which is important for products,

¹¹² The FSB is an international body that monitors and issues recommendations about the global financial system. The FSB aims at promoting international financial stability by coordinating national financial authorities and international standard-setting bodies (see <http://www.financialstabilityboard.org/about/>, last accessed 29 November 2015).

¹¹³ BRUMMER, *supra* n. 111, at 275.

¹¹⁴ BRUMMER, *supra* n. 111, at 277.

¹¹⁵ BRUMMER, *supra* n. 111, at 277.

¹¹⁶ See <http://www.imf.org/external/np/fsap/fssa.aspx>, last accessed 29 November 2015.

¹¹⁷ BRUMMER, *supra* n. 111, at 284-290.

¹¹⁸ BRUMMER, *supra* n. 111, at 262.

¹¹⁹ BRUMMER, *supra* n. 111, at 287.

¹²⁰ BRUMMER, *supra* n. 111, at 287.

¹²¹ BRUMMER, *supra* n. 111, at 288.

whose key differentiator (vis-à-vis conventional products) is being Islamic.¹²² Creating an alternative, globally accepted label would require high costs and face a significant risk of failure, since part of the legitimacy of the existing standards derives from the organizations' broad and inclusive membership and the sharing of resources – all of which is difficult to replicate. There is also a compliance pull towards accepting those standards, because the more market participants comply, the more the value of compliance increases.

The reputation of a national regulator depends on its capability - as perceived by other regulators and market participants – and its exposure. The high degree of technical capacity required for dealing with Islamic finance institutions,¹²³ and the resulting scarcity of human resources require substantial investments from national regulators to provide state-of-the-art regulation and supervision. A regulator's exposure depends on the degree of regulatory coordination and communication with market participants (through regulations, instructions, or regulatory advice). Mutual recognition schemes are a case in point. Regulators often rely on one another with respect to informational exchange and expect compliance. Where those expectations are frustrated the compliant party will rethink and re-evaluate its expectations and adjust accordingly.¹²⁴ Reputational benefits for regulators complying with AAOIFI standards might play a role, but this seems to be difficult to ascertain. Perhaps one aspect that promotes regulatory participation is that regulators' reputation depends on their capability - as perceived by other regulators and market participants. Capability is a specific challenge in the context of Islamic finance regulation as expertise in Islamic law already an immensely deep and broad expertise. In combination with expertise in finance and economics, i.e. the expertise conventional financial regulation requires apart from politics, capable persons are a scarce resource. The "capacity-challenge" and the increasing exposure regulators face in dealing with a growing and increasingly international industry likely leads regulators to embrace international standards.

Based on the foregoing, the applicability of market discipline and reputational benefits appear to be quite plausible with respect to AAOIFI's standards. However, in practice there is non-compliance even by major members of AAOIFI. Saudi Arabia, deviates with respect to the distribution of the insurance surplus. While the AAOIFI standard requires that such surplus belongs to the policyholders,¹²⁵ Saudi Arabian law requires that at least 90 % is transferred to the income statement of the *takaful* operator's shareholders, and only 10 % of the net surplus belongs to the policyholders.¹²⁶ It important to note that Saudi

¹²² The IFSB calls it the *raison d'être* of *takaful* (see IFSB Standard 8, p. 3, no. 11, available at:

<http://www.ifsb.org/standard/ED8Takaful%20Governance%20Standard.pdf>, last accessed 29 November 2015).

¹²³ Mohammed Shafique provides a brief overview of which skills are rare and what kinds of efforts are under way to reduce the shortage of human resources (see ANWAR HABIBA/MILLAR RODERICK, *Islamic Finance: A Guide for International Business and Investment*, GMB Publishing, at 143).

¹²⁴ BRUMMER, *supra* n. 111, at 286.

¹²⁵ AAOIFI Shari'a Standard No. 26, Section 12.

¹²⁶ See page 2 of the Surplus Distribution Policy of Saudi Arabian Monetary Agency (SAMA), available at: http://www.sama.gov.sa/en-US/Laws/InsuranceRulesAndRegulations/IIR_Surplus_Distribution_Policy.pdf, last accessed 29 November 2015, and Article 70 lit. e of the Implementing Regulations of the Law on Supervision of Cooperative insurance Companies promulgated by Royal Decree No. (M/32) dated 2.6.1424 H, available at: http://www.sama.gov.sa/enUS/Laws/InsuranceRulesAndRegulations/IIR_4600_C_ReguExecutive_En_2005_08_18_V1.pdf, last accessed 29 November 2015.

Arabia is the world's largest market for *takaful*,¹²⁷ and is expected to continue growing.¹²⁸ Considering the economic importance and leading role in AAOIFI as well as the countries' self-perception as guardian of the holy places¹²⁹, Saudi Arabia is a "price-maker rather than a price-taker"¹³⁰ in the realm of Islamic finance and *takaful* in particular. Against that background the country may be less motivated to exercise discipline regarding AAOIFI's standards.

b). Institutional Sanctions

Institutional sanctions may, according to Brummer, support the effectiveness of soft law.¹³¹ Such institutional sanctions could be imposed by international organizations such as the World Bank and the IMF. They are, for example, both members of the International Association of Insurance Supervisors ("IAIS"). While the IAIS itself does not impose any sanctions for non-compliance of its members with its standards and principles, the World Bank and the IMF impose conditionality considerations on their loans,¹³² and monitor their borrowers through a Financial Sector Assessment Program ("FSAP"). The FSAP includes a comprehensive and in-depth analysis of a country's financial sector,¹³³ including compliance with the IAIS. The results of the FSAP analysis are summarized and published in Reports on Observance of Standards and Codes ("ROSCs").¹³⁴ The ROSCs intend to identify developmental and technical assistance needs, identify risks, and help prioritize national policy objectives.¹³⁵ ROSCs are voluntary, which leads Brummer to comment that only the best performers are participating.¹³⁶ However, their absence may already be seen as a signal of defection, according to Drezner.¹³⁷

¹²⁷ Ernst & Young, Global Takaful Insights 2014, 3, available at: [http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/\\$FILE/EY-global-takaful-insights-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf), last accessed 29 November 2015.

¹²⁸ Ernst & Young, Global Takaful Insights 2014, 6 - 7, available at: [http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/\\$FILE/EY-global-takaful-insights-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf), last accessed 29 November 2015. A relatively low insurance penetration rate of (according to the Saudi Arabia Monetary Agency) below 1% in 2013 and just slightly above 1% in 2014 (see http://www.sama.gov.sa/sites/samaen/Insurance/Insurancelib/Sur_KSA%20Market%20Report_2013_English-vf.pdf, last accessed 29 November 2015, p. 7) indicates growth potential.

¹²⁹ See for example: https://saudiembassy.net/about/country-information/Islam/guardian_of_the_Holy_Places.aspx, last accessed 29 November 2015; according to Al-Yahya and Fustier it is a key foreign policy priority of Saudi Arabia to fulfill and maintain its role as leader of the Islamic world, see: AL YAHYA KHALID/FUSTIER NATHALIE, Saudi Arabia as a Humanitarian Donor: High Potential, Little Institutionalization, available at: http://www.gppi.net/fileadmin/user_upload/media/pub/2011/al-yahya-fustier_2011_saudi-arabia-as-humanitarian-donor_gppi.pdf, last accessed 29 November 2015).

¹³⁰ This expression is borrowed from Drezner, who used it to describe the relative power of great powers (DREZNER, *supra* n. 93, at 34).

¹³¹ BRUMMER, *supra* n. 111, at 289.

¹³² Brummer refers to the conditionality of the IMF and the World Bank as the lenders of last resort and sources of developmental assistance (BRUMMER, *supra* n. 111, at 289).

¹³³ See <http://www.imf.org/external/np/fsap/fssa.aspx>, last accessed 29 November 2015.

¹³⁴ BRUMMER, *supra* n. 111, at 291.

¹³⁵ The Financial Sector Assessment Program (FSAP) is a comprehensive and in-depth analysis of a country's financial sector, the results of which may be summarized and published in ROSC (see BRUMMER, *supra* n. 111, at 280-281) and for more detail: <https://www.imf.org/external/NP/fsap/fsap.aspx>, last accessed 29 November 2015).

¹³⁶ BRUMMER, *supra* n. 111, at 291.

¹³⁷ DREZNER, *supra* n. 93, at 141.

AAOIFI does not sanction non-compliance of its members with its standards. Yet, on the national level some countries have integrated the AAOIFI standards into domestic law in one way or another. For example in Bahrain, where the Central Bank acts as national regulator for financial services, rendering Islamic insurance services requires compliance with the principles of the *shari'a*. To ensure such compliance a *shari'a* board must be established, and the AAOIFI standards must be adhered to. Also, in Malaysia, where the central insurance regulator is located within the central bank, a *shari'a* board must be established and the standards of the AAOIFI must be implemented. Such direct and dynamic references incorporate international financial regulations into national law, elevating international soft law to national hard law. Such dynamic referral is remarkable as it concedes considerable authority to AAOIFI, albeit on a national level only.

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

Islamic finance related codes and standards are currently not subject of such ROSCs. On November 11, 2015 Christine Lagarde, Managing Director of the IMF issued a statement at the conclusion of her visit to Kuwait saying “Going forward, we will be working towards taking an institutional view on better integrating Islamic finance into our surveillance work”.¹³⁸ The IMF already takes into account “the implications of Islamic finance for those members where it has been relevant, in the context of (...) its Financial Sector Assessment Program (FSAP) assessments”¹³⁹. However, such integration appears to relate to prudential regulation rather than extending to level two coordination within the meaning of this paper. The Islamic Development Bank, whose purpose is “to foster the economic development and social progress of member countries and Muslim communities individually as well as jointly in accordance with the principles of *shari'a* i.e., Islamic Law”,¹⁴⁰ refrains from interfering with the political choices of the countries it finances.¹⁴¹ It offers its Islamic products, but does not attach political conditions in order to influence a countries’ policies. Theoretically, the Islamic Development Bank could demand compliance with international Islamic standards such as the AAOIFI standards as a prerequisite for eligibility. It could, for example, make any support subject to a certain form of level two coordination, i.e. some degree of integration of AAOIFI’s standards into the recipient country’s national legal framework. The IDB does, however, not pursue such a conditionality approach. With respect to level two coordination external institutional sanctions for non-compliance with international Islamic finance regulation does not exist.

¹³⁸ IMF Press Release No. 15/512, available at: <http://www.imf.org/external/np/sec/pr/2015/pr15512.htm>, last accessed 29 November 2015.

¹³⁹ KAMMER ALFRED/NORAT MOHAMED MARCO PIÑÓN/ANANTHAKRISHNAN PRASAD/TOWE CHRISTOPHER/ZEINE ZEIDANE, AND AN IMF STAFF TEAM, *Islamic Finance: Opportunities, Challenges, and Policy Options*, IMF Staff Discussion Note April 2015, available at: <http://www.imf.org/external/pubs/ft/sdn/2015/sdn1505.pdf>, last accessed 29 November 2015.

¹⁴⁰ <http://www.isdb.org/irj/portal/anonymouse?NavigationTarget=navurl://24de0d5f10da906da85e96ac356b7af0>, last accessed 29 November 2015.

¹⁴¹ The financings made available by the IDB are *shari'a* compliant, but the IDB does not attach policy conditions to its financings like the IMF and WB do. For a more general observation including the IDB see for example Neumayer, who states that Arab aid money usually comes untied, but he seems to refer primarily to economic conditions such as restrictions on what kind of goods may be purchased (NEUMAYER ERIC, *What Factors Determine the Allocation of Aid by Arab Countries and Multilateral Agencies*, *The Journal of Development Studies* 39, No. 4, 2003, available at: http://eprints.lse.ac.uk/615/1/JournalofDevelopmentStudies_39%284%29.pdf, last accessed 29 November 2015.

VI. Conclusion

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

AAOIFI generates a market standard and serves as a benchmark for corporate *shari'a* boards as well as for national regulators. However, it appears to be important to also note that AAOIFI should be understood as a technocratic forum rather than international effort to produce international law. AAOIFI's main function is bundling resources and exchanging knowledge and experience. Several reasons justify that description: first, AAOIFI itself does not impose sanctions for non-compliance with its standards; second, AAOIFI's standards are not embedded in other international institutions processes which could impose (direct or indirect) sanctions for non-compliance. To what extent there may be coercive forces at play, such as market discipline, remains to be examined in detail. Yet, in practice there is non-compliance even by major members of AAOIFI. Saudi Arabia, for example, deviates with respect to the insurance surplus. While AAOIFI standard requires that such surplus belongs to the policyholders,¹⁴² Saudi Arabian law requires that at least 90 % is transferred to the income statement of the *takaful* operator's shareholders, and only 10 % of the net surplus belongs to the policyholders.¹⁴³ Such deviation is not a Saudi Arabia is the world's largest market for *takaful*,¹⁴⁴ and is expected to continue growing.¹⁴⁵ In 2014 the global estimation is US\$ 14 billion, 48 % of which are believed to be the Saudi Arabia's share.¹⁴⁶ Considering the economic importance and leading role in AAOIFI as

¹⁴² AAOIFI Shari'a Standard No. 26, Section 12.

¹⁴³ See page 2 of the Surplus Distribution Policy of Saudi Arabian Monetary Agency (SAMA), available at: http://www.sama.gov.sa/en-US/Laws/InsuranceRulesAndRegulations/IIR_Surplus_Distribution_Policy.pdf, last accessed 29 November 2015, and Article 70 lit. e of the Implementing Regulations of the Law on Supervision of Cooperative insurance Companies promulgated by Royal Decree No. (M/32) dated 2.6.1424 H, available at: http://www.sama.gov.sa/enUS/Laws/InsuranceRulesAndRegulations/IIR_4600_C_ReguExecutive_En_2005_08_18_V1.pdf, last accessed 29 November 2015.

¹⁴⁴ Ernst & Young, Global Takaful Insights 2014, 3, available at: [http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/\\$FILE/EY-global-takaful-insights-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf), last accessed 29 November 2015.

¹⁴⁵ Ernst & Young, Global Takaful Insights 2014, 6-7, available at: [http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/\\$FILE/EY-global-takaful-insights-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf), last accessed 29 November 2015. A relatively low insurance penetration rate of (according to the Saudi Arabia Monetary Agency) below 1 % in 2013 and just slightly above 1 % in 2014 (see http://www.sama.gov.sa/sites/samaen/Insurance/InssuranceLib/Sur_KSA%20Market%20Report_2013_English-vf.pdf, last accessed 29 November 2015, p. 7) indicates growth potential.

¹⁴⁶ Ernst & Young, Global Takaful Insights 2014, 6 - 7, available at: [http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/\\$FILE/EY-global-takaful-insights-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf), last accessed 29 November 2015. Other estimations indicate a slightly higher percentage (see <http://www.islamicfinance.com/2015/01/takaful/>, last accessed 29 November 2015).

well as the countries' self-perception as guardian of the holy places¹⁴⁷, Saudi Arabia is a "price-maker rather than a price-taker"¹⁴⁸ in the realm of Islamic finance and *takaful* in particular. Against that background the country may be less motivated to exercise discipline regarding AAOIFI's standards. Considering those aspects, it should be prudent to state that AAOIFI is indeed a conduit for soft law, albeit with limited effectiveness. Therefore, the potential for further growth through standardization seems to be limited. If Islamic Finance is to continue growing it may rather be driven by national programs or the demand side, perhaps in the form of a more socio-economically oriented approach (in some ways perhaps not so different from the general trend towards social and ethical finance). Examining the potential for growth through such approach e.g. through social impact funds remains to be examined in a different paper.

¹⁴⁷ See for example: https://saudiembassy.net/about/country-information/Islam/guardian_of_the_Holy_Places.aspx, last accessed 29 November 2015; according to Al-Yahia and Fustier it is a key foreign policy priority of Saudi Arabia to fulfill and maintain its role as leader of the Islamic world, see: AL YAHYA KHALID/FUSTIER NATHALIE, *Saudi Arabia as a Humanitarian Donor: High Potential, Little Institutionalization*, available at: http://www.gppi.net/fileadmin/user_upload/media/pub/2011/al-yahya-fustier_2011_saudi-arabia-as-humanitarian-donor_gppi.pdf, last accessed 29 November 2015).

¹⁴⁸ This expression is borrowed from DREZNER, who used it to describe the relative power of great powers (DREZNER, *supra* n. 93, at 34).

Appendix 1

In the name of God, the Merciful, the Compassionate

The Kingdom of Saudi Arabia

Department of Research, Iftaa and Guidance

Secretariat General of the Supreme Council of the Senior Ulama

Resolution No. 51 dated 4th Rabi Thani 1397 Hejra [corresponding to 23rd March 1977 Gregorian]

Praise be to God and prayers and peace be upon the last Prophet.

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

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

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

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

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

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

First: To be obligated by the concept of Islamic economics, which leaves the responsibility for individual to carry out the different economic projects, and the role of the state, comes only as a complementary element, for what the individuals have failed to undertake, as directors and controllers, to guarantee the success of these projects and the correctness of their transactions.

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

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

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

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

- First: The cooperative insurance organization shall have branches Kingdom-wide, in addition to its head office. The organization shall include departments for all kinds of risks covered by insurance, such as a department for health insurance, insurance against disability, senility, and-so-on. Or a department for peddlers, merchants, students, engineers, lawyers, physicians, and-so-on.
- Second: The cooperative insurance organization shall be farsighted and not adopt complicated measures.
- Third: The organization shall have a supreme board to set forth policies, regulations and resolutions, to be valid and binding as long as they are in accordance with Islamic Law.
- Fourth: The government as well as the contributors shall be represented on this council. The supervision by the government shall guarantee against any possible mal-administration or fraud and ensure its safety.

Fifth: If the risks drain the institution's resources in a manner which necessitates the increase of its capital, the government shall shoulder this responsibility jointly with the contributors. The council, with the exception of the learned Sheikh Abdullah Bin Manei, resolved that a set of detailed articles shall be drafted by a group of experts specialized in this field, nominated by the government. After they finish this task, the articles shall be entrusted to the Supreme Council of the Senior Ulama to review them in accordance with Islamic Law. May God bless us all.

Supreme Council of the Senior Ulama

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

Abdul Razaq Afifi (signed)

Abdullah Bin Mohamed Bin Hameed (stamped)

Abdullah Khayat (signed)

Mohamed Al Harakan (stamped)

Salih Bin Uthaimen (stamped)

Ibrahim Bin Mohamed Al Sheikh (signed)

Suliman Bin Abaid (signed)

Mohamed Bin Jubair (signed)

Abdullah Bin Alian (signed)

Rashid Bin ... (signed)

Abdullah Bin Ga'wood (signed)

Salih Bin Lihaidan (signed)

Abdullah Bin Minei (signed)

Appendix 2

Bismillah Arrahman Arrahim

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

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

RESOLUTION N° 9 (9/2)

CONCERNING

INSURANCE AND REINSURANCE

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

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

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

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

RESOLVES

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

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

Third: The Academy invites the Islamic countries to work on establishing cooperative insurance institutions and cooperative entities for the reinsurance, in order to liberate the Islamic economy from exploitation and put an end to the violation of the system which Allah has chosen for this Ummah.

Verily, Allah is All-Knowing

Eine rechtssoziologische Analyse des islamischen *waqf*-Systems

von Ali Demir*

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Abstrakt

*Je abstrakter eine Rechtsnorm gefasst ist, desto besser kann sie den durch die funktionale Differenzierung der Gesellschaft entstandenen Kontingenzen gerecht werden. Umgekehrt hemmt ein Rechtssystem die System- und Sozialintegration einer Gesellschaft, wenn es hauptsächlich mit Analogien arbeitet, materielle Ziele verfolgt und damit den notwendigen Formwandel verhindert. Ein gutes Beispiel dafür ist das islamische *waqf*-System. Im Frühislam war Solidarität durch freiwillige Wohltätigkeit im *zakāt*-System erwünscht. In der Expansionsphase der islamischen Herrschaft wurde die Freiwilligkeit in eine theologisch legitimierte Norm verwandelt und im *waqf*-System institutionalisiert. Während dieser Transformationsphase dienten *awqāf* als ein System von Kompromissen. Dabei wurden die Bedingungen für *waqf*-Gründungen vom Zentrum bestimmt und ihre Verwaltung der Peripherie überlassen. Diese Arbeitsteilung wurde im Osmanischen Reich durch das duale Rechtssystem von sakralem und sultanischem Ursprung zusammengehalten. Zugleich wurde während dieser Phase die Lebenswelt einer rationalen Reflexion und das Recht einer Positivierung unterzogen. Die Stadien dieser Evolution werden im Folgenden nachgezeichnet und kritisch bewertet.*

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

I. Forschungsstand

Das islamische *waqf*-System wurde verschiedentlich beschrieben und mit anderen Systemen verglichen.¹ Die erste institutionalisierte und systematische Erforschung von *awqāf* wurde im Jahre 1938 am Institut für Stiftungen mit der Herausgabe der *Vakıflar Dergisi* (*Zeitschrift für Stiftungen*) eingeleitet.² Fahrettin Kiper (1879–1965) bestimmte in seiner Rolle als Direktor des Instituts im Vorwort der ersten Ausgabe der *Vakıflar Dergisi* das Ziel wie folgt: "In jeder historischen Epoche, an jedem Ort des türkischen Volkes, im sozialen, kulturellen Leben, in der Kunst und in der Architektur fällt die Welt der *vakıflar* als ein grossartiges Phänomen auf, das eine Untersuchung mit wissenschaftlichen Methoden und Erklärungen verdient."³ Der prominente Professor Mehmed Fuat Köprülü (1890–1966) ging noch weiter, indem er behauptete, dass eine Untersuchung der *vakıflar*-Dokumente nicht nur die Geschichte und die Rechtsgeschichte der *vakıflar* bzw. *awqāf* tangiere, sondern auch neue Dokumente zutage fördere, die einen Einblick in jede Phase der türkischen Geschichte ermöglichen würden. Dazu zählt er die Sozial- und Wirtschaftsgeschichte, die Geschichte der Städte, die Geschichte der Besiedlungen, die Geschichte der Topographie, die Herrschafts- und Finanzgeschichte, die Religionsgeschichte und die Frühgeschichte der Turkvölker.⁴ Was hier auffällt, ist, dass in beiden Fällen in der Zielsetzung der *Vakıflar*-Zeitschrift das Wort "Islam" gar nicht vorkommt. Entgegen dieser Sichtweise wurden *awqāf* als eine genuin islamische Institution mit globalen Auswirkungen gesehen. Nach Suleiman konnte die Oxford University dank dem Trust-System gegründet werden, das ursprünglich auf die islamischen *awqāf* zurückgehe.⁵ Demnach sind *awqāf* "charitable endowments for the benefit of the civic",⁶ die im Gegensatz zu Trusts einen Rückgang erfuhren.⁷

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

² Die Begriffe *waqf* (Arabisch, Plural *awqāf*) und *vakıf* (Türkisch, Plural *vakıflar*) werden als Synonyme gebraucht.

³ KIPER FAHRETTIN, [Vorwort], Vakıflar Dergisi, Vol. 1 (1938), I, URL: <http://dergipark.ulakbim.gov.tr/vakiflar/article/view/5000070535> [02. September 2016].

⁴ KÖPRÜLÜ M. FUAT, Vakıf Müessesesi ve Vakıf vesikalarnın tarihi ehemiyeti [Die Stiftungsinstitution und die Bedeutung der Stiftungsurkunden], Vakıflar Dergisi, Vol. 1 (1938), 5, URL: <http://dergipark.ulakbim.gov.tr/vakiflar/article/view/5000070535> [02. September 2016].

⁵ SULEIMAN HAITAM, The Islamic Trust waqf: A Stagnant or Riviving Legal Institution?, Electronic Journal of Islamic and Middle Eastern Law (EJIMEL), Vol. 4 (2016), 32 f., URL: <http://www.zora.uzh.ch/123754/1/Suleiman%20Haitam%20Waqf%20Published.pdf> [02. September 2016].

⁶ SULEIMAN, *supra* n. 5, 35, vgl. 39.

⁷ SULEIMAN, *supra* n. 5, 33.

Funktional gleicht das islamische *waqf*-System dem europäischen Trust-System insofern, als beide Systeme ursprünglich zur Sicherung der Kollektivgüter dienten.⁸ Während sich das *waqf*-System im Rahmen des öffentlichen Rechts von einer freiwilligen Wohltätigkeit hin zu einer Form des Privateigentums entwickelte, jedoch ohne einklagbare Rechtsansprüche blieb,⁹ die Universitäten im Osmanischen Reich praktisch verschwanden¹⁰ und die *awqāf* einen Niedergang erfuhren,¹¹ entfernte sich das europäische Trust-System von seinen familienrechtlichen Ursprüngen und steht heute innerhalb des säkularen Privatrechts als eine höchst ausdifferenzierte Institution des modernen Rechts da.¹²

Die erste Frage lautet: Wie kann diese entgegengesetzte Evolution der beiden Systeme erklärt werden? Ist der Grund des Niedergangs von *awqāf* im islamischen Recht zu suchen, wie verschiedenlich vorgeschlagen wurde, oder war der vermutete Niedergang einfach eine vorübergehende Phase, die mit dem folgenden "revival" aufgefangen wurde, wie Suleiman annimmt?¹³ Ausgehend von diesen einleitenden Fragen geht es im Folgenden zunächst um die Ableitung der eigenen Forschungsfrage wie auch um die Hypothese. Zu diesem Zweck wird die Definition von *waqf* nach Timur Kuran als Ausgangspunkt genommen und dann mit Singers und Schoenblums Ansätzen erweitert.

1. Definition von *waqf*

Awqāf wurden von Timur Kuran wie folgt umrissen: "In the premodern Middle East, from 750 C.E., perhaps even earlier, an increasingly popular vehicle for the provision of public goods was the *waqf*, known in English also as an 'Islamic trust' or a 'pious foundation'. A *waqf* is an unincorporated trust established under Islamic law by a living man or woman for the provision of a designated social service in perpetuity."¹⁴ Die Gründer von *awqāf* mussten in der Entstehungsphase Moslems sein und die Gründung musste an einem islamischen Gericht registriert werden.¹⁵ *Awqāf* als islamische Institution können in karitative *awqāf* (*waqf hayrī*) und Familien-*awqāf* (*waqf ahlī*) unterschieden werden. Während die karitativen *awqāf* auch historisch den Familien-*awqāf* vorausgingen, nahm die Anzahl der letzteren besonders im Osmanischen Reich zu.

Nach Kuran geht die Ausbreitung von *awqāf* darauf zurück, dass ihre Gründer dadurch, dass sie öffentlich wohltätig waren, nicht nur hohes Ansehen in der Gesellschaft erhielten, sondern auch die Garantie dafür, dass ihre Länder nicht verstaatlicht wurden.¹⁶ "One of the literal

⁸ SCHOENBLUM JEFFREY A., The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust, *Vanderbilt Journal of Transnational Law*, Vol. 32 (1999), 1191-227,

URL: <http://heinonline.org/HOL/LandingPage?handle=hein.journals/vantl32&div=40&id=&page=> [02. September 2016];

KURAN TIMUR, The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System, *Law & Society Review*, Vol. 4 (2001), 841-897, URL: www.jstor.org/stable/3185418 [02. September 2016].

⁹ ISIN/LEFEBVRE, *supra* n. 1.

¹⁰ IHSANOĞLU EKMELEDDIN, Science, technology and learning in the Ottoman Empire: Western influence, local institutions, and the transfer of knowledge, Aldershot 2004, 48.

¹¹ SCHOENBLUM, *supra* n. 8, 1192; SULEIMAN, *supra* n. 5, 33.

¹² SMITH LIONEL (Ed.), *The Worlds of the Trust*, Cambridge 2013.

¹³ SULEIMAN, *supra* Fn. 5, 29.

¹⁴ KURAN, *supra* n. 8, 842; ÜNSAR SEDA, A Study on Institutional Change: Ottoman Social Structure and the Provision of Public Goods, *Akademik Bakış*, Vol. 6 (2012), 170-200,

URL: <http://www.gaziakademikbakis.com/index.php/gab/article/view/175> [02. September 2016].

¹⁵ SINGER, *supra* n. 1, 93; KURAN, *supra* n. 8, 844 f., 851.

¹⁶ KURAN, *supra* n. 8, 842 f.

meanings of the term *waqf* is 'to stop', and another is 'to make dependent and conditional'. What the system was meant to stop was, on one hand, the expropriation of *waqf* assets and, on the other, deviations from the founder's directives on the use of these assets. What it rendered dependent and conditional was both the *waqf*'s objective and the means it used to reach the objective."¹⁷ Das *waqf*-System war aus dieser Perspektive ein islamisches Geschäftsmodell, das sich zwischen dem Staat und seinen wohlhabenden Bürgern positionierte.¹⁸ Während sich der Staat von *awqāf* gute Investitionen in die öffentlichen Güter versprach, verknüpfte der Kaufmann damit Rechtssicherheit und eine Reduktion der Steuern.¹⁹ Implizit wurde mit dem *waqf*-System die Prosperität, politische Macht, Legitimation und Rechtssicherheit in einer Art von Quid-pro-quo-Abkommen institutionalisiert. Je mehr der Kaufmann in öffentliche Güter investierte – d.h., die sozial erwünschten Investitionen in Form eines *waqf* auf dem Lande des Propheten Mohammad tätigte –, desto höher war die soziale Akzeptanz für die Steuerreduktion zulasten des profanen Staates.²⁰

Nach Singer sind *awqāf* keine genuin islamische Institution, sondern ihre Ursprünge lassen sich auf das Römische, das Byzantinische und das Sassanidische Reich zurückführen und wurden innerhalb des islamischen Rechts weiterentwickelt.²¹ Singer hebt in Übereinstimmung mit *Vakıflar Dergisi* hervor, dass sie einen Einfluss auf religiöse Praktiken, soziale Interaktionen, kulturelle Transformation, ästhetische Werke, politische Legitimation, Wirtschaftsorganisation und auf die physikalischen Konstrukte eines Dorfes oder einer Stadt ausübten.²² *Awqāf* wurden aus unterschiedlichen Gründen von ganz verschiedenen Akteuren gegründet. "Jews and Christians living in Muslim lands also founded waqfs. Because the purpose of the waqf had to be legal under Muslim law, synagogues and churches were not legitimate beneficiaries, but many other personal and communal goals were permitted."²³ Zwar waren *waqf*-Gründer und der jeweilige Anlass für die Gründungen sehr unterschiedlich, doch in ihrer Vielfalt umfassten die *awqāf* das ganze Leben, und es war insofern unmöglich, ihnen zu entrinnen. "In the course of their lives, few people in Muslim societies remained unaffected by endowments."²⁴ Nicht nur jeder Mensch als Gründer oder Nutzer, sondern auch jeder *waqf* hatte nach Singer seine hoch individuelle Geschichte. "Each individual waqf, therefore, constitutes a discrete story of individual intentions and local circumstances, and each was integrated into its local political, economic, and social context through its functions, personal, and properties."²⁵ Die Beständigkeit der *awqāf* führt Singer auf den "spiritual benefit" zurück, den sich die Gründer und die Nutzer von ihnen versprachen: das Ansehen in einer überschaubaren Gemeinschaft und die Erwartung eines angenehmen Jenseitslebens.²⁶

2. Waqf und Trust im Vergleich

Jeffrey A. Schoenblum geht in diesem Zusammenhang der Frage nach, ob auch andere Rechtssysteme zur Verwaltung des Familienguts eine ähnliche Institution entwickelt haben,

¹⁷ KURAN, *supra* n. 8, 862.

¹⁸ KURAN, *supra* n. 8, 844, 848.

¹⁹ KURAN, *supra* n. 8, 869.

²⁰ KURAN, *supra* n. 8, 848.

²¹ SINGER, *supra* n. 1, 91.

²² SINGER, *supra* n. 1, 91.

²³ SINGER, *supra* n. 1, 99.

²⁴ SINGER, *supra* n. 1, 100.

²⁵ SINGER, *supra* n. 1, 96.

²⁶ SINGER, *supra* n. 1, 100 f., 141.

und wird im europäischen Trust-System fündig.²⁷ Schoenblum legt in seinem Beitrag einen Vergleich zwischen Trust und *waqf* vor und stellt fest, dass das Trust-System eine Domäne des modernen Wirtschaftssystems ist, während der islamische *waqf* mit einem inkrementellen Niedergang konfrontiert war.²⁸

Schoenblum zählt vier prinzipielle Gründe dafür auf, warum sich das Familiengut nicht im islamischen *waqf*, aber im europäischen Trust-System entwickelte. Den ersten Grund sieht er in den Quellen der beiden Rechtssysteme: Das islamische Rechtssystem, in das die *awqāf* eingebettet waren, verhinderte nach Schoenblum eine Anpassung. Eine Entwicklung durch rationale Planung wurde von den als heilig geltenden sozialen Normen der islamischen Gesellschaft verhindert. Dieselben Normen macht Schoenblum auch für die Förderung eines Ethos verantwortlich, das einen die notwendigen Lernvorgänge zulassenden Vergleich mit bereits existierenden Alternativen unterband. Im Gegensatz zum Trust-System waren die erforderlichen Reformen entweder strikte verboten oder wurden im Modus überlieferter Analogien angewendet, welche die im europäischen Trust-System vorhandenen Abstraktionen nicht zuließen.²⁹ Mit der Rigidität des islamischen Rechtsverständnisses hängt auch zusammen, dass bei den *awqāf*, obschon älter als die Trusts, detaillierte Rechtsanwendungsregeln fehlen.³⁰ "The premise of this article is that [legal] doctrine matters, and this is true in all legal systems. While ad hoc adjustments can sustain the system for some time, it must ultimately falter when it can no longer efficiently serve the interests of the consumers. This is not the case, however, where the legal process itself permits adaptation in response to inevitably changing conditions and needs."³¹

Zweitens gehören gemäss Schoenblum die beiden Systeme zu zwei verschiedenen Rechtslogiken. Die *awqāf* seien von der religiösen Autorität des Propheten Muhammad abgeleitet und verfolgten daher religiöse, fromme, karitative Ziele.³² Während die Trusts ins säkulare Rechtssystem eingebettet waren, wurden *awqāf* von einer "inflexible and divine" Rechtsdoktrin getragen.³³ Darin sieht Schoenblum auch den Grund dafür, dass Kinder im Trust-System als legitime Erben³⁴ betrachtet werden, nicht aber im *waqf*-System.³⁵

Eine dritte Differenz zwischen *waqf* und Trust sieht Schoenblum in der staatlichen Regulierung. Während Trusts im Rahmen der Rechtsentwicklung permanent an die gesellschaftlichen Anforderungen angepasst werden konnten, wurden die *awqāf* in vielen islamischen Ländern von islamischen Herrschern als ein Verbot gegen Rechtsreformen und als

²⁷ SCHOENBLUM, *supra* n. 8, 1191 f.

²⁸ SCHOENBLUM, *supra* n. 8, 1192.

²⁹ SCHOENBLUM, *supra* n. 8, 1193 f.

³⁰ SCHOENBLUM, *supra* n. 8, 1193.

³¹ SCHOENBLUM, *supra* n. 8, 1193 f.

³² SCHOENBLUM, *supra* n. 8, 1198.

³³ SCHOENBLUM, *supra* n. 8, 1201.

³⁴ SCHOENBLUM, *supra* n. 8, 1203.

³⁵ Im Grunde genommen hatten im Osmanischen Reich auch Frauen kein Erbrecht und auch sie konnten keine *awqāf* gründen, obschon es Ausnahmen gab, so auch die berühmte Hürrem Sultan, die Frau von Kanuni Sultan Süleyman und Mutter von Sultan Selim. IMBER weist darauf hin, dass nach den Celâli-Aufständen um 1600 auch Frauen als Erben in Frage kamen, da es einfach zu wenige Männer gab, die das Land bearbeiten konnten. IMBER COLIN, The law on the land, in WOODHEAD CHRISTINE (Ed.), The Ottoman world, London 2012, 53. Für die Celâli-Aufstände siehe AKTAĞ MUSTAFA, Celâli İsyânlarının Başlaması [Der Beginn der Celâli Aufstände], *Ankara Dil ve Tarih-Coğrafya Fakültesi Tarih Bölümü* Vol. 4 (1946), 23-50, URL: <http://dergiler.ankara.edu.tr/dergiler/26/1243/14194.pdf> (20. März 2017).

ein Herrschaftsmittel für das Erlangen von Ansehen verwendet.³⁶ Das islamische Rechtssystem war von der Politik abhängig und verfolgte materielle Ziele. Aufgrund dieses politisierten Rechtszustandes befreite sich das *waqf*-System als juristische Persönlichkeit erst im 21. Jahrhundert; fortan konnte nicht nur der Verwalter (*mutawallī*), sondern der *waqf* selbst angeklagt werden.³⁷

Ein letzter Unterschied besteht im Verständnis des Eigentumsrechts. "At the core of the restrictions on alienation, mortgaging, and leasing lies the question of 'ownership'."³⁸ Ein *waqf* gehört gemäss Schoenblum im Endeffekt *Allah* und der Inhaber führt die Geschäfte eigentlich in dessen Namen.³⁹ Die erste Folge davon war, dass das Land dem Wirtschaftsmarkt entzogen wurde und an eine die Produktivität hemmende, risikoaverse "indolent class of beneficiaries" ging.⁴⁰ Genau diese Funktion verbirgt sich nach Schoenblum auch hinter dem Umstand, dass im 19. Jahrhundert die Hälfte Algeriens und ein Drittel Tunesiens als *waqf* galten.⁴¹ Diese wirtschaftlich brachliegenden Ländereien hätten politische Instabilität und eine entmutigende soziale Mobilität zur Folge gehabt.⁴²

Dann formuliert Schoenblum die Frage: "How can the underlying commitment of the property to Allah and, thereby, religious, pious, or charitable use for the Muslim community be squared with private benefit?"⁴³

II. Forschungsfrage und Forschungshypothese

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

Daher und angesichts der Komplexität des Untersuchungsgegenstandes wird die von Schoenblum gestellte Frage zunächst auf eine abstrakte Ebene gestellt: Wie wird ein Eigentumsrecht trotz seiner sakralen Ursprünge/Hintergründe in das moderne Privatrecht überführt? Diese Frage soll uns erlauben, Schoenblums Frage zum Ersten rechtssoziologisch zu behandeln. Zugleich verweist die Frage auf den historischen Hintergrund einer Rechtsentwicklung insofern, als dass auf dem europäischen Boden diese Evolution stattfand, wie Schoenblum im Falle des Trust-Systems zeigt.

Zum Zweiten soll Schoenblums Frage auf die islamischen Rationalitätsformen übertragbar werden, ohne einen direkten Vergleich zwischen *waqf*- und Trust-System anzustellen, oder das

³⁶ SCHOENBLUM, *supra* n. 8, 1204 f.

³⁷ SCHOENBLUM, *supra* n. 8, 1196, 1221 ff.; KURAN, *supra* n. 8, 843.

³⁸ SCHOENBLUM, *supra* n. 8, 1217.

³⁹ SCHOENBLUM, *supra* n. 8, 1206, 1218.

⁴⁰ SCHOENBLUM, *supra* n. 8, 1208.

⁴¹ SCHOENBLUM, *supra* n. 8, 1206.

⁴² SCHOENBLUM, *supra* n. 8, 1211.

⁴³ SCHOENBLUM, *supra* n. 8, 1207.

Trust-System als einen Idealtyp anzusehen. Anstelle dessen sollen mit einer Forschungsfrage die Besonderheiten in der Entwicklung des *waqf*-Systems hervorgehoben werden. Und um die Frage auch empirisch angehen zu können, lautet die Forschungsfrage dieses Beitrags: Wer hat wann und warum die *awqāf* gegründet? Gab es auch im islamischen *waqf*-System eine rechtssoziologisch nachweisbare Rechtsentwicklung?

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

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

Wir können vorwegnehmen, dass der Koran die Notwendigkeit von *awqāf* zwar andeutet (*Sure* 34, *Vers* 39 und 58:12), sie aber nicht direkt erwähnt.⁴⁴ Als solche werden sie erst im 8. Jahrhundert in *ahādīṭ* erwähnt. Als islamische Institution tauchen sie dann bei den Fatimiden im 12. Jahrhundert auf.⁴⁵ In der Zeit des Propheten Muhammad hatten die angedeuteten *awqāf* die Funktion einer freiwillig geleisteten Steuerform. Insofern ist es erlaubt, festzustellen, dass die *awqāf* nicht zur islamischen Theologie, aber zum islamischen Herrschaftssystem gehören. Diese Unterscheidung erlaubt eine Auseinandersetzung mit den *awqāf* anhand einer Untersuchung der Sozial-, Wirtschafts- und Rechtsgeschichte. Die Frage lautet: Warum kommt eine so wichtige islamische Institution im Koran, in der wichtigsten Schrift des Islams, nicht vor? Die Frage kann am besten mit der Suche nach einer funktional gleichen Institution beantwortet werden. *Awqāf* waren und sind eine institutionalisierte Form der Wirtschaftssolidarität insofern, als dass *awqāf* als eine Besteuerungsform eingesetzt wurden. Insofern muss nicht nach dem Warum, sondern nach dem Was gefragt werden: Welche Institution wurde vor der Prophetie Muhammads für die Besteuerung eingesetzt?

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

⁴⁴ Der Koran enthält 114 Suren, die ihrer Textlänge nach angeordnet sind. Dabei steht die erste Zahl in Klammern für die Zählung der Sure und die zweite Zahl für diejenige des Verses. Aus dem Koran wird nach der folgenden Übersetzung zitiert: URL: <http://www.ewige-religion.info/koran/> [29. Mai 2017].

⁴⁵ KURAN, *supra* n. 8, 846.

reserviert war. Erst im theologischen Kontext erhält es die Bedeutung von "rein", "gerecht", "gut" und suggeriert eine moralische Abstandnahme von materiellen Gütern.⁴⁶

1. Der Formwandel

Bis vor der Gründung der *umma* in Medina wurde *zakāt* als eine freiwillige Wohltätigkeit betrachtet. Im Koran kommt *zakāt* dreissig Mal vor und nur zwei Verse (18:81 und 19:13) stammen nach Watt aus der mekkanischen Periode.⁴⁷ Daher haben sich die im medinensischen Kontext entstandenen Suren (2:263, 4:114, 9:79) noch die Bedeutung von freiwilliger Almosenspende bewahrt.⁴⁸ Auch die Bedeutung "jemanden läutern" stammt aus dieser Zeit. Das ist der Grund, warum im Koran *zakāt* nie als etwas bezeichnet wird, "das man als Geschenk gibt, um ein bestimmtes Ziel zu erreichen oder eine Sache wiedergutzumachen. In diesem Fall steht stets das Wort *sadaqa*."⁴⁹ Denn die Bedeutung "freiwilliges Almosen" musste mit der Herrschaftsetablierung in eine erzwingbare Norm übersetzt werden.⁵⁰ Erst nachdem *zakāt* anstelle der Bedeutung von *sadaqa* die Bedeutung von vorgeschriebenen Obligation (2:83, 2:177, 9:5, 9:11, 9:71) erhielt, wurde es als eine religiöse Pflicht normiert (7:156, 19:31, 21:73, 30:38, 31:4, 41:7) (9:19).⁵¹ Die Anhäufung von Reichtum wurde folglich theologisch für unmoralisch (92:18) erklärt und die freiwillige oder theologisch wünschenswerte Vergabe von Almosen mit Reinheit (9:103) verknüpft. Am Ende dieser Evolution zahlte der wahrhaft Gläubige diese Steuer (2:177) freiwillig, durfte dafür mit einem "Lohn bei seinem Herrn" rechnen (2:277) und wer sie umgehen wollte, musste mit harten Strafen rechnen (3:180, 9:34 f).

Insofern gehört entgegen der weitverbreiteten Annahme die Heiligerklärung des Eigentums weder zur islamischen Theologie noch zur islamischen Herrschaft. Das kann darin genauer gesehen werden, dass *awqāf* im Koran nicht vorkommen und die Heiligerklärung nach der Religionssoziologie Durkheims zu einer Phase gehört, die eine Differenzierung zwischen dem allmächtigen Gott und bedürftigen Gläubigen gar nicht kannte. Gemäss Durkheim konnten die Götter während dieser Phase bestimmte Objekte, Orte, Städte wie auch Gedanken besitzen. Er führt dafür Beispiele aus Honolulu auf, wo der König eine Diamantmine für heilig erklärte, und Beispiele aus Tahiti, wo alles, was der Häuptling berührte, für heilig, zum Tabu erklärt wurde.⁵² Er weist darauf hin, dass gewisse Orte, an denen religiöse Zeremonien abgehalten wurden, dem profanen Gebrauch, der Marktwirtschaft, entzogen waren; zum Teil sind sie es bis heute. "Nur jene Menschen konnten diese Zone durchschreiten und die auf diese Weise von der Umgebung abgetrennte Insel betreten, welche die Rituale vollzogen und dadurch spezielle Bindungen zu den heiligen Wesenheiten eingegangen waren, denen der Boden ursprünglich gehörte. Dann gingen die göttlichen Kräfte, die den Dingen innewohnten, nach und nach auf die Menschen über; die Dinge waren nicht mehr aus sich heraus heilig; vielmehr kam ihnen diese Eigenschaft nur noch indirekt zu, insofern sie sich in der Abhängigkeit von Personen befanden, die ihrerseits heilig waren. Das ursprünglich kollektive Eigentum wurde zu einem persönlichen Eigentum."⁵³ Mit der Heiligerklärung konnte die heilige Sache dem

⁴⁶ WEHR HANS, Arabisches Wörterbuch für die Schriftsprache der Gegenwart, Beirut 1997, 344.

⁴⁷ WATT WILLIAM MONTGOMERY, Der Islam, Stuttgart 1980, 85 und 301.

⁴⁸ NAGEL TILMAN, Medinensische Einschübe in mekkanischen Suren, Göttingen 1995, 108.

⁴⁹ FARSHID OLAF, Zakāt in der Islamischen Ökonomik: Zur Normenbildung im Islam, Würzburg 2012, 54.

⁵⁰ FARSHID, *supra* n. 49, 54.

⁵¹ FARSHID, *supra* n. 49, 53 f.

⁵² DURKHEIM EMILE, Physik der Sitten und des Rechts: Vorlesungen zur Soziologie der Moral, Frankfurt am Main 1991, 203 f.

⁵³ DURKHEIM, *supra* n. 52, 237.

Gemeinnutzen entzogen und dem privaten Gebrauch einer einzigen Person unterstellt werden. Am Ende wurde mit jedem Tabu ein persönlicher Rechtsanspruch auf das Objekt erhoben.⁵⁴ Tabuerklärung funktioniert also dort, wo die gesellschaftliche Differenzierung nach dem Verschiedenheitsprinzip geregelt wird, die gemäss Niklas Luhmann schon in der mythischen Urgemeinschaft gegeben hat. "Sie [die Verschiedenheit] ist, nach alten Darstellungen, ein Moment der Perfektion der Schöpfung. Zur Ungleichheit kommt es erst durch den Sündenfall oder, nach der Theorie des Naturrechts, durch differentielle Nutzung des Eigentums. Das Beobachtungsschema gleich/ungleich ist im Unterschied zur blossen Anerkennung von Verschiedenheiten ein universelles und zugleich hoch spezifisches Schema."⁵⁵

2. Die Differenzierung im Recht- und Sozialsystem

Dieses Schema wurde für die Rechtsentwicklung eingesetzt. So kam innerhalb des Rechtssystems "das Gesetz" als einen Rechtskode schon mit einer Formalisierung und Ritualisierung der Entscheidungsfindung *vor* dem Auftauchen des Judentums zur Anwendung.⁵⁶ Aber "der Vertrag" als eine neue Form der Rechtskode kommt erst *nach* der Ausbreitung eines exklusiven Eigentumsrechts zur Geltung, womit die ideelle Freiheit des Individuums mit seinen materiellen Wahlmöglichkeiten verbunden wurde.⁵⁷ Seitdem wenden die Gerichte in Übereinstimmung mit diesen beiden Rechtsquellen ihre Entscheide an.⁵⁸ Mit der Implementierung vom Vertrag und den damit verbundenen Eigentumsrechten wurde nun auch eine Differenzierung in der Sozialstruktur der Gesellschaft notwendig, die in der Form von Zentrum und Peripherie eingeleitet wurde. Diese Differenzierung im Recht- und Sozialsystem kann im Osmanischen Reich im Aufkommen einer Mittelschicht gesehen werden, worauf die *waqf*-Gründungen hindeuten. Bis dahin kannte das Osmanische Reich nur ein Unten und Oben (Herrscher vs. Beherrscher, Diener vs. Allmächtiger) aber keine funktionale Differenzierung.⁵⁹ Besonders in seiner Expansionsphase wurde das Osmanische Reich anstelle von dem alten Schema Oben-Unten von einer funktionalen Dualität zwischen Zentrum und Peripherie getrieben.⁶⁰ Seit dem wurde im Zentrum *einheitlich geplant* und per Gesetz durchgesetzt, während in der Peripherie das per Gesetz Vorgeschriebene mit einem Vertrag *individuell umgesetzt* wurde. Diese Differenzierung entsprach den nun neu funktional prädestinierten Besitzverhältnissen.

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

⁵⁴ DURKHEIM, *supra* n. 52, 203, 207.

⁵⁵ LUHMANN NIKLAS, *Das Recht der Gesellschaft*, Frankfurt am Main 1993, 115.

⁵⁶ LUHMANN NIKLAS, *Rechtssoziologie*, Wiesbaden 2008, 160; AMSTUTZ MARC, *Das Gesetz*, in GAUCH PETER/PICHONNAZ PASCAL (Hrsg.), *Figures juridiques, Mélanges dissociés, pour Pierre Tercier à l'occasion de son soixantième anniversaire (= Rechtsfiguren, eine Festschrift [für] Pierre Tercier zu seinem sechzigsten Geburtstag)*, Zürich 2003, 155-165.

⁵⁷ LUHMANN, *supra* n. 55, 450 f., 463; LUHMANN NIKLAS, *Die Gesellschaft der Gesellschaft*, Frankfurt am Main 1998, 783 f.

⁵⁸ TEUBNER GUNTHER, *Ist das Recht auf Konsens angewiesen? Zur sozialen Akzeptanz des modernen Richterrechts*, in GIEGEL HANS JOACHIM (Hrsg.), *Kommunikation und Konsens in modernen Gesellschaften*, Frankfurt am Main 1992, 203.

⁵⁹ BERKES NIYAZI, *The development of secularism in Turkey*, Montreal 1964, 11 ff.

⁶⁰ HEPER METIN, *Center and Periphery in the Ottoman Empire: With Special Reference to the Nineteenth Century*, *International Political Science Review/Revue Internationale De Science Politique*, Vol. 1 (1980), 81-105, URL: www.jstor.org/stable/1600742 [02. September 2016]; BARKEY KAREN, *Bandits and bureaucrats: The Ottoman route to state centralization*, Ithaca 1994.

gewisse Autonomie in der Implementierung des Eigentumsrechts erhielt.⁶¹ Dank dieser funktionalen Arbeitsteilung übernahm das Zentrum die Koordinierung für die Eroberung fremder Länder und die Peripherie die Verwaltung der nun herrenlos gewordenen Länder.

Sowie das Prinzip der natürlichen Gerechtigkeit zur Unterscheidung von zwei Menschen ohne eine moralische Wertung diente, übernahm das Prinzip der Verschiedenheit dieselbe Funktion, indem sie aber auf der nächst höheren Abstraktionsebene auch die funktionale Unterscheidung zwischen Peripherie und Zentrum aufnahm. Der Gewinn besteht darin, dass, während im Prinzip der natürlichen Gerechtigkeit die Sozialintegration angestrebt wurde, im Verschiedenheitsprinzip und damit in der Differenzierung zwischen Peripherie und Zentrum auch die Systemintegration sichergestellt werden konnte. Mit dieser neuen Sozialstruktur waren sowohl die Vielfalt als auch eine einheitliche Koordinierung bis zur Moderne gewährleistet.⁶² Gestützt auf diese rechtssoziologischen Annahmen stellt die Gründung des islamischen *waqf*-Systems drei Kompromisse dar: der Kompromiss (1) zwischen Königen und Propheten, (2) zwischen Ordensführern/lokalen Eliten und Bauern und (3) zwischen dem sakralen und säkularen Recht.

IV. Awqāf im Osmanischen Reich

Zur Bekräftigung dieser Arbeitshypothese ist die Gründungszeit des Osmanischen Reiches exemplarisch, zumal in dieser Phase die *awqāf* zu ihrer vollen Entfaltung kamen. Das Osmanische Reich (1299–1918) entstand aus dem Machtvakuum nach der Zersplitterung der islamischen Dynastien, dem Niedergang des anatolischen Seldschukenstaates und des byzantinischen Reiches und dem Rückzug der Mongolen.⁶³ Es stellte die Integration der Menschen aus diesen Staatsgebilden wie auch die Integration von um 25 Kleinfürstentümern dar.⁶⁴ "Insofern repräsentierte das Osmanische Reich einen aus verschiedenen Gegenden und, entsprechend ihren unterschiedlichen Kulturen, verschiedenen Menschen bestehenden Verband. Nachdem es für die damaligen islamisch-türkischen Verhältnisse eine neue Welt, ein anderes Amerika zu implizieren begann, wurde es zur Bühne des Neuen in einer neuen Welt und für ein neues Leben bereit."⁶⁵

⁶¹ GERBER HAIM, *Economy and Society in an Ottoman City: Bursa, 1600–1700*, Jerusalem 1988.

⁶² ÖLMEZ ADEM, II. Mesrutiyet Devrinde Osmanlı Medreselerinde Reform Çabaları ve Merkezileşme / Reform Efforts in Ottoman Madrasas in the Second Constitutional Era and Centralization, *Vakıflar Dergisi*, Vol. 41 (2014), 121-140, URL: <http://dergipark.ulakbim.gov.tr/vakiflar/issue/view/5000007219> [07. September 2016]; HEPER METİN, The state, religion and pluralism: The Turkish case in comparative perspective, *British Journal of Middle Eastern Studies*, Vol. 18 (1991), 38-51, URL: <http://www.jstor.org/stable/195380> [04. September 2016]; KÜRŞAT ELÇİN, *Der Verwestlichungsprozess des Osmanischen Reiches im 18. und 19. Jahrhundert: Zur Komplementarität von Staatenbildungs- und Intellektualisierungsprozessen*, Hannover 2003.

⁶³ KAFADAR CEMAL, Introduction: A Rome of one's own: Reflections on cultural geography and identity in the lands of Rum, *Muqarnas* 24, (2007), 7-25, URL: <http://www.jstor.org/stable/25482452> [04. September 2016]; KAFADAR CEMAL, *Between the worlds: The construction of the Ottoman state*, Berkeley 1995.

⁶⁴ ERGENÇ ÖZER, Osmanlı Devletine Ruh Üfleyen Nefesler: Osman Gazi'nin Liderliğinin ve Karizmasının Ortaya Çıkışı [Akteure, die dem Osmanischen Reich den Atem eingehaucht haben: Die Entstehung des Charismas vom Osman Gazi], in İNALCIK HALİL (Hrsg.), *Kuruluş: Osmanlı Tarihini Yeniden Yazmak* [Gründungszeit: Neuschreibung der Geschichte des Osmanischen Reiches], Istanbul 2012, 67-80.

⁶⁵ BARKAN ÖMER LUTFI, Osmanlı İmparatorluğunda bir İskân ve Kolonizasyon Methodu olarak Vakıflar ve Temlikler I, *Istila Devirlerinin Kolonizatör Türk Dervişleri ve Zâviyeler* [Awqāf und Orden als eine Besetzung- und Kollonialisierungsmethode im Osmanischen Reiche I, die türkische Derwische und Orden in den Zeiten der Eroberung], *Vakıflar Dergisi*, Vol. 2 (1942), 285.

Wie das spätere "neue" Amerika wurde besonders das Osmanische Reich nebst der Kontrolle der Handelswege vor allem durch Landbesetzung, Landgewinnung, Landkultivierung und Landbesteuerung errichtet.⁶⁶ Damit hatten die späteren Osmanen schon vor der Zeit der Mongolen und Seldschuken begonnen, indem sie eine Reihe von *beylikler* (Fürstentümer) an der Grenze zu Byzanz errichtet hatten, weswegen sie *uç-beylik* (Grenz-Fürstentümer) und ihre Führer *uç-bey* genannt wurden.⁶⁷ Die osmanische Dynastie geht aus einem solchen Fürstentum hervor. Ein Charakteristikum dieser *beylikler* war, dass sie über ein Kontingent von irregulären Guerillakämpfern verfügten. Die wichtigsten davon wurden *alpler* (Held), *nöker* (Genosse) und *akıncılar*⁶⁸ genannt und ihre Hauptaufgabe bestand darin, beim gegnerischen Heer Angst und Verwirrung auszulösen. Für ihren Dienst erhielten sie als Kriegsbeute jeweils Land (*yurtluk*).⁶⁹

Nach einer Lesart war es das Werk von *Derwischen* und ihren mit der *gaza*-Ideologie instruierten irregulären Truppen (wie *alpler*, *nöker* und *akıncılar*), dank denen die Islamisierung vorangetrieben wurde und das Osmanische Reich sich als ein islamisches Weltreich durchsetzen konnte.⁷⁰ Dazu trug bei, dass während der Gründungszeit des Osmanischen Reiches die bestehende Vielfalt von Kulturen wie auch der Gegensatz zwischen Sesshaften und Nomaden besonders mit dem Mongolensturm (1256) zugespitzt wurden. Die Nomaden gefährdeten nicht nur als Viehzüchter den Ackerbau der Sesshaften, sondern wurden von den Emiren, den Kriegsherren, zu Kriegszwecken hin und her geschoben, was die städtische Abneigung ihnen gegenüber verstärkte.⁷¹ Trost fanden auch diese Nomaden und Soldaten bei den *Derwischen*, die bei diesen Völkerumsiedlungen dabei waren.⁷² "There was a wide range of dervishes, from the very orthodox to the heterodox."⁷³

Um den Zusammenhang zwischen der Landeroberung und der Landverwaltung mit dem islamischen *waqf*-System herzustellen und sie dann mit folgenden Ausdifferenzierungen zusammenzubringen, ist es notwendig, die damalige sakrale Einheit von Land-, Militär- und Glaubenssystem in Erinnerung zu rufen. Zur Illustration eignet sich der *Bektaşî*-Orden (*dergâh*), der massgeblich zur Staatswerdung des Osmanischen Reiches beitrug. Der *Bektaşî*-Orden übernahm bei der Gründung des Osmanischen Reiches ideologisch wie auch militärisch eine Führungsrolle. Seinen Namen erhielt der Orden von seinem geistigen Vater Hacı Bektaş Veli.⁷⁴ Max Weber nannte das Glaubenssystem dieses Ordens *Derwischreligiosität* und konnte es weder

⁶⁶ JLYBYER ALBERT HOWE, *The Ottoman Turks and the routes of Oriental trade*, *The English Historical Review*, Vol. 30 (1915), 577-588; INALCIK HALIL, *The Ottoman Economic Mind and Aspects of the Ottoman Economy: Studies in the Economic History of the Middle East*, (Ed.), COOK MICHAEL A., London 1970, 207-218.

⁶⁷ INALCIK HALIL, *Devlet-i Aliyye: Osmanlı İmparatorluğu Üzerine Araştırmalar. Klasik Dönem (1302-1606), Siyasal, Kurumsal ve Ekonomik Gelişim [Der ewige Staat: Untersuchung über das Osmanische Reich: Klassische Zeit (1302-1606), Band 1, Politische, institutionelle und ökonomische Entwicklung]*, Istanbul 2009, 11 ff.

⁶⁸ "Akıncılar" kann mit "die Schnellen", "die Brenner" übersetzt werden und bezieht sich auf die Mobilitätsfähigkeit dieser Guerillagruppen.

⁶⁹ FAROQHI SURAIYA, *Geschichte des Osmanischen Reiches*, München 2010, 24; INALCIK, *supra* n. 67, 27 f.

⁷⁰ DOUMANIS NICHOLAS, *Before the nation: Muslim-Christian coexistence and its destruction in late Ottoman Anatolia*, Oxford 2013, 22 f.; NAGEL TILMAN, *Timur der Eroberer und die islamische Welt des späten Mittelalters*, München 1993, 31; INALCIK, *supra* n. 67, 10, 13 f, 30 ff.; LANGER WILLIAM L./BLAKE ROBERT P., *The rise of the Ottoman Turks and its historical background*, *The American Historical Review*, Vol. 37 (1932), 503, URL: <http://www.jstor.org/stable/1837961> [02. SEPTEMBER 2016].

⁷¹ NAGEL, *supra* n. 70, 74 f., 124 f.; NAGEL TILMAN, *Staat und Glaubensgemeinschaft im Islam: Geschichte der politischen Ordnungsvorstellungen der Muslime*, Band 1, von den Anfängen bis ins 13. Jahrhundert, Zürich 1981, 46.

⁷² SMITH GRACE MARTIN (Ed.), *The poetry of Yunus Emre: A Turkish Sufi poet*, Berkeley 1993, 3.

⁷³ BAŞKAL ZEKERİYA, *Yunus Emre: The Sufi poet in love*, New York 2010, 10.

⁷⁴ GROSS ERICH, *Das Vilâjet-nâme des Hağği Bektaşch: Ein türkisches Derwischewangelium*, Leipzig 1927.

der Askese noch der Mystik zuordnen.⁷⁵ Gemäss *Vilāyetnāme* handelte Osman Gazi, der Gründer des Osmanischen Reiches, im Namen des *Bektaşî*-Ordens.⁷⁶ Tatsächlich war Osman Gazi mit der Tochter Scheich Edebälis verheiratet, der den *Ahi*-Orden führte.⁷⁷ Historisch gesichert ist der Umstand, dass der *Bektaşî*-Orden während der Zeit von Sultan Murad I. (reg. 1362–1389) gute Beziehungen zum Herrscherhaus unterhielt.⁷⁸ Auch der spätere Ordensführer Balım Sultan (gest. 1516) wurde vom Sultan Beyazid II. finanziell und politisch unterstützt.⁷⁹ "In other words, two organisations laid a victory of Islam over Eastern Christendom: the Ottoman state and the Bektasi Orden."⁸⁰

a) *Awqāf als Kompromiss zwischen Königtum und Prophetentum*

In dieser historischen Konstellation wurde im *waqf*-System der erste Kompromiss zwischen Prophetentum und Königtum gefunden. In dieser Phase stand die Religion mit dem Landsystem in einer strukturellen Beziehung, weil die Soldaten nach *gaza*-Ideologie geführt und ihnen im Falle eines erfolgreich geführten Krieges Länder zugeteilt wurden. Das eroberte Land gehörte nach dieser Logik nicht einem Staat oder König, sondern Gott höchstpersönlich, weswegen es auch kultiviert, das heisst, erobert werden durfte.⁸¹ Faktisch hatten die Propheten mit dieser Sprachregelung einen Rechtsanspruch auf die Länder der Könige erhoben.⁸² Auf Handlungsebene wurde in Form des Heiligen Kriegs auch eine überalltägliche Motivation für die Soldaten geschaffen, womit die Länder der Könige verunsichert wurden.

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

⁷⁵ WEBER MAX, *Gesammelte Aufsätze zur Religionssoziologie*, Band 1, Tübingen 1920, 155, 260, 538.

⁷⁶ GROSS, *supra* n. 74, 133.

⁷⁷ BARKAN, *supra* n. 65, 286 f.; LEWIS BERNARD, *The Islamic Guilds*, in *The Economic History Review*, Vol. 8 (1937), 29 f., URL: <http://www.jstor.org/stable/2590356> [04. September 2016]; KURAN TIMUR, *Islamic Influences on the Ottoman Guilds*, in ÇİÇEK KEMAL et.al, (Ed.), *The Great Ottoman-Turkish Civilisation, Economy and Society*, Vol. 2, Ankara 2000, 44 f.; BAER GABRIEL, *The Administrative, Economic and Social Functions of Turkish Guilds*, *International Journal of Middle East Studies*, Vol. 1 (1970), 28-31, URL: <http://www.jstor.org/stable/162064> [04. September 2016].

⁷⁸ GROSS, *supra* n. 74, 152; FAROQHI SURAIYA, *The tekke of Haci Bektas: Social position and economic activities*, *International Journal of Middle East Studies*, Vol. 7 (1976), 187, URL: <http://www.jstor.org/stable/162600> [07. September 2016].

⁷⁹ FAROQHI, *supra* n. 78, 191.

⁸⁰ KAFADAR, *supra* n. 56, 1995, 98.

⁸¹ Die Osmanen pflegten zu sagen; "toprak benim değil, Allahındır" (Das Land gehört weder dir noch mir, sondern einzig Allah).

⁸² Historisch ging das Königtum dem Prophetentum voraus. Soziologisch ist die Grenze zwischen diesen beiden Ordnungssystemen fließend.

Interessenlagen und nur in einer Gemeinschaft erfolgt.⁸³ Da historisch die Königtümer in einer Sippen-gesellschaft verankert waren und auf einer Legitimation im soziologischen Sinn beruhten, stand sie im Widerspruch zur aufkommenden Verantwortungsethik, die mit dem Islam innerhalb der *umma* angeboten wurde.⁸⁴ Das Rechtliche war im Falle des Königtums spätestens vor der faktischen Macht des Sultans machtlos. Dagegen erhielt ein ethisch legitimes Recht im Falle der *umma* erst recht ihre Ausschlagkraft mit der Idee einer Überwindung der königlichen Mächte.

Das Osmanische Reich war ein Königtum, das auf Kosten des Prophetentums gegründet wurde. Im Gegensatz zu andern Königreichen bediente sich das Osmanische Reich nun aber auch der ethischen Herrschaftslegitimation. Zur Einsicht dieser Differenzierung trug auch die gleichzeitige Existenz des sunnitischen Kalifats und des schiitischen Imamats bei. Da sie beide funktional der Durchsetzung des *dār al-islām* auf der Weltbühne dienten, machte eine alleinige Herrschaftslegitimation auf Grundlage islamischer Ethik obsolet. Folglich hatte der osmanische Hofhistoriker Tursun Bey (1427–1490) lautstark festgelegt, dass der Sultan *zillullah-i fi'l-arz* bzw. *zillullah* (der faktische Schatten Gottes auf Erden) sei, womit er ihn auch als einzig legitime Instanz mit Herrschaftsanspruch transzendierte.⁸⁵ In der Tat bediente sich der osmanische Staat auch der ethischen Kriegsführungslegitimation, indem er seinen Anspruch auf die Länder einerseits mit dem sakralen Rechtsverständnis erhob, gemäss dem der Sultan der Verwalter des Irdischen ist und andererseits damit, dass der Staat durch das Kriegsrecht (*kılıç hakkı*) diese Länder besitze.

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

Abgesehen von dieser fehlenden Rechtsgrundlage existierte in der Zeit auch kaum eine nach ethisch/rationalen Kriterien eingerichtete Bürokratie, die sich nicht nur in bereits eroberten Ländern, sondern auch erst noch zu erobernden Ländern auf eine Organisation und/oder Institution hätte verlassen können. Weder Herrschaft, noch Herrschaftsinstrumente waren in der Phase auf der Staatsebene im Sinne von Weber rationalisiert.⁸⁶ Es gab zwar von Anfang an einen militärischen Zwangsapparat, aber in dieser Phase existierte noch keine staatliche Bürokratie, in der nicht die faktische Macht des Stärkeren, sondern abstrakte Regeln zum Machterhalt führten. Die Gründung einer solchen Bürokratie muss von moralisch-ethischen Einstellungen einzelner Menschen absehen, die eine spätere Phase der Vergesellschaftung darstellt. Die unabdingbare Voraussetzung einer institutionellen Rationalisierung ist die

⁸³ WEBER MAX, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*, Tübingen 1980, 180 f. Darin definiert WEBER Macht wie folgt: "Macht bedeutet jede Chance, innerhalb einer sozialen Beziehung den eigenen Willen auch gegen Widerstreben durchzusetzen, gleichviel worauf diese Chance beruht", § 16, 62.

⁸⁴ WEBER MAX, *Gesammelte politische Schriften, Politik als Beruf*, Tübingen 1988, 505-560. Für die Gesinnungs- und Verantwortungsethik, 551 f.

⁸⁵ OCAK AHMET YAŞAR, *Türkler, Türkiye ve İslam: Yaklaşım, Yöntem ve Yorum Denemeleri* [Türken, Türkei und Islam: Auffassung, Methode und Interpretationsversuche]. İstanbul 2011, 70; INALCIK HALIL, *Tursun Beg, historian of Mehmed the Conqueror's time*, Wiener Zeitschrift für die Kunde des Morgenlandes, Vol. 69 (1977), 55-71, URL: <http://www.jstor.org/stable/23868095> [04. September 2016].

⁸⁶ WEBER, *supra* n. 83, 551-576.

Existenz eines verallgemeinerten Schemas, auf dessen Grundlage die bereits bestehenden Eigentumsverhältnisse und/oder Berufe nach dem Prinzip von (Un-) Gleichheit bewertet, besteuert und miteinander integriert werden können.⁸⁷ Dort, wo diese Bedingungen nicht weitverbreitet und vielfältig vorhanden sind oder aus politischen Gründen verhindert wurden, dort kommt es mit Worten von Max Weber zur "Hemmung der formalen Rationalität."⁸⁸

Der Keim dieser Rationalisierung bildete auf soziologisch-institutioneller Ebene der Orden. Im Osmanischen Reich waren die Orden die erste Organisationsform, aus der sowohl Berufe wie auch verschiedene Typen von Eigentumsverhältnissen zugleich hervorgingen.⁸⁹ Im Orden wird die Konstitution sozialer Beziehungen von dem alten ethisch-ethnischen Schema hin zu einem System von generalisierbaren Erwartungsabhängigkeiten verlagert. Im Rahmen eines Ordens wurden generalisierbare Verhaltenserwartungen, wie die Bildung, Kapitalakkumulation, (politische) Kooperation und der Tausch von verschiedenen Gütern institutionalisiert. Das *waqf*-System ermöglichte in dieser historischen Konstellation die Teilnahme am wirtschaftlichen und sozialen Leben gleichzeitig. Die Orden gehören sowohl in ihrer Funktionsweise, wie auch in ihrer Konstitution weder zu einer typischen Königtumsinstitution, noch zur Prophetie. In ihrer Funktionsweise kombinieren die Orden die Logik des rationalen Wirtschaftens, des Geldes, mit der einer ethischen Zugehörigkeit zu einer bestimmten sozialen Gruppe. So haben die Ordensangehörigen eine rationalisierte Beziehung zu Ordensverwaltern, auch wenn sich die Letzteren zu einer bestimmten Ethik zugeordnet haben. Die Orden sind in ihrer Organisationsart jedoch näher zu einem Wirtschaftsbetrieb als zu einer Sekte. Aus dieser soziologisch-wirtschaftlichen Warte sind die *awqāf* in ihrer Rationalität weniger eine prophetische als viel mehr eine wirtschaftlich-staatliche Institution.

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

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

Soziologisch ist die inhaltliche Beziehung zwischen Königtum, Prophetentum, Orden und Land- und Militärsystem konstitutiv für diese Zeit. Während dieser Zeit war die Landwirtschaft die Basis der Gesellschaft und gleichzeitig die Grundlage für die Macht der lokalen Herrscher, der Ordensvorsteher wie auch des Sultans selbst. Angelehnt an das Landsystem der Seldschuken wurde im Osmanischen Reich grundsätzlich zwischen *has*, *zemaet*

⁸⁷ LUHMANN NIKLAS, Grundrechte als Institution. Ein Beitrag zur politischen Soziologie, Berlin 1999, 162-185.

⁸⁸ WEBER, *supra* n. 75, 543.

⁸⁹ LUHMANN, *supra* n. 87, 108-135.

und *timar* unterschieden. Das kleinste Landgut wurde *timar* genannt und an die berittenen Soldaten (*sipahi*) und die Bediensteten des Sultans vergeben. Die *zemaet* dagegen erhielten die Provinzverwalter und die Wesire (Minister). Schliesslich erhielten die *kadı* (Richter) die sogenannten *has*. Mit der Islamisierung der Gesellschaft wurde die Unterscheidung zwischen *arz-i miri* (Staatsbesitz), *waqf* (*vakıf*: Stiftungsgut) und *mülk* (Privatbesitz) getroffen. Nach einer Landeroberung wurden die Länder als *arz-i miri* betrachtet und zunächst tatsächlich und später höchstens theoretisch vom Sultan direkt an den Bauern verpachtet.⁹⁰ Wie Faroqhi anhand der *tahrir* (osmanische Grundbücher) im Falle des Bektaşî-Ordens feststellt, wurden die eroberten Länder später nicht direkt den Bauern, sondern hauptsächlich den *waqf*-Gründern weitergegeben.⁹¹ Die Orden finanzierten sich ihrerseits aus diesen Stiftungsgütern, indem sie die Länder an Bauern verpachteten. Die Bauern erwarben das Mietrecht (*istigbal*),⁹² indem sie das Land im Rahmen eines bestimmten Steuertyps (*cizye*, *haraç*) pachteten.⁹³ Sie durften das Land nicht weitervererben, nicht weitergeben und nicht mit der Bearbeitung aufhören, da ihnen ansonsten eine Busse (*çift bozan*) drohte.⁹⁴

Die neuen osmanischen Dörfer in den eroberten Ländern wurden in der Regel um die *waqf*-Ländereien eines Ordens oder einer *zaviye* herum gegründet.⁹⁵ Ein jedes neue Dorf war im Grunde genommen die Gründung des Osmanischen Reiches im Kleinformat.⁹⁶ Die Gründung eines *waqf* setzte ein herrenfreies bzw. herrenfrei gemachtes Land, eine Gruppe von landlosen oder nomadischen Bauern, einen visionären Gründer und tüchtigen Verwalter voraus. Der Prozess vom brachliegenden Land zum funktionstüchtigen Dorf lief zum Teil über mehrere Generationen. Die Motivation für die Gründung eines *waqf* bezogen die Gründer nicht nur aus der idealen *gaza*-Ideologie, das Land für die Welt des Islams zu gewinnen, sondern auch aus der soziologischen Tatsache, dass diese Dörfer später den Namen des Gründers bekamen, womit dieser wie auch die Familie zu hohem Ansehen gelangten. Zu ihrem Tätigkeitsgebiet gehörte das Bauen von Brunnen, das Bauen von *kervansaraylar* für Reisende oder die Gründung von Suppenhäusern für die Armen. Auch konnten sich die *zaviyeler* die Anstellung eines Imams leisten, der im Namen des Gründers den Koran rezitierte.⁹⁷ Darüber hinaus wurde nach dem Tod des Gründers zur Sicherung des von ihm im Namen des Islams gewonnenen Landes und seines Ruhmes eine Grabstätte (*türbe*) gegründet, um die herum öffentliche Güter zur Verfügung gestellt wurden, wozu auch die Restaurierung von Grabsteinen und Grabstätten gehörte.

⁹⁰ ISLAMOĞLU-İNAN, Huricihan, Osmanlı İmparatorluğu'nda Devlet ve Köylü [Bauern und der Staat im Osmanischen Reich], Istanbul 1991; ÇIN HALİL, Mirî Arazi ve Bu Arazinin Özel Mülkiyete Dönüşümü [Die Mirî-Länder und ihre Verwandlung in den Privatbesitz], Konya 1987.

⁹¹ FAROQHI hebt hervor, dass in den *tahrir* die Steuern, wie zehent oder *öşür*, gar nicht auftauchen, da sie in Naturalien gezahlt wurden. *Tahrir* wurden dann angelegt, wenn sie vom Sultanat ausdrücklich verlangt wurden, was schon auf ein bestehendes Misstrauen hindeutet, FAROQHI, *supra* n. 1, 48.

⁹² ISLAMOĞLU-İNAN, *supra* n. 90, 194.

⁹³ İNALCIK HALİL, Osmanlı İmparatorluğu'nun Ekonomik ve Sosyal Tarihi, Band 1, 1600–1914 [Sozial- und Wirtschaftsgeschichte des Osmanischen Reiches, Band 1, 1600–1914], Istanbul 2000, 145-150.

⁹⁴ Die Angehörigen der nicht moslemischen Millets waren in das System integriert. Sie durften *Haraciyye*-Länder bearbeiten und mussten dafür die *cizye*-Steuer in bar und im Vergleich höher bezahlen. Wenn sie *kul* (Diener) des Sultans wurden, indem sie Militärdienst leisteten, verzichtete der Staat auf diese *cizye*-Steuer. Siehe dafür AKDAĞ MUSTAFA, Türk Halkının Dirlik ve Düzenlik Kavgası. Celali İsyanları [Der Kampf des türkischen Volkes um Land und Ordnung. Celali-Aufstände], Ankara 1999, 108 f.

⁹⁵ FAROQHI, *supra* n. 78, 183.

⁹⁶ BARKAN, *supra* n. 65, 284.

⁹⁷ BARKAN, *supra* n. 65, 294 f.

Die Leistungen dieses *waqf*-Systems für die Wohltätigkeit wurden vom osmanischen Staat damit gefördert, dass er auf bestimmte Steuern verzichtete.⁹⁸ Je nach Zeit und nach der Stärke des Ordens warb das Reich mit Zuwendungen (*avarız-ı divaniye* und *tekâlif-ı örfiye*) um die Gunst der Ordensführer.⁹⁹ Auch dienten diese *waqf*-Güter als Rekrutierungs-, "Propaganda- und Kulturzentrum" für das Osmanische Reich.¹⁰⁰ Ein weiterer Gewinn lag für den Staat darin, dass der *waqf*-Besitzer für den Kriegsfall je nach Grösse des *waqf*-Landes eine rationalisierte Anzahl von Fusssoldaten (*sipahi*) zu liefern hatte, die er auch zum Teil selber kommandierte.¹⁰¹

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

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

Während der Gründungsphase des Islams wurde die Kriegsführung nach Aussen mit der Prophetie und nach Innen mit der neuen, rechtlich konstituierten Solidaritätsform legitimiert. Nach einem *ḥadīth* darf nur ein Araber vom Stamm der Quraisch das Kalifat übernehmen.¹⁰² Insofern lag die historische Herausforderung darin, die angestammte genealogische Herrschaftslegitimation mit einer universalistisch/egalitär angelegten religiösen Ethik zusammenzubringen. Dies sieht man sowohl in den islamisch-messianisch motivierten Volksbewegungen, in der Gründung verschiedener Rechtsschulen wie auch darin, dass die Iraner, Seldschuken und Osmanen den Islam annahmen, womit sie dieses Prärogativ faktisch ausser Kraft setzten, indem sie ihr Reich auch Kalifat nannten.

Auf rechtsoziologischer Ebene war das Osmanische Reich von Anfang an mit der Frage konfrontiert, wie gesellschaftlicher Wandel ohne Gefährdung des Rechtssystems zugelassen werden konnte. Je stärker die Lebenswelt¹⁰³ infolge von Kriegen und Kriegsvorbereitung einer Zentralisierung, Bürokratisierung und Rationalisierung unterzogen werden musste, desto stärker machte sich die faktische Macht auf Kosten rechtlich gültigen und allgemein anwendbaren egalitären Prinzipien bemerkbar. In diesem Zuge musste die islamische Herrschaftslegitimation mit einem Hinweis auf höhere Mächte durch eine profanere

⁹⁸ BARKAN, *supra* n. 65, 296 f.

⁹⁹ FAROQHI, *supra* n. 1, 88 f.

¹⁰⁰ BARKAN, *supra* n. 65, 295.

¹⁰¹ BARKAN, *supra* n. 65, 299 f., 354-362; KARPAT KEMAL H., Osmanlı'dan Günümüze Elitler ve Din [Eliten und Din. Vom Osmanischen Reich bis zur Gegenwart] Istanbul 2009, 47; KARPAT KAMAL H., The transformation of the Ottoman state, 1789-1908, International Journal of Middle East Studies, Vol. 3 (1972), 254, URL: <http://www.jstor.org/stable/162799> [04. September 2016]; SADAT DEENA R., Rumeli Ayanları: The eighteenth century, The journal of modern history, Vol. 44 (1972), at 348, URL: <http://www.jstor.org/stable/1876416> [06. September 2016].

¹⁰² KARATEPE HAKAN T., Legitimizing the Ottoman sultanate: A framework for historical analysis, in KARATEPE HAKAN T./REINKOWSKI MAURUS (Ed.), Legitimizing the order: The Ottoman rhetoric of state power, Leiden 2005, 27.

¹⁰³ Für den Begriff "Lebenswelt" siehe HABERMAS JÜRGEN, Theorie des kommunikativen Handelns, Band 2. Zur Kritik der funktionalistischen Vernunft, Frankfurt am Main 1987, 173-297.

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

Paradoxerweise war der erste grosse Schritt dazu, der Erwerb des islamischen Kalifentitels. Nach der Eroberung von Kairo im Jahr 1517 durfte das Osmanische Reich den rechtlichen Anspruch auf das Kalifat erheben. Der Eroberer Yavuz Sultan Selim¹⁰⁴ holte den Kalifatstitel wie auch den Kalifen selbst nach Istanbul.¹⁰⁵ Der letzte Kalif von Kairo, Al-Mutawakkil, durfte erst zwei Jahre nach dem Tod von Sultan Selim I. im Jahr 1520 nach Ägypten zurückkehren.¹⁰⁶ Damat Çelebi Lütü Paşa (?–1563), der Schwager Yavuz Sultan Selims, gab dem oben erwähnten *hadī* nun eine neue Interpretation:

"Falls die oben erwähnten Eigenschaften in einer Person vereinigt sind, nämlich Eroberung, Macht zur Ausübung von Gewalt, Aufrechterhaltung eines gerechten Glaubens, das Gebieten des Guten und das Verbot des Bösen und die allgemeine Führeigenschaft, dann ist diese Person der Sultan, der berechtigterweise Anspruch darauf hat, die Titel Imam und Kalif zu tragen sowie die Titel Vali und Amir, ohne Widersprüche."¹⁰⁷

Der Entsakralisierung folgte eine Rationalisierung in Form eines Kompromisses. Der Nachfolger von Yavuz Sultan Selim war Sultan Süleyman I. (reg. 1520–1566), der den Beinamen "der Prächtige" trug. Er kam im Alter von 26 Jahren an die Macht und machte sich einen Namen als Gesetzgeber, weswegen er auch *Kanuni* Sultan Süleyman genannt wird. Nachdem die Zentralisierung unter den Sultanen Murad und Mehmed II. weitgehend erreicht worden war, legte Sultan Süleyman mit seinem Gesetzbuch die wichtigsten Bestimmungen zum Landrecht, dem Finanzrecht und dem fiskalischen Recht fest.¹⁰⁸ Die sultanischen Erlasse betrafen vor allem das *waqf*-System. Mit diesen Erlassen leitete Sultan Süleyman den wichtigsten Schritt zum Kompromiss zwischen dem sakralen und sultanischen Recht dadurch ein, dass er seine Erlasse (*kanun*) auf der Grundlage des *örfi*-Rechts und in seiner Rolle als *Hakan* durchsetzte.¹⁰⁹ Seine Rechtsreformen wurden als eine Alternative zum bestehenden sakralen Recht eingesetzt.¹¹⁰ Mit diesen Erlassen bekam er innerhalb des Osmanischen Reichs

¹⁰⁴Er erhielt den Beinamen "Yavuz" (der Grimmige). Siehe dafür, TANSEL SELÂHATTIN, Yavuz Sultan Selim, Ankara 1969.

¹⁰⁵KASI MIRZA DJEVAD KHAN, Das Kalifat nach islamischem Staatsrecht: Eine historisch-dogmatische Studie. Die Welt des Islams, Band 5, Heft 4, (1918), 207, URL: <http://www.jstor.org/stable/1569211> [04. September 2016]; SPULER-STEGEMANN URSULA, Die Stellung des Islams und des islamischen Rechts in ausgewählten Ländern: Türkei, in ENDE WERNER/STEINBACH UDO (Hrsg.), Der Islam in der Gegenwart, München 2005, 231.

¹⁰⁶KARATEPE, *supra* n. 102, 27.

¹⁰⁷Zit. nach KARATEPE, *supra* n. 102, 28.

¹⁰⁸GENÇ MEHMET, Klâsik Osmanlı Sosyal-İktisadî Sistemi ve Vakıflar / Classical Ottoman Socio-Economic System and Waqfs, Vakıflar Dergisi, Vol. 42 (2014), 9-18, URL: <http://dergipark.ulakbim.gov.tr/vakiflar/issue/view/5000008802> [07. September 2016].

¹⁰⁹INALCIK HALIL/ ANHEGGER ROBERT, Kânûnnâme-i Sultânî ber müceb-i örf-i Osmânî. II. Mehmed ve II. Beyazid devirlerine ait yasaknâme ve kânûnnâmeler [Sultanische Rechtsetzungskompetenz: Verbote und Gesetze während der Zeit von Mehmed II. und Beyazid II.], Ankara 2000.

¹¹⁰BARKEY, *supra* n. 60, 469 f.

die Rechtsunsicherheit bezüglich Landverwaltung in den Griff.¹¹¹ Damit wurden gleichzeitig nicht nur alle anderen Rechtsquellen (Prophetentum vs. Königtum), sondern auch alle anderen Rechtsverständnisse/Rechtsschulen zugunsten des nun direkt den staatlichen Zwecken unterworfenen Rechtsverständnisses rationalisiert.¹¹² In der Folge wurden die Erlasse nicht mehr *fetwa*, sondern *adaletname* (wörtlich: Gerechtigkeitsverordnungen) genannt. Das Osmanische Reich wurde so gesehen weder alleine vom *šarī'a*-Recht noch vom *örfi*-Recht geleitet, sondern von beiden gleichzeitig. Der Ort, an dem dieses duale Recht zur Anwendung kam, war das *waqf*-System. Das *waqf*-System repräsentiert mit andern Worten die Organisation eines Kompromisses zwischen sakralem und sultanischem Recht.

V. Rechtssoziologische Bewertung

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

Zur Expansion der islamischen Gemeinde hat die Erkenntnis entscheidend beigetragen, dass die religiöse Einheit durch die wirtschaftliche Einbindung der Nichtsesshaften und die politische Einheit durch die Integration der Mekkaner und anderer Kulturen sichergestellt werden musste, indem ein Gleichgewicht zwischen zum Teil divergierenden Interessen gesucht wurde.¹¹³ Der Prophet Muhammad legte selbst die grösste Verhandlungsbereitschaft an den Tag. Dieses Verständnis wurde nach seinem Tod weiterentwickelt, indem seine später fixierten Praktiken zum Modell einer islamischen Entscheidungsfindung erklärt wurden. Im Kampf um das Kalifat, in der Anzahl von Rechtsschulen und in messianischen Volksbewegungen kann die Entwicklung, die Anpassung und die Fixierung der islamischen Rechtsentwicklung rekonstruiert werden. So waren die Umayyaden-Dynastie eine sesshafte,

¹¹¹RÖMER CLAUDIA, Zu Verlassenschaften und ihrer fiskalischen Bearbeitung im Osmanischen Reich des 16. Jhs, Wiener Zeitschrift für die Kunde des Morgenlandes, Vol. 88 (1998), 185-211, URL: <http://www.jstor.org/stable/23865117> [07. September 2016]; SCHAENDLINGER ANTON C., Süleymân I, Sultan des Osmanischen Reiches, 1494–1566: Die Schreiben Süleymâns des Prächtigen an Vasallen, Militärbeamte, Beamte und Richter, Wien 1986.

¹¹²GERBER HAIM, Islamic law and culture 1600–1840, Leiden 1999, 29; ERGENE BOĞAÇ A., On Ottoman justice: Interpretations in conflict (1600–1800), Islamic Law and Society, Vol. 8 (2001), 52-87, URL: <http://www.jstor.org/stable/3399486> [07. September 2016].

¹¹³SONN TAMARA, Islam: A brief history, Second Edition, Malden 2010, 34 f.

städtische Bildungselite, die die altarabisch-mekkanische Aristokratie repräsentierte.¹¹⁴ Die Umayyaden bauten ihre Herrschaft auf ihrer eigenen Genealogie auf und verstanden sich nicht nur als Nachfolger des Gesandten Gottes (*ḥalīfat rasūl allāh*), sondern als direkte Stellvertreter Gottes (*ḥalīfat allāh*) auf Erden.¹¹⁵ Dieser Legitimitätskampf entzündete sich hauptsächlich an dem Umstand, dass mit der islamischen Expansionsphase die erreichte Komplexität der Gesellschaft staatliche Strukturen bedingte, deren Finanzierung eine funktionierende Besteuerung notwendig machte, die eher nach ökonomischen als nach ethnisch-ethischen Kriterien rationalisiert werden musste. Das Osmanische Reich baute auf diese Erfahrungen auf, indem es sich ethisch und ethnische Herrschaftslegitimation bediente und diese Legitimation im Rahmen des *waqf*-Systems auch in der Lebenswelt organisierte. Der Sultan war zugleich der gerechte Kriegsführer, der Nachfolger des Propheten Muhammads, der Besitzer aller Länder und Schatten Gottes auf Erden. Je nach der Phase und der Machtkonstellation wurde jeweils ein Attribut hervorgehoben.

Max Weber hatte herausgearbeitet, dass sich das Recht von der Moral und der Religion erst in seiner späteren Phase trennt. Zunächst wurde das Recht unter den abstrakten Begriff der Staatsräson gestellt, die "ohne Ansehen der Person" gleiche Fälle gleich zu behandeln hatte.¹¹⁶ Historisch hat sich dieser Weg erst unter dem Ansehen des Königs, des Sultans und auf den Kriegsfeldern etabliert. Der Krieg stellte nicht nur den Grund für eine Rationalisierung der Ethik dar, sondern bereitete auch den Boden für die Entstehung eines Pathos, das die Reziprozität unter den Mitgliedern der neuen Solidaritätsgemeinschaft förderte.¹¹⁷ In der islamischen Herrschaftsgeschichte kann dieser Prozess dadurch nachgezeichnet werden, dass mit der Expansion des islamischen Kalifats das *zakāt*-System nicht mehr für die Finanzierung der islamischen Gemeinde ausreichte. Zugleich veranlasst die reformwillige Frage danach, wie der Frühislam anpassungsfähig bleiben und gleichzeitig an der Unveränderbarkeit der Worte Gottes festhalten konnte, einige Gelehrten der Kalifatslehre dazu, jeglichen Bemühungen, die vollkommenen Gesetze Gottes mithilfe der Ratio (*idschtihād*) den historischen Umständen anzupassen, einen Riegel zu schieben, indem sie das *idschtihād*-Tor für geschlossen erklärten. Je stärker der rationale Diskurs unterbunden wurde, desto mehr wurde von Missbrauch, Misskredit und Misstrauen berichtet.¹¹⁸ Einerseits wurden Kriege im Namen des Islams geführt, Länder erobert, besteuert und Ortschaften für heilig erklärt und andererseits leitete die Missachtung der Tabuerklärung durch die Kriegsherren die Entzauberung der bestehenden Ethik ein. Beide Prozesse, die Heilserklärung und Schliessung der *idschtihād*-Tore einerseits, die Entzauberung der Ethik und Notwendigkeit der Einrichtung einer bürokratischen Besteuerung andererseits sind zwei Seiten der gleichen Medaille insofern, als dass sie je auf ihre Art auf die Dysfunktionalität des *zakāt*-Systems hinwiesen.

Die Forschungsfrage kann aus dieser Logik damit beantwortet werden, dass das sakrale Recht dort zum modernen Recht überführt werden konnte, wo ein König ein Monopol entweder gestützt auf ethisch-rechtliche Normen oder dank faktischer Präsenz über die Verwaltung und Interpretation der gesellschaftlich knappen Güter errichtet hatte. Jede Herrschaft braucht daher nicht nur gute Ideen (z.B. *umma*) sondern auch profane Institutionen (z.B. *awqāf*), die diese

¹¹⁴ HOURANI ALBERT, Die Geschichte der arabischen Völker, Frankfurt am Main 1992, 50-58.

¹¹⁵ ROHE MATHIAS, Das islamische Recht: Geschichte und Gegenwart, 2011 München, 31.

¹¹⁶ WEBER, *supra* n. 75, 546.

¹¹⁷ WEBER, *supra* n. 75, 547.

¹¹⁸ GHAUSSY A. GHANIE, Die islamische Wirtschaftsethik und Wirtschaftslehre, in Jahrbuch für Sozialwissenschaft, Band 34, Heft 3, (1983), 373; HOEXTER, *supra* n. 1, at 480 f.; FARSHID, *supra* n. 49, 71 f.

Ideen abgestützt auf verallgemeinerbare Interessen dauerhaft machen. In diesen Fällen kam es gemäss Habermas zu einem "Richterkönig", der aus dem sakralen Recht eine durch Sitte und Moral bindende Autorität ableitete.¹¹⁹ Dieser strukturelle Formwandel wurde im Osmanischen Reich dank dem *waqf*-System beschleunigt. Das *waqf*-System ermöglichte mehrere Kompromisse, die in ihrer Handlungslogik zu einer zeitgleichen System- und Sozialintegration dienten.

VI. Zwischenbetrachtung

Awqāf wurden bis anhin unter verschiedenen Gesichtspunkten erforscht, jedoch nicht aus dieser rechtssoziologischen Sichtweise. Dafür war Max Webers These, wonach handlungstheoretisch allein die protestantische Ethik die Fähigkeit zur Moderne hat, zu dominant. "Universalgeschichtliche Probleme wird der Sohn der modernen europäischen Kulturwelt unvermeidlicher- und berechtigterweise unter der Fragestellung behandeln: welche Verkettung von Umständen hat dazu geführt, dass gerade auf dem Boden des Okzidents, und nur hier, Kulturercheinungen auftraten, welche doch – wie wenigstens wir uns gern vorstellen – in einer Entwicklungsrichtung von universeller Bedeutung und Gültigkeit lagen?"¹²⁰ Seit Webers Diktum wurde die Auffassung, dass im Vergleich zum europäischen Rechtsverständnis das islamische Recht antimodern ist, immer wieder aktualisiert. Und seitdem ist die Versuchung gross, das "islamische" Recht in eine strukturelle Beziehung zu Antirationalität zu setzen.¹²¹

1. Funktionale Vergleichbarkeit

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

Die erste Position ist deswegen zu kritisieren, weil zum Beispiel die von Schoenblum angewendete Methode des Vergleichs die Annahme suggeriert, dass Trust und *waqf* in ihrem Wesen ähnliche/gleiche oder ungleiche Phänomene seien. Doch das islamische *waqf*- und das europäische Trust-System sind keine Institutionen, bei denen hinsichtlich ihrer Eigenschaften

¹¹⁹HABERMAS JÜRGEN, Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates, Frankfurt am Main 1998, 177.

¹²⁰WEBER, *supra* n. 75, 1.

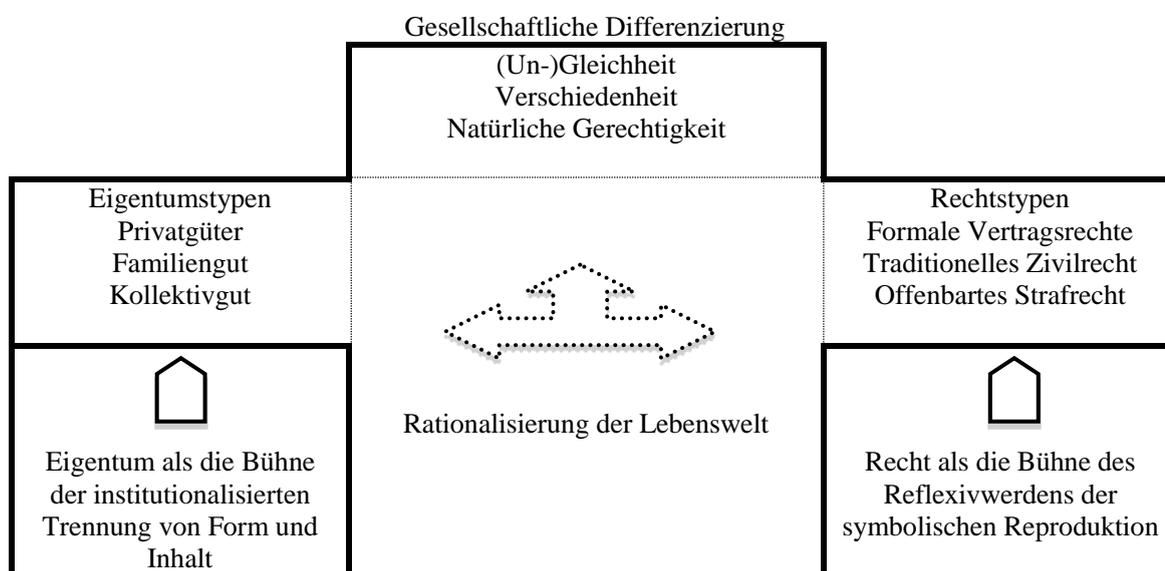
¹²¹TRUBEK DAVID M., Max Weber über das Recht und die Entstehung des Kapitalismus, in BREUER STEFAN/TREIBER HUBERT (Hrsg.), Zur Rechtssoziologie Max Webers, Interpretationen, Kritik, Weiterentwicklung, Wiesbaden 1984, 152-198; HUFF TOBY E., The rise of early modern science: Islam, China, and the West, Cambridge 2003.

eine Gleichheit und/oder Ungleichheit vermutet werden könnte.¹²² Sie zeichnen sich viel mehr durch ihre Verschiedenheit aus: Während *awqāf* eine Institution der Gemeinschaft waren, gehört das europäische Trust-System zu Institutionen der Gesellschaft.¹²³ Das ist auch der Grund dafür, dass die *awqāf* innerhalb des sakralen Rechts organisiert wurden und der Idee des Islams zu dienen hatten. Dagegen sind die Trusts dem hoch ausdifferenzierten Rechtssystem zuzuordnen, das sich als ein Selbstzweck versteht. Dieses Rechtssystem besteht aus einem Ensemble von Rechten. Insofern dürfen wir "Unterschied" nicht mit "Ungleichheit" verwechseln: Fingerabdrücke können nicht verglichen werden, auch wenn sie voneinander unterschieden werden können. Auseinanderhalten muss nicht mit Wertung einhergehen.

2. Formwandel anstelle einer Verfallsgeschichte

In diesem Beitrag wurde von den oben erwähnten vier der letzte Forschungsansatz vertreten. Anstatt von einer Verfallsgeschichte auszugehen, kann die Ausbreitung der *awqāf* mit der Dysfunktionalität des bestehenden *zakāt*-Systems als Besteuerungssystem und ihr Rückgang mit dem Formwandel des Rechts erklärt werden, der jeweils von der entsprechenden Wirtschaftsordnung getragen wurde. Durkheim zeigte anhand des Familienrechts, dass dieser Formwandel von konkreten Handlungen hin zu abstrakten Normen verläuft. Und in den Schriften Webers, Luhmanns und Habermas' kann diese Entwicklung mit Rechts- und Eigentumstypen und gesellschaftlicher Differenzierung zusammengebracht werden. Die Tabelle unten gibt diese Logik wider. Sie wurde ausgehend von der bisherigen Diskussion und angelehnt an Jürgen Habermas entwickelt.¹²⁴

Tabelle 1: Lebenswelt und gesellschaftliche Differenzierung



¹²²PICKEL SUSANNE et al. (Hrsg.), Methoden der vergleichenden Politik- und Sozialwissenschaft: Neue Entwicklungen und Anwendungen, Wiesbaden 2009.

¹²³TÖNNIES FERDINAND, Gemeinschaft und Gesellschaft: Grundbegriffe der reinen Soziologie, Darmstadt 1991.

¹²⁴HABERMAS, *supra* n. 103, 229-223, 260; LUHMANN, *supra* n. 55, 156 f.

Die gesellschaftliche Differenzierung findet durch eine lebensweltliche Kommunikation hindurch statt, worauf in der Darstellung die gestrichelten Linien aufmerksam machen. Der tabellarischen Darstellung liegt der Gedanke zugrunde, dass die gesellschaftliche Entwicklung einerseits auf Ideen im Sinne einer rechtlich-philosophischen Geltung, andererseits auf Interessen im Sinne eines soziologischen Ordnungssystems beruht. In Bezug auf Solidarität geht die Differenzierung nach Luhmann von natürlichen Gerechtigkeitsvorstellungen der segmentären Gesellschaft in das Schema von Gleich- und Ungleichheit einer funktional differenzierten Gesellschaft und schliesslich in System-Umwelt Differenzierung über.¹²⁵

3. Lebenswelt und die Differenzierung

Diese Differenzierung wird von der Rationalisierung der Lebenswelt angestossen: In der Lebenswelt wurde die normative Orientierung zunächst von konkreten historischen Menschen anhand konkreter Handlungen und nicht von Institutionen angeboten, die von abstrakten Prinzipien geleitet waren. Eine Rechtsentwicklung findet in dieser Phase noch durch Analogien statt. Auf der Herrschaftsebene fanden die Menschen unter der Leitung von Magiern und Zauberern zu einer Transzendenz, dank der sie eine Transformation in Gottheiten und vice versa ohne Widerspruch erlebten.¹²⁶ Auf der anderen Seite waren die Menschen so mechanisch in ihrer Lebenswelt integriert, dass sie nach Durkheim infolge des zu starken altruistischen Wertesystems ihr Leben für das Überleben der Gemeinschaft zu opfern bereit waren.¹²⁷ Ausgehend von Durkheim steht insofern fest, dass die (vor-)koranische Erwartung an Normen von der Empirie gestützt war, der erwünschten Wohltätigkeit im Rahmen des *zakāt*-Systems die notwendige Geltung mit dem Verweis auf eine ausseralltägliche Macht zu verleihen. Diese moralische Erwartung war effektiv und konstitutiv für die Zeit.

Nach der segmentären Differenzierung war die Rolle einer Person irgendwie und für immer von höheren Mächten bestimmt. Die Sozialintegration wurde anhand des Reziprozitätsprinzips durch konkrete Handlungen hergestellt. In diesen Gemeinschaften wurde die Vielfalt von Glaubens- und Lebensführungsstilen in den Rahmen der natürlichen Verschiedenheit durch diese segmentäre Differenzierung aufgefangen. Rechtsfragen wurden in diesen Gemeinschaften nicht nach abstrakten Normen, sondern nach Analogien geregelt.¹²⁸ Gleichzeitig führten der Fernhandel, die Kriege und die egalitäre Ethik zu einer Rollendifferenzierung, deren Steuerung nicht mehr innerhalb religiöser Verheissungen geleistet werden konnte.

Mit dem Aufbruch der Weltreligionen und in diesem Fall des Islams findet eine Rechtsentwicklung dadurch statt, dass die islamische Solidarität anstelle des Systems der freiwilligen Almosen (*sadaqa*) in der Form einer erzwingbaren Besteuerung im *zakāt*-System reorganisiert wurde. Der strukturelle Grund lag darin, dass die festen Zuschreibungen in einem Widerspruch zu den Leistungen standen, die von den Menschen für die Einrichtung einer gerechten islamischen Gesellschaft, einer Weltherrschaft erwartet wurden.¹²⁹ Der Stellenwert der *zakāt* ist darin genauer erkennen, dass sie eine der fünf Säulen des Islams blieb. Zugleich und im Gegensatz zu den Zeiten des Propheten Muhammads musste diese räumlich

¹²⁵LUHMANN, *supra* n. 55, 115; LUHMANN, *supra* n. 57, 60-78.

¹²⁶DURKHEIM EMILE, Die elementaren Formen des religiösen Lebens, Frankfurt am Main 1981, 307.

¹²⁷DURKHEIM EMILE, Der Selbstmord, Frankfurt am Main 1983, 243-347.

¹²⁸LUHMANN, *supra* n. 57, 651 f.

¹²⁹LUHMANN, *supra* n. 57, 636.

und kulturell expandierende Gemeinschaft anstelle von der Magie oder heiligen Versen durch Gesetze neu ausgerichtet werden, die von Menschen für die Steuerung der Gesellschaft rational entwickelt wurden.¹³⁰

Die Anpassungsfähigkeit, die Verhandlungsbereitschaft und die theologischen Rationalisierungsversuche waren für die Sozialintegration unverzichtbare Leistungen, aber für eine Systemintegration mussten den von verschiedenen Interessen geleiteten Akteuren auch die Partizipationsinstrumente zur Verfügung gestellt werden.¹³¹ Daher war die Frage nicht mehr, ob, sondern mit welchen Steuerungsformen die islamische Ordnungspolitik die beste Koordinierung erhalten würde. Die Lösung wurde im *waqf*-System gefunden. Im Gegensatz zum *zakāt*-System garantierte das *waqf*-System als ein islamisches Eigentumsrecht den Moslems, den Trägern der neuen Identität, eine Legitimationsgrundlage für die kommunizierte Eigenständigkeit und erlaubte ihnen, ihre Unabhängigkeit gegenüber der Sippengemeinschaft effizient geltend zu machen. Folglich wurde die Gründung eines *waqf* auch strukturell in einen Zusammenhang mit der Förderung der Idee der islamischen Gemeinde gestellt. Die islamische Herrschaft stand in dieser Phase vor der grossen Aufgabe, die auf Genealogie basierende Ordnung durch abstraktere Normen zu reformieren.¹³² Dafür entwickelte der Prophet Muhammad selber die islamische *umma*. In die Entwicklung der *umma* flossen nicht nur die Lerneffekte aus den jüdisch-christlichen Modellen ein, sondern sie wurde auch durch Offenbarungen neu ausgerichtet. *Umma* als eine Solidaritätsgemeinschaft bot zugleich vor allem den ersten Moslems, die mit ihrem Islambekenntnis in einen Konflikt mit ihrer Sippe, mit ihrem Stamm gerieten, nicht nur konkreten Personenschutz an, sondern erwartete von ihnen auch die Befolgung und die Verinnerlichung ein abstrakteres ethisches Vergesellschaftungsprinzip auf Kosten der alten ethnischen Vergemeinschaftung.

4. Institutionalisation des Formwandels

Als ein wichtigster Akteur dieser Phase wurde der *Bektaşî*-Orden identifiziert. Der Orden war sowohl bei der Gründung, Verteidigung, Etablierung wie auch bei der Expansion des Osmanischen Reiches eine der wichtigsten Institution für die Elitebildung. In der Organisation dieses Ordnes kann explarisch die Institutionalisation des Formwandels der Rechtscode nachgezeichnet werden. Seine *Derwische* spielten bei der Sozialintegration der Menschen aus verschiedenen Sprachen, Religionen und Lebensstilen eine entscheidende Rolle. Der *Bektaşî*-Orden steht auch in einen strukturellen Zusammenhang mit dem Land- und Militärsystem des Osmanischen Reiches. Denn die Ordensgründer haben die Frage beantworten müssen, wie das Kollektivgut mit dem islamischen Konzept des individuellen Schicksals auf eine Linie gebracht werden konnte. Im *waqf*-System wurde zunächst die Lösung gefunden, dass das Land weiterhin Gott oder dem Sultan gehörte, aber das Einkommen der wohltätigen/religiösen Einrichtungen nicht mehr pauschal für öffentliche Güter, sondern einzig und allein für islamisch-soziale Zwecke einzusetzen war, wofür sich jeder Mensch auf seine Art einbringen

¹³⁰LUHMANN, *supra* n. 57, 634-662.

¹³¹Für die Unterscheidung von Sozial- und Systemintegration siehe LOCKWOOD DAVID, Social Integration and System Integration, in ZOLLSCHAN GEORGE K./HIRSCH WALTER (Ed.), Social Change: Explorations, Diagnoses and Conjecture, New York 1964, 370-383; HABERMAS, *supra* n. 103, 179 f.; LUHMANN, *supra* n. 57, 618 f.; MOUZELIS NICOS, Social and System Integration: Lockwood, Habermas, Giddens. Sociology, Vol. 31 (1997), 111-119, DOI: <https://doi.org/10.1177/0038038597031001008> [29. Mai 2017]; DEMIR ALL, Entzauberung durch Diskurs: Eine rechtssoziologische Analyse zu systemischen Risiken und handlungstheoretischen Verantwortlichkeiten. Zur Option einer zeitgleichen System- und Sozialintegration, Hamburg 2017, 192-203.

¹³²ROHE, *supra* n. 115, 21.

konnte. Praktisch meinte diese Regelung, dass *waqf*-Land nicht versteuert werden musste, wenn sein Gründer es im Kriegsfall dem Sultan als Finanzquelle und "Humanressource" zur Verfügung stellte. Aus dieser Warte verdankt sich die Gründung des Osmanischen Reiches nicht alleine der Idee des Islams, zumal es historisch in der Zeit auch andere (islamische) Dynastien gab, sondern der rationalen Koordinierung der bestehenden Interessen durch die Gründungen einer Vielzahl von Orden. Im Orden wurde der Sinn von einer neuen Landgewinnung kommuniziert, die dadurch hergestellte soziale Ordnung einer generalisierbaren Wertidee unterstellt und dieser Wertidee mit einer *waqf*-Gründung materielle Sichtbarkeit verliehen.

Die Ordens- und *waqf*-Gründer liefern auch Hinweise auf das Aufkommen einer Mittelschicht. *Awqāf* als Familiengut beruhen in ihrer Funktionalität auf einer Arbeitsteilung zwischen Peripherie und Zentralstaat.¹³³ Diese Ländereien wurden Ende des 16. Jahrhunderts von einem halbprivaten Status ins Verwaltungsrecht verschoben. Der Kampf der *waqf*-Gründer um ihre Länder ist idealtypisch abgebildet in den Begriffen *timar*-Länder und *mülk*. *Timar* waren brachliegende Kollektivgüter, welche die Bauern nach einem Steuertyp (*cizye*, *haraç*, *istigbal*) pachten konnten. Die Bauern durften das Land nicht weitervererben, nicht weitergeben und *nicht* auf die Bearbeitung verzichten. Am anderen Ende der Skala standen die *mülk*- und *waqf*-Länder. Sie sind insofern als *halbprivate* Familiengüter zu bezeichnen, da sie im Kampf um Herrschaft verstaatlicht werden konnten, wie dies für die sogenannte *Fetret-Devri* (Zeit des Chaos) (1402–1412) gut dokumentiert ist.¹³⁴ *Awqāf* wurden in der Regel mit der Waffengewalt des Zentrums erworben und mit "Humanressourcen" der Peripherie kultiviert.

Das *waqf*-System war *das Ergebnis mehrerer Kompromisse*, die im Laufe der Zeit eingegangen und je nach Phase wie auch gesellschaftliche Erfordernisse gewichtet wurden. Bei diesen Kompromissen ging es im Grunde genommen um die System- und Sozialintegration. Nachdem die Systemintegration durch Vereinheitlichung, Rationalisierung und Differenzierung angegangen worden war, wendeten sich die Osmanen der Sozialintegration zu, indem sie das Recht zunächst von seinen sakralen Ursprüngen trennten und in die administrative Macht übersetzten. Während dieser Übersetzungsphase wurde das sakrale Recht entzaubert, in den *awqāf* institutionalisiert und für die spätere Positivierung freigegeben. Erst nach der Positivierung des Rechts bzw. des Reflexivwerdens des Rechts konnte die Rechtssetzung routinemässig und legitimerweise als Instrument zur Steuerung der Gesellschaft eingesetzt werden.¹³⁵

5. Tautologien in der Moderne

Nichtdestotrotz wurde mit der Moderne die Tautologie, die Geltung des Rechts aufgrund einer geltenden Rechtsnorm, offensichtlich. Um diese Paradoxie zu überwinden, definierte Luhmann Geltung als "ein von Moment zu Moment neu zu erarbeitendes Produkt des Systems".¹³⁶ Luhmann spricht hier auch den modernen Umstand an, dass soziale Phänomene je nach Standpunkt anders bewertet werden. Ein Erkenntnisgewinn ist gering, wenn die Standpunkte

¹³³FAROQHI, *supra* n. 78, 189 f.; BARKEY, *supra* n. 60, 469 f.

¹³⁴INALCIK, *supra* n. 82, 171 ff.; SALGIRLI SAYGIN, The rebellion of 1416: Recontextualizing an Ottoman social movement. *Journal of the Economic and Social History of the Orient*, Vol. 55 (2012), 32-73, URL: <http://booksandjournals.brillonline.com/content/10.1163/156852012x628491> [29. Mai 2017].

¹³⁵LUHMANN, *supra* n. 56, 207 f.; HABERMAS, *supra* n. 118, 108.

¹³⁶LUHMANN, *supra* n. 55, 109.

fix sind. Darin liegt auch der Grund, warum eine Debatte über die Gründe des Niedergangs oder des Wiederauflebens der islamischen *awqāf* in beiden Fällen zu einer Auflistung von Hintergründen der Gründe führt. Dagegen erlaubt ein evolutiver Ansatz, auch die feinen Unterschiede zwischen den verschiedenen Systemen zu sehen und vor allem sie als solche anzuerkennen. Insofern kann der Grund für das Fehlen des Wortes *waqf* im Koran damit erklärt werden, dass es für die damaligen sozioökonomischen Verhältnisse kaum von Belang war. Auf der anderen Seite liegt der Grund für das Fehlen des Wortes *islām* in der Zielsetzung von *Vakıflar Dergisi* darin, dass sie in einer Phase der Nationbildung herausgegeben wurde, in der die "Nation" als solche auf der Grundlage eines rationalen Plans eine Vorreiterrolle in der Modernisierung der Gesellschaft übernehmen sollte.¹³⁷ Deswegen mussten aus der Sicht der *Vakıflar Dergisi* die religiösen Erklärungen entkräftigt und dem islamischen Erklärungsmodell entzogen werden, um sie dann mit Instrumenten der Wissenschaft, die als die höchste Form der Rationalität angesehen wurde, zu beschreiben.

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

¹³⁷HABERMAS JÜRGEN, *Zeitdiagnosen: Zwölf Essays*, Frankfurt am Main 2003, 175; ANDERSON BENEDICT, *Die Erfindung der Nation: Zur Karriere eines folgenreichen Konzepts*, Frankfurt am Main 1996; MARDIN ŞERİF, *Jön Türklerin Siyasi Fikirleri 1895–1908: Bütün Eserleri 1* [Die politischen Vorstellungen der Jungtürken 1895–1908: Gesammelte Werke 1], Istanbul 2006; BELGE MURAT, *Genesis: Büyük Ulusal Anlatı ve Türklerin Kökeni* [Genealogie: Epik der Nation und die Ursprünge der Türken], Istanbul 2008.

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

by Abdulmumini A. Oba* and Ismael Saka Ismael**

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Abstract

The Nigerian legal system is pluralistic with common law, Islamic law and customary law as the major legal traditions/cultures in the country. However, the judicial structures for administration of Islamic law and customary law are largely ad hoc and haphazard. The Sharia Courts of Appeal are pivotal in the administration of Islamic personal law which includes matters relating to inheritance (mirāth) and wills (wasiyyah). Although these courts are superior courts of record created by the Constitution, they do not have a clearly spelt-out legal framework for the administration of estates. This poses legal challenges that include unresolved questions concerning the status of the estate distribution panels constituted by the Sharia Courts of Appeal, ambivalence in the membership of the panels, and limitations of the panels in dealing with substantive legal issues. Other challenges include jurisdictional competition from the area/sharia courts and the legal implications of litigation on an estate distributed by the panel coming on appeal before the same Kadis. The paper recommends that the Grand Kadis of the Sharia Courts of Appeal invoke their statutory and constitutional powers to make the appropriate court rules for the administration of estates in their courts.

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I. Introduction

In Nigeria, the regulation of marriages governed by Islamic law is within the legislative competence of the states while the federal government regulates marriages governed by statutory law.¹ However, the administration of estates under all these marriage regimes comes under residual matters which are within the exclusive jurisdiction of the states.² The Nigerian legal system is pluralistic with common law, Islamic law and customary law as the major legal traditions/cultures in the country.³ Islamic law and customary law were the dominant state law in the pre-colonial era in their respective areas of influence; colonialism relegated both to the background. The colonial authorities adopted common law as state law which operated in the country as a full-fledged legal system but curtailed the operation of Islamic law and customary law.⁴ Islamic law became a mere variant of customary law and there was no systematic attempt to incorporate Islamic law and customary law into the country's legal system.⁵ Rather, ad hoc and haphazard laws were made for the administration of both laws. The position has remained largely the same in the post-colonial era (despite attempts to systemize the administration of Islamic law by some states in northern Nigeria in the post-1999 era).⁶ This haphazardness is reflected in the legal framework for the administration of estates in the Sharia Court of Appeal which was first established in the Northern Region of Nigeria in 1960 as an Islamic court of equal status with the High Court.⁷ The Sharia Courts of Appeal are pivotal in the administration of Islamic personal law which includes matters relating to inheritance and wills. However, a major challenge is that although the Sharia Courts of Appeal are superior courts of record created by the constitution,⁸ there are no clear rules for administration of estates in these courts. Another challenge is that the Constitution makes the court optional for states.⁹ While there are Sharia Courts of Appeal in all the states in northern Nigeria, none has been established in any of the states in the southern part of the country. In addition, the Sharia Courts of Appeal being essentially appellate courts need trial or subordinate courts from whence appeals would come. There are area courts and sharia courts for this purpose in all northern states,¹⁰ but there are no such courts in the southern states.

This paper examines the legal framework under classical Islamic law and in the Sharia Courts of Appeal for the administration of estates. The paper identifies the *lacunae* and ambiguities in the legal framework for administration of estates in the Sharia Courts of Appeal and explores

¹ The Constitution puts "The formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto" on the Exclusive Legislative List, see Item 61, Second Schedule, Part I, Exclusive Legislative List, Constitution of the Federal Republic of Nigeria, as amended 1999 (the 1999 Constitution).

² See ONOKAH MARGARET, *Family Law*, Ibadan 2007, at 7-12.

³ See OBA ABDULMUMINI ADEBAYO, *Harmonisation of Shari'ah, Common Law and Customary Law in Nigeria: Problems and Prospects*, *Journal of Malaysian and Comparative Law*, Vol. 35 (2008), at 119-145.

⁴ *Id.*, at 120-126 and OBA ABDULMUMINI ADEBAYO, *The Administration of Customary Law in the Post-Colonial Nigerian State*, *Cambrian Law Review*, Vol. 37 (2006), at 95-112.

⁵ See generally OBA ABDULMUMINI ADEBAYO, *Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction*, *American Journal of Comparative Law*, Vol. 52(2004), No. 4, at 859 and OBA, *supra* n. 3, at 123.

⁶ See a summary of the ambit of the post 1999 reforms in OBA, *supra* n. 3, at 132.

⁷ See *Sharia Court of Appeal Law (no. 16 and 30 of 1960)*, Cap. 122, *Laws of Northern Nigeria, 1963*; on the circumstances surrounding the establishment of the court, see OBA, *supra* n. 5, at 859-867.

⁸ Section 6 (3) and (5) (a)-(i), 1999 Constitution

⁹ "There shall be for any State that requires it a Sharia Court of Appeal for that State": Section 275 (1), 1999 Constitution.

¹⁰ For example, see Section 54 (1), *Area Courts Law, Cap. A9, Laws of Kwara State, 2004* and Section 51, *Sharia Courts Law, State, 2001* respectively.

the legal challenges which the absence of a clearly spelt-out legal framework poses to the courts and Muslims in matters of inheritance (*mirāth*) and bequests (*wasiyyah*) and suggests what can be done to remedy the situation.

The paper uses the Kwara State Sharia Court of Appeal as a case study since the court has consistently engaged in estate distribution and it has published comprehensive reports of its activities in this regard since 1994. Since there is no Sharia Court of Appeal in any of the southern states, this paper is limited to considering the position in the northern states. In terms of sources, this paper relies on statutes, judicial decisions and court records (again, particularly those of the Kwara State Sharia Court of Appeal),¹¹ interviews of relevant role actors such as judges, lawyers and litigants¹² and the experience and observations of the authors as practicing lawyers in Nigeria.¹³

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

The Constitution gives the Sharia Court of Appeal of each state a limited jurisdiction consisting of an appellate and a supervisory jurisdiction in civil proceedings involving “any question of Islamic personal law regarding a *wakf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim”.¹⁴ This jurisdiction is in addition to “such other jurisdiction as may be conferred upon [the court] by the law of the [applicable] state”.¹⁵ The Supreme Court has held that any additional jurisdiction conferred on the Sharia Court of Appeal by any such law must be within the ambit of Islamic personal law.¹⁶ What follows from this is that there is nothing preventing states from giving original jurisdiction to their own Sharia Courts of Appeal provided that it is limited to Islamic personal law. However, no state has taken advantage of this to give original jurisdiction to its Sharia Court of Appeal. On the contrary, the constitutive law of the Sharia Courts of Appeal in some states expressly prohibits the court from having original jurisdiction in any matter.¹⁷

The Constitution makes provisions for the adjective and procedural laws applicable in the Sharia Courts of Appeal. The Constitution says that subject to the provisions of any law made by the House of Assembly of the relevant states, the Grand Kadis may make rules “regulating the practice and procedure” in the Sharia Courts of Appeal.¹⁸ The constitutive law of the Sharia Courts of Appeal of the various states makes “Islamic law of the Maliki school” and “natural

¹¹ There is a paucity of reported cases of Islamic courts. Although all the 19 states in northern Nigeria have a Sharia Court of Appeal each, only the Kwara State Sharia Court of Appeal publishes an annual report of the activities of the Court. As of now, the reports for 1994 to 2015 are available.

¹² These interviews are largely informal and unstructured.

¹³ Both authors are conversant with the practice of law in Nigeria generally and in Kwara State in particular where they have practiced as legal practitioners for more than three decades and two and half decades respectively.

¹⁴ Section 277 (1) and (2), 1999 Constitution.

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

¹⁶ *Fannami v Sarki* (1961-1989) 1 Sh. L. R. N. 94, *Maida v Modu* (2000) 4 NWLR (Pt. 659) 99, *Faransi v Noma* (2007) 10 NWLR (Pt. 1041) 202 and *Fada v Ibrahim* (2015) LPELP 24449. See also OBA, *supra* n. 5, at 858-874.

¹⁷ For example, in Kwara State, see Section 10 (3), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007: “Except as provided in subsection (2), the Court shall have no original jurisdiction in any cause or matter”. Subsection (2) deals with matters incidental to the powers of the court as an appellate court.

¹⁸ See Sections 274 (High Courts) and 279 (Sharia Courts of Appeal), 1999 Constitution.

justice, equity and good conscience according to Islamic law” as a part of the sources of the courts’ procedural laws.¹⁹

In classical Islamic law, courts are constituted by Kadis. Although the Kadi is primarily a judge, the role of the Grand Kadis under Islamic law is not limited to litigation. In relation to administration of estates, where a Kadi is vested with a general unrestricted jurisdiction, scholars say that this jurisdiction includes guardianship over persons who are incapable of looking after their affairs such as minors and insane persons, administration of endowments (*waqf*), and disposing of legacies under wills (*wasiyyah*).²⁰ These jurisdictions are exclusive as no other official shares these jurisdictions with the Kadi.²¹ However, Kadis do not have exclusive jurisdiction in the distribution of inheritance.²² The primary jurisdiction to distribute estates of a deceased person among the heirs is vested on competent Muslims who possess the requisite knowledge.²³ The scholars and leaders of the Sokoto Caliphate accepted the traditional Islamic exposition of the administration of estates. However, when there are not many who possess the knowledge of distribution of estates, the Kadi could assume jurisdiction upon invitation of the heirs. Such was the position in the early period of the Sokoto Caliphate and thus one of the leaders, Abdullahi bin Fodiye, puts distribution of estates among heirs as one of the jurisdictions of the Kadi.²⁴ What follows from this is that although Kadis do not have exclusive jurisdiction in the distribution of estates among heirs, disputes as to inheritance being matters affecting the “rights of persons” are within the jurisdiction of the courts.²⁵

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

“The Grand Khadi²⁶ with the approval of the Governor may make rules of court providing for any or all of the following matters –

[...]

(h) securing the due administration of estates;

(i) requiring and regulating the filing of accounts of administration of estates;

(j) ascertaining the value of estates;

[...]

(o) generally carrying into effect the provisions of the Law.”²⁷

¹⁹ For example in Kwara State, see Section 13 (a), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007.

²⁰ See AL-MAWARDI ABU AL-HASAN, *The Ordinances of Government: A Translation of al-Ahkām al-Sultāniyya wa al-Wilāyah al-Dīniyya* (translated by Wafaa H. Wahba), Reading 1996, at 79.

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

²² This jurisdiction is not included among the jurisdiction of Islamic courts in AL-MAWARDI, *supra* n. 20, at 79-80 and AL-JAZA’IRY ABU BAKR JABIR, *Minhaj al-Muslim*, Riyadh, Vol. 2 (2001), at 537-538.

²³ See Qur’an 4: 7-9.

²⁴ FODUYE, *supra* n. 21, at 21.

²⁵ See AL-MAWARDI, *supra* n. 20, at 79, and AL-JAZA’IRY, *supra* n. 22, at 537.

²⁶ This spelling has no legal backing as the spelling that the constitution has adopted is ‘Kadi’, see Sections 275-279, 1999 Constitution.

²⁷ Section 24 (h)-(j), (o), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007.

These rules clearly intend that the administration of estates of Muslims should be within the jurisdiction of the Sharia Court of Appeal and that the control of rules relating thereto should be in the hands of the Grand Kadi.

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

Although Grand Kadis have statutory powers to make rules of court relating to the administration of estates in the Sharia Courts of Appeal, no Grand Kadi has exercised this power, even though this power had been granted to them since the creation of the Sharia Court of Appeal in the defunct northern region of Nigeria.²⁸ The courts that succeed did not invoke their jurisdiction in respect of administration of estates until recently. Although in 2007 the then Grand Kadi in Kwara State referred to “the approval of [the Governor] to formalize the distribution of the estates of Muslims”,²⁹ this reference was to the fact that the Court had obtained the approval of the Governor for the court to charge fees for the distribution of estates through a memo.³⁰ While the power to charge fees implies the power to distribute estates, there are still no rules stating the procedure that the court and applicants would follow in the distribution of estates. In any case, the approval and the fees approved were not published in the official gazette as required in cases of delegated legislation.³¹ The authors have not come across any rules for the administration of estates in the Sharia Courts of Appeal in any of the northern states. For the foregoing reasons, the procedures for the administration of estates in the Sharia Courts of Appeal are currently not based on clear-cut rules.³²

Some disagree and affirm that based on the current laws, the Sharia Courts of Appeal have an inherent *jurisdiction* and *power* to distribute estates. For example, ISHOLA argues that sections 10 and 11 (which confer appeal jurisdiction on the Sharia Courts of Appeal) and 24 of the Sharia Court of Appeal law (which empowers the Grand Kadi to make rules for the administration of estates) together with “a clear and proper grasp of the scope and nature of the inherent jurisdiction of the court”³³ conferred on the court by the Constitution make it “logical to conclude that extra judicial services of the court are within and intrinsic to the exercise of the judicial jurisdiction of the court and therefore not statutorily baseless, but is rather constitutionally justified”.³⁴ The reliance placed on sections 10, 11 and 24 of the Sharia Court of Appeal Law is misplaced. Sections 10 and 11 merely affirmed the *appellate* jurisdiction of the court in matters of Islamic personal law and therefore cannot be stretched beyond this. The jurisdiction to distribute estates can be inferred from section 24. It is arguable that under section 24 the Grand Kadi of a state has power to make rules for the administration of estates

²⁸ Section 25 (h), Sharia Court of Appeal Law, Cap. 122, Laws of Northern Nigeria, 1960.

²⁹ 2007 Annual Report of the Sharia Court of Appeal, Kwara State, at X.

³⁰ See the Kwara State Sharia Court of Appeal approved memo SCA/GKC/C/77/04 of 19 October 2005 cited in AMBALI MUTTALIB ATANDA, *The Practice of Muslim Family Law in Nigeria*, 3rd ed., Lagos 2013, at 382.

³¹ Section 20 (3) Interpretation Act, Cap. I5, Laws of Kwara State, 2007, provides that “All orders, regulations and rules of court made under any law of the State shall be published in the State Gazette”.

³² See OBA ABDULMUMINI ADEBAYO, *The Sharia Court of Appeal: Accounting to the Public in Kwara State*, *The Jurist*, Vol. 10 (2005), 161 at 165.

³³ ISHOLA ABDULLAHI SALIU, *Beyond Adjudication: The Extra Judicial Services of the Sharia Court Appeal to the Muslim Community in Nigeria*, *Al-Irshaad (The Guidance)* - Maiden Edition of the Magazine of the Muslim Students Society of Nigeria (MSSN), Kwara State University Branch, Vol. 1(1) (2013), 46 at 47.

³⁴ *Id.*

and that the Sharia Court of Appeal could distribute estates if the Grand Kadi has made the relevant rules. In absence of such rules, there is no legal basis for the distribution of estates by the Sharia Courts of Appeal. What this means is that although the court has *jurisdiction* to administer estates, it has not yet acquired the *power* to do so. Although ISHOLA did not proffer arguments in support of his reliance on section 24, the section could provide a basis for the *power* of the Sharia Courts of Appeal to administer estates if properly utilized. Again, the inherent jurisdiction argument cannot provide a basis for this *power*. It is true that the Constitution recognizes and affirms the inherent power of all superior courts of record in the country. Section 6 (a) of the 1999 Constitution provides that:

“The *judicial powers* vested in accordance with the foregoing provisions of this section -

(a) shall extend, notwithstanding anything to the contrary in this constitution, to *all inherent powers and sanctions of a court of law*” (emphasis supplied).

The court referred includes the Sharia Courts of Appeal.³⁵ Two questions come up here. First, it is clear that the section refers to “judicial powers” of “a court of law”. Is the Sharia Court of Appeal a court exercising judicial powers while distributing estates? This question has been asked many times in the course of administration of estates by the Sharia Courts of Appeal over the years. As noted below, the Kadis (at least in Kwara State) do not claim to exercise judicial powers of a court. The second question is what are the inherent powers of a court and especially, what are specifically the inherent powers of the Sharia Courts of Appeal? As noted by OBA:

“Inherent powers are generally vague and are part of “an innate and intrinsic element in the court’s search for justice”. It is likely that these powers and sanctions are different in the common law and Islamic law traditions. If this is the case, then, for the Sharia Court of Appeal, these powers and sanctions must be traced not to the common law courts as in the case of courts of common law origin such as the High Court, but to Islamic courts in their pristine form. The implication is therefore that this section preserves for the Sharia Court of Appeal, all the inherent powers and sanctions that Islamic courts traditionally possessed” (references omitted).³⁶

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

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

³⁵ See Section 6 (5), 1999 Constitution.

³⁶ OBA, *supra* n. 5, at 881-882.

court of record and that the powers must be exercised subject to the Constitution and other statutes”(references omitted).³⁷

Another argument that can be advanced in support of the power of the Sharia Courts of Appeal to distribute estates is that the court could invoke Maliki law as provided in the Sharia Court of Appeal laws to fill the *lacuna* in the distribution of estates rules. For example, in Kwara State the relevant law states that:

“As regards both *substantive law* and *practice and procedure*, [the court] shall administer, observe and enforce the observance of the principles and provisions of (a) Islamic law of the Maliki school [...] and (d) natural justice, equity and good conscience according to Islamic law”.³⁸

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

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

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

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

1. Status of estate distributing panels

There are some ambiguities in the status of estate distribution panels of the Sharia Court of Appeal. First, it is not clear in which capacity the court is distributing estates. In Kwara State Kadis wear their official robes when meeting for distributing estates and do not use the regular court but use a disused courtroom that has now been refurnished and rearranged to make it more conducive to the more informal task of estate distribution. The sitting arrangement is unlike the formal court where lawyers sit fully robed opposite the Kadis and the parties sit by the side. While distributing estates, lawyers are not robed and they sit by the heirs facing the panel. The Kadis themselves are not sure of their status when distributing estates. Grand Kadis

³⁷ OBA, *supra* n. 5, at 882.

³⁸ Section 13 (a) and (d), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007 (italics supplied).

have variously described estate distribution as the court's "semi-constitutional judicial duties",³⁹ "extra-judicial activities"⁴⁰ "community services",⁴¹ and "semi-judicial function".⁴² Official records usually refer to Kadis distributing estates as "officiating ministers"⁴³ but in addition to this term the 2002 report of the court variously referred Kadi in charge of distributing the estate as "distributing officer", "administrator" and "secretary/administrator".⁴⁴ The appellation "officiating minister" has also been used for non-Kadis to distribute estates.⁴⁵ No one considers the panel of Kadis distributing an estate as sitting as a court. It is probably because of the ambiguity in status that the panels would not assume jurisdiction to distribute estates unless the invitation to the court is supported by the unanimity of the heirs. Thus, in the *Estate of Justice Olagunju* the deceased was a justice of the Court of Appeal. The President of the Court of Appeal asked the Kwara State Sharia Court to administer the estate. However, the Kwara State Sharia Court of Appeal did not continue with the distribution of the estate as the non-muslim wife and daughter of the deceased by obtaining letters of administration in respect of the estate protested against the Sharia Court of Appeal distributing the estate.⁴⁶

2. Powers of estate distributing panels

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

³⁹ See 2001 Annual Report of the Sharia Court of Appeal, Kwara State, at V (per Ambali, Grand Kadi).

⁴⁰ 2012 Annual Report of the Sharia Court of Appeal, Kwara State, at VII (per Haroon, Grand Kadi), 2010 Annual Report of the Sharia Court of Appeal, Kwara State, at V, and 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at VII.

⁴¹ 2014 Annual Report of the Sharia Court of Appeal, Kwara State, at VII (per Muhamad, Grand Kadi) and 2015 Annual Report of the Sharia Court of Appeal, Kwara State, at VI.

⁴² 2013 Annual Report of the Sharia Court of Appeal, Kwara State, at VII (per Haroon, Grand Kadi) and 2013 Annual Report of the Sharia Court of Appeal, Kwara State, at VI.

⁴³ For example, see 2014 Annual Report of the Sharia Court of Appeal, Kwara State, at 439.

⁴⁴ See 2002 Annual Report of the Sharia Court of Appeal, Kwara State, at 201, 205 and 208 respectively.

⁴⁵ For example, in the *Estate of Akano*, 2014 Annual Report of the Sharia Court of Appeal, Kwara State, 379 at 381. The person listed as no. 2 on the attendance list as "officiating minister" is an Islamic scholar, but not a Kadi. Again, in the *Estate of Sanni*, 2013 Annual Report of the Sharia Court of Appeal, Kwara State, at 214, the Islamic scholar described as "officiating minister" and listed as no. 2 on the attendance list at 216, 225, 228, 235, and no. 3 on the attendance list at 237, is not a Kadi.

⁴⁶ The annual report of the Court does not contain a report of this estate. However, newspapers reports are available, see "Request for withdrawal of Sharia Court of Appeal from administration of the Estate of Late Hon. Justice S.A. Olagunju", *The Nation*, 24 November 2013, available at: <http://thenationonlineng.net/re-request-withdrawal-sharia-court-appeal-administration-estate-late-hon-justice-s-olagunju/>, OLADIMEJI SAMUEL, "Release My Husband's Estate, Justice's Widow Urges Court", *Frontiers News*, 18 October 2013, available at: <http://www.frontiersnews.com/release-my-husbands-estate-justices-widow-urges-court/> and "Release my husband's property, late justice's widow urges court", *The Nation*, 20 October 2013, available at: <http://thenationonlineng.net/release-husbands-property-late-justices-widow-urges-court/> (all links last assessed on 17 July 2016).

Registrar should furnish them with a certified copy of the court order directing the bank to release the moneys to the Court. In reality, no such order exists because the Sharia Court of Appeal is not sitting as a court (the court has only appellate jurisdiction) when administering estates but is engaged in an administrative function. In absence of an order of the court, some banks insist that the Chief Registrar of the court should sign an agreement personally indemnifying the bank against any loss that may occur to the bank from the release of the money.⁴⁷ In an instance, the bank's external solicitor insisted on a certified copy of the Chief Registrar's letter ordering the bank to make the payment to the account of the Sharia Court of Appeal.⁴⁸ In some other instances, it could be that the banks were simply coerced into submission with barely veiled threats of dire repercussions for 'disobedience' to court 'order'.⁴⁹

A similar challenge arises in respect of entitlements (gratuities, pensions, etc.) payable by the deceased's employers. In many instances, the applicable rule is that such entitlements are payable to the legal representatives and next of kin previously designated by the employee. Normally, in Muslim cases the legal representatives or next of kin collects the entitlements and hands it over to the administrators of the estate to distribute according to the applicable Islamic law. In the *Estate of Olumo*, the Kwara State Sharia Court of Appeal grappled with the challenges of collecting the terminal benefits of the deceased from his former employer the National Immunization Programme (NPI). The estate came into the Sharia Court of Appeal when one of the two wives of the deceased wrote a letter of petition against the next of kin. The letter written to the NPI was copied to the Sharia Court of Appeal and the Sharia Court of Appeal was able to take over the administration of the estate.⁵⁰ A similar letter was written by the wife to the Sharia Court of Appeal and copied to the NPI. Upon receipt of this petition, the Grand Kadi through the Chief Registrar of the Sharia Court of Appeal wrote to the NPI asking that the deceased's entitlements be paid into the account of the court. The NPI, presumably after taking legal advice, refused to comply with the directive. The NPI insisted that the NPI being a statutory corporation was governed by law. According to the NPI, the relevant law states that the entitlements are to be paid to the deceased's "legal representative" or to "any person designated by him during his life time as his survivor".⁵¹ The court's response came through a letter signed by the Chief Registrar of the court. The letter stated that following the "application/petition" of the deceased's wife, the Sharia Court of Appeal "became seized with the matter in an official manner" and that "whatever directives [and requests] which emanate there from and there under have the potent force of a court order under the law" because of the court's "exclusive jurisdiction over [...] matters involving questions of inheritance of deceased Muslims".⁵² The court went on to justify its assuming jurisdiction on the estate and the mandatory nature of Islamic law of inheritance on Muslims. The court stated that under Islamic law the designated next of kin cannot take precedence over the heirs in the course of administering the estate and that in any case the next of kin is no more than a trustee of the heirs. The court asked the NPI to furnish it with the names of the next of kin on file. In addition, the court attached a letter written by a brother of the deceased inviting the court to

⁴⁷ See *Estate of Sulaimon*, 2007 Annual Report of the Sharia Court of Appeal, Kwara State, 369 at 375-378.

⁴⁸ See *Estate of Adegboye*, 2007 Annual Report of the Sharia Court of Appeal, Kwara State, 265 at 279.

⁴⁹ For example, see *Estate of Adegboye*, 2007 Annual Report of the Sharia Court of Appeal, Kwara State, 265 at 285-286.

⁵⁰ 2006 Annual Report of the Sharia Court of Appeal, Kwara State, at 428.

⁵¹ *Estate of Adegboye*, *supra* n. 50, at 434.

⁵² *Estate of Adegboye*, *supra* n. 50, at 435-436.

distribute the estate.⁵³ According to the court, the letter is not only an “eloquent testimony” to the fact that the Sharia Court of Appeal is “well-positioned to handle the estate of the deceased which include all entitlements from his place of work”, it also shows that the court “enjoys the recognition and confidence of the Muslims of Kwara State for who it was established to serve and protect their interests”. The chief registrar’s letter ended with the hope that the NPI will “readily respect and comply with the laws of the land”. In response to this rather lengthy letter, the NPI complied by paying the entitlements of the deceased into the account of the court and thanking the court “for the intervention”.⁵⁴

3. Membership of estate distributing panels

The absence of a legal framework has brought some ambivalence in the workings of the Sharia Courts of Appeal estate distribution panels. Panel membership is often fluid. Unlike court proceedings where the court would maintain the same panel of Kadis to hear a case, membership of estate distribution panels are not stable. For example, in the *Estate of Omodele*⁵⁵ who is a well-known and highly respected Islamic scholar, the panel met nine times. Although only three Kadis distributed the estate finally, six Kadis participated at various stages. Of these three Kadis only one was present at every stage of the proceedings; the other Kadis were absent four and three times respectively. Of the three Kadis who were not present at the final distribution of the estate, one was present at all other proceedings while two Kadis were present in only four and two of the proceedings respectively.⁵⁶ Again, official records of estate distribution by the Kwara State Sharia Courts of Appeal panels often list persons who are not Kadis as “officiating ministers”⁵⁷ and “members”.⁵⁸ In addition, there is often confusion about the status of Sharia Courts of Appeal officials who are not Kadis. For example, one official was listed in various proceedings of the same estate distribution panel as “secretary” and “member”.⁵⁹ The reports often describe the same official as “secretary” and “recording secretary” at various sittings of a panel.⁶⁰ In the distribution of the *Estate of Abdullateef Salaudeen*,⁶¹ the report of the court says that the estate was distributed by two Islamic scholars “with guidance from” a Kadi who signed the report. One of the scholars also signed the report as “Officiating Minister/Representative of [some heirs]”.⁶²

⁵³ It is not clear from the report whether the brother who wrote the letter is the next of kin registered by the deceased with NPI.

⁵⁴ 2006 Annual Report of the Sharia Court of Appeal, Kwara State, 428 at 438.

⁵⁵ 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 480.

⁵⁶ 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 480 at 482, 485, 488, 492, 498, 501, 503, 505 and 508.

⁵⁷ For terminology, see discussion above.

⁵⁸ For example, in the report of a panel the same official was listed as “panel member” and as “Asst. Rec. Sec [Assistant Recording Secretary]”, *Estate of Adisa*, 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 401 at 401 and 403. See also another official was listed as “panel member” and “secretary” in the various sittings of a panel, *Estate of Bale*, 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 416 at 416, 418 and 423.

⁵⁹ For example, see 2005 Annual Report of the Sharia Court of Appeal, Kwara State, 345 where an official was listed as secretary at 354 and 357 and as member at 369 and 383.

⁶⁰ See *Estate of Adisa*, 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 401 at 401 and 403.

⁶¹ 2013 Annual Report of the Sharia Court of Appeal, Kwara State, 301 at 312

⁶² 2013 Annual Report of the Sharia Court of Appeal, Kwara State, 301 at 321.

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

The Sharia Court of Appeal is conscious of its appellate-only jurisdiction hence its estate distribution panels are reluctant to deal with controversial matters. For example, the panels leave the issue of illegitimacy to the deceased family to resolve and abide by the family decision. It is not clear whether the modes of determining the paternity issues employed by those families are consistent with Islamic law. The reference of legitimacy issues to families and the subsequently apparent ratification of the decisions of the families by the Sharia Court of Appeal could create the false impression that those decisions have a legal backing whereas those decisions are ordinarily challengeable in the courts. This feeling of helplessness is perceivable in the two estates mentioned above where this had happened and the affected persons “left everything to God” instead of pursuing legal remedies.⁶³ The correct position is that any person dissatisfied with a family decision declaring him or her a child born out of wedlock has the right to challenge the decision in an area court. The Sharia Court of Appeal should always make it clear to all the relevant parties that such family decisions are not legal judgments of the court and could be challenged by filing suits at the area courts.

5. Accountability

The absence of a well-defined legal framework could also facilitate fraud. In a case in Kaduna State, an area court judge was allegedly invited to participate in the distribution of an estate. In the course of the exercise, large sums of money were collected on behalf of the estate. The area judge ordered that the moneys totaling 23 million Naira be paid to the account of the Sharia Court of Appeal, the court that supervises area courts. The money handed over to the Chief Registrar of the Sharia Court of Appeal who paid the money into the court’s account. When it came to the distribution to the heirs, it was found that the money was not available as the registrar had allegedly absconded with the money. The Grand Kadi disclaimed responsibility on the ground that the area court judge acted extra-judicially as no case concerning the inheritance was actually before the area court. The area court judge was suspended and put on half pay for paying “wrongly” into the account of the Sharia Court of Appeal and the Court washed its hands off the case leaving the heirs to take whatever action they wished against the area court judge.⁶⁴ The excuses given by the learned Grand Kadi is not satisfactory to say the least. The area court judge actually ordered the money to be paid to the accounts of the Sharia Court of Appeal as is the usual practice when money is paid into area courts. It is not correct for the Grand Kadi to say in the circumstances that the area court judge was acting in a personal capacity and that the court would not accept any responsibility for the alleged misconduct of the registrar. The case illustrates the kind of issues that can arise when there are no clear-cut rules on administration of estates governed by Islamic law.

⁶³ For example, see *Estate of Alaya*, 2006 Annual Report of the Sharia Court of Appeal, Kwara State, 338 at 349, 352, 354-362, 374-375 and 377-378, where the legitimacy of several children of the deceased (from different mothers) were in issue and the family rejected some of the children.

⁶⁴ This story here is derived from “How a court registrar ran away with N21.6m inheritance, by Grand Khadi” by KRISHI MUSA ABDULLAHI, Daily Trust, 4 September 2014, available at: <http://www.dailytrust.com.ng/daily/news/33469-how-court-registrar-ran-away-with-n21-6m-inheritance-by-grand-khadi> (last access 21 April 2016).

6. Absence of probate and letters of administration

As noted above, administration of estates in the Sharia Courts of Appeal is limited to distribution of estates. The court provides no services in respect of estates not distributed by the court. This means that one cannot apply for letters of administration or letters of authority to deal with estates not administered by the court.⁶⁵ In addition, the Sharia Courts of Appeal have not invoked their jurisdiction in respect of the administration of wills. However, it has been suggested that the Sharia Courts of Appeal could provide facilities for the safekeeping of wills.⁶⁶ It is significant that the High Court already provides this service in respect of wills governed by the Wills Acts.⁶⁷ The suggestion goes further that a Sharia Court of Appeal can even act as executor of wills deposited with the court.⁶⁸

7. Competition and challenges from area/Sharia courts

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

Even then, there remains the major obstacle that the Sharia Courts of Appeal have only appellate jurisdiction under the constitution and under their respective constitutive laws. The area courts and Sharia courts have original jurisdiction in all cases involving Islamic law of inheritance.⁶⁹ In *Adua-Hassan v Probate Registrar* the High Court rejected the contention by counsel that the Sharia Court of Appeal is best placed to issue a letter of authority (in lieu of a letter of administration) to be used by the plaintiffs to collect the deceased's cash deposits in the defendant banks.⁷⁰ The court held that what is appropriate is "a sealed order of the class of

⁶⁵ However in exceptional cases, the Court Registry will write an authorization letter for the bank to release money to the court when the application to that effect is made by a reputable person well-known to the Court such as retired Kadis and senior lawyers concerning estates not distributed directly by the Court. This was stated by Mallam Y. M. Gbalasa, Head of Department (Probate), Kwara State Sharia Court of Appeal in an interview conducted by Dr. Ismael on 21 November 2016 at the Probate Registry Office, Sharia Court of Appeal, Ilorin.

⁶⁶ ISHOLA, *supra* n. 33, at 48.

⁶⁷ See Order 52, Custody of Wills, Rule 15, Kwara State High Court (Civil Procedure) Rules, 2005: "Every original Will, of which probate or administration with Will annexed is granted shall be filed and kept in the Probate Registry in such manner as to secure at once its due preservation and convenient inspection. A copy of every such Will and of the probate or administration shall be preserved in the Registry".

⁶⁸ ISHOLA, *supra* n. 33, at 48.

⁶⁹ For example, see Section 18, Area Courts Law, Cap. A9, Laws of Kwara State, 2007 and Sections 19 and 22, Sharia Courts Law, Kaduna State Law No. 10, 2001.

⁷⁰ Suit no. KWS/13S/2012 decided on 30 July 2013 by the Kwara State High Court. This case is quoted and discussed extensively in ISHOLA ABDULLAHI SALIU, *Judicial Declarations of 10% Probate Fee and Issuance of Letters of*

Area Court vested with jurisdiction for the release of a deceased Muslim property which administration is [governed] by Islamic law".⁷¹ It would appear that the Sharia Court of Appeal and area courts/Sharia courts have respectively administrative and judicial jurisdictions in the distribution of Muslims' estates while the Sharia Court of Appeal and area courts are trial and appellant courts respectively for litigations arising *after* distribution of such estates. Unlike the Sharia Court of Appeal, what makes the area courts unattractive here is that there is no provision for a non-contentious application to distribute inheritance. Rather, area courts will only take cases arising from distribution or non-distribution of estates, which means that the parties before area courts in this respect are plaintiffs and defendants rather than a family consisting of heirs, family members and the *wali ul amr* ('executor') of the estate.

8. Post-distribution of estates remedies

Lastly, there are some unresolved incongruities in the role of the Sharia Courts of Appeal in the distribution of estates and the position of area/sharia courts. For example, if a heir is dissatisfied with the distribution by the Sharia Courts of Appeal, such a person can seek judicial remedy. The problem here is that the only court for remedy are the area or Sharia courts which are subordinate courts to the Sharia Courts of Appeal. In fact, the only judicial jurisdiction of the Sharia Courts of Appeal are appeals coming from these courts. Two major jurisdictional incongruities arise from this. First, it is not neat that the area courts sit on a matter decided by Kadis who are superior to them. The acting Grand Kadi of Kwara State Sharia Court of Appeal remembered a case where he as an Area Court summoned a Kadi that presided the Sharia Court of Appeal panel was responsible for the distribution of the estate that was subject of litigation before the area court.⁷² The Kadi was called as a witness and was subjected to cross-examination accordingly. Secondly, if appeals from area courts on estate distributions are made to the Sharia Courts of Appeal, Kadis who were part of distribution panels cannot sit as judges on cases emanating from the same estates that they distributed. The *Estate of Laufe* relates to the estate of Laufe who was a prominent member of the ruling family and an important chief in the Emirate. The Kwara State Sharia Court of Appeal indicated that given the status of Laufe and "out of respect for the Emir", five Kadis would constitute the panel that would distribute the estate.⁷³ If any heir had gone to the area court and the matter came on appeal to the Sharia Court of Appeal, all the Kadis that took part in the distribution would have not be competent to hear the appeal. Given that the total number of Kadis of the court at that time was six⁷⁴ and the quorum of the Court for hearing appeals is three,⁷⁵ that would have ended in a crisis. Again, in *the Estate of Omodele*,⁷⁶ although the estate was eventually distributed by a panel consisting of three Kadis, all the six Kadis of the court participated in the proceedings at various times.⁷⁷

Administration on Muslim Estates as Illegal in Kwara State of Nigeria: A Reportage Review, *Naklas-Buk Journal of Law*, Vol. 2 (2013), 106 at 107-118.

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

⁷² Hon Kadi M. O. Abdulkadir, interview by Ismael Saka Ismael, 14 July 2010, Ilorin, Nigeria.

⁷³ 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at 360.

⁷⁴ The six Kadis were Haroon, Mohammad, Idris, Abdulbaki, Abdulkadir and Owolabi.

⁷⁵ See Section 278, 1999 Constitution.

⁷⁶ 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at 479.

⁷⁷ 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at 488 and 505.

V. Conclusion: The Way Forward

Since the colonial era, there are no rules for the administration of estates in the Sharia Courts of Appeal and no such rules were made in the post-colonial period. There is a dire need to remedy the situation in the Sharia Courts of Appeal. A major step in the administration of estates of Muslims in Nigeria would be for Grand Kadis to make rules governing the administration of estates in their respective states. Such rules should be comprehensive and should include both probate and letters of administration in all estates governed by Islamic law, whether or not the estate is administrated directly by the court or by other persons. In addition, the rules concerning distribution of estates should empower the Kadis to constitute a panel for distribution of estates, but should also protect in a clear manner the power of other scholars learned in Islamic law to distribute estates according to Islamic law. For reasons of logistics and possible litigation the Sharia Court of Appeal panel for estate distribution should not consist of more than two Kadis. This would leave enough Kadis free in case the court needs to empanel the mandatory three Kadis to hear any possible appeal case on the distribution should it come to the court on appeal. Similarly, there should be rules of the Sharia Court of Appeal on the safekeeping of wills and for appointing the Sharia Court of Appeal as an executor of wills. Here again it should be clearly asserted that rules regarding the distribution of estates or to administration of wills should not exclude the rights of any qualified Muslim to distribute estates and administrate wills. As noted above, the making of these rules should be within the competence of the Grand Kadis and their respective State Governors.

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