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Islamic Law in Past and Present

By

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Translated by

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Preface¹

In the public debate in western countries, Islamic law, often identified with the term 'sharia', is overall seen as the antithesis of the law of secular states under the rule of law and their understanding of human rights. Among Muslims, opinions are divided. More than a few are simply not interested in the subject, unless it immediately affects them in concrete situations of everyday life. Others regard Islamic law as part of their faith and view it – if not all its interpretations and individual details – with a fundamentally positive attitude. Still, others reject it as being an outdated construct of medieval scholars.

Considering the tensions between these points of view it is not an easy undertaking, but an all the more important one, to pronounce on the subject of Islamic law while maintaining the necessary scholarly distance. The aim of this book cannot be to explain how Islamic law could be a part of religious culture, and what is its 'correct' substance. As a non-Muslim scholar the author cannot, and does not wish to, presume to have authority in such matters. Rather, he intends to use models showing how Islamic law took shape, has evolved, and is still evolving according to statements made by Muslim scholars and institutions, and according to concrete sources from legal practice. It cannot be surprising that a multitude of opinions on and arrangements for applying the law have developed over nearly 1400 years of history, and on a territory stretching from West Africa to Polynesia. Consequently sweeping pronouncements on what Islamic law genuinely comprises, and what genuinely defines it, must be viewed with some scepticism. On the other hand, the complex subject matter does not simply dissolve randomly.

This book's main concern is consequently to render the essential connections within Islamic law – and in particular its sources and the methods of applying it – transparent, and to show outlines and developments of the characteristic areas it covers. In view of the breadth of the topic, generalisations are unavoidable. They will occur in areas where we can see clear and extensive temporal and local agreement concerning essential issues, even though there may be divergent evidence in isolated cases or at other times. Several issues typical of Islamic law throughout history and in the present will be examined in depth. Not only those regions of the world with Muslim majority population will be taken into account in detail, but also, to serve as examples, countries

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1 The original page numbers of the German edition are given in the margin of this volume.

with significant Muslim minorities. The deliberations are based on, among other things, the author's work and research in several Arab countries, Turkey, Afghanistan, India, in several European countries and in Canada. Specific studies of particular regions or countries, or of specific periods in time, are still necessary.

XVIII This book addresses Muslims as well as members of other religions and belief systems, as well as jurists, Islamicists and scholars of other disciplines, and also interested laypersons. The author is aware that this is a piece of brinkmanship. He is all the more delighted with the manifold pleasant resonance from all these groups after the appearance of the first two editions. Warm thanks are due to all those who have contributed to the further development in this, the third edition with kind encouragement as well as with friendly and critical remarks and suggestions. I should like to mention here, in the place of many, my teacher Josef van Ess as well as Dr Andreas Neumann. I am deeply grateful to the Börsenverein des Deutschen Buchhandels, the Fritz-Thyssen-Stiftung, the German Foreign Office and the VG Wort for awarding me the prize 'Geisteswissenschaften International', which made this translation of the book into English possible. My heartfelt gratitude goes to Gwendolin Goldbloom for her tremendous work in translating the book and the numerous amendments made between 2011, when the third German edition was published, and the date of this publication, and for the continuous excellent cooperation.² My sincere thanks go furthermore to my colleague Reinhard Zimmermann, who selected the book as one of the six books most worth reading of the year in the *Juristische Wochenschrift* (Issue 50/2009).

Haters of Islam will not like this book, as the author was shown quite clearly after its publication in Germany. Whoever has acquired, without much knowledge or thought, an image that shows Islam or sharia as 'the enemy', is clearly unwilling to be distracted by facts, and some of these people will also dislike the messenger. The public debate, including that in the media, to which the author has been able to contribute over the last few years, has shown that one has to make a decision. Someone who wishes to see Islam and its system of norms, in the face of all historical and present-day experiences to the contrary – as an unchanging quantity that will always oppose secular systems and the rule of law, will be perturbed when confronted with its varied

² In a few parts, the author has added some sentences without consulting Gwendolin Goldbloom. If the reader comes across linguistic shortcomings in English, this is the sole responsibility of the author.

and dynamic nature. Patrick Bahners has tackled some apologists of similar attitudes in his thoughtful pamphlet *Die Panikmacher*. It would be similarly ahistorical and wrong from an academic point of view to measure legal systems of the past with the yardstick of the present. Someone who writes a book on the law in the Roman era and expresses appreciation of its cultural achievements does not have to distance himself continuously from aspects such as slave laws or the patriarchal structures – this distance is a matter of course. The same applies to the scholarly examination of Islamic law, which is comparable in many respects.

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On the other hand it is encouraging to see the widespread willingness to engage with this very variety and dynamism. It is a sign of hope, and also reason for gratitude, for a scholar who has researched the subject for the past three decades. If the German Bundesministerin für Justiz (federal minister of justice) could make the issues discussed here the subject of her new year's reception in 2011, this is an illustration of the readiness, as well as the necessity, to base ourselves on facts and human decency in our approach to issues the handling of which is important for fruitful coexistence.

Some readers, who are not familiar with the systematic foundations of the law, may have been surprised by the selection and arrangement of individual topics, but this was unavoidable: this is not a book on 'sharia' or 'fiqh' (discussed in the introductory chapter), but on law and its specific substance, orientation and functions. Islamic ritual practice has been left out – not because it is less important than legal provisions, but because it does not belong in the present context. The author's decision to set these limits was taken all the more readily as they are also found in the Islamic system of norms.

Sadly, some gaps will remain for the time being. The author could not, and did not wish to, stretch the publishers' generous patience, and that of Dr Ulrich Nolte, the German editor continuing to oversee the work on this book in such exemplary fashion, any further; adding his gratitude for the editor's willingness to not only stoically accept but indeed support a number of expensive extensions. However, there were many well-founded suggestions for extensions in the fields of e.g. inheritance law, procedural law, penal law or Shi'ite legal dogmatics which it was sadly not possible to add at all, or only rudimentarily; even many hundreds of pages are much too short for the detailed examination of every significant facet of a legal culture nearly 1400 years old. The author does not wish to claim to be qualified to discuss all these facets in equal detail. It is hoped all the more that this new edition will encourage future generations of scholars to plumb the many little-studied aspects of a system of norms that must be reckoned among the great cultural phenomena of the history of humanity. There is hope that the establishment of university departments in

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Islamic theology in Germany, and the concomitant invigoration of the 'secular' Islamic sciences, which are giving Islamic studies a boost, will inspire this development as well.

Concerning the transliteration of Oriental names and terms cf. p. XIV

Dates are often given according to the Islamic and the Christian calendar. The Islamic calendar begins in 622AD, calculated from Muhammad's emigration (*hijra*) from Mecca to Medina. The year is made up out of twelve lunar months, with the result that over 100 years there is a shift of three years compared to the Christian calendar. The *hijra* year 1436 started in autumn 2014.

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This book would not have been possible without a multitude of inspiring conversations with scholars and members of Muslim educational institutions and organisations. I wish to thank all of them for numerous insights. Thanks are due in particular to the Volkswagenstiftung, which donated a generous sum to enable research in Great Britain, France, Belgium and Austria during a sabbatical term in 2001, as well as the Fritz-Thyssen-Stiftung, which donated a similarly significant amount to allow research in India and Canada in 2006 and 2014.

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Notes on Transcription/Transliteration and Pronunciation

The transcription of Oriental names and terms overall follows the Library of Congress Style. A few changes have been made in the interest of readability. Particularly in the case of names and terms which are, or are becoming, current in English usage a simplified spelling has been used (e.g. Quran, Muhammad, hadith); in some other cases the transliteration has been modified (e.g. Shi'ites). Authors' names are cited according to the style used in their respective publications.

Arabic spelling has been retained even where it diverges from the actual pronunciation. Thus the article is always written al-, including in words where the pronunciation would assimilate it to the following consonant (so-called sun letters, from *al-shams* 'the sun', pronounced *ash-shams*). In Dari and Farsi the vowels 'a' and 'i' tend towards an 'e' or 'eh' sound; 'u' towards 'o'; these will be rendered according to the actual pronunciation (e.g. 'Ebadi'), except in a few established phrases.

Pronunciation of transliterated words:

- ʾ glottal stop, as in 'uh-oh'
- ʿ 'ayn'; guttural fricative tending towards 'a'; in Farsi and Dari similar to 'a'
- ā long 'a'
- c Turkish: 'j' as in 'jungle'
- ç Turkish: 'ch' as in 'chime'
- dh voiced 'th' as in 'this'
- ḍ voiced, dull 'd'
- ē Persian: long 'e', as in French 'allez'
- ğ Turkish: so-called 'yumuşak-g', a very soft consonantal 'y', or lengthening the preceding vowel
- gh voiced guttural fricative, similar to French 'parcours'
- ḥ Arabic: voiceless 'h' rather like a dry cough; in Farsi and Dari similar to English 'h'
- î Turkish, as 'ee'
- ī long 'ee'
- ı Turkish, short 'i' as in 'ill'
- j Arabic: frequently 'j' as in 'jungle' (in some places such as Egypt the Arabic letter *jīm* is, however, pronounced 'g' as in 'get')

- kh guttural fricative as in Scots 'loch'
- q Arabic: guttural 'k'-sound (not 'qu' or 'kw'); in Farsi and Dari tending towards 'g' as in 'get'
- r rolled 'r'
- s voiceless 's' as in 'sing'
- ş Turkish: 'sh'
- ş voiceless, dull 's'
- ţ voiceless, dull 't'
- th Arabic: voiceless 'th' as in 'thing'; in Farsi and Dari similar to a voiceless 's' and transcribed as such (e.g. 'mesl')
- ū long 'oo' as in 'mood'
- z voiced, dull 'z' or 'th'

Abbreviations

AJCL	The American Journal of Comparative Law
AG	Amtsgericht (Local Court), Aktiengesellschaft (corporation)
AGB	Allgemeine Geschäftsbedingungen (general terms and conditions)
ArbuR	Arbeit und Recht (Labour and Law)
BAG	Bundesarbeitsgericht (Federal Labour Court)
BayOBLG	Bayerisches Oberstes Landesgericht (Bavarian Supreme Regional Court)
B.C.L.R.	British Columbia Law Reports
C.S.C.	British Columbia Supreme Court
BFH(E)	Bundesfinanzhof (Entscheidungssammlung) (Federal Fiscal Court, Collection of Decisions)
BGB	Bürgerliches Gesetzbuch (Civil Code)
BGH	Bundesgerichtshof (Federal Court of Justice; German Federal Supreme Court)
BGHZ	Rulings of the BGH in civil cases
BKR	Zeitschrift für Bank- und Kapitalmarktrecht
BSG	Bundessozialgericht (Federal Social Court)
BSOAS	Bulletin of the School of Oriental and African Studies
BVerfG(E)	Bundesverfassungsgericht (Entscheidungen) (Federal Constitutional Court, Decisions)
BVerwG(E)	Bundesverwaltungsgericht (Entscheidungen) (Federal Administrative Court, Decisions)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
DLR	Dominion Law Reports
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Act to the Civil Code)
EI II	The Encyclopaedia of Islam, New Edition, Leiden 1960–2009
EI III	The Encyclopaedia of Islam THREE, Leiden 2007–
EJOS	Electronic Journal of Oriental Studies
EMRK	Europäische Menschenrechtskonvention (European Convention on Human Rights)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
FamRZ	Zeitschrift für das gesamte Familienrecht
FLR	Family Law Reports

FS	Festschrift
FPR	Familie, Partnerschaft, Recht
GG	Grundgesetz (German constitution)
GmbH	Gesellschaft mit beschränkter Haftung (Limited Company)
HGB	Handelsgesetzbuch (Commercial Code)
HUÜ	Haager Unterhaltsübereinkommen (Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations 1973)
IC	Islamic Culture
ICLQ	International and Comparative Law Quarterly
id./ead.	the same
ILAS	Islamic Law and Society
IPG	Gutachten zum internationalen und ausländischen Privatrecht (Expert opinions on foreign private law and international private law)
IPR	Internationales Privatrecht
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
IPRspr.	Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts
JZ	Juristenzeitung
KAGB	Kapitalanlagegesetzbuch (German Investment Act)
KG	Kammergericht (Superior Court of Justice)/Kommanditgesellschaft (limited partnership)
KSÜ	Kinderschutzübereinkommen (Hague Convention on Parental Responsibility and Protection of Children 1996)
KWG	Kreditwesengesetz (German Banking Act)
LAG	Landesarbeitsgericht (Higher Labour Court)
LG	Landgericht (District Court)
LSG	Landessozialgericht (Superior State Social Court)
MünchKomm	Münchener Kommentar zum Bürgerlichen Gesetzbuch (Munich commentary on the Civil Code)
n. d.	no date
n. pl.	no place of publication
NJOZ	Neue Juristische Online Zeitschrift
NJW	Neue Juristische Wochenschrift
NJWE-FER	Neue Juristische Wochenschrift – Entscheidungsdienst Familien- und Erbrecht
NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungs-Report
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungs-Report
NZA-RR	Neue Zeitschrift für Arbeitsrecht – Rechtsprechungs-Report

OLG	Oberlandesgericht (Higher Regional Court)
OVG	Oberverwaltungsgericht (Higher Administrative Court)
PLD	Pakistan Legal Decisions
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
R.I.D.C.	Revue internationale de droit comparé
RIW	Recht der internationalen Wirtschaft
RNotZ	Rheinische Notar-Zeitschrift
R.S.O.	Regulations and Statutes of Ontario
SCC	Supreme Court Cases
StAZ	Das Standesamt
StGB	Strafgesetzbuch (Penal/Criminal Code)
VG	Verwaltungsgericht (Administrative Court)
VGH	Verwaltungsgerichtshof (Higher Administrative Court)
VRÜ	Verfassung und Recht in Übersee
WG	Wechselgesetz (Bills of Exchange Act)
WM	Wertpapier-Mitteilungen
WRV	Weimarer Reichsverfassung (Weimar Constitution)
ZDMG	Zeitschrift der Deutschen Morgenländischen Gesellschaft
ZEuP	Zeitschrift für europäisches Privatrecht
ZEV	Zeitschrift für Erbrecht und Vermögensnachfolge
ZGB	Zivilgesetzbuch (civil code)
ZPO	Zivilprozessordnung (Code of Civil Procedure)
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft

INTRODUCTION

Islam, 'Sharia' and Law



About This Book

Islamic law is law, too. This statement, which is really self-evident, serves to emphasise that legal systems throughout history and also in the present have fulfilled comparable functions, all differences in details notwithstanding. This is true independently of whether there is a relevant debate concerning legal theory or not. The leitmotiv of all legal systems is the search for justice. Their self-image is that of being the guiding concept of society. The idea of justice immanent in them is meant to set standards. In this respect there are differences between religious and secular legal systems; the former include a transcendent dimension that looks to the afterlife. In addition the substance of what is considered to be 'just' may differ considerably according to the respective time, place, and culture.

The function of the law as a mechanism to guide human relations, to balance interests (for instance under contract law) and to protect people from infringements (for instance in cases regarding penal law and civil law of tort – which were not separate for a long time) is, however, nearly as important. In this context, aspects such as the equal application of legal norms in all situations covered by them, and more generally the implementation of a peace framework at the interpersonal level as well as for greater political units, gain in importance. This can only succeed if the rules to be applied possess a certain degree of abstraction, i.e. go beyond the applicability to one specific instance. This applies independently of whether a legal system is based on more or less codified rules or whether it is evolving on the basis of precedent. Consequently it is necessary to understand how the concepts work based on which the rules are formulated.¹ This, indeed, is the characteristic juristic task. Without it a legal system will remain incomprehensible.

Even those who have hardly any knowledge of Islamic law often have very precise ideas of what it involves. Cutting off of hands, flogging or stoning adulterers, killing members of other faiths and discriminating against women are some of the most widespread stereotypes. Arbitrary 'kadi jurisprudence'² is seen as a trademark. Thus Islamic law fits into the widespread image of an

4

1 Thus in my view Nagel (*Das islamische Recht*, 175, with n. 43) does not carry conviction when he takes the message of salvation as his starting point, *instead* of the concepts.

2 Thus the term adopted and used by Max Weber (cf. P. Crone, Max Weber, *Das islamische Recht und die Entstehung des Kapitalismus*, in: W. Schluchter (ed.), *Max Webers Sicht des Islams*,

Orient that is cruel and backward. But does this image in fact correspond to reality, or does it say more about the observer?

Studying Islamic law outside the Islamic world has been the preserve of Oriental or Islamic studies since its earliest days. Jurists with the linguistic skills needed to evaluate the primary sources have come to the forefront only in recent decades. Thus a great part of the extant literature is characterised by a linguistic and sociological approach. Eduard Sachau, who wrote a book on Shafi'ite law that was the standard work for a long time, emphasised in the preface that he did not believe he was qualified to do a jurist's work. Rather, he would concentrate on philological study as faithful to the sources as possible.³

So far, the modern development of the law occupies a comparatively small space overall, compared to early and classical development. Consequently a historicising view is widespread among academics as well. Regarding some important aspects this does not achieve a structured approach according to the remit of the different areas of the law⁴ and the solutions offered. Difficulties arising from the *conditio humana* rather than from local, temporal or cultural idiosyncrasies (e.g. living in family groups, aspects of the protection of minors, allocation of legal positions and asset values to persons and protecting them from attack, necessity of legal commitment in cases of economic activity based on the division of labour) are frequently not recognised for what they are.

There is, however, a multitude of cross-cultural problems which are resolved by specifically juristic approaches.⁵ An instance of this is found in the deliber-

Frankfurt/M. 1987, 294, 296f. with further references); Weber was, however, quite discerning concerning these matters, unlike the US judge Frankfurter's statement 'We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency', Justice Frankfurter in *Terminiello v. City of Chicago*, 337 United States Supreme Court 1 (1949), 1, 11. Powers' study (*Law*, 23 and ff., 232) is detailed and perceptive and well worth reading; he points out correctly that taking the social and economic consequences of judgments into account does not rule out adherence to the sources of the law.

3 Sachau, *Muhammedanisches Recht*, Vorwort p. XXIX.

4 As a rule classical texts do not look at issues of legal theory in an abstract way, but rather with the purpose of legal institutions such as marriage and ways in which it can be resolved, or with considerations of who and for what reasons ought to enjoy the law's protection against certain kinds of intervention.

5 One current example, and this is not intended to expose the author to criticism, is Brinkley Messick's very intellectual essay 'Indexing the Self: Intent and Expression in Islamic Legal Acts', *Islamic Law and Society* 2001, 151ff. An anthropologist may find it surprising that in legal acts in cooperation with other persons, formal elements receive comparatively greater consideration, while in cases of unilaterally effective legal acts personal intent is of greater importance. To a jurist this is an insight acquired during the early terms of study: it reflects the

ations of the great Hanafite jurist al-Sarakhsī⁶ (d. 483/1090) on the subject of homicide. He begins by pointing out the great damage done by such actions with reference to statements from the Quran and by the prophet Muhammad. He goes on to emphasise the importance of punishing the perpetrators in this world: if pressure (on possible perpetrators) were limited to punishment in the next world, only a very small proportion of people would be deterred from such actions. In order to ensure an effective deterrent, he says, the system of punishment in this world (*uqūba*) and corresponding retribution mechanisms was introduced. In this way he defines the remit of the law – safeguarding human life by means of effective deterrent.

We find discriminating statements even regarding the connected issues of immediate religious relevance, such as the equal or unequal treatment under the law of followers of different religions. Al-Sarakhsī⁷ considers for instance 5 the diverse views of the question of whether the same amount of blood money (*diya*; cf. 4.7.c below) is to be paid in case of killing or injuring Muslims and protected non-Muslims (*dhimmīs*; cf. 4.9.d below). Those who demand unequal treatment at the expense of non-Muslims (for instance reducing the amount to half or a third) base their opinion essentially on Quranic passages according to which there is no equality (*musāwāt*) of Muslims and unbelievers (e.g. sura 59:20) and on other traditions. Al-Sarakhsī counters these statements with other Quranic passages and traditions, but also with a substantive argument focussed on the remit of the law: the Quranic passages that support inequality, he says, refer to the afterlife, not to this world. The substance of the protection treaty with the *dhimmīs* demands their equal treatment in this world. Furthermore, he points out, *dhimmīs* are able under the law to possess property in the same way that Muslims are, consequently the same should apply to their physical integrity. In addition, the purpose of blood money is to ensure safety and security (*iḥrāz*), a purpose related to the realm of this life (*dār*), not to religion (*dīn*), and Muslims and non-Muslims have the same need for the safety of their person and property.

Of course law is also integrated within a social context and influenced by it to a significant degree. Consequently limiting oneself to texts of abstract norms without reference to pre-legal conditions or attendant circumstances would result in a distorted image of any legal system. On the other hand, law exerts a certain influence on social life through its inherent order and institutions.

balancing of the relationship between private autonomy and protection of bona fide rights, an issue that has been discussed by jurists for centuries.

6 Kitāb al-mabsūṭ, vol. 26, 59; for his biography cf. Taṣṭan, Al-Sarakhsī, 239 ff.

7 Kitāb al-mabsūṭ, vol. 26, 84–86.

Thus it would be similarly wrong to regard the law as a predominantly social phenomenon and to attempt to comprehend it without knowledge on its specific instruments and argument structures.

6 Still, is there actually such a thing as 'Islamic law'? Even the most superficial examination results in the insight that there is no sign anywhere of 'Islamic law' as a comprehensive, fairly clear legal code containing calculable solutions to legal matters. Just as 'European law' from Antiquity to the present day cannot offer consistent solutions, neither can Islamic law. We have to let go of the plan of writing a textbook on the subject that would be able to discuss every area of the law with reliable results. Introductory works that claim to do this usually refer to the remarks of one particular school of law (among several) at one particular time. Furthermore, over a long time Islamic Studies dealing with Islamic law focussed nearly entirely on the classical development of the law, discussing modern tendencies and applied law only in passing. Law, however, is not least 'law in action' – certainly from the point of view of the persons directly involved.

Besides limiting the subject matter studied, the long-term focus of great numbers of European scholars on the early and classical periods has also resulted in a pre-conception going a long way beyond purely legal matters: it sees early and classical developments as 'Islam' per se, while modern developments are considered as not being part of 'genuine' Islam and are consequently dismissed. In the field of law this is indeed true of the 'Western' laws enforced under colonial rule. It is by no means a matter of course, however, as regards the internal Muslim reform debate, in part inspired by European thought, that has unfolded in great variety since the nineteenth century. Studying ideas originating in non-Islamic cultures does not have to be 'un-Islamic', as the developments in the theology and law of the early centuries prove; the concept is supported by Muhammad's oft-quoted remark that one ought to search for knowledge, even if it were to be found in China.⁸

The only way to cover the subject of Islamic law in a meaningful way is consequently to understand it as a subject matter that is constantly evolving. Its system becomes apparent less through individual regulations than through its doctrine of the sources of the law and deducing laws from the sources (*uṣūl al-fiqh*). Notwithstanding differences in this area, some fundamental shared ideas will be found here that are on the whole undisputed. Thus most constitutions

8 The hadith in question, quoted by several classical authors, is classed as 'void' by Muhammad Nāṣir al-Dīn al-Albānī (*Silsilat al-aḥādīth al-ḍaʿīfa wa-l-mawḍūʿa wa-athāruhā al-sayyīʿ fi l-umma*, vol. 1, al-Riyadh 1412/1992, no. 416 (p. 600)); however, he quotes a hadith that does encourage people to acquire knowledge generally.

in the cultural area influenced by Islam refer in some fashion to the sharia as a whole (whatever that may be), or at the very least to its key principles as the definitive basis of the law.⁹ Similarly, nearly all works of Islamic legal literature do not concentrate on one specific Islamic national law but on Islamic law per se. Despite all the differences there are indeed some shared fundamental principles as well.¹⁰ These in particular are to be the subject of this book. As for the rest, the rule, typical not of Islamic law only, holds, according to which there are at least two differing opinions even within each school of law on every possible issue.

The variety is all the greater if we take into account the impact of Islamic law which spans several cultural areas. What is true of the Middle East may be less so in Malaysia, Indonesia, Kazakhstan, Nigeria or Bosnia. This insight, which appears to be trivial at first glance, also determines the internal Islamic debate. Norani Othman, member of the Malaysian 'Sisters in Islam' emphasises the necessity to distinguish between the cultural heritage of Muslim societies in the Middle East on the one hand and that which truly is Islam on the other.¹¹ As a result the jurist will be faced with the additional difficulty of separating the particular geographical and cultural characteristics and trifles from the core substance of Islamic law to be discussed here.

Even in the core areas of Islamic law the volume of regulations varies considerably. Gaps, or entirely rudimentary rules extended or supplemented with adopted Western laws, will on the whole be excluded from the examination. They would require monographs according to countries which could provide an introduction into the respective national legal system independently of its systematic provenance. All of which goes to show what this book will not be able to do: provide a comprehensive reference work providing answers to concrete legal problems. The legal situation in the individual states of the Islamic world is so varied that it is indispensable to research the law in force in each case. This book will have to remain an attempt at providing a selection of instances in order to convey a representative picture, which will resemble a woodcut rather than an etching. It would hardly be possible to accomplish a comprehensive account of *the* substantive Islamic law, as there is a significant degree of uncertainty, not least regarding the legal basis, due to the lack of codification of many areas. Thus more than for many European legal systems, the saying according to which one really is in God's hands in court and

9 Cf. only the excellent collection *Constitutionalism in Islamic Countries* (ed. by Grote/Röder), and especially Abou el Fadl's contribution *The Centrality of Shari'a*, 35 ff.

10 Cf. only Schacht, Introduction, 201.

11 'Blame Men, Not Allah, Islamic Feminists Say', *New York Times*, 10 Oct. 1996, A 4.

on the high seas is true of Islamic law – a Muslim jurist would find nothing to cavil at in this sentiment anyway. The idea of legal philosophy, that there is only one correct decision, does not do justice to reality, even in cases where the best intentions and the most competent procedures prevail. A judge's experience teaches us¹² that due to the difficulty of knowing all the facts, and due to the scope of interpretation of many legal norms, there is room for a spectrum of 'correct', i.e. justifiable judgments. The smaller the potential for clarification of relevant facts and the more unclear the normative position, the greater does this spectrum become.

The diversity of Islamic law will be reflected by the reference made to representative original texts (primary sources) – frequently quoted in Islamic literature – of the different schools of law. However, it would go beyond the scope of this book to provide comprehensive references for all topics mentioned. This is why in many cases I refer to reliable secondary sources in European languages where the primary sources are examined. It is hoped that in this way readers who have no, or insufficient, command of Arabic will find the subject matter more easily accessible.

Overall this book intends to take Islamic law into account as living law. On the one hand, the legal situation in the Islamic world can be understood only with a view to the classical development of Islamic law. On the other hand, it displays so many special features and new developments that ignoring these, as has been done by some introductory works, will result in an incorrect, and possibly distorted, picture of the situation. Consequently past and present will be given equal attention here.

This book is divided into three major parts. The first part presents an overview of the essential foundations and rules of classical Islamic law, as it took shape during the first centuries of Islamic history and was transmitted until the eighteenth century. The second part deals with 'modern' Islamic law as the product of far-reaching endeavours to effect reforms from the nineteenth century onward. The third part provides examples of Islamic norms as applied in the diaspora. This arrangement is, of course, rather superficial. Of course there were individual developments on the fringes – the early formative period until ca. 750, and during the period from the fourteenth to the eighteenth century. They will be taken into account, but with the brevity necessary in the present context. Especially in the less thoroughly examined marginal areas we may expect to find much intriguing and encouraging information: this book

12 The author occupied the position of judge at the Oberlandesgericht (higher regional court) Nuremberg for six years.

is certainly nearer the beginning than the end of the scholarly examination of Islamic law. In cases where individual areas of the law are to be examined in greater detail, the views of the Hanafite Sunni school of law will generally be consulted by way of example. Over the course of the history of the Islamic world this school of law has spread most widely;¹³ it has the greatest experience of government including the Ottoman and Mughal Empires. Consequently it frequently provides the most detailed and most practically applicable attitudes. Furthermore it is likely that this school of law – which was recognised officially in the Austro-Hungarian Empire as early as 1912¹⁴ – has the closest connection with Islam in present-day Europe.

13 Cf. Kaya, *Continuity*, 26 and ff.

14 Law of 15 July 1912 concerning the followers of Islam according to the Hanafite school as a religious community; cf. Bair, *Das Islamgesetz*, esp. 27 ff.; Heine/Lohlker/Potz, *Muslimen*, 49 ff.

‘Sharia’ and Law

In the literature as well as in the public discussion the term ‘sharia’ is often presented as being synonymous with ‘Islamic law’. The term ‘sharia’, however, is ambiguous. In the non-technical sense – which includes Quranic terminology (cf. sura 45:18) – it denotes ‘the path cleared (by God)’, ‘the path to the watering-place’.¹ As a technical term it is found with a broader as well as a narrower meaning, and both alternatives are often mingled together and thus cause confusion.

The broader interpretation of sharia comprises the entirety of all religious and legal norms, the mechanisms to deduce norms, and the Islamic rules of interpretation, such as the rules on praying, fasting, the prohibition of certain foods and drinks such as pork and alcohol, and the pilgrimage to Mecca, as well as contract, family and inheritance laws. The corresponding term of rule (*ḥukm*, pl. *aḥkām*) denotes legal as well as religious rules.² In this sense, translating ‘sharia’ as ‘Islamic law’ would be very limited. It would be positively wrong if the established concept of law were applied in this context. ‘Law’ thrives on its function of pacifying the real world and has recourse, if necessary, to the means of (public) authority, including force.³ Consequently its main characteristic is its enforceability in this world. It applies to the relationships between people and other legal personalities such as corporate bodies as well as their relationship with the upholders of the legal system – nowadays, the state and its subdivisions.

Religious commandments, on the other hand, are characterised by the fact that their observation in this world cannot be enforced by law but only by means of social pressure, and that as a rule ignoring them has consequences in the next world only. This only changes if religious rules are also enforced by means of penalties in this world, by decree of the respective rulers. Thus the essential difference is not the claim to possessing binding force – religious as well as legal rules consider themselves to be binding – but above all the system of sanctions linked to the rules.

10 This distinction according to the type of sanctions is also found in the sharia. It features evaluations of human actions with relevance to this world

1 Cf. only the article ‘Sharī’a’ in EI II, vol. 9, at 1.1 and 5.

2 Cf. al-Khudarī, *Uṣūl*, 18 ff.

3 Cf. also Wichard, *Recht und Religion*, 533 ff.; Zahraa, *Features*, 189; Abdel Wahab, *L’ordre public*, 76.

such as 'obligatory' (*wājib*) or 'duty' (*farḍ*), 'permitted' (*mubāḥ*) and 'forbidden' (*ḥarām*), but also some with relevance to the afterlife namely 'recommended' (*mandūb*, *mustaḥabb*) and 'disapproved of' (*makrūh*),⁴ the latter frequently without any effect in this world (for examples from the area of contract law cf. 4.4 below).⁵ Occasionally the term 'Sunna', Turk. 'sünnet', is found for the category of actions that are desirable or praiseworthy.⁶

As regards the law in a narrower, non-transcendent sense, the delimitations between *wājib* and *mandūb*/*mustaḥabb* on the one hand and *ḥarām*/*bāṭil* and *makrūh* on the other are of particular interest. If there is no action defined as *wājib*, there are no legal consequences, unlike cases where only the desirable element is absent. Similarly, infringements defined as *ḥarām* will as a rule result in the legal consequence of ineffectiveness; frequently the term employed is the customary one, *bāṭil*. Actions that are merely disapproved of, on the other hand, tend to not have any sanctions in this world. What some people believe to be 'obligatory', others consider to be merely 'recommended'.⁷ The well-respected contemporary jurist Mohammed Hashim Kamali describes the delimitation clearly: 'Muslim jurists have thus distinguished the religious (*dīnī*) from the judicial (*qaḍā'ī*) objections and maintained that only the latter are enforceable before the courts. Most of the religious aspects of the individuals' life in society are private and non-justiciable.'⁸

In addition religious and legal rules frequently differ as to the basis of their claim to validity. Nowadays law usually applies on a territorial basis, i.e. independently of the characteristics of the person finding him- or herself on the territory of the legislating power. Religion on the other hand can be based at the personal level only, tied to the religious beliefs and practice of individuals. A 'state religion' does not change this, unless it prescribes specific religious actions for individuals. A distinction of this kind is found in Hanafite Sunni doctrine, which distinguishes between the religious applicability of the rule (*diyānatan*) and its legal effect (*qaḍā'an*).⁹

4 Cf. al-Khuḍarī, Uṣūl, 30 ff.; Hallaq, History, 40.

5 Cf. El Baradie, Gottes-Recht, 62 ff.; al-Khuḍarī, Uṣūl, 30 ff.; A. Hasan, Principles, 38 ff.; Wichard, Zwischen Markt und Moschee, 73 ff.

6 Cf. Krawietz, Hierarchie, 115 ff. This includes e.g. the circumcision of boys.

7 Concerning the different interpretation of the term *amr*, commandment, in Shi'ite texts cf. the references in Löschner, Die dogmatischen Grundlagen, 48 ff.

8 Kamali, Constitutionalism, 24.

9 Cf. Karčić, Applying the Sharī'a, 220, with reference to the Hanafite standard text by Ibn 'Ābidīn, Radd al-mukhtār.

In the same way law enforcement in this world, of necessity objectivised and formalised, differs from the scrutiny of inner convictions and attitudes focussed on the afterlife. The founders of the great schools already addressed this issue.¹⁰ Thus from the point of view of the law, the question of whether a person is a Muslim, and thus subject to legal norms applying specifically to Muslims, must be answered according to external factors, even if the person in question has in fact inwardly renounced Islam.¹¹ One who perjures himself, even in a trifling matter, will be excluded from paradise according to a prophetic tradition and end in the fires of hell; but it is possible to also see the consequence of perjury –
 11 in this world – of ‘the rights of a Muslim being curtailed’.¹² Similarly, the competence of the (secular) judge ought to include matters which are covered by legal rules or prohibitions, but not those (religious) issues that are included in the categories ‘recommended’ or ‘disapproved of’ which are focussed on the next world.¹³ This highlights the diverse types of insight possible, and the structural difference between them. The relationship between humans and God is essentially a matter of the *forum internum*; the relevant factor in many cases is not (solely) the external, perceivable action but the intent at the back of it (*niyya*). The legal evaluation of human interaction, on the other hand, is dependent on the *forum externum*: it is not possible to look into people’s hearts. Thus a rather formal path is outlined for deciding legal matters; the decision arrived at cannot claim complete substantive ‘guarantee of correctness’.

The contemporary Muslim jurist Abdullahi al-Na’im, who teaches in the US, entirely rejects enforcing sharia rules by means of legislation. He explains: ‘As a Muslim lawyer, especially from Sudan¹⁴, I can hardly ignore the tragic costs of futile efforts to enforce shari’a through positive legislation in any Islamic society.’¹⁵ He then specifies: ‘By the term shari’a I mean the religious normative system of Islam. I prefer to use this term rather than Islamic law precisely because (...) shari’a cannot be enacted into law and remain a religiously sanctioned normative system’,¹⁶ and ‘enforcement through the will of the state is the negation

10 See Wichard, *Recht und Religion*, 537 ff.

11 Discussed in al-Shāfi‘ī, *Al-risāla*, 482 (at 1350 ff.).

12 Cf. the relevant hadith in Mālik ibn Anas, *Al-muwatṭa’*, vol. 2, 727, no. 11.

13 Cf. Ibn Rushd, *Bidāyat al-mujtahid*, vol. 2, 750.

14 Regarding the background see the politicised introduction of Islamic law and its consequences, Part 2, 3.4.a below. Al-Na’im is a pupil of Maḥmūd Muhammad Ṭaha who was executed for apostasy.

15 *Shari’a and Positive Legislation*, 29, 40.

16 *Ibid.*, 29, n. 1.

of the religious rationale of the binding force of shari'a (...):¹⁷ By retreating to the 'genuine' religious matters, the claim to dominate the law is abandoned.¹⁸ In a later text¹⁹ al-Na'im develops a more detailed theory of why Islam and state should be separate, the latter being neutral. Presenting these ideas at a conference organised by the universities of Jos (Nigeria) and Bayreuth in 2004 and held in Jos led, however, to uproar among the Muslim attendees; around 250 delegates, some of them high-ranking, left the presentation in protest.²⁰ In his most recent work, 'Islam and the Secular State', al-Na'im²¹ develops these ideas further. During the pre-colonial era it was not the comparatively weak state but the scholars who implemented sharia norms. Considering the modern states, which are strong, internally pluralistic and members of international organisations, it is not possible to revert to this practice. On the other hand, the wealth, the plurality of the sharia itself would be lost if the state declared one particular school or interpretation as binding. Whenever the state was used to enforce sharia, this, he says, led to extremely selective norms divorced from their legitimate methodological sources. Thus the sharia ultimately became a symbol of group identity and a playing field for attacks on the political authority. If the state claims sharia for itself in this way, this would result not only in sharia becoming easier to manipulate but also in the supporters of the state enforcing its rules trying to take control of the state itself. Then sharia would be the symbol of a despotic and authoritarian government, while its creative and liberating potential would waste away.

12

Scholars whose arguments run along more traditional lines also distinguish between sharia as the path laid down by God and the prophet on the one hand, and *fiqh* as a man-made construct. In this way the immediately divine origin of the legal norms deduced, or of their interpretations, is questioned.²² Ibn Khaldūn²³ (732–808/1332–1406) defines *fiqh* as follows: *Fiqh* is the knowledge

17 Ibid., 37.

18 Cf. e.g. the writings by the Iranian scholar 'Abdolkarim Soroush who categorises the human rights debate as belonging in the realm of neither law nor religion but – despite recognised religious links – in the realm of philosophy (in: Reason, 128 ff.).

19 Islam and the Secular State, 4 and *passim*.

20 Report by Franz Kogelmann, Shari'a-Debatten, 179, 182.

21 Islam and the Secular State, 284–289.

22 Cf. e.g. the contemporary Indian textbook Muhammedan Law by Aqil Ahmad, continued by I. A. Khan, 21st ed. Allahabad 2004, 11: 'God and Prophet laid down the path of Shariat while the whole structure of Fiqh is erected by human agency'; similarly already Fyzee, Outlines, 24. Further references for the more recent debate may be found in Krämer, Gottes Staat als Republik, 51 ff.

23 Al-muqaddima, 804.

of rules (*ahkām*) provided by God the August in order to classify the actions of those who are subject to these rules (*al-mukallaḥīn*) as commanded, prohibited, recommended, disapproved of and simply permitted. These rules are taken from the Quran, the sunna and others provided by the giver of laws (God) as sources and instruments (*adilla*) to serve their enlightenment. Once the rules have been determined from these sources and interpretations, that is called *fiqh*.¹³ In the following passage Ibn Khaldūn states that there had been disagreement regarding these ways of achieving insight from the earliest days of Islam onwards. He sees this disagreement as virtually inevitable, for reasons of linguistic ambiguity as well as differing traditions and methods of verifying norms. Structural uncertainty will of necessity place human processes of achieving insights – which are guided by rules – at the centre of the subject matter.

In this context the question arises of what is specifically legal in Islam. When answering the question, to begin with we are faced with the division that was evolved in the Western world, between law and state on the one hand and religion on the other.²⁴ The question of whether this division exists in Islam has not only scholarly but also political significance, and is consequently highly controversial.²⁵ Whether Islam is genuinely and intrinsically ‘religion and state’ (*dīn wa-dawla*) in the same way, will be deliberated below (ch. 4.8). The distinction between rules regarding the relationship between humans and God and those regarding the relations among humans is clearly present in the Islamic scholarly literature on the subject from the earliest time onwards. The books in question are usually divided into two great sections. The first will mainly discuss issues of religious observance, especially the ‘five pillars’ of Islam, the profession of the one God and his prophet Muhammad (*shahāda*), the five daily ritual prayers (*ṣalāt*), the giving of alms (*zakāt*), the fast during the month of

24 The Western division between ‘auctoritas’ and secular ‘potestas’ dates back to Pope Gelasius I (492–496). Concerning its development in the context of the development of the history of scholarship studying Islamic law cf. the concise description in Johansen, Contingency, esp. 42 ff., which includes a wealth of material.

25 Regarding the widely-held but sparsely supported belief in an unbreakable link cf. Van den Berg, Principes, 1f. He claims that the Semitic peoples were able to comprehend the state only as a theocracy. Consequently the concepts of law and religion are nearly identical in Islam. Jurists have to be theologians and vice versa. Consequently, he says, the law possesses great stability: it is not disposed to adapt to new requirements but, on the contrary, attempts to shape society according to God’s commandments. Hallaq, Authority, 166 with further references from classical literature, clearly contradicts the last statement; cf. also Johansen, Contingency, 265 ff.; Scholz, Malikitisches Verfahrensrecht, 91 ff. with further references.

Ramadan (*ṣawm*), and the pilgrimage to Mecca during the month of Dhū-l-ḥijja (*ḥajj*). These are called the *'ibādāt*, a multi-layered term with a hint of 'divine service'. The second part will discuss legal matters such as marriage and divorce, individual statutory offences, contract law, company law, law of torts, inheritance and procedural law. These subjects are called *mu'āmalāt*, issues of (interpersonal) relationships.²⁶ A modern Muslim author²⁷ describes this as the division between this world as the place where humans can make decisions (*dār al-ikhtiyār*) and the next world, where they will receive what is due to them (*dār al-qarār*). This is sufficient reason to concentrate on the area of *mu'āmalāt* here, and to refer to the *'ibādāt* only where the legal argumentation is linked to them.

At the same time we can observe a distinction – which developed gradually and is not absolutely rigid²⁸ – at the personal level, between religious scholars/theologians (*'ulamā'*/*ahl al-kalām*) and law scholars (*fuqahā'*, sg. *faqīh*, a derivation from the abstract noun *fiqh*, 'jurisprudence'²⁹). While religious as well as legal matters are approached in Islam with reference to God's revelation and Muhammad's mission, clear delimitations are found in theoretical writings as well. One of the most eminent Sunni 'theologians', Abu l-Hasan al-Ash'arī (probably 260–324/873 or 874–935 or 936), distinguishes very clearly between the remit and methods of theology on the one hand and jurisprudence on the other (al-Ash'arī cites divorce and Quranic penalties as examples): the latter deals with the evaluation of concrete particulars (*ḥawādith al-furū'*) that can be resolved by means of the transmitted rules of the sharia. Universal fundamental issues (*uṣūl*), on the other hand, ought to be tackled by every Muslim in possession of his faculties using universally accepted principles based on reasoning, sensation, intuition etc. The two spheres must not be mixed.³⁰ Conversely, according to al-Shāfi'ī, presumably the most significant Islamic legal

26 With regard to particular statutory offences such as the consumption of alcohol it is assumed that they also protect the 'rights of God', whatever the interpretation of these in concrete instances; cf. also El Baradie, Gottes-Recht, 44.

27 Ismā'īl al-Shāfi'ī from Kuwait, *'Al-Islām alladhī nurīd. 'alaynā ikhrāj al-Islām min ma'ziq al-turāth'*, al-Sharq al-Awsaṭ, 6 June 1998, 10.

28 Cf. the Hanbalite scholar Ibn 'Aqīl (d. 513/1119 in Baghdad): in his work *Al-wāḍiḥ fī uṣūl al-fiqh*, vol. 1, 10, he describes the science of fiqh as 'knowledge of the rules (*aḥkām*) of the sharia' as such. Regarding this development cf. also Johansen, Contingency, 2 ff.

29 Regarding the rather inconsistent terminology cf. e.g. Muslehuddin, Islamic Jurisprudence, 13 ff. with further references; Löschner, Die dogmatischen Grundlagen, 27.

30 Al-Ash'arī, Risāla, 95; transl. in McCarthy, Theology, 130. Cf. also F. Rahman, Functional Interdependence, 90.

14 theorist,³¹ and also in the opinion of the eminent Hanafite jurist al-Sarakhsī³², the opinion of the experts in theology, the *kalām*, is not relevant in determining a consensus among scholars (of law).

One example illustrating the different deliberations is the Quranic prohibition (sura 62:9) of concluding purchase contracts on Fridays during the prayer hour. Scholars with an interest in 'juristic' matters examine the question of whether breaches of this prohibition result in the contract being void (cf. also 4.4.a below). Authors with a more 'theological' inclination concentrate on issues of interpretation of the precise circumstances covered by the prohibition, without reference to the worldly implications of such contracts.³³ According to this opinion the greater part of the sharia, and the Quran in particular, are relevant to the law only to a comparatively minor extent: of the thousands of Quranic verses, only a few dozen are concerned with legal matters.³⁴ However, the boundaries are occasionally fluid (cf. also 4.4.e below).

In addition some tendencies towards definitive separation may be perceived in the Islamic world. One specific type is the overall very strict separation between the state legal system and religion in Turkey.³⁵ In other states, where secularisation is not even being discussed and whose constitutions contain a sharia proviso in the context of deducing the law, there are also numerous instances of decisions by supreme courts which are hardly compatible with traditional sharia rules.

Overall, and with all the necessary caution, we can observe a surprisingly far-reaching separation. Thus the decision to restrict this book to 'law' as the entirety of rules for life within society that are enforced by means of formalised mechanisms of keeping order and imposing sanctions acquires additional justification out of the development of Islam itself. Of course the boundaries to the transcendent level are still not impenetrable: during the classical period in general, and in the present day still to some extent, law, too, is understood to

31 Kitāb al-umm, vol. 2, 279 and ff. (ed. Muhammad Zuhri al-Najjār, Beirut, n. d.).

32 Uṣūl, vol. 1, 302: '*khilāf ba'ḍ ahl al-kalām mimman lā naẓara lahu fi l-fiqh*'; also unequivocal *ibid.*, 312, presented as the opinion of al-Karkhī regarding the theologians (*mutakallimūn*) and the hadith scholars (*muḥaddithūn*).

33 Cf. e.g. al-Ṭabarī, Jami' al-bayān, vol. 12, 64 ff.; Ibn al-'Arabī, Aḥkām al-Qur'ān, vol. 4, 1805.

34 As pointed out by Al-'Ashmāwī, Al-sharī'a al-islāmiyya, 7; cf. also M. Charfi, Islam and Liberty, 71, who mentions 200–500 verses.

35 Cf. also Part 2, 2.6 below. The religious authority of the state DİYANET, however, embodies intensive state control and emphasis on Sunni Islam. Regarding the illuminating Turkish debate on the separation of government activity and religion cf. Uçar, Moderne Koranexegese, esp. ch. 4 f. (forthcoming).

be part of Islam as such. Thus it was and still is out of the question for Muslims to come under the jurisdiction of non-Muslim judges. According to the famous Hanafite jurist al-Sarakhsi³⁶ referring to a tradition by the second caliph 'Umar, even the office of historiographer is open only to Muslims. Furthermore legal rules regarding e.g. marriage or the establishment of trusts are regarded by many to this day from a religious point of view.³⁷

One consequence of the religious purity rules is, for instance, that to this day hardly any waste water is purified and reused, despite water shortage. The reason is the ulama's vetoing adding purified water to fresh drinking water.³⁸ Thus the state's scope of implementation is more limited than it would be in a secular society.

It would not be overstating the facts by much to say that while Islamic law is not per se secular, it does have a clearly outlined and limitable secular side. This must be emphasised because there have been cases where ill-informed Western courts were of the opinion that they could not apply regulations of Islamic law originating from other countries due to their religious nature.³⁹

The narrow interpretation of 'sharia' only covers its legal sections. Frequently they include only the specifically developed traditional legal rules in the areas of family and inheritance law, Quranic penal law and, in part, the law on foundations and trusts. This opinion is widespread among Turkish Muslims in particular; legal reforms under Atatürk targeted essentially these rules. The areas which are problematic from the point of view of modern human rights are covered by these regulations (aspects of gender discrimination, of discrimination against Muslims and the imposition of harsh physical punishment).⁴⁰

For non-Muslims, but also for more than a few Muslims, the sharia has been a concept of plain terror not only since 11 September 2001. Fears find real points

36 Kitāb al-mabsūt, vol. 16, 93f.

37 Thus e.g. Prof. Fikret Karčić from Sarajevo on 19 June 2008 in Berlin, during a conference on the subject 'Institutionalization and Representation of Religion' hosted by the Konrad Adenauer-Stiftung and Erfurt University.

38 'In Saudi-Arabien ist Wasser knapper als das Erdöl', Frankfurter Allgemeine Zeitung, 3 Nov. 1998, 18.

39 See also 4.3.a.bb below. Hence the non-jurist Tilman Nagel's criticism is fundamentally flawed ('Lohn und Strafe im Diesseits und im Jenseits', NZZ, 7 Nov. 2009, viewed on 24 Mar. 2011 at http://www.nzz.ch/nachrichten/kultur/buchrezensionen/lohn_und_strafe_im_diesseits_und_im_jenseits_1.3981865.html).

40 Concerning the possible collisions between the 1948 UN declaration of human rights and rules of Islamic law cf. e.g. al-Midani, La Déclaration, 153ff. It must not be forgotten that capital punishment, which is still carried out in many cases in e.g. the US, is of course the harshest possible physical punishment.

of contact, as illustrated not only by serious breaches of human rights in Saudi Arabia or Iran, but also by an article published in the Daily Express in July 2004 which reported on the website of an organisation called ‘Supporters of Sharia’ with ties to an extremist preacher in London.⁴¹ The website showed images of children who re-enacted killing a prisoner with swords. The association with real events in Iraq is inescapable. There are, however, occasional false reports: Sergej Moleveld, chairman of the Dutch *Liste Pim Fortuyn*, confessed according to press reports that he forged a threatening letter allegedly from a radical Islamic group and sent it to himself and another member of parliament.⁴² Clearly, it is always necessary to look at events carefully.

The broad spectrum, ranging from prayer regulations – which might lead to difficulties only in the sphere of employment law of countries with non-Islamic legal systems⁴³ – to entirely unacceptable physical punishment, is frequently not perceived as such. More than a few Muslims, in fact, regard the broadly interpreted ‘sharia’ as a basically positive religious inheritance. Many Muslims, however, reject the narrowly interpreted law sharia, especially where it breaches human rights. The Alevis, a population group of millions in Turkey, and hundreds of thousands in Germany, consider the sharia to have been abolished – including essential religious sections.⁴⁴

How can such divergent attitudes come about? The sharia is by no means a law book, but a highly complex system of norms and rules of how to discover and interpret norms. The literature on the subject, which has been composed for nearly 1400 years, is as varied as the history and culture of Islam itself. Islamic law in the Sunni and the Shi‘ite forms, but also the approach to religious norms, are based on the secondary deduction by means of exegesis, interpretation and conclusions, i.e. on human thought and reasoning.⁴⁵ This is illustrated not least by the fact that since the early period scholars have not limited themselves to applying norms according to their more or less clear wording, but inquire into the meaning and purpose of these norms (*Ar. ‘illa*).

In the fourteenth century, Abu Ishāq al-Shāṭibī, the most prominent and most frequently quoted exponent of this approach, explicitly asked the ques-

41 ‘Children in mock beheading horror on Hamza’s website’, Daily Express, 1 July 2004, 11.

42 ‘Haager Regierung will Abschiebung erleichtern’, Frankfurter Allgemeine Zeitung, 12 Nov. 2004, 1.

43 Cf. Rohe, *Islam und deutsches Zivilrecht*, 35, 38 ff.

44 Cf. Erbektaş, *Axiome*, 86, 89 ff.; Vorhoff, *Die Aleviten*, op. cit., 10, 18 ff.

45 Explicitly e.g. in F. Osman, *Islam and Human Rights*, 34; more recently cf. also Krawietz’ fundamental work, *Hierarchie der Rechtsquellen im tradierten sunnitischen Islam*, Berlin, 2002.

tion of what the purposes (*maqāṣid*) of the sharia are.⁴⁶ He discovers these purposes in five interests ('necessities', *ḍarūriyyāt*): religion, life, progeny, possessions and reason. These purposes are absolute and cannot be abrogated; individual aspects may, however, be implemented differently in order to safeguard the original purpose.⁴⁷ Acting in accordance with the sharia, he says, is no end in itself: if the external conditions are suitable for a particular action but not in accordance with the (intended) purpose, carrying out the actions would be wrong and against the norms, as they are mandatory only for a particular purpose.⁴⁸ Those who claim that these purposes cannot be comprehended – his reproach against the religious-philosophical trend of the *bāṭiniyya*⁴⁹ – are destroying the sharia.⁵⁰ It is not possible, he maintains, for the norms (Ar. *adilla*, signs) of the sharia to be contrary to reason, as comprehending them by means of reason is the precondition of their being binding (i.e. applicable to concrete cases, Ar. *taklīf*).⁵¹ Ritual duties (Ar. *'ibādāt*) only are beyond being penetrated by human reason; all other norms are accessible to it.⁵²

Consequently the statement, expressed by many scholars, that God alone could be the 'lawgiver'⁵³, ultimately has no validity. From the very early days of Islam it was humans who interpreted the norms they understood as given by God, and who evolved the rules for the implementation of the norms. Within Islam, too, there is no rule that it would be possible to apply without this interpretation – at least as regards its applicability with reference to time, place

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46 Al-muwāfaqāt, vol. 2, 8, 39 and *passim*; cf. also al-Raysuni, Imam al-Shatibi's Theory, esp. 137 ff.; Kamali, Principles, esp. 400 ff. For present-day understanding cf. also Masud, Muslim Jurists' Quest, 8 f.; M. Ibrahim, Maqāṣid al-Sharī'a, 6 ff.; Ibn 'Abdarrahmān, 'Ilm maqāṣid al-shāri'; Johnston, Maqāṣid al-Sharī'a, 149 ff., 157 ff.; Majma' al-fiqh al-islāmī qarār 141 (8/15), 393 f.

47 Al-muwāfaqāt, vol. 3, 77.

48 Al-muwāfaqāt, vol. 2, 285.

49 This was the name of specifically the Shi'ite Ismailis, more generally also those who rejected the all too literal interpretation of a text in favour of a more 'inward' (Ar. *bāṭin*); cf. the article 'Bāṭiniyya' in EI II, vol. 1 (M. G. S. Hodgson).

50 Al-muwāfaqāt, vol. 2, 291.

51 Al-muwāfaqāt, vol. 3, 16.

52 Al-muwāfaqāt, vol. 2, 294 and *passim*. A good summary of the core statements may be found in al-Raysuni, Imam al-Shatibi's theory, 317 ff.

53 Cf. only al-Zuhaylī, Al-fiqh al-islāmī, vol. 6, 651, 657, as well as the relevant remarks in the judgments by the Abu Dhabi court of cassation, judgment 748/1991, of 15 Nov. 1991, as reprinted in Ḥammādī, Qaḍā, 30, according to which legislation is tied to the divine norms of the sharia, and in case of conflict between the applicable law and sharia norms the judge must apply the latter.

and persons. Interpretations, however, may change just like persons and their circumstances. This is illustrated not least by the diversity of opinion among Muslims themselves.

The great majority of modern Muslim authors distinguishes between the eternal foundations of the sharia and individual rules that are relevant to and at a particular time and place, and are consequently subject to changing times and circumstances.⁵⁴ The first signs of this approach have already been present in classical literature for more than a thousand years. Frequently only those rules are considered eternally valid which are part of religion according to Western opinion as well (e.g. prayer rules or dietary laws), while a significant portion of legal regulations, if not all, are seen as being tied to a particular time.⁵⁵ Still, the sharia is varied and can be approached dynamically even in those of its legal sections that hold some potential for conflict. The legal key is independent reasoning (*ijtihad*; cf. 2.1 below) when interpreting sources. At the level of legal theory a dynamic approach becomes possible mainly where norms can be interpreted according to their meaning and purpose, and the universal benefit (*maṣlaḥa*) is accorded independent significance in the interpretation.⁵⁶

Thus 'liberal' attitudes – unlike the traditionalist mainstream still prevalent among scholars – can be supported by means of the instruments of the sharia. Consequently those doing the interpreting and their approach to the interpretation have great significance. While the spectrum of possible interpretations is not unlimited, it is wide indeed. The Jordanian prince al-Hasan ibn Ṭalāl describes the sharia simply as a never-ending process.⁵⁷

The opinions of the Alevi will not be discussed further here. Their home is in Turkey, but they also live in many EU countries. They have evolved an independent theology⁵⁸ that regards the sharia laws as abolished. They regard these laws as only outward signs of faith that are not required any more once a person has internalised the faith (by being a member of the Alevi community).⁵⁹

54 Cf. e.g. Engineer, *The Rights of Women*, esp. 11 ff., 61 ff., 89 ff. and *passim*; id., *On Developing*, 90 f. and *passim*; al-Alwani, *Für ein korrektes Verständnis*, 37 ff., esp. 48 ff.; Borrmans, *Cultural Dialogue*, 89 ff.; Krämer, *Techniques*, 177 ff.

55 Cf. only Balić, *Ruf vom Minarett*, 184 ff.

56 Cf. Bagby, *The Issue of Maṣlaḥa*, esp. 6 ff.

57 Remark made during a conference on Religion and the Rule of law on 27 Feb. 2008 in Amman.

58 Regarding the Alevi's self-classification cf. Gorzewski's thorough study, *Das Alevitentum in seinen divergierenden Verhältnisbestimmungen zum Islam*, Berlin 2010.

59 Cf. Erbektaş, *Axiome*, 86, 89 ff.; Vorhoff, *Die Aleviten*, 10, 18 ff.

Due to many years of oppression by the Sunni majority faith the publicly recognised debate on the foundations of Alevism has emerged only in very recent time. However, until this day Alevi tradition has not been interested in legal issues tied to religious ones, of the kind with which this book is concerned. The only exception are sanctions applying within the community only, which might at worst result in someone being excluded from the community⁶⁰; consequently they are not distinct from other internal religious rules. The same is true of the Baha'i, a syncretistic faith that evolved in Iran in the nineteenth century. The Ahmadiyya, finally, which developed towards the end of the nineteenth century on the territory of what is now Pakistan, adheres to Islamic law in the main, but rejects the traditional doctrine of apostasy (cf. 4.7.b.gg below) and of jihad (cf. 4.9.c below) and will be referred to in these contexts.

60 Cf. Yıldırım, *Alevilikte Hukuk Sistemi*, 37 ff. (Germ. Summary 51 f.).

PART 1

The History of Islamic Law



The Origins of the Islamic State and Its Legal System

1 The Beginnings

In the year 622AD Muhammad and a band of followers migrated from Mecca to the Yathrib oasis, later to be called simply 'Medina', the city (of the prophet). Soon afterwards, the date of this migration (Ar. *hijra*) would be taken as the starting point of the Islamic calendar. Once they had converted to Islam, the members of the tribes living there, the Aws and the Khazraj, who were feuding constantly, entrusted Muhammad with the resolution of their differences and the leadership of the newly emerging community.¹ This led to concrete tasks relating to a legal order, which found expression in an increase in Quranic revelations on the subject.² As a consequence of the rapid expansion of the Islamic Empire during Muhammad's lifetime, and especially after his death in 632, these tasks increased dramatically. An Empire reaching from the Iberian Peninsula to the Indus was created during only a few decades. The majority of the Empire's population was not of the Muslim faith, and large swathes were not of Arab descent, either. It became necessary to clarify the relation between the conquerors and these subjects, for instance with regard to taxation and their legal position vis-à-vis the Muslims and among themselves. Public finances had to be regulated, particularly in respect of organising army pay and distributing war booty (which fell into the Muslims' hands in great abundance at first). Finally, a general legal system including a peace framework was required. This is dealt with in a multitude of legal sources (more in II. below) and hinted at in Muhammad's famous farewell sermon (*khuṭbat al-wadāʿ*), which begins: 'You may not injure your blood and your possessions among yourselves, so that you may come to your Lord.'³ Islamic Law had to

1 For information on Muhammad's life and achievements Muslim tradition relies mainly on Ibn Hishām's biography (*sīra*), which follows a similar, lost work by Ibn Ishāq. For translations cf. Bobzin, Mohammed, 35 ff. and the references on p. 123. From the field of Islamic Studies cf. the succinct and instructive accounts by Bobzin (loc. cit.) and Paret, Mohammed und der Koran, 9th ed. 2005.

2 In editions of the Quran suras are commonly classified as 'Meccan' or 'Medinan'; cf. 2.6 below.

3 '*inna dimāʾakum wa-amwālakum ʿalaykum ḥarām illā an taltaqū rabbakum*', cf. Ibn Hishām,

work towards freeing itself from the Bedouin system, which was based on blood kinship and clan structures, and tackle the further development of pre-Islamic urban legal forms.⁴

22 Due to the scarcity of the sources we have only little reliable information on the early development of Islamic law after Muhammad's death.⁵ Older research presumed that until around the end of the Umayyad dynasty the predominant system was one of finding pragmatic solutions to individual cases, rather than a pervasive and universally applied legal system. Schacht went so far as to claim that there was no Islamic ('Muhammadan') law during the early period.⁶ More recent research⁷ has noticeably relativised this view and provided evidence that some remarkable independent developments took place as early as the beginning of the seventh century. It does, however, seem to be certain now that traditional Islamic law was developed gradually⁸ until the fourth/tenth century.⁹ After the rapid expansion of Islamic dominion into the vast Byzantine and Sasanid territories, a numerically very small group of the population, who had no significant knowledge of the administration of a great empire, had to master this very challenge. This was only possible with the support of the, at least at first, predominantly non-Muslim administration.¹⁰ On the other hand, even the earliest Islamic history following the

Al-sira, vol. 4, 185; cf. also Muslim, *Ṣaḥīḥ*, part 1, Thesaurus Islamicus Foundation 2000, ḥadīth 3009, 500.

4 Cf. Coulson, *History*, 10 f.; Muslehuiddin, *Islamic Jurisprudence*, 19 ff.

5 Concerning the beginnings of Islamic jurisprudence in academic research of the nineteenth and twentieth century cf. the chapter of the same name in Motzki, *Anfänge*, 7 ff. with further references.

6 Cf. in particular Schacht, *Origins*, 190 ff.; on the critical reception of Schacht's theories cf. Motzki, *Anfänge*, 49 ff. with further references; Hallaq, *Origins*, 103 ff.; A'zamī, *Studies in Early Ḥadīth Literature*. Similar to Schacht: Crone, *Roman, Provincial and Islamic Law*, 1987. Al-Na'im, *Toward an Islamic Reformation*, 14 ff., has an overview of developments from a 'reform Islamic' point of view.

7 Worth mentioning are, in particular, Motzki (*Anfänge*), Katz (*Origins*), Dutton (*Origins*) and Hallaq (*Origins*), and Mitter (*Das frühislamische Patronat*) against Crone (cf. n. 6 above).

8 Cf. e.g. Scholz's studies on Malikite procedural law.

9 Following the plausible categories postulated by Hallaq (*Origins*, 3), we should assume that the science of legal methodology and independent interpretation were not established fully, and the Schools of Law not distinctly formed until the fourth/tenth century; the same is true of the emergence of a complete judicial system including law of evidence and procedural law.

10 Concerning the situation in the territories of the Byzantine Empire and the Sasanid Empire later conquered by the Muslim Arabs cf. Tyan, *Histoire*, 83 ff.

death of Muhammad shows clearly that the new Muslim community was by no means willing to 'merge' completely into some already established culture. Thus one remarkable fact is that they did not simply adopt the conquered capital cities with all their functions, but frequently established military camps (*amsār*), such as Kufa in Iraq or Fustāt in Egypt as new centres of government, inhabited by a comparatively homogeneous Muslim population.

Thus the period of state formation was determined by, among other things, the existing legal and administrative structures which were in many cases retained for a long time.¹¹ Consequently it is virtually impossible to distinguish between Islamic law 'proper' on the one hand and 'foreign' elements on the other. It is, however, possible that this division simply does not apply: this would apply in cases where Islamic law can be traced back to an immutable essence found in different forms adapted to people's respective needs according to time and place. Seen in this light the adoption of existing elements would not be 'un-Islamic' but, on the contrary, part of the concept that accepts everything which does not contradict its essence.¹²

In fact, the success story of Islam may probably be explained in part by the conquerors retaining existing (legal) customs in the newly acquired territories to a significant degree, and recognising them as being in accordance with the law (common law, custom, *'urf wa-'āda*).¹³ In cases where Islamic law did not provide a rule, the existing one might remain in force. A juridical basis for this practice was finally established in the source of norms *shar' man qablanā* (pre-Islamic law, 'law of those who came before us'). As Islam sees itself as correcting inadmissible deviations in the 'precursor' religions Judaism and Christianity, and consequently also as their successor, retaining everything that was not affected by Muhammad's 'correcting' prophetic mission appears to have been the obvious course of action. The legal rule of *istiṣhāb*, according to which existing provisions continue to be valid in the absence of clearly recognisable changes in the overall situation, may have provided further legitimation.

The much-quoted dialogue between Muhammad and Mu'ādh ibn Jabal, who was sent to Yemen as a judge,¹⁴ is seen as a typical instance of the situation

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11 Cf. only Mallat, *From Islamic to Middle Eastern Law*, 699ff. with further references; Schneider, *Kinderverkauf*, 354.

12 Tending slightly in this direction: Chebel, *Manifeste*, 73 ff.

13 Similarly Hallaq, *Origins*, 197.

14 Hallaq (*Origins*, 35 ff.) points out that the duties of the early 'judges' were frequently mainly in the areas of military, police or general administration, even including the

during the early period (more in 2.1 below). It is clear that at first people did not assume a detailed and self-contained system of norms, but recognised that there were obvious gaps requiring to be filled in. However, with Muhammad's death, the process of revelation was seen as complete, and consequently no additions could be expected from this source.¹⁵ Gaps would thus have to be filled after deliberations of 'common sense'. This is how we should understand the term *ra'y* ('view, opinion') which is used in this context.¹⁶ It was not long, though, before quarrels arose concerning the scope this *ra'y* might be allowed. The counter-movement of the *ahl al-ḥadīth* emerged, in particular in the cultural centres of Iraq, who wanted to give more scope to prophetic traditions and thus restrict the independent finding and application of norms.¹⁷ In the development of legal theory at least, this opinion was able to assert itself.

Unlike the preceding remarks, many Muslim scholars past and present hold comparatively set ideas of the early period, especially as regards the fundamental questions of the doctrine of the legal sources. Often no distinction is made between the formative period and the development reached by the ninth/tenth century, or later stages. Impressive proof is furnished by the fact that modern literature quotes as references nearly exclusively the great works of *fiqh* composed from the end of the eighth century onwards. Furthermore, there is a clearly visible tendency of tracing existing practice back to the early days of Islam if possible, in order to achieve the greatest possible legitimation.¹⁸

From the point of view of Islamic Studies and of jurisprudence it would certainly be appealing to discover, as far as possible, how it 'really' was. From the internal Muslim point of view, however, this examination of the early period has acquired an independent, intrinsic value: the point of reference of many discussions is not reality – which is often difficult or impossible to reconstruct – but the idealised, concise image people have of it. From the point of view of the present at least, this image of homogeneous tradition becomes a 'primary source'. Consequently it must be a major topic of the discussion of

collection of taxes. Their activities would be limited to the settlements of the new Arab ruling class, while specialisation and professionalisation would come later (op. cit., 96 ff.).

15 Cf. suras 6:38; 16:89; also sura 42:10. Concerning the special case of the Ahmadiya cf. v1.8.a below.

16 Cf. Goldziher, *Die Zāhiriten*, 5 ff.; detailed information on the evolving connotations in Schacht, *Origins*, 98 ff.

17 Cf. Ibn Khaldūn, *Al-muqaddima*, 446; Hallaq, *Origins*, 122 ff.

18 Cf. only Wellhausen, *Das arabische Reich*, 177 ff., regarding questions of tax law.

the self-image and systems thinking of Islamic law. It is important, however, always to bear in mind that there is no evidence sufficient to presume the early development of a self-contained system of the kind that becomes perceptible from the ninth century onwards.

Thus even present-day Muslim scholars will find a wealth of opportunities to apply new historical research to one or the other rigid opinion in order to revise it or relativise its import. This would not be breaking with Islamic tradition: when it comes to individual legal questions, even some of the later classical works report on the great variety of actions and opinions since the earliest days, in some cases going so far as to quote diverging traditions of the views of one and the same scholar. The Hanbalite jurist Ibn Qudāma's (d. 620/1223) brief remarks on the question of whether a marriage contract will become valid only if two (suitable) witnesses are present may serve as an instance: 'A marriage can only be contracted before two witnesses, this is known from Aḥmad's¹⁹ opinion that has been transmitted the greatest number of times. It is also reported from 'Umar²⁰ and 'Alī,²¹ and it has been declared by Ibn 'Abbās,²² Sa'īd ibn Musayyab,²³ Jābir ibn Zayd,²⁴ al-Ḥasan,²⁵ al-Nakhā'ī,²⁶ Qatāda,²⁷ al-Thawrī,²⁸ al-Awzā'ī,²⁹ al-Shāfi'ī³⁰ and the *ahl al-ra'y*.³¹ It is also transmitted from Aḥmad that it would be a valid contract without witnesses, as was done by Ibn 'Umar,³² al-Ḥasan ibn 'Alī,³³ Ibn al-Zubayr³⁴ as well as Sālim and Ḥamza, the two sons of Ibn 'Umar. 'Abd Allāh ibn Idrīs,³⁵ 'Abd al-Raḥmān ibn Mahdī,³⁶ Yazīd ibn

19 Aḥmad ibn Ḥanbal, founder of the school of law that bears his name, b. 164/780, d. 241/855.

20 'Umar ibn al-Khaṭṭāb, second caliph, r. 13–23/634–644.

21 'Alī ibn Abī Ṭālib, Muhammad's cousin and son-in-law, fourth caliph, r. 35–40/656–661.

22 Prophet's companion, d. 68/688.

23 B. 14/635, d. 94/713.

24 Founder of the Ibādīya, d. ca. 93/711 or later.

25 Ḥasan al-Baṣrī, prominent scholar of the early period, b. 21/642, d. 110/728.

26 Ibrāhīm al-Nakhā'ī, prominent scholar of the early period, b. ca. 50/670, d. ca. 96/717.

27 Qatāda ibn Di'āma, transmitter famous for his superior memory, b. 60/680 (?), d. 117/735.

28 Sufyān al-Thawrī, prominent scholar of the early period, b. 97/716, d. 161/778.

29 Founder of a Syrian school of law (which has now ceased to exist), b. 88/716, d. 157/774.

30 Muḥammad ibn Idrīs al-Shāfi'ī, founder of the school of law that bears his name, b. 150/767, d. 204/820.

31 Cf. 3. below.

32 'Abdallāh ibn 'Umar ibn al-Khaṭṭāb, prominent transmitter, d. 73/693.

33 Third imam of the Shī'a, son of 'Alī ibn Abī Ṭālib, b. 3/625, d. 50/671.

34 Rebel anti-caliph, b. 2/624, d. 73/692.

35 Medinan scholar, d. 192/808.

36 Prominent transmitter, b. 135/752, d. 198/814.

Hārūn,³⁷ al-‘Anbarī,³⁸ Abū Thawr³⁹ and Ibn al-Mundhir⁴⁰ all supported this, and it is also the view of al-Zuhrī⁴¹ and Mālik,⁴² if they (the couple to be married) proclaim it so.⁴³

2 The Schism between Sunnis and Shi‘ites

Ever since its beginnings, Islam has suffered from a traumatic division (*fitna*, test) between two main orientations, which have been hostile to each other ever since.⁴⁴ The cause was the divergent understanding of who should be
 25 Muhammad’s deputy/successor (Ar. *khalīfa*, caliph) after his death in 632, and become head of the community, and who was qualified to decide the matter, and in what fashion. A ‘party’ (Ar. *shī‘a*, Shia) supporting ‘Alī ibn Abī Ṭālib, Muhammad’s cousin and son-in-law, emerged. This party based its claim on a tradition according to which Muhammad himself was said to have appointed ‘Alī his successor not long before his death.⁴⁵ According to this view only a member of the closest family of the prophet was suited to the office of caliph.

The majority party, on the other hand, believed the succession to be unresolved after Muhammad’s death.⁴⁶ From among their own ranks they appointed Abū Bakr, an old comrade-in-arms, caliph (r. 632–634) and understood

37 Prominent transmitter, b. 118/736, d. 206/822.

38 Abū Bakr Muḥammad ibn al-Qāsim, scholar, b. 271/885, d. 328/940.

39 Ibrāhīm ibn Khālid, prominent legal scholar and founder of a school, b. ca. 170/786–787, d. 240/854.

40 Shāfi‘ite, later independent scholar, whose teachings spread especially in Yemen, d. probably ca. 318/930. I am grateful to my teacher Joseph van Ess for this information.

41 Abū Bakr Muḥammad ibn Muslim, co-founder of the science of tradition, d. 124/742.

42 Mālik ibn Anas, founder of the school of law that bears his name, b. 93/715, d. 179/795.

43 Ibn Qudāma, *Al-mughnī*, vol. 6, 315.

44 To mention but one book from among the abundance of literature on Islamic history: Haarmann (ed.), *Geschichte der arabischen Welt*, especially the chapter on early Islam by Noth (esp. 98 ff.).

45 Regarding the contradictory traditions on the event by the ghadir (pond) Khumm cf. Ibn Kathīr, *Al-bidāya wa l-nihaya*, vol. 4, 359 ff.; Ja‘far al-Subḥānī, *Adwār al-fiqh al-imāmī*, 21. The Sunnis based themselves on another tradition, repeated by many traditionists, in favour of Abū Bakr; cf. al-Albānī, *Silsilat al-aḥādith al-ṣaḥīḥa*, vol. 7, no. 317 (p. 313 f.). Cf. Lambton, *State*, 221 and ff.

46 Cf. al-Mawdūdī, *Tadwīn*, 46.

this course of action to be in keeping with tradition (Ar. *sunna*, 'custom'); hence the name 'Sunni'. The two subsequent caliphs 'Umar ('Omar'; r. 634–644) and 'Uthmān ('Osman', r. 644–656) were appointed in this way, and both later murdered. 'Alī only attained the position as the fourth caliph and held it until he was murdered by a Khārijite⁴⁷ assassin in 661. Now the Sunni majority supported Mu'āwiya from the clan of 'Uthmān, the Banū Umayya, to succeed to the office of caliph. He moved the seat of government to Damascus and founded the Umayyad dynasty, who ruled until the middle of the eighth – and in Spain until the end of the tenth – century. The Shi'ites, on the other hand, were convinced that only 'Alī's sons and their descendants were to be considered as head of the community and ruler (*imām*).

The result was fundamental disagreement on the question of the degree to which genealogical proximity to the prophet and/or charismatic qualities should be the determining factors when the power was to be conferred. It was impossible for the Shi'ite pretenders to prevail in these power politics. To this day the Shi'ites celebrate the 'Āshurā rites in memory of the martyrdom of al-Ḥusayn, 'Alī's second son, at Kerbela in 60/680. In the early third/ninth century the caliph al-Ma'mūn attempted to name the Twelver Shi'ite imam 'Alī al-Riḍā his successor,⁴⁸ but failed due to the latter's premature death. Even before this time internal Shi'ite divisions had emerged with regard to the legitimation of individual imams. As a consequence three main branches established themselves: firstly the so-called 'Twelver Shi'a' (Ar. *ithnā-ashariyya*) (also known as 'Imāmiyya' or 'Ja'fariyya'⁴⁹), named after the number of twelve imams they recognise: all descendants of 'Alī, until the occultation⁵⁰ of the twelfth imam in

47 One group of 'Alī's original followers is called Khārijites (literally: 'those who have gone away'). They disagreed with 'Alī's willingness to face a secular arbitration court after the murder of his predecessor during the civil war. Consequently they left his camp and fought him from then on. They were furthermore of the opinion that every believer might be elected to the office of imam, as long as he was the most pious.

48 Coins minted in Isfahan and Samarqand during al-Ma'mūn's reign in 202/816–817, name al-Riḍā as the successor to the throne (*walī al-'ahd*) (reference for Isfahan in Artuk, Ibrahim/Artuk, Cevriye, İstanbul Arkeoloji Müzeleri teşhirdeki islāmī sikkeler kataloğu, vol. 1, İstanbul 1971, no. 305 (p. 88)). Concerning the designation document cf. Crone/Hinds, *God's Caliph*, 133 ff.

49 Named after the sixth imam Ja'far al-Ṣādiq (d. 148/765), who is considered to have been the founder of Shi'ite law (Halm, *Der schiitische Islam*, 36). Nowadays it is predominant in Iran as well as among the Shi'ites of Iraq, Lebanon, Saudi-Arabia, Afghanistan and Pakistan.

50 The eleventh imam Ḥasan al-'Askarī had died in 260/874. Subsequently four 'messengers'

the ninth/tenth century. Secondly, the ‘Fiver Shi‘a’ or ‘Zaydiyya’⁵¹ (named after the controversial fifth imam Zayd, in their view the last one descended from ‘Ali), and thirdly the ‘Sevener Shi‘a’ or ‘Ismā‘īliyya’ (named after the disputed 26 seventh imam Ismā‘īl).⁵²

The schism of the early period had significant legal as well as psychological consequences beyond questions of constitutional law – such as, who is the legitimate caliph? Important areas of the law, such as inheritance law, developed differently because the Shi‘ites did not recognise some of the Sunni ‘authorities’ on the transmission of legal sources and consequently did not take their traditions into account in their works. The Sunni side, on the other hand, emphasised Abū Bakr’s reliability as compared to ‘Alī.⁵³ A practical instance of the divergent opinions is the question of the proportion to which the daughter of the deceased shares in the inheritance beside more distant relations such as uncle, aunt or (male) cousin as the only living heirs. According to Sunni inheritance law, the daughter would inherit half besides the other relations, while according to the Shi‘ite doctrine of classes of heirs and their ‘filling’ according to preference, she would inherit everything. If she had predeceased her father and left a daughter, the latter would also be the sole heir.⁵⁴

In addition the Shi‘ites had no part in wielding political power and establishing institutions in most parts of the Islamic territory for a long time. Traditions grown within the school of thought of the Sunni majority, some of which impeded further development (see 2.1 below), exerted rather less of an influence on the Shi‘ite discussion.

of the occulted twelfth imam appeared, until the last one died in 329/941. From this date onwards the Twelver Shi‘a uses the term ‘the greater occultation’ (*al-ghaybat al-kubrā*).

- 51 It prevailed in northern Yemen. Regarding its development and most significant exponents cf. the references in Stewart, *Islamic Legal Orthodoxy*, 250 f.
- 52 Cf. only Halm, *Der schiitische Islam*, 37 f. The Fatimid Shi‘ite caliphs of the Islamic Middle Ages were Sevener Shi‘ites, as were the violent and extreme Assassins (cf. only Endreß, *Der Islam*, 56 f.); nowadays they include the followers of the Aga Khan (in India: Khoja, Nizari) and other splinter sub-groups (in India: Bohra, Mustā‘li, in turn divided into several branches).
- 53 Cf. Afsaruddin, *Epistemology*, 49, 54 f. with further references.
- 54 Regarding the various traditions and corresponding conclusions adduced with reference to the Shia, cf. al-Kulaynī, *Furū‘ al-kāfi*, in: *Mawsū‘at al-kutub al-arba‘a fi aḥādīth al-nabī wa l-‘itra*, vol. 7, ch. 61, 109 ff.; with reference to the Sunna, cf. traditions in al-Bukhārī, *Ṣaḥīḥ*, vol. 3, 1361 ff., and Maḥmūd ‘Abd Allāh Bakhīt/Muḥammad ‘Aqlat al-‘Alī, *Al-wasiṭ fi fiqh al-mawārith*, 59, 67; cf. also EI II, vol. 7, art. ‘Mirāth’, 110 (J. Schacht).

The schism was fraught with conflict and felt to be a catastrophe. Due in no small part to this emotion, in the development of the law, the dividing elements were pushed into the background; if necessary, (tacit) mutual acceptance might be based on compromises in the wording. This was probably necessary for a religiously charged legal system, as otherwise it would have required permanent conflict over the relevant points of controversy. The following two sources exemplify the dislike between Sunnis and Shi'ites, which resurged again and again: the Sunni Mongolian ruler Tamerlane (d. 1405) conquered a fortress near Amul in eastern Iran on 19 October 1392. He had the entire population, with the exception of the sayyids descended from Muhammad, killed, stating that they were all Shi'ite heretics. Timur reproached the sayyids, saying that they should show respect for Sunni scholars and not allow themselves to be tempted by just any old dervish to disregard the sharia.⁵⁵ In the 1860s Hermann Vámbéry, travelling disguised as a Sunni dervish, was reviled as a 'Sunni cur' (*seg-e sunnī*) in Shi'ite Tabriz.⁵⁶ On arriving in Mazanderan, his Sunni travel companions, on the other hand, bewailed the fact that this paradise was in the hands of the heretic Shi'ites, and that strangely, in fact, all the most beautiful parts of the world had fallen into the hands of unbelievers.⁵⁷ The current violent quarrels in Iraq, Pakistan and elsewhere are thus part of an inglorious tradition.

27

3 The Emergence of Schools of Law and Institutions of the Law

Who were the people who could help implement the law, and which standards were there for them to orient themselves towards? To begin with there were the prophet's companions (*ṣaḥāba*) and only a few scholars, who had to rely on their own reasoning to a high degree whenever there were no fixed sources of law available. They were widely called *ahl al-ra'y*, people who adjudicated according to their own view. There are traditions reporting that Muhammad himself sent judges (concerning the office of judge cf. 4. below) to areas of the newly founded empire, for instance Mu'adh ibn Jabal to Yemen.

There were no fixed rules as to the preconditions required for someone to count himself among the legal scholars, or to assume an office in the field. There was, however, a clear consensus that a certain degree of relevant pre-

55 Cf. Nagel, Timur, 202, with further references.

56 Vámbéry, Mohammed in Asien, preface by Simons, 15.

57 Op. cit., 69.

vious study was indispensable. In order for someone to be declared qualified for *qiyās* (juristic deduction, cf. 2.5 below), al-Shāfi⁵⁸ called for the following qualities: knowledge of the Quranic norms, the dogma of duty and the ethics of the Quran, what abrogates and what is abrogated in the Quran, its specific and generic rules and its guidance, furthermore the ability of interpreting according to the prophet's sunna, and in the absence of the last-named, according to the consensus of the Muslims, and in the absence of this, by *qiyās*. In addition, knowledge of the established sunna, the statements of the ancestors, the general consensus and existing issues was needed; also (sufficient) knowledge of Arabic, mental health, a faculty of discrimination with regard to (apparently) similar things, and no inclination to make hasty statements without sufficient reason. Also necessary, finally, was the willingness to listen to divergent opinions in order to avoid possible negligence and to gain greater certainty in the reasons in favour of whatever should be deemed right. The jurist would always have to observe greatest dedication and be as neutral as possible in order to be able to distinguish the merits of the chosen option over the dismissed one. Besides the general qualities, specific and expert knowledge would be required in concrete cases.

A legal scholar was not only needed as a judge but also to dispense legal advice; Muhammad himself is cited as the example for this practice.⁵⁹ These legal opinions (Ar. *fatāwā* or *fatāwī*, sg. *fatwā*) are based on concrete requests. They are not legally binding⁶⁰ and their weight depends on the authority of the scholar giving the opinion (*al-muftī*).⁶¹ It is impossible to overestimate their practical significance (see also III. below). In a much later period, some collections of fatwas assumed the function of extensive textbooks for scholars' practical activity.⁶²

58 Al-*risāla*, 509 ff.; transl. in Khadduri, 306 f.

59 Cf. Krawietz, *Der Prophet Muḥammad als Muftī und Muḡtahid*, 55 ff.

60 Cf. only Krüger, *Grundprobleme*, 29.

61 Regarding the details of classical doctrine cf. the relevant passages in al-Nawawī (AH 631–676), *Adab Al-Fatwa Wal Mufti Wal Mustafti*; cf. also the explanations in *Rawḡat al-ṭālibīn*, vol. 8, 87 ff. Concerning the form, contents and significance of fatwas at different times in different places cf. the instructive collection by Masud/Messick/Powers (eds.), *Islamic Legal Interpretation*; on the subject of Ottoman fatwas esp. Krüger, *Fetwa und Siyar*; on the subject of more recent Shi'ite fatwa practice see Schneider, *Iftā'*, 73 ff. Cf. also Krüger's summarising essay, *Grundprobleme*, 9 ff., which is most instructive and covers a wealth of material.

62 Regarding the 'Fatāwā-e Ālamgīrī' of the seventeenth century, significant for Hanafite

Until the fourth/tenth century, an additional institutionalisation of legal doctrine in Sunni Islam took the form of the development of schools of law (Ar. *madhāhib*, sg. *madhhab*). They were at first concentrated in core areas such as southern Iraq (Kufa, Basra), the Hejaz (Medina, Mecca) and Syria.⁶³ The term *madhhab* is used in a twofold sense in the relevant Sunni literature: on the one hand, it may denote the personal opinion of the founder or member of a school, on the other, it may refer to the opinion of the school as a whole, or indeed the school as such. The Shi'ites furthermore use the term to mean 'reliability, authority' (e.g. with reference to the transmission of the imams' opinions).⁶⁴

This development of schools was by no means due to a formalised deed of foundation. It is also unlikely that the men who were later seen as founders of the schools that were to bear their names saw themselves in this light at the time. Thus the actual institutionalisation of the Shafi'ite school is linked to Abū l-'Abbās ibn Surayj (249–306/864–918 in Baghdad).⁶⁵ Starting from the centre in Baghdad, similar educational establishments (ar. *madrassa*, pl. *madāris*) emerged during the Sunni renaissance initiated by the Seljuk rulers⁶⁶ from the fifth/eleventh century onwards.⁶⁷

The Sunnis' most important schools of law are the so-called 'Four Schools' (*al-madhāhib al-arba'a*), named after their founders Abū Ḥanīfa⁶⁸ (Hanafite school, *ḥanafīyya*), Mālik ibn Anas⁶⁹ (Malikite school, *mālikīyya*), Mālik's pupil Muḥammad ibn Idrīs al-Shāfi'ī⁷⁰ (Shafi'ite school, *shāfi'īyya*), and Aḥmad ibn Ḥanbal⁷¹ (Hanbalite school, *ḥanābila*). Also significant were the schools of

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India and based on Marghinānī's *Hidāya*, cf. Guenther, *Hanafi Fiqh in Mughal India: the Fatāwā-e Ālamgīrī*, 209 ff.

63 Cf. Melchert, *Formation*; Hallaq, *Origins*, 150 ff.

64 Cf. Gleave, *Intra-Madhhab Ikhtilāf*, 127 ff.

65 Melchert has detailed information, *Formation*, 87 ff., with further references.

66 In 447/1055 the Seljuk ruler Toghril Beg conquered Baghdad. The driving force behind the foundation of institutions was the vizier Nizām al-Mulk, who died at the hands of the Assassins.

67 Cf. Ephrat, *Madhhab and Madrasa*, 77 f. In detail: Makdisi, *The Rise of Colleges*, 9 ff.

68 Abū Ḥanīfa Nu'mān ibn Thābit, b. ca. 80/699 in Kufa, d. 150/767; for his biography and impact cf. Yanagihashi, *Abū Ḥanīfa*, 11 ff.

69 Mālik ibn Anas, b. 95/713 in Medina, d. 179/795; for information on Mālik cf. Wymann-Landgraf, *Mālik and Madina*, 2013; Rapoport, *Mālik b. Anas*, 27 ff.

70 Muḥammad ibn Idrīs al-Shāfi'ī, b. 150/767 in Palestine, d. 204/820; on his career see Khadduri, *Risala*, 8 ff.; cf. also Lowry, *Al-Shāfi'ī*, 43 ff.

71 Aḥmad ibn Ḥanbal, b. 164/780 in Baghdad, d. 241/855; for his biography and work cf. Spector, *Aḥmad b. Ḥanbal*, 85 ff.

Awzā'ī⁷² and the Zāhirites,⁷³ which have now ceased to exist, as well as the short-lived school of al-Ṭabarī (d. 310/923),⁷⁴ who is famous as a Quran commentator and historian. A scholar – not a layperson – had to join a school of law and, according to later and controversial⁷⁵ opinion, also follow its pronouncements on principle and in detail.⁷⁶ Adopting the different views of a different school would not then be possible any more.⁷⁷

On the whole the Sunni schools of law recognised one another, although in the period following the formation of the schools some, partly very polemical, texts were written on the divergent opinions of the schools (*ikhtilāf al-madhāhib*). The Hanafite judge al-Balāsāghūnī (d. 506/1112) is quoted as saying that he would like to subject the Shafi'ites to the poll tax (*jizya*, levied on non-Muslims), if only he had the power.⁷⁸ There are also some accounts of violent disagreements between followers of the different schools.⁷⁹ On the other hand, medieval scholars developed theories aiming at the acceptance of 'legal pluralism' beyond exceptional cases of mere necessity.⁸⁰ In practice, the pluralism of schools was repeatedly used for obtaining pragmatic solutions of legal problems e.g. in family law 'within' the system (cf. 1.2.b.gg) below).

There is, however, a remarkable variety of opinion on numerous important questions even within the respective schools. This is true of the place of the application of the law within the specific social context as well as the attitude towards the doctrine of the sources of the law and its practical implementa-

72 Al-Awzā'ī, d. 157/774; regarding him and his works Bouzenita, 'Abdarrāḥmān al-Awzā'ī, with annotated translation of the passages concerning him (al-radd 'alā siyar al-Awzā'ī) in al-Shāfi'ī's Kitāb al-umm, op. cit., 243 ff.; concerning members of his school cf. Gerhard Conrad, Die quḍāt Dimašq und der madhhab al-Auzā'ī. Materialien zur syrischen Rechtsgeschichte, Beirut 1994.

73 Named after Dāwūd al-Zāhirī, b. ca. 200/815, d. 270/884 in Baghdad, cf. Goldziher, Die Zāhiriten; Melchert, Formation, 178 ff. For the development of the school and its doctrine cf. Osman, The Zāhirī *Madhhab*. The most important member was the Andalusian Ibn Ḥazm (d. 456/1064); for more information on him cf. Adang et al. (eds.), Ibn Ḥazm of Cordoba, 2013; Kaddouri, Ibn Ḥazm, 21 ff.; regarding the extent of the school in al-Andalus cf. Adang, Beginnings, 117 ff.

74 Regarding his school cf. Melchert, Formation, 191 ff.

75 Cf. Weiss, *Madhhab*, 5 ff. with further references.

76 Cf. Ibn Khaldūn, *Al-muqaddima*, 448 f.

77 Al-Nawawī (AH 631–676), *Adab al-fatwa wal mufti: wal mustafti*, 40.

78 Šibṭ ibn al-Jawzī, *Mir'at al-zamān*, 44; Talmon-Heller, *Fidelity*, 109.

79 Cf. Talmon-Heller, *Fidelity*, 109 f. with further references.

80 Cf. Ibrahim, *Al-Sha'rānī's Response*, 110 ff. with further references.

tion.⁸¹ Thus for instance the question of whether the extended clan (*‘āqila*) of a perpetrator who had committed a negligent (*khaṭā’*) or conditionally wilful (*shibh al-‘amd*) killing or injury would be liable as well, would be answered differently depending on the regional situation. Jurists from Khorasan, for instance, argued that this extended liability was based on the social structure prevailing among the Arab tribes and their system of mutual aid and support, whereas structures in Khorasan were different.⁸² It is also frequently pointed out that even the great theorist and founder of a school al-Shāfi‘ī altered his opinion on certain questions due to the different situation in Iraq and later in Egypt.⁸³

Another instance of the variety of opinions within one school is one of the early works of the Hanafite school, penned by the great jurist Abū Yūsuf and entitled *Ikhtilāf Abī Ḥanīfa wa ibn Abī Laylā*,⁸⁴ in which he presents and comments on different opinions of his two teachers named in the title. In view of this internal variety, too brief a characterisation of these schools as, e.g., traditionalist, pragmatic, liberal, or theory-oriented, becomes impossible, although it has been attempted repeatedly.

The schools emerged and spread in certain regions, but not strictly separated from one another. The Hanafite school dominated in Iraq early on, later also in Transoxania (central Asia), in the Ottoman Empire⁸⁵ and in the Mughal Empire in India. After first beginnings in the Hejaz, the Malikite school dominates in the Maghreb. Shafi‘ites are mainly found in Egypt, Syria, East Africa and South East Asia. The smaller Hanbalite school with its centre in Baghdad would later be characteristic of the Arabian Peninsula. In urban centres, other schools than the dominating one were also frequently found, as well as judges affiliated to them.⁸⁶

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81 Cf. Kaya, *Community*, 30 ff.; regarding the specific situation in the Shia cf. Gleave, *Intra-Madhab Ikhtilāf*, 126 ff.

82 Cf. Kaya, *Community*, 31 with further references from Abū ‘l-Layth al-Samarqandī’s *Kitāb al-nawāzil*.

83 Cf. Dağcı, *Ḥayati ve Fıkıh usulü ilmindeki yeri*, 41; Krawietz, *Hierarchie*, 308 with further references; Salqinī, *Al-muyassar*, 44; Prof. El Kosheri, President of the Université pour le Développement Africain in Alexandria, during a conference on ‘Islamic Law and its Reception by the Courts in the West’ on 22–24 October 1998 in Osnabrück.

84 Ed. by Abū l-Wafā al-Afghānī, Cairo 1357/1938; discussed by e.g. al-Sarakhsī, *Kitāb al-mabsūt*, vol. 30, 128 ff.

85 Regarding their standardisation and development as the ‘official’ school cf. Peters, *What does it mean*, 147 ff.

86 Cf. Tyan, *Histoire*, 172 ff., esp. 174.

Rather later, three significant schools developed in the Shia: the Imāmiyya or Twelver Shia, which predominates today, the Fiver Shia or Zaydiyya, and the Sevener Shia or Ismāʿīliyya. The small number of Ibādītes in North Africa and Oman the Khārijite tradition, who differ from Sunna and Shia in the central questions of legitimate rule.⁸⁷

In the formative period of the Shiʿite schools, many Imamite scholars studied under Sunni teachers.⁸⁸ Due to the chronologically later emergence of different schools, Shiʿite doctrine must be seen as a critical debate with the Sunnis and their understanding of state and law. There were only infrequent attempts at uniting Sunna and Shia under one roof of mutual recognition. Sunna and Shia were and are often in hostile opposition to one another. Thus the Shiʿites' traditional execration of the first three caliphs, who are highly revered among the Sunnis, remains a source of tensions.

Such antipathies and hostile attitudes had to have a disruptive effect on a legal system ultimately based on the one God and the practice devised by his messenger Muhammad. A legal concept claiming to be self-contained requires a specific explanation if disagreements occur between parties who are equally qualified to interpret the law. Islamic law has found this explanation in the, probably apocryphal, hadith 'disagreements among my community are a blessing' (*inna ikhtilāfa ummatī rahma*⁸⁹). A jurist of Western secular tendency will refrain from any rash mocking of such explanations; after all, he will be familiar with the sarcastic comment of 'two lawyers, three opinions', and aware that as one seeking legal solutions he can do no more than offer an honest endeavour to achieve success (which is after all always uncertain) in his deduction of laws.

31 Not the least of the problems of a legal system with a religious point of reference is the possibility of wrong decisions. Islamic law has found a pragmatic attitude that, as is so often the case, can be justified on a religious level as well. According to this view, the duty of the small, fallible human – including in his manifestation as a jurist – cannot be more than an honest endeavour to find the

87 Cf. EI II, vol. 4, art. 'Khārijītes' (della Vida).

88 Cf. Stewart, *Islamic Legal Orthodoxy*, 63 ff. with further references.

89 Regarding authenticity cf. al-Qaraḏāwī, *Al-ṣaḥwat al-islāmiyya*, 70 with further references, as well as the article 'Ikhtilāf', EI II, vol. 3, 1061 f. (Schacht); according to this, the opinion on which it was based is first found in Abū Ḥanīfa. Despite its rank, hadith is also used in the current debate, e.g. by the then director of the Institute for Islamic Law of the Law Department of the University of Istanbul, Armagan, on the occasion of a conference on 'Islamic Law and its Reception by the Courts in the West' on 22–24 October 1998 in Osnabrück.

correct solution: *kullu mujtahid muṣīb*,⁹⁰ ‘everyone who exerts himself is doing the right thing’, is the consoling helping hand, the proverb according to which one who fails while endeavouring to find a just solution will receive one reward, but he who actually finds the just solution, two rewards.⁹¹ Caliph ‘Umar’s asking the legal scholar Abū Mūsa al-Ash‘arī not to cling on to a decision that had been recognised to be wrong, but rather to correct it, expresses a similar point of view.⁹²

In the legal literature at least, the legal scholar, and in particular the judge, enjoys great esteem. His activity is said to be among the noblest of religious deeds, for out of the just judicial verdict grows justice, and justice is the foundation on which rest heaven and earth.⁹³

The emergence of schools of law is connected chronologically and in substance to the struggle for the legitimate leadership of the community: who should succeed the prophet Muhammad in his office as head of the congregation? Could there even be a ‘representative of God’ on earth? During the Umayyad caliphate (661–750) the caliphs’ claim to power does not seem to have met with any sustained legal challenge from the legal profession, certainly not in the sense that they would have claimed the power for themselves in the caliph’s stead. On the contrary, from the end of the first/seventh century onwards the Umayyad caliphs were regarded not merely as the representatives/successors of God’s messenger (*khalīfat rasūl Allāh*) but in fact as God’s representatives (*khalīfat Allāh*);⁹⁴ however, the exact dimension of this term is quite unclear.⁹⁵ Seen in this way, the legal scholars would have had to be content with a comparatively subordinate position, but they were obviously not prepared to accept it. Later texts show a clear anti-Umayyad bias.⁹⁶ The dynasty’s legitimation appears to have been gradually called into doubt for various reasons, mainly political, economic and social, which would ultimately lead to its downfall around the middle of the second/eighth century.

90 For a detailed study cf. van Ess, *Kull muṣṭahib muṣīb*, 123 ff.; Krawietz, *Hierarchie*, 327 ff. with further references; Johansen, *Contingency*, esp. 35 ff.

91 Quoted in al-Shāfi‘ī, *Al-risāla*, 494; cf. also Abū Dāwūd, *Sunan*, part 2, ḥadīth 3576; also Muslim, *Ṣaḥīḥ*, ḥadīth 4584 (*Thesaurus Islamicus foundation* 2000, 609, or 746).

92 Cf. al-Māwardī, *Al-aḥkām*, 91; al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 16, 60; also Mahmassani, *Falsafat*, 97; Muslehuddin, *Islamic Jurisprudence*, 57.

93 Al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 16, 59 f. with further references.

94 Cf. Noth, *Früher Islam*, 84; Rotter, *Die Umayyaden*, 33 f., as well as Crone/Hinds’ inspiring study *God’s Caliph*, 1986. A silver dirham minted in 75/694–695 indeed shows an upright caliph’s figure with the inscription *khalīfat Allāh*.

95 Cf. Afsaruddin, *Mawdūdī’s ‘Theo-Democracy’*, 315 ff.

96 Concerning this power struggle cf. Crone/Hinds, *God’s Caliph*, esp. 43 ff.

In the early years of the subsequent Abbasid caliphate (750–mid-ninth century), advocates of assigning the caliph far-reaching powers clashed with those who wanted the legal scholars to have the final say on the legitimacy of the caliph's actions. The most prominent representative of the former opinion was probably Ibn al-Muqaffa'.⁹⁷ He supported – albeit unsuccessfully – the establishment of a strong central power which would then enact a unified legal cod.⁹⁸ On the other hand he, too, argued against blind obedience towards an unjust ruler in those matters which God decreed to be a duty or which he made punishable.⁹⁹ Serious disagreements followed at the time of the greatest display of power on the caliphs' part in the early third/ninth century. The Mu'tazilites, a theological tendency following a strongly rational argumentation, gained the support of the caliph al-Ma'mūn and his successors. The extremist monotheistic dogma of the Quran's 'createdness', on the other hand, met with grim and ultimately successful resistance on the part of many more traditionally oriented scholars, some of whom were ruthlessly persecuted as a result (era of 'trials', *miḥna*).

In the end, however, the scholars were able to decide this debate over the legal theory of the right of the final decision in their own favour.¹⁰⁰ This is illustrated by Aḥmad ibn Ḥanbal's (d. 241/855) progression from prison inmate to esteemed founder of one of the four enduring schools of law in Sunni Islam. There is no more mention of being God's representative. On the contrary, the works of the important Shāfiite theorist of state law and chief justice of Baghdad al-Māwardī¹⁰¹ (384/994–450/1058) contain the statement: 'The imamate has been appointed for the succession of the prophethood under the protection of religion and the administration of secular affairs.' In the fifth/eleventh century al-Juwaynī¹⁰² went so far as to demand that the caliphs should treat legal

97 Cf. his memoir of the 'Abbasid caliph al-Manṣūr entitled *Risāla fī l-saḥāba*, 345 ff. Cf. also al-Azmeh, *Muslim Kingship*, 101 f.; on his eventful biography and critical reception cf. van Ess, *Theologie und Gesellschaft*, vol. 2, 22 f.

98 *Risāla*, esp. 354; regarding this cf. Goitein, *A Turning Point*, 149 ff.

99 *Risāla*, 348 f.: he gives the examples of holding the ritual prayer, fasting (during the month of Ramadan), pilgrimage to Mecca and the *ḥudūd* (cf. Part 2, 4.7.b. below).

100 Cf. al-Azmeh, *Muslim Kingship*, esp. 101 ff., Stewart, *Islamic Legal Orthodoxy*, 30; regarding the tension between *fiqh* and *siyāsa* and the scholars' successful strategies of asserting themselves cf. Vogel, *The Rule of Law*, 133 ff.; a concise summary of the background is found in Endreß, *Der Islam*, 61–64.

101 Al-Māwardī, *Al-aḥkām*, 5. Cf. the English translation by Wahba, *The Ordinances*, 3.

102 Abū l-Ma'ālī ibn 'Abd al-Malik, d. 478/1085; teacher of Abū Ḥāmid Muḥammad al-Ghazālī, d. 505/1111.

scholars like the prophet himself, as they had inherited the cloak of prophethood.¹⁰³ Scholars (*‘ulamā’* and *fuqahā’*) would from then on be called *ūlī’l-‘amr* in works on the subject,¹⁰⁴ to whom according to sura 4:59 obedience was due as to God and his messenger; some name them together with the secular rulers (*umarā’*, pl. of *amīr*).

Legal scholars acquired and consolidated their importance through the institutionalisation of schools of law, offices linked to these schools such as judges, and educational establishments (*madāris*, sg. *madrasa*). This is true not only of the Sunni schools but also – with certain idiosyncrasies and rather later in time – of the moderate groups in the Shia. The contemporary author Aziz al-Azmeh¹⁰⁵ is of the opinion that the influence of the jurists led to a sacralisation of secular matters. Others mention the exaggerated veneration of the founders of schools and the concomitant submission to one’s own school of law, as if imam and law-maker (*shāri’*) were exchangeable.¹⁰⁶

However, this influence was disrupted in many ways. In the history of the Islamic world the rulers are legion who paid no heed to the opinions of legal scholars. In view of the size and cultural diversity of the vast territory, this is not really surprising. Texts on the subject also show a corresponding contrast throughout the centuries: besides the relatively small number of works on constitutional law we find a great many ‘mirrors for princes’ with advice on how to be a good ruler, very famous among them e.g. the *Sīyāsat-nāmeḥ* by the Seljuk vizier Niẓām al-Mulk. These works unite ideas of Islamic law with the Iranian tradition of a government oriented towards kingship.¹⁰⁷

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Legal scholars consequently had to deal with the question of up to which point an ‘unjust’ ruler might deserve loyalty. Sunni jurists went through a remarkable quietist development between the tenth and fourteenth centuries, moving away from an ‘ideal caliphate’ towards coming to terms as much as possible with the actual circumstances. This development was driven by the frequently expressed conviction that sixty years under a tyrannical ruler are better than one night without a ruler.¹⁰⁸ Shi‘ites, rarely in power and often persecuted, had to develop strategies to bear the secular power they saw as

103 Ghiyāth al-umam, 107; al-Azmeh, Muslim Kingship, 103 with n. 94; cf. also a similar ḥadīth in al-Bukhārī, Ṣaḥīḥ, Thesaurus Islamicus Foundation edition, 2000, vol. 1, ḥadīth no. 67, p. 21.

104 Cf. Wizārat al-awqāf, Al-mawsū‘a, vol. 28, 324 f.

105 Muslim Kingship, 102.

106 References in Krawietz, Hierarchie, 75.

107 Cf. the studies by Leder, Aspekte, 120, 134, 137 and *passim* with further references.

108 Cf. Ibn Taymiyya, Al-sīyāsāt al-sharī‘a, 139.

non-legitimate (cf. 2.8.b below). At the same time the political powers were also granted the authority to make decisions in administrative matters (*siyāsa*) and of determining which one from among a number of possible interpretations should be seen as binding. This refers to the execution of secular power as expressed in al-Māwardī's¹⁰⁹ complementary description: the ruler is called upon and has the power to make political and administrative decisions within the limits set by the sharia (*siyāsa sharī'a*).¹¹⁰ It is from this perspective that the contemporary Muslim scholar Azifa Quraishi arrives at the conclusion that 'it could be said that when a state makes a *siyasah*-rule for the public good, then the state is acting consistently with its Islamic obligation to uphold the Sharī'ah, because *siyasah* that serves the public good is part of the Sharī'ah (as long as it does not force Muslims to sin)'.¹¹¹

This illustrates that pragmatic solutions were frequent occurrences in the history of Islamic Law. Furthermore, it is likely that in many cases legal disputes were resolved outside of courts, or at least through amicable settlement. Concentrating exclusively on material laws would consequently ignore essential sections of the law. Most people are not interested in legal texts or deliberations leading to the deduction of laws, but in the results of the implementation of laws – in their favour, if possible. In theoretical texts as well as texts concerning actual legal practice we can find a multitude of regulations and guidance aimed at avoiding litigation before the courts in the case of legal disputes. Mandatory attempts at conciliation, or simply social pressure, can be a very effective means towards producing legal stability,¹¹² even though the, possibly written, law might lead to other results of litigation, which might in fact be less peaceable. The orientalist Hermann Vámbéry, for instance, reports from central Asia during the late nineteenth century, describing credit transactions among Turkmens with unusual securities in place. A bill was made out as security and remained with the debtor (who was granting the security; the assignor). The creditor (who was accepting the security; the assignee) was happy with this, explaining that the debtor would need the document to remind him of his debt.¹¹³ Asserting one's claims was

109 Al-Māwardī, *Al-aḥkām*, 5: the imamate is appointed 'to preserve religion (*dīn*) and to administer secular matters (*siyāsāt al-dunyā*)'.

110 Cf. Ibn Qayyim al-Jawziyya, *Al-ṭuruq al-ḥukmiyya*, 19 ff.; El-Awa, *On the Political System*, 79 f., refers to him (Arab. original *Fī l-nizām al-siyāsī li-l-dawlat al-islāmiyya*, Cairo etc. 1975).

111 Quraishi, *The Separation*, 66; cf. also Fadel, *State*, 99 f.

112 Cf. the example quoted in Rosen (*The Justice of Islam*, 86 ff.) of a dubious husband who wants to uphold the marriage against the wife's wishes.

113 Vámbéry, *Mohammed in Asien*, 150.

obviously not a problem within the social context, and consequently formal legal positions were superfluous.

In the absence of a social context in which these comparatively rigid regulations might be firmly integrated and which could then insist on a compromise, the 'frightening skeleton of petrified norms' described by Christian Wichard¹¹⁴ might be all that remains. Indeed, this will become increasingly significant in the case of the modern implementation of the law.

4 Courts and Jurists within the State Structure

There were no detailed regulations of the structures of the judiciary at the time of the early Muslim community in Medina. Overall, matters of state structure were of secondary importance during Muhammad's life.¹¹⁵ The succession of the prophet (unresolved according to the opinion of the majority), and the crisis immediately after Muhammad's death, provide eloquent proof. We only find sporadic pieces of historically verifiable information on the early development.¹¹⁶ The idea of a comparatively self-contained system only emerges in the great works of legal literature of the classical period from the third/ninth century onwards. They usually discuss all these matters in a separate chapter entitled *adab al-qāḍī*, or in specific sections dealing with, e.g., witness statements (*shahādāt*).¹¹⁷

We may safely assume that disagreement between Muslims would at first be resolved by the age-old tradition of arbitration (*taḥkīm*)¹¹⁸ and then gradually in the style of a court by respected men who would follow the relevant rules of the Quran or the prophet's and his recognised secular successors' (the caliphs) practice, insofar as they were familiar with it;¹¹⁹ they could furthermore refer to

114 Wichard, *Recht und Religion*, 533, 544.

115 Regarding the legal system, Tyan, *Histoire*, 64 ff. and *passim*.

116 Tyan's study, *Histoire*, is still the fundamental and definitive book.

117 Cf. e.g. al-Sarakhsī, *Kitāb al-mabsūt*, vol. 16, 59–197.

118 Cf. Tyan's pertinent research, *Histoire*, 64 ff. with further references.

119 The practice of referring back to the prophet's and his companions' legal verdicts was only later given a form defined by legal theory. Justified criticism of the authenticity of many details notwithstanding there are no sufficient indications of Islamic tradition as a whole having undertaken a sweeping, ahistorical reconstruction. We must also bear in mind that oral tradition, which is not tangible anymore, always carried great weight in the Arabian culture area, as instanced in the later law of evidence which recognises witness evidence as central and carrying more weight than written documents.

existing rules and their own sense of justice.¹²⁰ There would have been much improvisation in these cases; after all, some of the judges are said to have been illiterate. And there was no systematic instruction in legal matters.

In his biographies of judges, Muḥammad ibn Khalaf ibn Ḥayyān Wakī' (d. 306/918)¹²¹ records verdicts of earlier judges the substance of which would certainly not be supported by later law. Thus he tells us¹²² of the illiterate judge 'Ābis ibn Sa'īd from Fustāṭ who, when examined by the new provincial governor in the year 65/684, admitted to being unfamiliar with Quranic inheritance law (*al-farā'id*). Even so, he retained his office; the governor was satisfied with his answers as he judged according to his knowledge and always asked to find out what he did not know. Around the same time we can distinguish a clear increase in the study of prophetic traditions, often by judges themselves.¹²³ Clearly it was desirable for the judiciary in a growing empire with a new dominant religion to have a more secure foundation. Wael Hallaq makes a connection here with the tribal Arab striving for consensus in which following the decrees of the ancients is a custom held in high esteem.¹²⁴

In the Umayyad era (41–132/661–750) the office of judge gradually took shape.¹²⁵ The judge (*al-qāḍī*, pl. *quḍāt*) was a judge sitting singly¹²⁶ responsible for his district (*wilāya*) and at first dependent on the provincial governor (*al-wālī*).¹²⁷ According to accounts from the Abbasid era, areas of jurisdiction

120 Cf. Hallaq, *Origins*, 34 ff.

121 Akhbār al-quḍāt, part 3, 631 ff.

122 Op. cit., part 3, 632. Hallaq (*Origins*, 39 with n. 26) considers this account to be authentic precisely because of this extraordinary result. It is true that there would be genuine doubt only if targeted anti-Umayyad propaganda could be proved to be behind the account, of which there is no indication.

123 Cf. Hallaq, *Origins*, 49 ff.

124 Op. cit., 51.

125 Regarding the gradual replacement of the pre-Islamic arbitrator (*ḥakam*) and the outline of the institutionalised office of judge in the Quranic provisions cf. Gräf, *Gerichtsverfassung*, 48, esp. 56 ff. On the general development up to the present cf. the concise account in Schneider, *Qāḍī*, 55 ff., with numerous references.

126 Cf. Tyan, *Histoire*, 212 f.

127 Cf. Hallaq, *Origins*, 79; regarding a judge's precarious position in practice cf. Coulson, *Doctrine*, 211 ff. Hallaq's claim (*Origins*, 83) that judges enjoyed a considerable degree of independence is hardly borne out by the sources. Hallaq's own example of an Egyptian judge who defended himself against the governor of Egypt's intervention (releasing a prisoner awaiting trial) by resigning his office illustrates the high degree of dependence: the governor did not accede to the judge's demands to reinstate him in his office, but instead appointed another judge.

might, however, also be shared or overlap.¹²⁸ It was probably during the time of the caliph Mu'āwiya that judges were granted jurisdiction in criminal matters as well. A certain Sulaym ibn 'Itr is said to have been the first judge in the Egyptian administrative centre Fustāṭ to exercise this jurisdiction.¹²⁹ Later the specialist field of responsibility of the military judge emerged (*qāḍī al-askar*).¹³⁰ There was disagreement among jurists regarding the question of whether women were excluded from the office of judge, or whether they might hold the office of judge with more limited competences.¹³¹

Caliph Sulaymān (96–99/715–717) is said to have been the first ruler to appoint a judge directly.¹³² It was probably also around this time that the office of court scribe (*kātib*) became established; also further support staff to look after the administrative side of things.¹³³ Court witnesses were also appointed,¹³⁴ a practice which survives to this day in some parts of the Islamic world.¹³⁵ The office of the *ṣāhib al-masā'il* was responsible for inspecting their qualifications.¹³⁶

There were no specific court buildings. The person of the judge was important; he might convene a hearing (*majlis*) in any suitable place.¹³⁷ In centres such as Mecca, Medina, Kufa and Basra, and to a lesser extent also in Fustāṭ, Damascus, Yemen and Khorasan, groups of people with special knowledge in the areas of religion and law soon formed, who studied such matters because of their religious convictions. They were also consulted by judges with less knowledge.¹³⁸ Gradual textualisation and systematisation of the law accompanied

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128 Hallaq, *Origins*, 80 ff. with further references.

129 Al-Kindī, *Kitāb al-ʿumarāʾ*, 309.

130 Cf. Tyan, *Histoire*, 530 ff.

131 Concerning the diverging opinions cf. op. cit., 161 ff. with further references. E.g. according to al-Marghīnānī (*Al-hidāya*, vol. 2, 106) women were able to give judicial verdicts in all matters except for Quranic criminal law and talion law (*qisaṣ*).

132 Al-Kindī, *Kitāb al-ʿumarāʾ*, 333, 335 f.

133 Cf. Hallaq, *Origins*, 87 ff.; Tyan, *Histoire*, 254 ff. with further references.

134 Hallaq, *Origins*, 61 with further references.

135 Cf. e.g. for Morocco Buskens, *Tales*, 143 ff.

136 Op. cit., 85 ff. with further references.

137 Op. cit., 59 with further references. On the sequence of events during a hearing cf. Najm al-Dīn al-Ṭarsūsī (Hanafite chief justice of Damascus, d. 758 or 760/1356 or 1358), *Kitāb al-i'lām*, partially edited and revised by Guellil, *Damaszener Akten*, 334 ff.; Tyan, *Histoire*, 275 ff. Regarding the image of the judge in the relevant literature cf. Schneider, *Das Bild des Richters*, 1990.

138 Hallaq, *Origins*, 62 ff. with further references; in detail concerning the consultation of experts in Tyan, *Histoire*, 214 ff.; cf. also al-Shāfiʿī, *Kitāb al-umm*, vol. 7, 157 f.

this development, even though typically there would still be no written law books. Relevant texts, insofar as they can be reconstructed, while discussing individual practical problems, quote Quranic instances, prophetic instances which were increasingly seen as legally binding, and – mainly – scholars' opinions. Of course there was some legislation by the caliphs or their representatives, but it was not collected and has mostly been lost. At the same time the Umayyad dynasty, which ruled until ca. 132/750, was plunging ever deeper into a crisis of legitimation. One of the reasons for this crisis, besides ethnic and power-political aspects, was the accusation that the rulers (with the exception of 'Umar II,¹³⁹ 99–102/717–720, who was often set apart) did not adhere to the principles of Islam.

The Abbasid dynasty that followed (from 132/749–750 onwards) did strive for greater legitimation. This fuelled the legal scholars' increasingly firmly raised claim that the final decision should lie with them. At the same time a chasm opened up between the emerging literature of legal theory and legal practice, form and extent of which are much debated to this day. It is certain that the early Abbasids still commanded a central power, which is illustrated by Harun al-Rashid's appointing the prominent Hanafite scholar Abū Yūsuf (d. 182/798) from Kufa chief justice (*qāḍī l-quḍāt*).¹⁴⁰ The appointment of judges by the caliph himself rather than the provincial governor became customary. Provincial judges in turn had some say in the appointment of their deputies/district judges (*nawwāb*, sg. *nā'ib*) who would usually have limited competences.¹⁴¹

37 There is evidence of the increasingly professional status of judges over the course of the second/eighth century, accompanied by comparatively generous remuneration.¹⁴² The sources contain regulations concerning bias, as well as explicit references to the prohibition of accepting gifts from the parties in a legal case.¹⁴³ For instance, according to al-Māwardī¹⁴⁴ a judge should not be bound in his decision by statements of members of his own school of law: his activity is a task which requires independent reasoning (*ijtihād*); consequently the duty of accepting the tenets (*taqlīd*) within one school does not apply. Par-

139 One of the first initiatives to collect prophetic traditions is also attributed to him; cf. Hallaq, *Origins*, 71.

140 Cf. Tyan, *Histoire*, 128 f.

141 Cf. Hallaq, *Origins*, 80 f. with further references.

142 Cf. Hallaq, *Origins*, 96 ff.; regarding their remuneration from the public purse (*bayt al-māl*) cf. Abū Yūsuf, *Kitāb al-kharāj*, 186 f.

143 E.g. al-Māwardī, *Al-aḥkām*, 96 f.

144 Op. cit., 86.

ticularly remarkable, among others, is the instance of this view attributed to the second caliph ‘Umar ibn al-Khaṭṭāb. When asked about his changing judgment on a particular question, he answered simply that in the past year he decided one way, and now differently. This opinion was, however, distinctly controversial.¹⁴⁵ Accounts have been transmitted from fifth-/eleventh-century Andalus according to which the legal council (*shūrā*) of prominent scholars (of the Maliki school) was consulted during trials to aid decision making.¹⁴⁶

Classical Islamic law did not have any stages of appeal. Verdicts by any ‘level of authority’ were consequently definitively final. But there were no fixed rules, even rudimentary ones, regarding legal validity, and there are accounts of cases in Egypt during the late second and third/ninth century where judges revised the judgments of their predecessors.¹⁴⁷

In this context, a facet of the tension between legal scholars and judiciary on the one hand and the caliphs’ administration on the other is the institutionalised ‘complaining about injustice’ (*mazālim*¹⁴⁸) to the caliph or his ministers (*wazīr*, pl. *wuzarā*, ‘vizier’) and provincial governors.¹⁴⁹ According to information from judges’ biographies and legal source texts¹⁵⁰ isolated cases were already raised during the Umayyad era (the caliph ‘Umar ibn ‘Abd al-‘Azīz is mentioned by name), and a greater number of more clearly defined cases occurred under the Abbasid dynasty around the middle of the second/eighth century from the time of the caliph al-Mahdī (r. 158–169/775–785) onwards.

This institution must be seen as a court to which people could appeal with regard to decisions made by the executive, and represents a logical perpetuation of the caliph’s administrative authority (*siyāsa* – authority; cf. also Part 2, 2.2 below). We have only little knowledge regarding the type and extent of this institution; it does not appear to have enjoyed any particular popularity

145 Put into perspective in Fysee, *Outlines*, 79, as also already Najm al-Dīn al-Ṭarsūsī (Hanafite chief justice of Damascus, d. 758 or 760/1356 or 1358), *Kitāb al-i‘lām*, partially edited and revised by Guellil, *Damaszener Akten*, 332f., according to whom Hanafite judges were permitted to delegate certain matters to Shāfi‘ite judges. The Hanafite judge, however, was not permitted to agree to an opinion which contradicted that of his own school.

146 Cf. the references in Ch. Müller, *Gerichtspraxis*, 103f., 151ff., 363ff.

147 Al-Kindī, *Kitāb al-‘umarā*, 403, 404, 474f.; Hallaq, *Origins*, 83.

148 Plural of *mazlama*, here: unjust action. For a detailed account cf. Tyan, *Histoire*, 433ff.

149 Both the latter are mentioned by e.g. al-Māwardī (*al-aḥkām*, 97) in the context of *mazālim*; cf. also al-Zuhaylī, *Al-fiqh al-islāmī*, vol. 6. 759.

150 Cf. al-Māwardī, *Al-aḥkām*, 98.

in books written by legal scholars. However, in some contexts it is seen explicitly as a constituent of the caliph's governance in accordance with Islamic law (*siyāsa sharʿīya*).¹⁵¹ In any case it was not a developed authority for the review of court verdicts, but rather seems to have put in an appearance only sporadically.¹⁵² There are records of administrative disputes in particular, which this institution was called upon to deal with.¹⁵³ There was no strict division of authority between *mazālim* and sharia courts. Their boundaries changed with the power political constellations. Still, the classical institution of the *mazālim* has remained the model court in certain parts of the Islamic world. Together with other instances of judiciary administration it represents the beginnings of a further development of Islamic law outside the sharia courts, which tended to be rather rigid. Irene Schneider reaches the conclusion that it is possible to discern a dichotomy between the sharia courts and a state jurisdiction in some degree of competition with it even during the pre-modern era.¹⁵⁴ The development of different situations varied, however: while the *mazālim* institutions were abolished in the Ottoman Empire, they played an important part in Mamluk Syria and in the Mughal Empire.¹⁵⁵

Among the cases reviewed were for instance administrative decrees¹⁵⁶ regarding tax matters or state payments of wages, but also complaints about incompetent or corrupt judges or measures taken by the administration of religious foundations. It was also possible to intervene when the position of a judge was vacant, or when judges were not able to enforce their verdicts.¹⁵⁷ There appears to have been sufficient cause: At the end of his remarks on judges' pay the Baghdad chief justice and prominent Hanafite jurist Abū Yūsuf deplors the many negligent judges who did not fulfil their duty and did not prevent their subordinates wasting the fortunes of orphans and those entitled to legacies.¹⁵⁸

151 Cf. Tyan, *Histoire*, 447, on the attitude of the Malikite school; the Shāfiʿite author al-Māwardī integrates it quite matter-of-factly into his system of constitutional law (*al-aḥkām*, 96 ff.) Cf. also Quraishi, *The Separation*, 63, 65 ff. with further references.

152 Cf. Hallaq, *Origins*, 99 ff. with further references; Tyan (*Histoire*) speaks of a subsidiary function.

153 Cf. the instructive study by Nielsen, *Secular Justice in an Islamic State*, 1985, esp. 35 ff.

154 Schneider, *Qāḍī*, 55, 71, 75.

155 Hallaq, *Shariʿa*, 208 ff. with further references.

156 Thus al-Zuhaylī (*Al-fiqh al-islāmī*, vol. 6, 757) interprets them as a kind of administrative courts.

157 Cf. al-Māwardī, *Al-aḥkām*, 101 ff.; Hallaq, *Origins*, 100 f.

158 Abū Yūsuf, *Kitāb al-kharāj*, 187; numerous further references in Tyan, *Histoire*, 295 f., 299 ff.

In the case of affairs which did not fall under criminal law¹⁵⁹ but could be decided by the parties involved themselves, there was not only the possibility of judicial settlement of disputes but certainly also of informal amicable settlement by arbitration (*taḥkīm*)¹⁶⁰ or other forms of conciliation.¹⁶¹

5 Presenting the Evidence in Court

The foundation of the law of evidence is a statement attributed to Muhammad,¹⁶² according to which the burden of proof is on the plaintiff, while the defendant (denying his guilt) must take the counter-oath contradicting him. This archaic form of evidence results in a multitude of practical problems. To mention but one example, while the partners in a limited partnership can commit one another under the law, they are not able to take one another's place during a trial when it comes to taking the oath. Consequently it is not impossible that the partner required to take the counter-oath is one who may not even have been present when the business transaction was concluded.¹⁶³

Islamic law places the evidence of witnesses (*shahāda*) at the centre of the law of evidence.¹⁶⁴ In comparison with this, especially when it was confirmed by court witnesses, documents carried much less weight. Following a doctrine already established during the early period, purely documentary evidence was (in theory) not recognised.¹⁶⁵ This attitude becomes comprehensible before the background of the Arabian society of the seventh century, which did not have any written culture to speak of. Considering all the regional differences, oral tradition was particularly valued. Goethe¹⁶⁶ captured this in his verses on the 'pure east': 'How very important the word was there, because it was

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159 Cf. Tyan, *Histoire*, esp. 64 ff., on the vague delimitation of a judge's duties in the early period. For the later time cf. al-Marghīnānī, *Al-hidāya*, vol. 2, 108 (admissible in all matters with the exception of Quranic criminal law and talion law; cf. Part 2, 4.7.b, d below).

160 Based on sura 4,35; cf. also al-Zuhaylī, *Al-fiqh al-islāmī*, vol. 6, 756 f.

161 Cf. only Ch. Müller, *Gerichtspraxis*, 211 and ff. on inheritance disputes the involved judicial clarification of which one hoped to avoid.

162 Cf. al-Bukhārī, *Ṣaḥīḥ*, vol. 3, 116: *al-bayyina 'alā al-mudda'i wa-l-yamīn 'alā man ankara*; al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 17, 28 and ff.

163 Cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 19, 104 f.

164 Cf. Tyan, *Histoire*, 236 ff.

165 Cf. Wakin, *Function*, 4 ff.

166 *Westöstlicher Diwan*, Moganni Nameh/Buch des Sängers, Hegire, ed. by Hans-J. Weitz, 4th ed. Frankfurt/M. 1981, 9.

the spoken word'. Rudiments of this tradition survive to this day. It seems that members of a culture of oral tradition are able to commit information and experiences to memory to a very high degree, and recall them whenever needed. In this respect, the ground was prepared for making use of this skill as required by the law of evidence.

As far as documents were concerned, by the end of the second/eighth century the conviction had taken hold that documents were only valid if they could be corroborated by two witnesses.¹⁶⁷ Thus the evidence of a witness concerning the drawing-up and contents of a document is admissible.¹⁶⁸ The draft version of a debenture bond from third-/ninth-century Egypt reads as follows in translation: 'But if (...) they should raise claims or assert a liability (...) or if something is taken from them, everything claimed for every reason and cause will be at my expense and incumbent upon me, however much it may amount to. And the testimony concerning this is Abū Ja'far's testimony, may God make him highly honoured. And al-Ḥasan ibn Jidh' wrote it in his own hand in the month of Sha'bān, and he called God to witness in such and such a year, and he called God to witness against himself, and He suffices as a witness.'¹⁶⁹

However, written documents, for which Arabic gradually became the standard language, were becoming indispensable.¹⁷⁰ From the second/eighth century onwards they were kept in the judge's archive (*dīwān*). Among these documents, which were held separately in an envelope (*kharītha*),¹⁷¹ were court records (*maḥādir*) and the evidence relating to them together with the court's verdict (*ṣijillāt*, sg. *ṣijil*¹⁷²); also lists of the reliable court witnesses, lists of foundations' holdings, managers and employees, legal guardians and property trustees, registers of legacies, contracts and court correspondence.¹⁷³ From a later period we also have documentary evidence of directories of prisoners and warranties as well as legal representatives (*wukalā'*, sg. *wakīl*).¹⁷⁴

167 From the classical period cf. e.g. al-Marghīnānī, *Al-hidāya*, vol. 2, 105f. in the context of the exchange of documents between judges (the evidence of two men or one man and two women is necessary); Hallaq, *Origins*, 87f.; Tyan, *Histoire*, 237 with further references.

168 Cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 18, 172 and ff.

169 Cf. Grohmann/Khoury, *Papyrologische Studien*, 121f.; I have slightly changed their translation of the original document.

170 Cf. Tyan, *Histoire*, 253. For a comparatively early, extensive bundle of documents and charters dating from the fourteenth/fifteenth century cf. Saghbini, *Mamlukische Urkunden aus Aleppo, Hildesheim etc.* 2005.

171 Cf. e.g. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 16, 93; Tyan, *Histoire*, 194 with further references.

172 This is a loan from Latin *sigillum*, 'seal'.

173 One example regarding the Ottoman Empire is Niemöller, *Jurisdiktion*, 20 ff.

174 Cf. Hallaq, *Origins*, 92 ff. with further references; Tyan, *Histoire*, 194 f., 253 with further references.

Consequently documentary evidence in fact acquired essential significance. After all, Islamic law evolved in an environment of Byzantine or Sasanid bureaucracy which was based on writing, and proved to be significant for the further development in several respects.¹⁷⁵

By comparison, witness evidence is archaic in form. There is for instance disagreement on how many witnesses are sufficient or required to disprove a witness statement.¹⁷⁶ According to a widely held opinion women are not admitted in the field of serious crime (*ḥudūd* and *qīṣāṣ*) at all,¹⁷⁷ and in other cases not as the only witnesses. The reason for this may be found in al-Sarakhsī:¹⁷⁸ 'They (i.e. the women) lack understanding and religion as described by the prophet (...); they are furthermore ruled by aberration and forgetfulness, they are easily deceived and guided by emotions, and all this devalues their evidence (...)' The normative basis adduced is sura 2:282, which indeed contains a rule concerning the evidence required for a certain contractual agreement (the acknowledgement of a debt), namely evidence from two men or from one man and two women. Some modern authors have pointed out that this is a specific regulation which must be seen as belonging to its time: it reflects the typically small experience women would have had of such matters at the time of the revelation, and should consequently be understood in the context of that time. It should not be generalised, and by no means proves that women are less qualified to be witnesses.¹⁷⁹

We can only speculate concerning other mechanisms of the administration of justice, as there are long periods for which there are hardly any extant relevant written sources. We can, of course, assume that in homogeneous groups and under uniform living conditions social pressure against 'deviating behaviour' could take the place of formal law enforcement. Someone who would be ostracised if he committed certain acts and has no chance of escaping does not have to be prevented from committing these acts by the institutions of the state.

In addition there were effective transcendent mechanisms of imposing penalties, although there are some doubts as to their Islamic origins. The Hungarian Orientalist Hermann Vámbéry assumed the disguise of a dervish to travel in, among other places, the territory of the (Muslim) Turkmens in the

175 Cf. Wakin, *Function*, 2 f. with further references.

176 Cf. al-Sarakhsī, *Kitāb al-mabsūt*, vol. 16, 137 ff. with further references.

177 Cf. Anwarullah, *Islamic Law of Evidence*, 5, 22 ff. with further references.

178 Al-Sarakhsī, *Kitāb al-mabsūt*, vol. 16, 142.

179 Engineer, *The Rights of Women*, 62 ff.

years 1863/64. He tells of the theft of a horse from the local mullah.¹⁸⁰ The well-known thief, a member of a powerful clan, refused to return the horse. Now the culprit was accused before his ancestors, by driving a lance into a burial mound and hanging bloodied rags (in the case of murder) or a broken bow off the lance.
 41 As soon as the thief saw the lance that had been driven into his grandfather's grave, he returned the horse to its owner the very next night. He who has these means of enforcement at his disposal has no need of bailiffs.

6 Further Administrative Institutions

The development of other important administrative institutions such as the *shurṭa* (police)¹⁸¹ or the *ḥisba* (city administration, market inspectorate) is largely obscure. According to some later sources¹⁸² the first caliphs already appointed appropriate officials (*ṣāhib al-shurṭa*, sometimes also called *wālī al-aḥdāth* or *ḥāfiẓ*). The *shurṭa* – which would later be sub-divided into special branches in parts – was responsible in particular for the implementation of administrative decrees, including solving crimes and meting out the punishment,¹⁸³ and for upholding public order. In addition some cases of civil law might fall within its sphere of authority, such as disputes regarding contracts of sale.¹⁸⁴

It is unclear what its responsibility was in relation to the judicial competence in criminal cases. Some legal texts explicitly allocate to the courts (only) jurisdiction with reference to Quranic criminal law (*ḥudūd*) (regarding contradictory sources cf. 4.7.c below).¹⁸⁵ They distinguish between the actual trial on the one hand and the preceding investigation on the other. The latter should not be the responsibility of the court.¹⁸⁶ However, the sources are most dis-

180 Mohammed in Asien, 114–116.

181 Cf. Tyan, *Histoire*, 576 ff. regarding this and the description of duties.

182 Maqrīzī (*Al-khiṭaṭ*, 362) names Abū Bakr as the founder of the *shurṭa*; al-Balādhurī (*Futūḥ*, 82) names ‘Umar; al-Suyūṭī (*Ta’rīkh al-khulafā’*, 154) names ‘Uthmān; Al-Ya’qūbī (*Ta’rīkh*, 276), Mu’āwiya; Ibn Khaldūn (*Al-muqaddima*, vol. 1, 400, ed. by Quatremère) attributes the establishment to the Abbasids.

183 The highest person in charge is called *ṣāhib/ wālī al-gharā’im* (‘master over crimes’); cf. Tyan, *Histoire*, 595 and *passim*.

184 On the proceedings cf. Tyan, *Histoire*, 603 ff. with further references. The descriptions of cases from fifth-/eleventh-century Andalusia in Ch. Müller, *Gerichtspraxis*, 247 ff., are most instructive.

185 Cf. al-Māwardī, *Al-aḥkām*, 275.

186 Op. cit., 273 f.

parate.¹⁸⁷ Al-Kindī reports of conflicts of competencies between judges and governors in some *ḥadd* cases (consumption of alcohol, false accusation of fornication; see 4.7.b below) in the first half of the second/eighth century; in both cases the judges resigned.¹⁸⁸

Other cases which might overlap with private compensation for damages in parts could, if an action was brought, also be resolved by the courts. For the rest, they may have remained within the jurisdiction of the police administration; a view supported by the fact that the courts themselves were not able to conduct their own investigations.¹⁸⁹

The *ḥisba* is an institution which generally appears quite vague.¹⁹⁰ In the widest sense it refers to the Muslims' general duty of retaining the good and rejecting the bad. In a more narrow sense it includes the possibility of popular action (setting in motion of an action without being individually affected) on the one hand and certain administrative activities on the other, which would be conducted by the *muḥtasib* / *wālī al-ḥisba* or his aides.¹⁹¹ The responsibilities extend from general religious and moral policing¹⁹² to concrete activity such as inspecting markets, trades, roads and construction. Duties as well as personnel might well be the same as the 'police' (*shurṭa*).

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Outside of the courts there were notaries (*muwaṭṭiq*, *shurūṭī*). They drew up contracts in particular – the term *shurūṭ* denotes contract terms – and were consulted for legal advice.¹⁹³

187 Cf. Ibn Khaldūn (*Al-muqaddima*, vol. 2, 30 f.; vol. 1, 401, ed. by Quatremère), who points out that there were cases where the police (or indeed the judge) were assigned the entire proceeding. Similarly disparate are the sources in the documents quoted by al-Qalqashandī, *Ṣubḥ al-ʿashā*, vol. 10, 15, 22; 31, 39; 264, 270; vol. 11, 174 ff.; vol. 14, 340.

188 *Kitāb al-ʿumarāʾ*, 328; 356.

189 Cf. Tyan, *Histoire*, 595 ff., 600 ff. with further references.

190 Cf. Tyan, *Histoire*, 617 ff. with further references.

191 Cf. e.g. al-Māwardī, *Al-aḥkām*, 299 and *passim*.

192 Al-Māwardī (*Al-aḥkām*, 303) mentions e.g. the observation of the communal Friday prayer in inhabited areas.

193 Cf. Hallaq, *Origins*, 92.

The Development of the Dogmatics of Islamic Law

The Dogma of the Legal Sources and the Methodology of the Deduction of Laws from the Sources of Law (uṣūl al-fiqh)

1 Introduction

Like the development of the institutions of the law, the emergence of the dogmatics of Islamic law took place in a rather improvised fashion, heterogeneous and over a long time. The sources are comparatively sparse, in particular for the earliest period. Of the few texts that have been transmitted as books (*kitāb*, pl. *kutub*) by no means all were actually prepared for publication by the author named; a number are later compilations by pupils and others.¹ The wealth of works of legal literature does not date back further than the third/ninth century. On the whole we know very little about the degree of effectiveness they had in practice, as hardly any sources of everyday legal affairs, such as documents and charters which could provide the necessary information, survive from the time before the ninth/sixteenth century. It is remarkable that some of the fundamental texts were composed at the explicit request of rulers: this alone would suffice to relativise the, occasionally exaggerated opposition between scholars and political power.²

All of this is in stark contrast to the idea, widely held later, of a coherent system with a self-referential basis. According to this kind of traditionally grown understanding, the foundations of the sharia are God-given, and consequently immutable. As we mentioned at the beginning, the separation of legal norms and religious rules is indeed possible within Islam as well, even though their mutual boundaries are not always clearly defined. The two spheres do, however, share two important principles. Firstly: everything that is not forbidden is allowed (the so-called *ibāḥa aṣliyya*; cf. also 4.4.b below regarding contract law); secondly: there is no obligation unless there is a specific decree to that effect (the so-called *barā'a aṣliyya*).³ It is important to emphasise this because there is

1 Cf. Görke, *Das kitāb al-amwāl*, 7 ff. with further references.

2 Cf. Jokisch, *Islamic Imperial Law*, 522 ff.

3 Cf. al-Ghazālī, *Al-mustaṣfā*, vol. 1, 29; cf. also the instances in Ramadan, *Das Islamische Recht*, 68 ff., and Löschner, *Die dogmatischen Grundlagen*, 214 ff. Contemporary Quran exegesis emphasises this aspect as well (cf. Uçar, *Moderne Koranexegese*, MS p. 139 with further

a widely held opinion, based on an incorrect preconception, which erroneously asserts the contrary.⁴ A rule of this kind, expressing a universal prohibition, is – as far as we can tell – found only in the writings of the early Abbasid jurist ‘Īsā ibn ‘Abān,⁵ whose view does not, however, appear to have made any perceptible impression.

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The first task was, and is, indeed, in every legal system, to ascertain all the relevant sources of the law. Islamic law encounters particular difficulty here, as there are many areas for which there is no precise and case-relevant information in either the Quran or the prophetic tradition. Consequently a supplementary collection of legal sources and instruments of the deduction of laws had to be developed. A separate branch of jurisprudence evolved, which was concerned with the ‘roots of law deduction’ (*uṣūl al-fiqh*).⁶ The counterpart to this field is the application of these rules and instruments in the practice (*furūʿ*, ‘branches’).

As we have mentioned before, we do not have much information on the beginnings of the Islamic legal system. What is reasonably certain is that the Quran,⁷ the prophet Muhammad’s relevant legal practice and his companions’ (*ṣaḥāba*) and the early caliphs’ continuation of this practice were guidelines for the evolving legal system. This is true independently of whether the traditions on the subject stand up to scrutiny of their authenticity.⁸ One such tradition was and is quoted particularly frequently:⁹ Before sending Mu‘ādh ibn Jabal to Yemen as a judge,¹⁰ Muhammad asked him on what he was going to base his

references). According to one tradition, Muhammad already reproached those Muslims who asked too many questions, provoking prohibitions; cf. Krawietz, *Hierarchie*, 287.

4 Cf., in the place of many, Spies/Pritsch, *Klassisches Islamisches Recht*, 220, 222; on contract law cf. Schacht, *Introduction*, 144. In agreement with the revised opinion e.g. Milliot, *Introduction*, 205, marginal note 193; Ramadan, *Das Islamische Recht*, 67, 71 ff. with further references.

5 Cf. the references in Josef van Ess, *Theologie und Gesellschaft*, vol. 2, 302; vol. 4, 573, to whom I owe this information.

6 Cf. only the concise introduction in Jokisch, *Islamic Imperial Law*, 517 ff. with further references.

7 Cf. Crone/Hinds, *God’s Caliph*, 54 and *passim*; Hallaq, *History*, 8.

8 Still, Muhammad’s ‘farewell sermon’ (*khutbat al-wadāʿ*) in Ibn Hishām’s *Al-sira*, vol. 4, 186, contains the statement that one must not diverge from God’s book and his prophet’s ‘sunna’ (*lan taḍillu abadan (...) kitāb Allāh wa-sunnat nabiyihi*).

9 Its authenticity is doubtful all the same, concerning the different opinions cf. Lucas, *Legal Principles*, 289, 317 ff. with further references; Jokisch, *Islamic Imperial Law*, 526 ff. with further references.

10 The sources differ regarding the scope of his responsibilities: according to some accounts

administration of justice. Mu'ādh replied that he would first search in God's book; if he could not find a solution there, he would look in the prophet's sunna. In addition he would strive indefatigably to form his own opinion (*ajtahidu ra'yī*).¹¹ The verb in this phrase already shows the key concept for the flexible administration and further development of Islamic law: *ijtihād* (Ar. *ijtihād*, derived from the verb *ijtahada*), independent rational deliberation.

45 Considering the many legal questions not resolved in the Quran and in the evolving prophetic tradition, the third of the above-named three possible paths is likely to have been the most common at first. The representatives of this guild were not called the *ahl al-ra'y* (people of their own opinion) for nothing. According to Goldziher¹² the denotation of the terms *fiqh* and *ra'y* even coincided at first. A quarrel between them and the so-called *ahl al-ḥadīth* (people of hadith) is documented in the second/eighth century.¹³ The latter preferred a closer connection with the prophetic tradition, even though the – occasionally fierce – opposition between the two trends in later times do not seem to be quite conform to reality. The concept of *ra'y* clearly underwent a change of meaning with increasingly negative connotation. If we consider the tradition of the dialogue between Muhammad and Mu'ādh ibn Jabal to be authentic, the concept has a positive connotation, while it would later be equated with unlawful arbitrary decisions increasingly frequently.

Harald Motzki, however, has proved that the strict separation between *fiqh* and hadith literature, which had been presumed for a long time, did not in fact exist in this form.¹⁴ Joseph Schacht's¹⁵ theory, according to which the doctrine the sources of the law was devised later in a kind of historical retrospective, is not entirely tenable any more.¹⁶ It is true that a certain canonisation of the

he was sent to take up the office of governor, in the course of a military expedition or in order to teach the Quran; cf. Tyan, *Histoire*, 70 with further references.

11 Transmitted e.g. in Aḥmad ibn Ḥanbal's *Musnad*, vol. 5 (Beirut edition 1413/1993), 272 f. (no. 22068); quoted in Salqīnī, *Al-muyassar*, 73, 142; concerning criticism cf. Muslehuddin, *Islamic Jurisprudence*, 44.

12 Goldziher, *Die Zāhiriten*, 18 f.

13 Cf. Ibn Khaldūn, *Al-muqaddima*, 446; Motzki, *Anfänge*, 17 with further references; Hallaq, *Origins*, 74 ff.; Melchert, *Formation*, 1 ff.

14 Motzki, *Anfänge*, 20, 68 ff.

15 *The Origins*, 190 ff.

16 Motzki, *Anfänge*, 28 ff., 262 f. Cf. already Coulson's criticism of methodology, *History*, 64 ff., and A'zamī, *Studies in Early Ḥadīth Literature*.

legal sources took place only at the beginning of the third/ninth century in the fundamental works by Muḥammad ibn Idrīs al-Shāfiʿī,¹⁷ who had studied the doctrines of the Malikite and Hanafite schools thoroughly, and his successors. The effect of this systematisation was so comprehensive in its tendency¹⁸ that the present study will take it as its basis. Those wishing to take into account the actual historical situation as well, must free themselves from the idea that the transmitted formation of the system had been completed to any degree, or even clearly delineated, during Muhammad's lifetime or immediately afterwards. On the contrary, we must presume a gradual development of the systematisation.¹⁹

Special conditions obtain in the development of Shiʿite Islamic law: the first surviving works concerning *uṣūl al-fiqh* date back to around 200 years after al-Shāfiʿī's fundamental work.²⁰ They were composed during a climate that was comparatively favourable to the Shiʿites, as the Buyids, the de facto rulers of the Abbasid state (334–447/945–1055) professed the Shiʿa.²¹ The most influential works mentioned are Shaykh Mufīd's (d. 413/1022) lost *Uṣūl al-fiqh*, further works from his pen and those of his pupils.²² Only after the 'occultation' of the twelfth and last imam did the Twelver Shiʿa, the dominant group among the Shiʿites (cf. 1.2 above), feel compelled to develop a coherent concept of the doctrine of the legal sources and their interpretation.²³

Despite basic similarities, the relevant works usually differ clearly from the Sunni interpretation in their conception and contents. Compared to Sunni texts they are frequently more open to independent reasoning and less

17 Concerning the history of his important *Risāla*, cf. Khadduri, *Risala*, 19 ff.

18 Cf. Schacht, *Origins*, 1 f.; Hallaq, *Origins*, 127 ff.; Muslehuddin, *Islamic Jurisprudence*, 32; Stewart, *Islamic Legal Orthodoxy*, 30 ff. with further references, also concerning divergent opinions.

19 Regarding the developing 'generalisation' and systematisation cf., for instance, Scholz, *Fortbildung der Scharia*, 95 ff. with further references.

20 Cf. Stewart, *Islamic Legal Orthodoxy*, 133 ff. A lost work by the Shiʿite scholar Abū Sahl Ismāʿīl ibn ʿAlī al-Nawbakhtī bore the programmatic title *Kitāb naqd risālat al-Shāfiʿī* (Criticism/rejection of al-Shāfiʿī's *risāla*); cf. Stewart, *Islamic Legal Orthodoxy*, 178.

21 Buyid rulers insisted e.g. on calling themselves *amīr al-umarāʾ* (commander of commanders), a title which carried real power; later they added the title King of Kings (Ar. *malik al-mulūk*, Pers. *shāhānshāh*), cf. Busse, *Chalif*, 26, 33 f., 178 f. and *passim*. Cf. also Stewart, *Islamic Legal Orthodoxy*, 54 ff., also concerning Sunni opposition.

22 Löschner, *Die dogmatischen Grundlagen*, 113 f. with further references.

23 Op. cit., 32 and *passim*; 112 ff. Other branches of the Shiʿa such as the Ismailites (sub-divided into Nizari and Mustāʿli/Bohra) still see themselves as being connected to the imam and do not need to train a specific group of legal scholars; cf. Stewart, *Islamic Legal Theory*, 177.

painstakingly involved in questions of detail. In-depth discussions of problems of legal theory or of *ijtihād* are typical,²⁴ while they are found comparatively rarely in this form in Sunni literature. A prominent exponent is al-‘Allāmat al-
 46 Ḥillī (d. 725/1325) of the school of Ḥilla in southern Iraq. He was the first to bear the epithet *Āyatullāh* (‘sign of God’), and converted the Mongol khan Öljaytū to the Shi‘ite faith.²⁵ The strong focus on the (occulted) imam as the final instance only seemingly contradicts this; after all, he was not actually available to provide a decision. Earlier Shi‘ite texts²⁶ understand the concept of *uṣūl al-fiqh* in a narrower sense than later ones: instruments of deducing and interpreting the law beyond the Quran, the specifically interpreted sunna and similarly specific consensus as well as ‘reason’ (*‘aql*) were either not yet available²⁷ or were explicitly dismissed, as e.g. in the works of the fourth-/tenth-century Fatimid Sevenser Shi‘ite al-Qāḍī al-Nu‘mān²⁸ or the writings of the Twelver Shi‘ite minority of the Akhbārī.²⁹

In every legal systems three questions require clarification once norms as relevant as possible have been established, and Muslim jurists have asked these questions since earliest times: How can the relation between norms be determined if they overlap but are not equivalent? From among several norms with (at least partly) equivalent substance, which one should be given priority? Is there a hierarchy of norms with coincident substance, which might be deduced from the respective origin of the norm?

The first question looks at the relation between general and specific regulation. The competition is resolved according to the principle of speciality using the terminology employed for the first time by al-Shāfi‘ī:³⁰ the more specific

24 From among modern Shi‘ite literature cf. e.g. Muhammad al-Ḥusaynī al-Shirāzī, *Al-fiqh*, vol. 1, *Kitāb al-ijtihād wa-l-taqlīd*, Beirut, 2nd ed. 1407/1987, whose thoughts on the subject comprise nearly 500 printed pages. A concise overview over Shi‘ite *uṣūl* doctrine may be found in Yūsuf Muhammad ‘Amrū, *Al-madkhal*, 64 ff.

25 Cf. Halm, *Der schiitische Islam*, 116; Schneider, *Iftā’ in der Schia*, 77 with further references.

26 Cf. Halm, *Der schiitische Islam*, 111 ff.; Löschner, *Die dogmatischen Grundlagen*, 32 ff.; Stewart, *Islamic Legal Orthodoxy*, 133 ff. with further references.

27 Löschner, *Die dogmatischen Grundlagen*, 41 and *passim*.

28 According to him the Fatimid caliph is the last source of legal authority besides the Quran and the sunna of the prophet and the early imams, see Stewart, *Islamic Legal Orthodoxy*, 179.

29 Cf. Stewart, *Islamic Legal Orthodoxy*, 176 ff., 189 ff. with further references. This branch with its emphasis on scripture, recognising only the Quranic text and accepted sayings of the prophet Muhammad and the imams, was in the end unable to prevail against the dominating *uṣūlī* school (cf. Halm, *Der schiitische Islam* 126 ff.).

30 *Al-risāla*, 53 ff. (marginal no. 179 ff.) and *passim*; transl. in Khadduri, *Risala*, 96 ff.

regulation (*al-khāṣṣ*) overrides the more general one (*al-ʿāmm*). Nevertheless, it is far from easy to discern whether a provision is meant to be specific or general. In al-Buwayṭī's abridgment of al-Shāfi'ī's *Risāla* we find chapters dealing with general wording in the Quran and the sunna meant to be specific, and with expressions that appear specific at first sight, but in fact have a general meaning.³¹

The second question tackles chronological competition. The position of Islamic law corresponds with the modern Western position to the extent that the later regulation abrogates the earlier one of the same rank and with the same substance (*naskh*, displacement, abrogation). The context-specific terminology has *nāsikh* (the later regulation which abrogates the earlier one) and *mansūkh* (the abrogated norm).³² Divergent opinions are found for instance concerning whether norms of different hierarchical status may stand in a relation of abrogation to one another; this problem is discussed in the context of the relation between the Quran and the prophetic tradition. Similar debates, but employing a different terminology, are conducted concerning the duration of the binding nature of established interpretations (*taqlīd*) and the permissibility of searching for new interpretations (*ijtihād*).³³

Overall we can observe a tendency through several centuries of the clearly comprehensively employed independent approach and interpretation of the early period becoming more restricted in favour of the canonisation of legal sources and the results of their interpretation.³⁴ On the other hand, the *naskh* theory led Shi'ite authors in particular to develop dynamic energy when interpreting sources: They debate the argument according to which there could not possibly be any derogation within the Quran, as the divine law-giver only provides eternally valid rules which offer advantages and avoid disadvantages. A

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31 Cf. El Shamsy/Zysow, al-Buwayṭī's abridgment, 327, 335 f. (chapters 5 and 6, Arabic text), 347 f. (English translation).

32 For a detailed overview cf. e.g. al-Shāfi'ī, *Al-risāla*, 106 ff., 311 ff. and *passim*; Ibn Sallām, *Al-nāsikh wa-l-mansūkh fī l-kitāb wa-l-sunna*; al-Nakhhās, *Kitāb al-nāsikh wa-l-mansūkh*; al-Ḥāzimi, *Al-ītibār fī l-nāsikh wa-l-mansūkh min al-āthār*. A support for *naskh* is found in particular in sura 2:106 ('And for whatever verse (of the words of the revelation) We abrogate or cast into oblivion, We bring a better one (in its place) or the like of it'); regarding the problem of its import cf. Burton, *Sources*, 205 ff. and *passim* with further references; Souaiaia, *The Function*, 243 ff. and *passim*.

33 Cf. e.g. Krawietz, *Hierarchie*, 70 ff. with further references esp. from works of contemporary legal history; Al-Alwani, *Issues*, 70 ff.

34 Cf. Powers' studies (*Law*, esp. 230 ff. and *passim*) on the Maghreb under the Marinids, based on sources focussing on legal practice.

later alteration would consequently change something good into something bad. This is countered with the argument that the evaluation of good or bad might be different depending on the situation or the point in time.³⁵ Of course, if according to this view Quranic rules may be dependent on the time and the situation, this must be assumed to an even greater degree with regard to all other sources, too.

The third question, finally, is aimed at the hierarchy of legal sources in cases where the respective sources are of unequal rank. This has been clarified to a significant extent in the case of the two highest-ranking sources, the Quran and the prophetic tradition (*sunna*), but by no means unanimously. With regard to all the remaining sources and instruments of interpretation there are differences, some very clear-cut, between the opinions of the past and the present. They will be taken into account in the following when individual sources are presented. Birgit Krawietz has produced an excellent study of the hierarchy of legal sources in transmitted Sunni Islam, including many references, which provides much detail on the topic.³⁶

The question of comprehending the meaning of the norm has even higher priority. Can it be understood unambiguously from the text, or is an interpretation of the contents required?³⁷ Most norms are indeed in need of interpretation. Even in the case of those whose text appears unambiguous, the question of their local and chronological applicability arises – are they binding for every person (belonging to the group addressed) in every place and at all times? This explains that, just as in other legal systems, more than one opinion will be upheld with regard to virtually every question. Consequently the interpreters' knowledge, previous understanding of the subject, orientation and methods are all the more important. Overall the essential potential of the development of Islamic law, and with it the key to understanding it, rests in the doctrine of the sources of the law and the instruments of deducing laws. It is not the individual results, which keep changing throughout history, but the journey towards them that guarantees authenticity – which will always be assessed anew – as well as the necessary flexibility without which every legal system will lose its acceptance.

35 Cf. Muḏaffar, *Uṣūl al-fiqh*, vol. 2 (part 3), 53; Löschner, *Die dogmatischen Quellen*, 83.

36 Krawietz, *Hierarchie*, 2002. Her study does not focus on actual historical development but on the 'ideal system' of the doctrine of the legal sources and the instruments of deducing the law developed in Sunni Islam, found in traditionalist literature up to the present day.

37 Cf., once more, al-Shāfi'ī, *Al-risāla*, 26 ff. and *passim*; transl. in Khadduri, *Risala*, 71 ff.; in the context of the concept of *ribā* ('usury') see Ibn Rushd, *Al-muqaddima*, vol. 2, 179 f.

This is closely linked to the answer to the question of who is entitled to interpret the respective norms. According to traditional opinion by no means everybody (*al-‘ammī*) is qualified to do this, but rather only someone who possesses sufficient religious steadfastness, integrity and knowledge (*mujtahid*).³⁸ The subject is usually discussed in context with the responsibilities of the mufti. A parallel development may be seen here, too, which tends to restrict freedom of action in favour of the uncritical adoption of expert opinions. Thus al-Āmidī discusses the question of whether someone who is not capable of *ijtihād* himself is obliged to follow the mujtahids' statements and opinions.³⁹ He answers in the affirmative without reservations, and at the same time dismisses the view of Mu‘tazilite scholars who stated that the duty of adopting an opinion was dependent on an examination based on sufficient indication, consequently leaving more room for individual reflection. The author does allow more leeway at the level of the mujtahid: someone qualified for *ijtihād* must not simply adopt another mujtahid's opinion instead of his own reasoned results.⁴⁰

48

2 The Quran

The first and most noble source of the law is without question⁴¹ the Quran (*qur‘ān*, the book to be recited frequently).⁴² According to its own statement it commands and teaches justice⁴³ and allows assured decision.⁴⁴ The Quran is much more than a 'law book'; its greater part comprises not laws but statements on God and his prophet, articles of faith, religious commandments and prohibitions, edifying narratives, interpretations of the world, statements and instructions on historical events and about people of Muhammad's time, and much else. An estimated 500 verses are presumed to refer immediately to legal contents. These include the large proportion of rules for religious ritual (*‘ibādāt*),

38 Cf. only al-Āmidī, *Iḥkām*, vol. 3/4, 921 ff.; for his biography cf. Weiss, *Al-Āmidī*, 339 ff.

39 Op. cit., 975 f.

40 Op. cit., 955 ff.; also e.g. al-Nawāwī, *Rawḍat al-ṭālibīn*, vol. 8, 88.

41 Despite the vague transmission history there is extensive agreement between Sunnis and Shi‘ites; cf. Löschner, *Die dogmatischen Grundlagen*, 72 and ff. with further references also concerning the divergent views of the Shi‘ite Akhbārī party.

42 From among a wealth of literature on the subject of the Quran, cf. only the introductions by Hartmut Bobzin, *Der Koran*, 4th ed. 2001, esp. 18 ff. on the terminology, and by Michael Cook, *The Koran*, Oxford 2000.

43 Cf. e.g. sura 4:135; 5:8; 6:152; 7:29; 16:90; 40:9; 57:25.

44 Cf. e.g. sura 5:50.

while only a few dozen verses contain commandments regarding matters of civil or criminal law.⁴⁵ Legal questions are also answered indirectly, with reference to statements not originally concerned with legal matters, as e.g. the question of whether conclusions by analogy are permissible (see 5. below).

The Quran offers detailed legal rules for some areas, such as inheritance law, marriage and family law and a few penalty provisions (cf. 4.2.f below), and alms tax. In some instances legal subject matter is indicated, but without specifying legal consequences of transgressions, such as in the case of extra-marital intercourse. A body of detailed exegetic literature (Ar. *tafsīr*, 'elucidation') developed over the centuries following the prophet's death. An important work of the early period is for instance the commentary by Abū Ja'far Muhammad ibn Jarīr al-Ṭabarī (d. 310/923).⁴⁶

When dealing with Quranic legal norms, two main challenges arose from a juristic point of view. On the one hand simple problems of interpretation (*ta'wīl*) needed to be solved. As in every book of laws, the wording is virtually never so clear as to preclude any question of interpretation. This is just as true of a work which is seen as shaping the language even in the fifteenth century of the Hijra. Exegetes distinguish between clear verses which do not require interpretation (*muḥkam*) and those which do not possess this degree of clarity.⁴⁷ The latter are in the great majority. The Twelver Shi'ite minority of the Akhbārī ('traditionalists') even held the view, against that of the majority of the Uṣūlī ('rationalists'), that the Quranic text was so incomprehensible to the people after the occultation of the twelfth imam that no legal rules could be gleaned from it; its normative substance could only be unlocked by means of the tradition (*sunna*) of the imams.⁴⁸ Adherents of the dominant Uṣūlī party also presume that in these times it is only possible to approximate to a comprehension of the wording and that consequently the substance of statements is only 'probable'.⁴⁹

Norms – including those of religiously based laws – always require interpretation with regard to their chronological, local and personal applicability. Thus some provisions relate only to the heathen Meccans who were at war with the

45 Hallaq, *History*, 3 f.; Löschner, *Die dogmatischen Grundlagen*, 75 with further references.

46 Jāmi' al-bayān 'an ta'wīl āyāt al-Qur'ān, called *Tafsīr al-Ṭabarī*.

47 Cf. Bobzin, *Der Koran*, 109 f.

48 Cf. Gleave, *Inevitable Doubt*, 249 and *passim* with further references; Löschner, *Die dogmatischen Grundlagen*, 76 ff.

49 Cf. Falaturi, *Zwölfer-Schia*, 85; Löschner, *Die dogmatischen Grundlagen*, 78. Regarding the different epistemological approaches of the two schools of thought cf. Gleave's study, *Inevitable Doubt* 2000.

new Muslim community, others only to the prophet's wives.⁵⁰ These examples show clearly how inappropriate it would be to read such norms purely literally and removed from their context, their interpretation and time.⁵¹ The subject of interpretation will be discussed in some detail below (4.7.b.ff) using the example of the penalty for theft (sura 5, 38). In the present context, a few illustrations should suffice:

Suras 65:1 and 2:228 determine the time (*'idda*) a divorced woman has to wait before a possible remarriage. The time stipulated is 'three menstrual cycles'. However, the term *qurū'* is not entirely clear: it denotes the days of the actual menstruation (*ḥayḍa*) as well as the time in between (*tuhr*). Consequently the allotted time is calculated differently depending on whether Hanafites and Hanbalites (calculation beginning with the first *ḥayḍa*) are consulted, or 50 Malikites and Shafi'ites (calculation beginning with the first *tuhr*).⁵²

Another example is the rule in sura 60:11, according to which in the case of women who have joined the believers from the unbelievers the dower paid had to be repaid. An early work of legal scholarship quotes 'Aṭā ibn Abī Rabāh's (late first/early second century AH) opinion on the subject: the verse quoted does not refer to women of the polytheists (from Mecca) in general, but only to those who had a part in the armistice treaty of al-Ḥudaybiya in the year 6/628⁵³ between Muslims and polytheistic Meccans.⁵⁴ This interpretation illustrates that from the earliest period onwards the exegetes referred to the causes of the revelation (*asbāb al-nuzūl*).⁵⁵ With the corresponding interpretation, some of these revelations are to be seen as entirely linked to a particular time. This is true also for instance in the case of fighting/killing the 'hypocrites' as ordered in

50 Cf. sura 33, 50.

51 This technique provides a point where some Muslim extremists, uneducated Muslim traditionalists and crude anti-Islamic propagandists meet – an ugly example of how some forms of extremism cross cultural borders, and of simple narrow-mindedness.

52 Cf. al-Zuhaylī, *Al-fiqh*, vol. 1, 468; vol. 7, 630 ff.; al-Shāfi'ī, *Al-risāla*, 562 ff.; transl. in Khadduri, *Risala*, 334 ff. Al-Shāfi'ī cites this explicitly as an example of admissible disagreement in the interpretation (*ikhtilāf*).

53 Cf. Ibn Hishām, *Al-sīra*, vol. 3, 196 ff.; Pohl, *Islam*, 80.

54 Cf. Motzki, *Anfänge*, 100 with further references.

55 Cf. e.g. the comments on the relevant Quranic passage in al-Qurṭubī, *Al-jāmi'*, vol. 17, 59 ff.; for a general overview cf. Rippin, *The Function*, 1–20. Fundamental texts are al-Suyūṭī, *Lubāb al-nuqūl fī asbāb al-nuzūl*; al-Naysābūrī, *Asbāb al-nuzūl*. Hans-Thomas Tillschneider, *Typen historisch-exegetischer Überlieferung, Formen, Funktionen und Genese des asbāb an-nuzūl-Materials*, Würzburg 2011, presents an analysis of the textual material, written in a rather ponderous style but with a wealth of material.

sura 4:88 ff.⁵⁶ Andrew Rippin⁵⁷ has come to the conclusion that the information on certain causes of the revelation is often so diverse and flexible that the exegete would have reached a certain solution first by means of interpretation and afterwards underpinned it with information concerning the cause of the revelation.

The well-established prohibition of 'alcohol' is not unambiguous, either: while the Quran does forbid the consumption of *sharāb*⁵⁸ or *khamr*,⁵⁹ it is open to interpretation what exactly these two terms refer to. Thus there are statements claiming that only wine made from grapes is intended, or only (certain) other inebriating drinks. Later texts, however, include all inebriating drinks in this prohibition.⁶⁰ The interpretation of the rule stated in sura 2:280 may serve as a final example: it demands that a debtor in financial difficulties should be granted an extension of the payment time until he has found relief. In this instance the exegetic literature refers to an event concerning obligations to repay a sum of capital on the one hand and a corresponding interest payment on the other. Consequently some exegetes linked the commandment to grant respite to interest payments only. As the regulations on charging interest had already been revealed elsewhere, others did not find this at all convincing.⁶¹

Besides, questions of competition between verses of diverging contents had to be solved. There are a large number of such divergences, an example being
51 the gradual revelation of the prohibition of alcohol consumption in suras 16:67; 2:219; 4:43, and finally 5:90. At the end a nearly absolute prohibition was issued, which may be disregarded in genuine emergencies only. Another example is the time a widow must wait before a remarriage: the time of twelve months fixed in sura 2:240 is seen to be replaced by the time of four months and ten days set in sura 2:234.⁶²

56 Cf. al-Qurṭubī, *Al-jāmi'*, vol. 5, 308 ff.

57 The Function, 8.

58 Sura 16:67.

59 Sura 2:219; 5:90.

60 Cf. e.g. al-Qudūrī (362–428/973–1037), *Al-tajrīd*, 6079 ff.; 'Abd al-Raḥmān al-Jazīrī, *Al-fiqh*, vol. 3, 6 f. Abū Ḥanīfa is said to have distinguished between the consumption of *khamr* and *nabīdh*: in the case of the former the *ḥadd* punishment must be carried out independent of whether inebriation resulted, while after consumption of the latter, inebriation was the condition of the punishment; cf. al-Māwardī, *Al-aḥkām*, 284.

61 Cf. al-Nakḥkhās, *Al-nāsikh wa-l-mansūkh*, 83 f., against Shurayḥ's and Ibrāhīm al-Nakha'ī's restrictive view quoted there.

62 Cf. Burton, *Sources*, 57 ff. with further references.

In order to resolve the question of competition the principle mentioned above would apply: The later regulation supersedes the earlier one. In technical terms, the earlier verse (*mansūkh*) is abrogated (*naskh*, abrogation) by the later one (*nāsikh*).⁶³ Dividing the suras into Meccan (up to the hijra in 622) and Medinan (after the hijra) gains in importance in this context. The fact that the edition of the Quran (which is accepted to this day) was prepared comparatively soon afterwards under the third caliph ʿUthmān allowed the editors to collect information on the time of the respective revelations from the surviving companions of the prophet. There is disagreement on whether the Quran and the prophetic tradition (*sunna*) may affect one another along the lines of abrogation. According to one view Quran may abrogate Quran as well as *sunna*, a second opinion holds that the Quran may abrogate only the Quran but not the *sunna*, while a third one affirms that the *sunna* may abrogate both Quran and *sunna*.⁶⁴

Additional problems arise from the fact that when it comes to abrogation, *uṣūl* science distinguishes between the levels of the written text (*tilāwa*) on the one hand and the command implied in it (*ḥukm*) on the other. The abrogation by a passage formulated later of an earlier passage still found in the Quran (*naskh al-ḥukm dūna l-tilāwa*) is comparatively easy to comprehend – the earlier text is still present, but does not apply any more. However, another variant considered possible is that the text of a rule as well as the implied command may be abrogated and that consequently this rule would not have been included in the extant text of the Quran (*naskh al-tilāwa wa-l-ḥukm*). Later the further variant is added that only the text is abrogated but not its substance (*naskh al-tilāwa dūna l-ḥukm*). This is relevant in particular in the context of the punishment of stoning – which is not included in the Quranic text – for illegal sexual relationships of married people (*zinā*; cf. also 4.7.b.cc below): whoever considers this variant of *naskh* possible is able to base the punishment by stoning not only on (very controversial) prophetic traditions but also on the Quran itself.⁶⁵ Khārijites and Muʿtazilites, on the other hand, rejected this penalty precisely because there is no Quranic basis for it.⁶⁶

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63 Instances of this are found as early as the turn of the second century of the hijra; cf. Motzki, *Anfänge*, 90, 102 ff. with further references; cf. also Powers, *The Exegetical Genre*, 19; Rippin, *Al-Zuhri*, 22 ff. In detail Burton, *Sources* 1990.

64 Cf. the even more, but not entirely consistent, overview in al-Nakhkhās (d. 338/949), *Al-nāsikh wa-l-mansūkh*, 10 f.; cf. also Burton, *Sources* 35 ff.

65 Regarding the relevant sources cf. Burton, *Sources*, 122 ff., esp. 134, 147; Souaiaia, *The Function*, 259. Other views in e.g. Diakho, *La Lapidation*, 59 ff., 148.

66 Burton, *Sources*, 148 f. with further references.

Finally the Quran serves as a basis for the argumentation of further legal sources and instruments of deducing laws in *uṣūl* science. Where adherence to formal rules would lead to unsuitable results it is possible to refer to the oft-repeated statement that God wants to bring relief rather than making things more difficult for humans, as after all humans were created weak.⁶⁷

3 The Sunna of the Prophet

The second legal source whose significance is largely uncontested is the so-called sunna of the prophet Muhammad. It is the basis for, e.g., the law of evidence (cf. 1.5 above),⁶⁸ according to which the plaintiff must bring proof of his claims; the defendant must confirm his denial by oath (at the plaintiff's request).

The concept of sunna is, however, remarkably multi-faceted. It denotes approximately the established practice which is considered right. It is important to bear in mind that during the formative period of the Sunnites and even afterwards, especially in the Malikite school, 'sunna' referred to not only the prophet Muhammad's traditions but also the practice of the prophet's companions and the practice of the community in Medina.⁶⁹ These are the basis for regulations of the husband's one-sided right to divorce (*ṭalāq*) and the specific divorce law for wives (*khul'*, cf. 4.2.b.gg below), absence of criminal responsibility in the case of (Quranic) theft by persons of under six spans tall, freedom from punishment for the killing of a rapist, non-applicability of Quranic laws on theft to non-Muslims and equal blood-money to be paid for Muslim and non-Muslim victims of wilful homicide.⁷⁰

Scholarship contains a wealth of conjecture on whether the actual daily practice of the early period might be in conflict with the traditions of the prophet's words and deeds (Ar. *aḥādīth*, sg. *ḥadīth*, Turk. *hadis*, 'tradition')

67 Cf. e.g. sura 2:185; 4:27 f.; 65:4, 7.

68 *Al-bayyina 'alā l-mudda'in wa-l-yamīn 'alā man ankara*, cf. al-Bukhārī, *Ṣaḥīḥ*, vol. 3, 116; al-Māwardī, *Al-aḥkām*, 91; al-Qayrawānī, *Al-risāla*, 260; in detail in al-Shāfi'ī, *Kitāb al-umm*, vol. 7, 17 ff.

69 Cf. Sa'īd Abū Jib, Aḥmad ibn Ḥanbal, 91 and ff. with further references, Krawietz, Hierarchie, 63 with further references. Shi'ites express objections, e.g. Ḥasan al-Amin, *Dā'ira*, vol. 11, 256.

70 Cf. corresponding traditions in Zakariyya ibn Bulām Qādis al-Bākistānī, *Mā ṣaḥḥa min āthār al-ṣaḥāb fī l-fiqh*, vol. 3, 1043, 1232, 1238, 1245, 1271.

which were only systematically collected and promulgated rather later.⁷¹ The debates between *ahl al-raʿy* and *ahl al-ḥadīth* mentioned above can give us some starting points in this context. Once scholarly works on the doctrine of legal sources began to appear, the term developed clearer contours which it retains to this day. Since that time the sunna is usually understood as the entirety of the authentic traditions of the prophet Muhammad's words and deeds insofar as they are based on his prophethood rather than on his purely human quality. There are several hadiths in relation with clearly wrong instructions on cultivating dates which point to this aspect: 'I (sc.: Muhammad) am (only) human; if I instruct you in religious matters, accept my instruction, but if I instruct you according to my own deliberation (*raʿy*), then I am a (fallible) human',⁷² and 'In your worldly affairs you are more knowledgeable (than I)'.⁷³ In this context a modern author⁷⁴ points out that the Quran reprimands even Muhammad if he errs, but that later scholars as indeed all followers of organised religions found it difficult to distinguish between the man and the prophet with regard to authority and reliability.

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To Sunnis the term sunna often includes the confirmatory practice of Muhammad's companions (*ṣaḥāba*) and successors (the first four 'rightly guided' caliphs, Ar. *al-khulafāʾ al-rāshidūn*). Among the Twelver Shi'ites the opinion prevails that besides the prophetic traditions the normative practice of the 'infallible' twelve imams as the successors of the prophet had to be included in the sunna; some also include Muhammad's daughter Fāṭima, the wife of the caliph 'Alī.⁷⁵ Referring to traditions which go back to the, in their view, 'false' first three caliphs, on the other hand, is rejected by the Shi'a.⁷⁶

In the by now accepted self-referential argumentation, the legitimization of the sunna as a source of the law is inferred from various Quranic verses.⁷⁷

71 Cf. only Goldziher, *Muhammedanische Studien*, part 2, 11 f.; Schacht, *Origins*, 58.

72 *Innamā anā basharun idhā amartukum bi-shay'in min dīnikum fa-khudhū bihi wa idhā amartukum bi-shay'in min ray'in fa-innamā anā bashar*, transmitted by Muslim, *Ṣaḥīḥ*, vol. 2, 1011 (no. 6276).

73 *Antum a'lamu bi-amri dunyākum*, transmitted by Muslim, *Ṣaḥīḥ*, vol. 2, 1011 (no. 6277), a comparable tradition is in Ibn Majā, *Sunan*, Thesaurus Islamicus Foundation edition 2000, 358 (no. 2565).

74 Souaiaia, *The Function*, 343 f.

75 Cf. Löschner, *Die dogmatischen Grundlagen*, 86 f. with further references.

76 Cf. Ḥasan al-Amin, *Dā'ira*, vol. 11, 248 ff., 255 ff.; cf. also Stewart, *Islamic Legal Orthodoxy*, 243 with further references.

77 Cf. e.g. sura 7:157: the prophet commands what is right and forbids what is evil; sura 33:21: exemplary character of the prophet Muhammad; suras 3:32, 132; 4:59; 5:92; 8:1, 20, 46; 24:54,

The sunna's particular significance lies in the fact that many points of law are not addressed or settled explicitly. On the other hand, after the death of the last prophet (*khātam al-anbiyā'*, 'seal of the prophets') Muhammad, direct access to solutions via revelations was barred. It is likely that during the first century of the hijra independent reasoning (*ra'y*, opinion) was the most widely used means of deducing laws, even though some traditions of the prophet and his companions were consulted as well. From the second century of the hijra onwards people increasingly began to wish for verdicts based on a more secure religious foundation. The fact that the 'exemplary' prophet's companions and those who had received direct information from them had passed away by that time may have played a part in this development. Consequently the traditions of the prophet's words and deeds were gradually collected and compiled. By the end of the third/ninth century the groundwork of Sunni *'ilm al-ḥadīth* (hadith science) had been completed to a great extent.⁷⁸ At the same time Sunni Islam saw a distinct rapprochement between the positions of extreme adherence to traditions on the one hand, as typical of Zāhirites and Hanbalites and their predecessors, and extensive independent reasoning of other scholars and schools on the other.⁷⁹

The standard collections used by the Sunnis to this day are the 'six books' by Bukhārī,⁸⁰ Muslim,⁸¹ Abū Dāwūd,⁸² Ibn Māja,⁸³ Tirmidhī⁸⁴ and Nasā'ī,⁸⁵ as well as the collections by Dārimī⁸⁶ and by Bayhaqī⁸⁷ and Aḥmad ibn Ḥanbal's *Musnad*.⁸⁸ The great majority of traditions goes back to the prophet's companions 'Abd Allāh ibn 'Umar, 'Alī ibn AbīṬālib, Anas ibn Mālik, Abū Hurayra, Ibn 'Abbās, Ibn Mas'ūd, 'Umar ibn al-Khaṭṭāb and 'Uthmān, while other companions are only occasionally mentioned as the source. The majority of them lived in the centres Kufa, Basra, Medina and Mecca.⁸⁹ The Ibādīs also contributed

56; 33:33, 66, 71; 64:12; 67:33; 68:13: the command to obey God and his messenger. Cf. also suras 8:13, 27; 14:44; 26:216; 60:12.

78 On its genesis cf. Motzki, *Anfänge*, 37 ff. with further references.

79 Cf. Melchert, *Formation*, 198 f. and *passim*.

80 Muḥammad ibn Ismā'īl al-Bukhārī (194–256/810–870), *Kitāb al-jāmi'* al-ṣaḥīḥ.

81 Muslim ibn al-Ḥajjāj al-Qushayrī (204–261/820–875), *Ṣaḥīḥ*.

82 Abū Dāwūd Sulaymān ibn al-Ashath (202–275/817–889), *Sunan al-muṣṭafā*.

83 Abū 'Abdallāh Muḥammad ibn Yazīd (209–273/824–886), *Sunan*.

84 Al-Tirmidhī, Abū 'Isā Muḥammad ibn 'Isā (209–273/824–886), *Sunan*.

85 Abū 'Abdarraḥmān Aḥmad ibn Shu'ayb al-Nasā'ī (215–303/830–915), *Al-sunan*.

86 Abū Muḥammad 'Abdallāh ibn 'Abdarraḥmān al-Dārimī (181–255/797–869), *Sunan*.

87 Abū Bakr Aḥmad ibn al-Husayn (384–458/994–1065), *Al-sunan al-kubrā*.

88 Aḥmad ibn Ḥanbal (164–241/781–856), *Musnad*.

89 Hallaq, *Origins*.

considerably to hadith collections.⁹⁰ Among the Shi'ites, the relevant 'four books' composed in the tenth and eleventh centuries enjoy particular esteem, namely the works *Al-kāfi fī 'ilm al-dīn* by al-Kulaynī,⁹¹ *Man lā yaḥḍuruḥu l-faqīh* by his pupil Ibn Bābawayh (Bābōye) al-Qummi,⁹² and *Tahdhīb al-aḥkām* and *Al-istibṣār fī mā ukhtulifa fīhi min al akhbār* by Abū Muḥammad Ja'far ibn al-Ḥasan al-Ṭūsī⁹³ ('al-Shaykh al-Ṭūsī').⁹⁴

The challenge arising was not only to collate, if possible, all traditions, but also how to address the problem of verification. Referring to an alleged prophetic tradition might have far-reaching consequences for both legal policy and power politics. The danger of falsification was consequently great.⁹⁵ There are indeed specific lists of famous falsifiers of hadiths.⁹⁶ According to texts on establishing authenticity, even respected scholars such as Qatāda ibn Di'āma, Ḥasan al-Baṣrī or Ḥabīb ibn Abī Thābit are said to have circulated falsified hadiths.⁹⁷ Hadith science sought to evade this difficulty by prefacing every single tradition with a chain of the authorities (*isnād*)⁹⁸ who had reported the respective contents (*matn*). The *isnād*, supported by wide-ranging genealogical knowledge, served to verify or falsify the authenticity of the respective tradition.

Thus a scale of 'degrees of rank' was evolved for the authenticity of traditions, based on the number and structure of the chains of transmitters as well as on the trustworthiness of the individual authorities. There are clear differences between Sunnis and Shi'ites.⁹⁹ The Shi'a did not consider those prophet's companions reliable authorities who had supported the appointment of those caliphs who were not legitimate according to Shi'ite opinion. Shi'ite imams, on

90 Cf. the references in Nami, *Studies*, 66 ff.

91 D. ca. 329/941; modern edition in *Mawsū'at al-kutub al-arba'a*, ed. by Muḥammad Ja'far Shams al-Dīn, 8 vols., Beirut 1413–1419/1992–1998.

92 D. ca. 381/991; modern edition by Muḥammad Jarār al-Faqīh, 4 vols., Beirut 1415/1992.

93 D. 460/1067; modern edition of *Ahdhib al-aḥkām* by Muḥammad Ja'far Shams al-Dīn, 10 vols. in five books, Beirut 1412/1992; modern edition of *Al-istibṣār fī mā ukhtulifa fīhi min al akhbār* by Ḥasan al-Mūsawī al-Khurāsān, 3 vols., 2nd ed. Najaf 1375–1376/1956–1957.

94 Cf. Löschner, *Die dogmatischen Grundlagen*, 93.

95 Cf. e.g. Hallaq, *Origins*, 73 f. with further references; Charfi, *L'islam*, 192 ff. is very critical regarding reliability and the traditionally strong position in comparison with the Quran.

96 Cf. al-Sarīṭi, *Ta'rikh*, 89 f.; Krawietz, *Hierarchie*, 49 ff.

97 References in Hallaq, *Origins*, 74 with n. 66; cf. also EI II, vol. 2, art. 'Djābir b. Zayd (on al-Ḥasan al-Baṣrī)', 359 f.

98 On its genesis cf. Motzki, *Anfänge*, 25 ff., with a plausible refutation of Schacht's assumption that the use of *isnād* only came up during the second century of the hijra.

99 Cf. Coulson, *History*, 105.

the other hand, were of particular importance in this field.¹⁰⁰ This is the reason why Sunni and Shi'ite inheritance law developed in clearly different ways (cf. also 4.3 below).

Within Sunni law, three rough 'quality grades' of traditions have developed. The most trustworthy tradition is *sunna mutawātira*, traced back to a great number of prophet's companions and transmitted without interruptions via numerous chains of transmitters.¹⁰¹ In later times among the Sunnis this 'grade' would also include those frequently occurring traditions which differ in the wording but not the substance (*ma'nā*) of the statement.¹⁰² *Sunna mashhūra*, which goes back to only one or few prophet's companions but was then transmitted via a great number of chains of transmitters, is weaker;¹⁰³ the weakest grade is *sunnat al-āḥād* or *khābar al-wāḥid*. It neither goes back to a great number of prophet's companions, nor is it based on a great number of chains of transmitters. In extreme cases it shows only one transmitter per generation. This grade includes the majority of hadiths,¹⁰⁴ and their status is a matter of controversy within and between the schools.¹⁰⁵

In some instances argumentation can be rather cavalier: in al-Marghīnānī's famous *Hidāya*, the chapter concerning the alimony payable to an irrefutably divorced wife includes diverging opinions on whether the former husband must pay alimony to her during the waiting period (*'idda*) stipulated before a possible remarriage. Al-Marghīnānī¹⁰⁶ refers to a prophetic tradition which goes back to Fāṭima bint Qays, in which Muhammad answered this question in the negative. Al-Marghīnānī adds that this tradition was later rejected by 'Umar (the second caliph) remarking that the Quran and the prophet's sunna would most certainly not be set aside in favour of the statement of a woman of whom it was impossible to be sure whether she was speaking the truth or lying, whether she remembered correctly or had actually forgotten the tradition. There then follows a tradition to the contrary, transmitted by 'Umar himself, together with a reminder that other authorities such as Zayd ibn Thābit, Usāma ibn Zayd, Jābir and 'Ā'isha rejected the former version.

There were conflicting views on the question of whether the authenticity of a tradition required to be applied in practice at the same time, and consequently

100 Cf. e.g. Ḥasan al-Amīn, *Dā'ira*, vol. 11, 251 ff.

101 Cf. Salqīnī, *Al-muyassar*, 75; al-Āmidī, *Iḥkām*, vol. 2, 252 ff.

102 Cf. Hallaq, *Sharī'a*, 95.

103 Salqīnī, *Al-muyassar*, 76.

104 Op. cit., 76 f.; cf. also Hallaq, *Sharī'a*, 94 f.

105 Cf. Melchert, *Formation*, 179 f., 199; Ahmed, *Narratives*, 73 ff.

106 *Al-hidāya*, vol. 2, 290.

whether a tradition along the channels of hadith was superfluous. Scholars from Medina in particular, and the Maliki school succeeding them, inclined – unlike the other great schools of law – to this opinion and emphasised the significance of Medinian practice (*‘amal ahl al-Madīna*).¹⁰⁷ The majority, however, increasingly equated prophetic tradition (*sunna*) and the corresponding textual tradition (*hadith*). 56

Boundaries had to be drawn with regard to contents as well: The prophet’s words and deeds were limited to his individual practical situation in and knowledge of the world and could not be – and his own words to that effect are transmitted – used as a source of the law. There were also attempts, especially among Mu‘tazilites and Hanafites, to investigate not only the chain of transmitters but also to examine the contents of the tradition, as they did not see the ‘technical’ examination alone as being able to exclude all danger of falsifications.¹⁰⁸ To this day, however, these approaches have not been able to prevail to any significant degree as an independent method in Muslim *uṣūl* literature, while some elements (content-based criteria for identifying a forged hadith¹⁰⁹) have been implemented into later Sunni doctrine.¹¹⁰ This is not surprising as after all the most vehement supporters of this opinion were the rationalists of the Mu‘tazila, who would later be widely rejected.¹¹¹

As *naṣṣ* (‘text’, pl. *nuṣūṣ*), the Quran and the sunna enjoy the highest esteem of the sources of law. There is not, however, agreement on whether the Quran is higher than the sunna throughout. This is relevant on the one hand with reference to the question of whether there can be abrogation (*naskh*) in the relation between later sunna and earlier revelation in the Quran. Supporters of this kind

107 Cf. Saḥnūn, *Al-mudawwana*, vol. 1, 61 ff. (for his biography cf. Brockopp, Saḥnūn, 65 ff.); al-Yaḥṣūbī, *Tartīb al-madārik*, vol. 1, 19 ff., 22 ff.; Dutton, *Original Islam*, 17 and *passim* with translated source references from Muḥammad ibn Muḥammad al-Rā‘ī’s (782–853/1380–1449) *Intiṣār al-faqīr al-sālik li-tarjih madhhab al-imām al-kabīr Mālik*, 69 ff.

108 Cf. Ibn Qutayba, *Kitāb ta’wīl mukhtalif al-ḥadīth*, 188 ff., 206 ff.; Burton, *Sources*, 149; other textual instances by authors of the third and fourth/ninth and tenth centuries are found in J. A. C. Brown, *How We Know*, 154 ff.; id., *The Rules*, 356 ff. with further references; Karčić, *Über die Methode*, 40 ff. Some signs are also present in the Hanbalite Ibn ‘Aqīl’s *Al-wāḍiḥ*, vol. 3, 77 ff.

109 J. A. C. Brown (*The Rules*, 362) refers to the work of al-Khaṭīb al-Baghdādī (d. 463/1071) containing criteria such as reports which reason rejects as impossible, which contradict e.g. the Quran or the widely transmitted sunna, or which recount events so momentous that if the report were true, it would have been transmitted more widely.

110 Cf. J. A. C. Brown, *How We Know*, 150 ff.; id., *The Rules*, 359.

111 Cf. J. A. C. Brown, *How We Know*, esp. 167 ff.

of abrogation put forward the argument that both have their origin with God.¹¹² Opponents argue that the sunna is only a supplement to the revelation, but that God did not authorise his prophet to change his commandments.¹¹³ However, the sunna might be adduced to help clarify questions of abrogation within the Quran.¹¹⁴ According to al-Shāfi'ī, this 'clarifying' function goes very far: at first (4:15 ff.) Quranic revelations regarding the punishment for unlawful sexual intercourse stipulate imprisonment until death unless 'God appoints for them a way', or chastisement. These regulations are abrogated by sura 24:10: a hundred lashes. The sunna then states this 'more precisely', namely that only unmarried offenders were to be punished with lashes, while married culprits were to be stoned according to the sunna (nowadays controversial, cf. Part 2, 3.4.a below).¹¹⁵ Similarly, sunna and consensus (*ijmā'*) arrive at the interpretation of Quranic inheritance law provisions (sura 2:180 – commands that a will should be made in favour of parents and closest relatives, and sura 2:240 – commands to provide for surviving wives) that a will in favour of an heir is unlawful,¹¹⁶ which is not at all indicated by the Quranic text.

57 On the other hand there is the question whether a later revelation can abrogate an earlier sunna. Al-Shāfi'ī's argumentation may provide an instance:¹¹⁷ The prophet formulated norms only at God's command. If an earlier sunna were to be abrogated by a later revelation, a corresponding new sunna would have to be formulated. Abrogation, he says, can only exist between norms that are of the same rank and only in the explicit form of an old rule being replaced by a new one. Otherwise one would have to assume that the entire sunna could be put into doubt by (later) revelations. This would, for instance, lead to the prerequisites for establishing the elements of the offence of theft (*sariqa*; cf. sura 5:38 and IV 7.b.ff below), namely the minimum value of the stolen goods and breach of safekeeping, which are based on the sunna, not applying anymore due to the general wording of the concept 'theft'; al-Shāfi'ī clearly considers this unacceptable. Al-Sarakhsi¹¹⁸ on the other hand states quite drily

112 Cf. al-Ghazālī, *Al-mustaṣfā*, vol. 1, 124, with examples; al-Āmidī, *Al-iḥkām*, vol. 2, 520 ff.

113 Cf. al-Shāfi'ī, *Al-risāla*, 106 (sunna merely supplementary), transl. in Khadduri, 123 f.; cf. also Mahmassani, *Falsafat*, 64 ff.

114 Al-Shāfi'ī, *Al-risāla*, 115 f.

115 Op. cit., 129 ff., transl. in Khadduri, 137 ff.

116 Op. cit., 137 ff., transl. in Khadduri, 141 ff. Regarding the divergent opinions cf. e.g. Shahbūn, *Al-shāfi*, vol. 2, 133 ff. (with reference to Art. 280 of the Moroccan *mudawwana*); Souaiaia, *The Function*, 55 ff. and *passim*.

117 *Al-risāla*, 106 ff., transl. in Khadduri, 123 ff.

118 *Kitāb al-mabsūṭ*, vol. 16, 85.

that his (Hanafite) school considers the abrogation of sunna by Quran permissible; his instance is the Quranic alteration of the direction of prayer from that practised by Muhammad – facing towards Jerusalem (Bayt al-maqdis) – to Mecca.

Thus a considerable degree of uncertainty remains with regard to the sunna as a source of the law; at the same time, however, there is considerable choice, described by a modern standard work on Islamic law in the following way: ‘Of these teachings (the hadiths) despite the monumental labours of the traditionists,¹¹⁹ we have no authentic record, for, on closer examination the well-known traditions in the authoritative collections appear to have “grown” later, in the second or third century A.H., and we cannot say for certain whether they represent the prophet’s actual words and actions. Modern research tends to show that a major portion of the traditions attributed to the prophet is apocryphal. (...) The hadith may thus be one of two things: (i) a reform advocated by the prophet in opposition to the prevalent usage, or (ii) a practice put forward by certain jurists to support their own theoretical opinion or the prevalent usage of a particular community.’¹²⁰

The sources of the law and instruments of deducing laws to be presented in the following have all been arrived at by juristic reasoning, even though their roots are to be found in the Quran and the sunna. Their foundations and their status within the structure of the doctrine of the sources of the law were disputed in many respects over time. Scholars who were primarily oriented towards prophetic tradition refused to accept further sources or rules of interpretation on a more theoretical juristic level, generally limiting themselves to the study of the traditions themselves. A specific school adhering to this opinion did not develop.¹²¹ While the comparatively small Hanbalite school that is most closely related to this opinion has developed its own system of juristic dogma, it still fits into the framework of the other schools of law, notwithstanding numerous divergences on a more detailed level. Conversely the status accorded prophetic traditions in the other schools has risen to such a degree has risen that no fundamental tensions occur any more.

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119 He means the transmitters of hadiths.

120 Fyze, *Outlines*, 25, 27.

121 Cf. Melchert, *Formation*, 13 ff., esp. 22 ff.

4 The Consensus of the Legal Scholars (*ijmā'*)

Ijmā', the consensus of all the relevant scholars in accordance with the Quran and the sunna, is the third source of the law that is nearly universally accepted.¹²² It is supported by the Quran,¹²³ by hadith,¹²⁴ and by the practice of the prophet's companions, e.g. in the case of the agreement on the appointment of the caliph after Muhammad's death.¹²⁵ However, this example illustrates the problems of *ijmā'*: from the Shi'ite perspective there was no agreement at all, as in their view the 'only true' caliph would have been 'Alī (cf. 1. above), who was not appointed.¹²⁶ Thus the Shi'ites arrived at their own version of consensus, which must above all not go against the opinion of the infallible imam.¹²⁷ In other words, in their view the simply human accord is not sufficient, making it rather more difficult to agree on a consensus.¹²⁸

The preconditions for an *ijmā'* were increasingly restricted during the formative period of Islamic law. While the scholars of Iraq or the Hijaz would at first be satisfied with the local or regional consensus, later, e.g. in al-Shāfi'i's view,¹²⁹ only the agreement of all Muslims – subsequently specified as the relevant scholars¹³⁰ – would suffice.¹³¹

Structural differences between Sunnis and Shi'ites remained. The Shi'ites were accused (from the Sunni perspective) of deviating from the consensus, the gravity of the accusation occasionally approaching that of heresy or even apostasy.¹³² An example in this context is the Shi'ite concept of temporary

122 Cf. al-Shāfi'i, *Al-risāla*, 47 ff., transl. in Khadduri, 285 ff.; al-Ghazālī, *Al-mustaṣfā*, vol. 1, 173 ff.; Hasan, *The Doctrine of Ijma' in Islam*, Islamabad 1976; Kamali, *Principles*, 168 ff.

123 E.g. sura 3:110 and 159; 4:115; 37:37; regarding Shi'ite criticism of basing the concept on the Quran cf. Löschner, *Die dogmatischen Grundlagen*, 17 ff.

124 E.g. 'My congregation does not agree on errors' (*la tajtami'u ummatī 'alā ḍalāla*), Ibn Maja, *Sunan*, 464.

125 Thus al-Sarakhsī, *Uṣūl*, vol. 1, 301; cf. al-Mawdūdī, *Tadwīn*, 46.

126 Cf. Scheich al-Mufid, *Kitab al-Irschad*, 19 and *passim*; al-Muzaffar, *Uṣūl*, vol. 2, 99 ff.; Halm, *Der schiitische Islam*, 15 ff. Concerning Shi'ite consensus theory cf. Löschner, *Die dogmatischen Grundlagen*, 131 ff.; cf. also Coulson, *A History*, 107 f.

127 Cf. Stewart's extensive study, *Islamic Legal Orthodoxy*, esp. 111 ff. with numerous source references, and Halm, *Der schiitische Islam*, 112 f.

128 Cf. the overview in Zacharias, *Islamisches Recht*, 146 ff.; 101 f. with further references.

129 *Al-risāla*, 475 f.; transl. in Khadduri, 285 ff.

130 Cf. al-Ghazālī, *Al-mustaṣfā*, vol. 1, 181 f.

131 Khadduri, *Risala*, 32; cf. also al-Ghazālī, *Al-mustaṣfā*, vol. 1, 181 ff.

132 Stewart, *Islamic Legal Orthodoxy*, 50 f.; 54 ff.

marriage for a set, longer or shorter, time (so-called *mut'ā*¹³³). Shaykh al-Mufīd (d. 413/1022), one of the earliest prominent Shi'ite authors, already debated this in his *Al-masā'il al-ṣaghāniyya fī l-radd 'alā Abī Hanīfa*.¹³⁴ These issues illustrate that to begin with the Shi'ites generally followed Sunni sources and then defined themselves by dissociating themselves from the Sunni doctrines formulated earlier.

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On the whole, hardly any area of the Islamic law is more debated than the method of arriving at and effectiveness of *ijmā'*. Benjamin Jokisch¹³⁵ puts it aptly: "There is no *ijmā'* about *ijmā'*". It is unclear who must be party to a decision by consensus, how the decision is arrived at in a concrete situation, and whether the consensus is binding for future scholars as well. There is probably agreement on the fact that consensus decisions by the prophet's companions (*ṣaḥāba*) who are recognised authorities are and remain binding. Until the fifth/eleventh century the majority (opinion) developed towards granting all later consensus decisions binding character as well. The answers to the multitude of decided issues must consequently be adopted without criticism (*taqlīd*).¹³⁶ Support for this view is found in sura 4:115 as well as in the prophetic tradition which legitimises *ijmā'* generally. The well-nigh insoluble question of how to determine the group of the relevant scholars was usually ignored. However, according to the opinion of the majority, the consensus of only the scholars of Medina – a place of particular learning in the early period – would not be sufficient.¹³⁷

The more the number of actual or alleged consensus decisions grew, the less room there was for independent individual reasoning (*ijtihād*), especially if the decisions were considered to be binding even beyond the death of the parties to the consensus. In principle all those rules which are not entirely clear (*dalīl qaṭ'i*)¹³⁸ and consequently require interpretation (*dalīl ḡanni*) are open to *ijtihād*, and in this sense these are the great majority. According to al-Ghazālī, counter-examples instancing clear rules are the instructions for

133 Cf. Gourji, *Temporary Marriage*, 27 ff.; Sindawi, *Temporary Marriage*, 42 ff.

134 Najaf, n. d.

135 Ijtihad, 119, 126; cf. e.g. al-Āmidī, *Iḥkām*, vol. 1, 161 ff.

136 Cf. only the article headed *taqlīd* in *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 13, 154 ff.

137 Al-Shāfi'i, *Al-risāla*, 533 ff., 535; al-Ghazālī, *Al-mustaṣfā*, vol. 1, 187; critical: Malikite literature, cf. e.g. Muḥammad ibn Muḥammad al-Rā'i's (782/1380–852/1449) work *Intiṣār al-faqīr al-sālik li-tarjih madhhab al-imām al-kabīr Mālik*, transl. by Dutton, *Original Islam*, 77 ff. On differentiating positions cf. also Lucas, *Legal Principles*, 289, 302 with further references.

138 al-Ghazālī, *Al-mustaṣfā*, vol. 2, 354.

the five daily prayers and the alms tax *zakāt*.¹³⁹ The doctrine of ‘closing the gate to *ijtihād*’ (*insidād* or *ighlāq bāb al-ijtihād*) was, however, already hinted at by al-Shāfi‘ī.¹⁴⁰ By the fourth/tenth century the development to the extensive adoption of existing legal opinions (*taqlīd*) had essentially been completed.

Still, this doctrine was not undisputed during the classical period, either. A significant opponent was the very influential Ibn Taymiyya (661–728/1263–1328) who, like his pupil Ibn Qayyim al-Jawziyya (691–751/1292–1350), recognised as binding only the consensus of the prophet’s companions.¹⁴¹ This opinion was already attributed to the founders of law schools Mālik ibn Anas¹⁴² and Aḥmad ibn Ḥanbal and also supported by the founder of another school, Dāwūd al-Zāhiri.¹⁴³ In this context Ibn Taymiyya also quotes Abū Ḥanifa’s change of mind with regard to the legal form of a company *muzāra‘a* (more on which 4.5 below), which he had at first declared to be forbidden, but later decided – like his pupils – was permitted, because people simply did not adhere to his first opinion (forbidding it).¹⁴⁴ Shi‘ites and others also recognise only this close consensus.¹⁴⁵ The modern opinion, which reopens the gate to *ijtihād* once more (cf. Part 2, 2.4.b below), ties in with this view; according to recent research, the gate had never really been entirely closed after all.¹⁴⁶

It is, however, possible to observe that Sunnis in general have come to adhere more closely to the opinion of a school over a long time, and the scope for putting independent emphasis on issues has grown smaller in the face of the increasing abundance of literature. It is not by chance that the widely held – albeit supported far from convincingly by the sources in all its severity¹⁴⁷ – topos of the closing of the gate to *ijtihād* has become pretty much common property among contemporary Muslim scholars. They avail themselves of it in order to explain the rigidity of Islamic jurisprudence, for whose rejuvenation they strive by means of new *ijtihād*, with the aim of rendering it more up

139 Op. cit.

140 Al-Shāfi‘ī, *Al-risāla*, 487 ff., transl. in Khadduri, 295 ff.; cf. also Khadduri, *ibid.*, 43.

141 Cf. Ibn Abī Ya‘lā, *Ṭabaqāt*, vol. 2, 304; from Ibn Taymiyya’s *Fatāwā*, vol. 30, 80; vol. 35, 380 ff.; for concrete instances cf. Jokisch, *Ijtihad*, 119, 125 f. with further references.

142 Krawietz, *Hierarchie*, 64 with further references.

143 Cf. Ibn Abī Ya‘lā, *Ṭabaqāt*, vol. 2, 304; Melchert, *Formation*, 180 with further references.

144 Ibn Taymiyya, *Majmū‘ Fatāwā*, vol. 30, 81; cf. also *id.*, op. cit., vol. 35, 383 ff.

145 Quoted by al-Ghazālī, *Al-mustaṣfā*, vol. 1, 189, who objects to it.

146 Explicitly Hallaq, *Was the gate of Ijtihad closed?* in *id.*, *Law*, ch. v; cf. also Melchert, *Formation*, 16 ff.; Haykel, *Revival*, esp. 81 ff., 96 ff.

147 As an instance cf. the discussion in Ibn Khaldūn, *Al-muqaddima*, 448; rightly critical e.g. Krawietz, *Hierarchie*, 419 f.; Poya, *Iḡtihād*, esp. 230 ff.

to date.¹⁴⁸ Thus Asaf Fyzee simply speaks of a long period of general decay.¹⁴⁹ Abdelmajid Charfi writes pointedly: ‘The gravest consequence of the fuqaha’s activities is that the Muslims have ceased to consult the Quranic text directly and consequently allowed secondary texts to occupy the first rank which claim to be drawing their insights from them (the primary sources) while they (the secondary texts) are in fact an obstacle to understanding and personal reflection which should take place without supervision and quite freely. Similarly the image of the prophet has been painted in idealised hues, raising him above the average mortal to the level of angels and mythical heroes, and the founders of schools have also become infallible or quasi-infallible in the Islamic perspective. Nobody dared criticise their ideas or observe the fact that these arose from the historical context which inevitably shaped them.’¹⁵⁰

This corresponds to the observation that once the schools of law had been established, the originality of legal texts did indeed decrease noticeably: works from the fifth/eleventh century onwards – some of them opulent ones – discuss an abundance of individual questions and reflect the opinions of earlier scholars in great detail.¹⁵¹ We would look in vain, however, for new conceptions or intellectual approaches to fundamental questions within legal texts in the traditional mould. Thus there are complaints about the near-complete absence of functional constitutional law and land law.¹⁵² In the Shi’a, on the other hand, greater scope of individual reasoning remained, based on the maxim attributed to ‘Allāmat al-Ḥillī, also found in ‘Alī al-Karakī (d. 940/1534), according to which a dead man’s opinion should not be followed.¹⁵³

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If one assumes later consensus decisions to be binding as well, one would also have to address the virtually unsolvable task of determining the group of those who are entitled to cooperate on the consensus. This is closely linked to the question of how a consensus of all the relevant scholars between Fes and

148 Cf. Yūsuf al-Qaraḍāwī, *Al-ijtihād al-mu‘āṣir*, 9; Kamali, *Divorce*, 85, 98f.; Moinuddin Ahmed, *The Urgency*, 10 ff., 31 ff., 65 ff., 111 ff.; Lamchichi, *Jihad*, 47; Krawietz, *Hierarchie*, 70 ff. with further references.

149 Fyzee, *Outlines*, 36 and ff.

150 Charfi, *L’Islam*, 168.

151 Melchert’s list (Formation, 60 ff.) of 62 commentaries on the two works by the early Hanafite jurist al-Shaybānī (*Al-jāmi‘ al-ṣaghīr* and *Al-jām‘ al-kabīr*) from the four centuries after his death furnishes a clear example.

152 Charfi, *L’Islam*, 168 ff.

153 *Lā qawla li-l-mayyit*, ‘a dead man has nothing to say’; cf. Halm, *Der schiitische Islam*, 119; Schneider, *Iftā’ in der Schia*, 78.

Bukhara could have been agreed in actual fact at all. A consensus thus declared unequivocally (*ijmāʿ ṣarīḥ*) is likely to have been the exception.

Some look to a 'solution based on objection': silence with respect to a particular known process of decision-making is interpreted as assent (*ijmāʿ sukūṭī*).¹⁵⁴ Knowledge of the subject of the decision is, however, a condition, and consequently the problem would not be significantly closer to being solved. Some schools of law, such as the Shafiʿites, reject this kind of *ijmāʿ* on principle.¹⁵⁵ Silence does not necessarily express assent but might also be an expression of respect (for the one who 'errs') or fear.¹⁵⁶ One example of how these considerations apply to the present day is the problem of whether the time of government may be limited (e.g. to the term in office of a parliament). Yūsuf al-Qaradāwī remarked that while there is *ijmāʿ* stating that a ruler might rule for life, there was never any discussion of or research into the question of a time limit for his rule. This complete silence leaves the solution wide open.¹⁵⁷

The situation is similarly uncertain in the case of the so-called implicit consensus (*ijmāʿ ḍimnī*) which assumes that a certain legal question was the subject of controversial debate among scholars. In spite of divergent opinions the implicit consensus is then called upon to exclude all those views which disagree with all the presented opinions while not having been presented themselves.¹⁵⁸ One example is the entitlement to inherit of the grandfather of the deceased besides his brothers. In the view of the prophet's companions Abū Bakr, Ibn ʿAbbās and ʿUmar, the grandfather should be the sole heir, while ʿAlī and Zayd ibn Thābit were of the opinion that he could only be an heir together with the brothers. As a consequence only the brothers being the heirs would not be possible.

62 Overall there is much uncertainty. Thus occasionally we read in one legal text that there is consensus regarding the solution discussed (*mujmaʿ ʿalayhi*), while the next book states that there is disagreement on the subject (*mukhtalaf fihi*). An instance is the determination of the penalty for the consumption of alcohol, which is not defined either in the Quran or the sunna (40 or 80 lashes;

154 This is an approximate reflection of the attitude of Hanbalites such as Ibn Taymiyya and Ibn Qayyim al-Jawziyya; cf. Jokisch, *Ijtihad*, 126 with further references, also concerning divergent opinions.

155 Cf. al-Ghazālī, *Al-mustaṣfā*, vol. 1, 191 f.

156 Cf. Salqīnī, *Al-muyassar*, 96 f.

157 Al-Qaradawī, *Priorities*, 158.

158 Cf. Salqīnī, *Al-muyassar*, 110 ff.

cf. 4.7.b.ee below).¹⁵⁹ With reference to M. Shalabī,¹⁶⁰ M. El-Awa states that claiming the existence of a consensus is a method widely used by Muslim jurists when they wish to refute opinions contradicting their own.

The sources of the law and processes of deduction listed in the following are rooted in Sunni *uṣūl* doctrine. As regards contents the deliberations are to a great extent found among the Shi‘ites as well, but under the multi-faceted heading of ‘reason’ (*‘aql*). This extends from meaning deliberations on the interpretation of norms to being an independent source of norms besides Quran, sunna and consensus.¹⁶¹

5 Conclusion by Analogy and Other Methods of Deduction (*qiyās*)

The general term *qiyās* comprises not sources of law as such but (also) juristic methods of deduction.¹⁶² The commonly used¹⁶³ translation ‘conclusion by analogy’ is not wrong, but does not go far enough. The conclusion by analogy is indeed included, but also the arguments *a minore ad maius*, *a maiore ad minus* and *a fortiori* as well as *e contrario* (*qiyās al-‘aks*¹⁶⁴)¹⁶⁵ – basically the entire range of the art of juristic argumentation. On a general level al-Shāfi‘ī equates *qiyās* with *ijtihād*¹⁶⁶ and allows scope for it where there are neither sufficiently clear provisions in the Quran and the sunna nor a binding consensus.¹⁶⁷ Al-Ghazālī’s argument against those who reject *qiyās* on the grounds that everything relevant was already set down in the Quran is remarkable.¹⁶⁸

159 Cf. al-Shawkānī, *Nayl al-awṭār*, vol. 7, 205 f.; al-Ghazālī, *Al-mustaṣfā*, vol. 1, 305 f.

160 Al-Shalabī, *Muḥammad Muṣṭafā*, *Ta‘līl al-aḥkām*, Cairo 1949, 5 f. (quoted in El-Awa, *Punishment*, 47).

161 Cf. the overview in Löschner, *Die dogmatischen Grundlagen*, 149 ff.

162 Cf. the fundamental texts by Ibn Taymiyya, *Risālat al-qiyās*, and Ibn Qayyim al-Jawziyya, *Fuṣūl fi l-qiyās*. Concerning specific questions cf. also Ibn Taymiyya, *Majmū‘at al-rasā‘il*, vol. 2, 217 ff., showing the distinction between correct and incorrect *qiyās*; the latter then describes the argument *e contrario*; Ahmad Hasan, *Analogical Reasoning*; Kamali, *Principles*, 197 ff.

163 Cf. from among many recent works Nagel, *Das islamische Recht*, 159 f. and *passim*.

164 Cf. Ibn Taymiyya, *Risālat al-qiyās*, 10.

165 Cf. Tyan, *Méthodologie*, 79, 82 f.

166 *Al-risāla*, 477, transl. in Khadduri, 288.

167 Al-Shāfi‘ī does not mention the latter throughout, but in important places, e.g. *Al-risāla*, 508 and *passim*; transl. in Khadduri, 288.

168 Al-Ghazālī, *Al-mustaṣfā*, vol. 2, 256.

Where, he asks rhetorically, are the provisions regarding the legal situation of the grandfather of the deceased compared to his brothers under inheritance law, etc.? The legitimacy of other sources of law such as *ijmā'* and *qiyās* is shown by the Quran and the sunna; the legitimacy of *qiyās* also by *ijmā'*. The Quran does not forbid *qiyās*, consequently its opponents would be prohibiting something that is permitted (thus contravening a fundamental maxim of Islamic law).

63 Al-Shāfi'ī also provides an instance of *qiyās* in its guise of argument *a minore ad maius* (a general rule deduced from a specific one):¹⁶⁹ namely that the firmest *qiyās* could be inferred from the prohibition of a small amount found in the Quran or the sunna to imply the prohibition of a larger amount. The example he quotes is the transmitted prohibition to shed the blood of one of the faithful, to take his possessions away from him, and the commandment to think only well of him. If it is thus forbidden to think ill of someone, contradicting the good which is known about him, it must surely be all the more forbidden to speak ill of him without foundation. Another argument based on *qiyās* – in the context of how to deal with theft according to the Quran (*sariqa*) – is also attributed to al-Shāfi'ī and the early scholar Zufar, and can be interpreted only as an argument *e contrario*. Al-Sarakhsī discusses it:¹⁷⁰ The case postulated is that several accomplices break into a place of safekeeping, but that only some of them actually remove the booty, and the question arises of whether those accomplices who did not physically carry away the booty should also be punished. Al-Shāfi'ī and Zufar objected on the grounds that the person carrying the – unlike a beast of burden loaded by all those involved together (and here we have the argument *e contrario*) – is the sole agent of removing the booty while the others were not immediately involved. Al-Sarakhsī on the other hand invokes the *istihsān* (more on which immediately below), which focuses on the deliberate cooperation of all involved.

The *qiyās* as an institution – not, however, all the methods of deduction collected – is rejected by parts of the Hanbalite school,¹⁷¹ the Zahirite school,¹⁷² several other scholars¹⁷³ and large parts of the Shi'a (with the exception of the

169 Cf. e.g. al-Shāfi'ī, *Al-risāla*, 513 f.; transl. in Khadduri, 308.

170 *Kitāb al-mabsūṭ*, vol. 9, 149.

171 Cf. Melchert, *Formation*, 179.

172 Cf. Ibn Khaldūn, *Al-muqaddima*, 446; Goldziher, *Die Zāhiriten*, 156 ff.

173 Concerning the hostile attitude of the great hadith collector al-Bukhārī, which has rarely been taken into account cf. Lucas, *Legal Principles*, 289, 303 ff. with further references.

Zaydis).¹⁷⁴ This rejection is based on sura 7:11–13, sura 15:28–36 and sura 38:71–78. According to the last-named the angel Iblīs (with overtones of the Greek *diabolos*, devil) refused to prostrate himself before Adam at God's command as Adam was made from clay, while he (Iblīs) was made from fire. In response God banished him from Paradise, an action seen as the prohibition of any kind of *qiyās*.¹⁷⁵ Supporters of *qiyās*, on the other hand, base their opinion on a number of verses from the Quran¹⁷⁶ and on the daily practice of the prophet and his companions.

According to classical understanding the *qiyās* must be based on an enduring (i.e. not abrogated) passage of the Quran, sunna or *ijmā'*. The point of law dealt with there must be comparable to the one in need of adjudication (*mutasāwī*). For this purpose the reason (*ratio*) (*'illa*) of the basis on which the analogy is drawn has to be determined. It must be clear (*zāhir*), definite (*mundābit*) and suitable (*munāsib*) and may not be a regulation applying to special or exceptional cases (*waṣf qāṣir, mukhtaṣṣ*). If the reason (*ratio*) discovered can be transferred onto the case in need of adjudication, the latter will be subject to the same judgment.¹⁷⁷ Works on the subject contain an abundance of nuances concerning individual details.

An example of the conclusion by analogy is furnished by the decision according to which the father of a deceased man excludes the latter's siblings from the succession. The analogy is based on sura 4:176, which excludes the siblings of the deceased in favour of his sons. The shared reason is that the agnate blood relationship in the ascending and descending line is stronger than the cognate blood relationship.¹⁷⁸

The decisions arrived at by applying *qiyās* are at first isolated and, due to human fallibility in the process of deduction, subordinate to Quran, sunna and *ijmā'*. If universally recognised they may, however, be upgraded to *ijmā'*.¹⁷⁹

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174 Cf. Fyzee, *Shī'ī Legal Traditions*, in Khadduri/Liebesny, *Law I*, 122 and ff.; Kamali, *Principles*, 221.

175 Example used by Prof. Ibrāhīm Salqīnī in the lecture *Uṣūl al-fiqh* at the Law Department of the University of Damascus during the academic year 1984/85.

176 Sura 5:90; sura 38:28; sura 86:78 f.

177 Cf. Khallāf, *Maṣādir*, 50.

178 Islamic inheritance law modifies the strictly agnate inheritance law previously in force; cf. Spies/Pritsch, *Klassisches islamisches Recht*, 220, 230 ff.

179 Cf. al-Ghazālī, *Al-mustaṣfā*, vol. 2, 293; Ibn Qudāma, *Rawḍat al-nāzīr*, vol. 3, 847; Milliot, *Introduction*, 144.

6 'Considering (Something) to be Better' (*istiḥsān*)

The Hanafite school frequently employs the institution of *istiḥsān* ('considering (something) to be better', preferring).¹⁸⁰ This is used to prevent legal consequences which would have to ensue if other sources of law were applied. Advocates of *istiḥsān* find support for its significance in sura 39:18 and 55, in a – contested – prophetic tradition¹⁸¹ and in further sources. Thus forward purchase (*salām*)¹⁸² and contracts for work and materials¹⁸³ are permitted as an exception – contrary to Shafiite opinion – and contrary to the rule according to which the object of purchase must be fixed at the time of contract (cf. also below 4.4.b).

The most frequent case in which it is applied is *istiḥsān* against *qiyās*. Al-Sarakhsī¹⁸⁴ has examples: The starting point is the prohibition of unauthorised settlement of succession (beyond permissible bequests amounting to no more than a third of the estate). *Qiyās* would thus also entail the prohibition of the dying man's acknowledging a debt. *Istiḥsān* on the other hand demands the effectiveness of such acknowledgements up to the freely disposable third of the estate. This really only states the basis of the analogy and confirms that as far as the free third is concerned, there is no infringement of the provisions of inheritance law at all. This is precisely the target for criticism of the institution of *istiḥsān*: it has no place, for either the conclusion by analogy is incorrect or the regulation has no basis in the sharia.¹⁸⁵

In the case of the owner of the property being liable for damage caused by a collapsing wall, *istiḥsān* is applied as well.¹⁸⁶ If the wall was not constructed in the proper fashion, the owner will be liable; if it was built properly, he will not be liable. In the latter case *qiyās* prescribes freedom from liability also in the event that the wall should lean later. *Istiḥsān* on the other hand could be used

180 In great detail including modern examples: Kamali, *Istihsan*.

181 *Mā ra'āhu l-muslimūna ḥasanan fa-huwa 'inda Allāhi ḥasan*; in al-Ghazālī, *Al-mustaṣfā*, vol. 1, 267 f. with criticism.

182 Thus the prophetic tradition 'He who negotiates a forward purchase contract must do so only regarding items fixed as to their weight and size and for a fixed date' (*man aslama fabyuslim fī kaylīn ma'lūm ilā ajalīn ma'lūm*), al-Bukhārī, *Ṣaḥīḥ*, vol. 3, 43 f. For a detailed study cf. Diem, *Arabischer Terminkauf*, esp. 25 ff.

183 Cf. Mahmassani, *Falsafat*, 85.

184 *Kitāb al-mabsūṭ*, vol. 18, 186.

185 Ibn Taymiyya, *Majmū'at al-rasā'il*, vol. 2, 218; cf. also Ibn Qayyim al-Jawziyya, *I'lām*, vol. 1, 269; cf. also Mahmassani, *Falsafat*, 85 f.

186 *Kitāb al-mabsūṭ*, vol. 27, 8 f.

to justify liability if the owner was aware of the later change (the wall's changing angle). In this case the omission (despite the owner's presumed ability to take preventive action within reason) is equated to the original illegal course of action (poor construction work).

A further example concerns the pledging of one's ward's property. There is agreement that a guardian may not use his ward's property to pay his own debts; the question is whether he is entitled to pledge it against his own debt. The *qiyās* – with Abū Yūsuf – would be opposed to this course of action as in the event of default the property would be used for the guardian's own ends and without necessity. Others, like Abū Ḥanīfa and al-Shaybānī opposed this by *istiḥsān*: it is undisputed that the guardian may deposit the ward's property for safekeeping. In this case the custodian, unlike a pledgee, would not be liable for the loss of the property. In addition the ward would be granted a title for compensation against the guardian in case the pledged property should be used in the event of default.¹⁸⁷

The last example refers to crimes of homicide and bodily injury among strangers who are guaranteed protection in territories under Islamic rule (*musta'min*; cf. also 4.9.d.bb below). According to al-Sarakhsī¹⁸⁸ a conclusion by analogy would mean that due to the existing guarantee of protection the perpetrator would be subject to talion law (*qiṣāṣ*), as he would be in any situation of the kind, as the guarantee of protection supersedes the foreigner's ordinary status of having no right to protection under the law.¹⁸⁹ *Istiḥsān*, however – still according to al-Sarakhsī – would lead to the contrary result, as the guarantee of protection revokes an enemy foreigner's (*ḥarbī*) unprotected status only temporarily. The foreigner might return to enemy territory at any time, thus the case should not be treated any differently than if the foreigner was killed on enemy territory.

The other schools reject *istiḥsān* on the whole.¹⁹⁰ Al-Shāfi'ī¹⁹¹ refers to it in the same breath as 'arbitrariness' (*ta'assuf*).¹⁹² The example he adduces shows, however, that he primarily rejects decisions made by ignorant people: no one would ask a just scholar with no knowledge of the prices of slaves concerning the value of an (injured) slave. If this is true of an issue of such comparatively

187 Cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 21, 102; Abū Zahra, *Mawsū'a*, vol. 1, 417; Salqīnī, *Al-muyassar*, 153 f.

188 *Kitāb al-mabsūṭ*, vol. 26, 133 f.

189 Arabic uses the term of *ibāḥa*, the general 'permittedness' (in this case: of assault).

190 Cf. *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 3, 218.

191 *Al-risāla*, 507; transl. in Khadduri, 305; in detail al-Shāfi'ī, *Kitāb al-umm*, vol. 7, 492 ff.

192 *Al-risāla*, 507; transl. in Khadduri, 305.

small importance, surely it would be even more the case in questions regarding God's commands and prohibitions. In another place¹⁹³ al-Shāfi'ī emphasises that in his opinion *istiḥsān* beyond a *qiyās* based on the Quran or the sunna is not permissible.

66 Despite their hostile attitude towards the institution of *istiḥsān* as such, the other schools do employ instruments of comparable function. Of particular importance is *istiṣlāḥ*, to be described below. A modern author employing traditional arguments¹⁹⁴ can use *ḍarūra* (necessity) as the generic term shared by both these institutions.

7 Considering the Universal Good (*istiṣlāḥ*, *al-maṣāliḥ al-mursala*)

While Malikites, Shafiites and Hanbalites on the whole reject the *istiḥsān* as an instrument of deducing laws, they accept considering of the universal good (*istiṣlāḥ*) as a permissible instrument of finding the law.¹⁹⁵ It is possible to distinguish three categories in this context.

There can be no doubt that the universal good is part of all the reasons (*rationes*) (*ilal*, sg. *illa*) open to analogy on which the existing legal provisions are based.¹⁹⁶

Conversely, an 'abrogated benefit' (*maṣlaḥa mulghāt*) may be determined, if there are valid regulations which contradict this concrete consideration of benefit.¹⁹⁷ Based on this argument it is not permissible to prohibit polygamy with the aim of avoiding quarrel and inequality in a desirable manner ('benefit'). This argument would be in conflict with the permission of polygamy in sura 4:3 – this being the classical interpretation of this verse. The permission of polygamy is in turn justified with the desirable increase of offspring, the avoidance of immoral actions and provision for war widows.¹⁹⁸ This illustrates clearly that a historical interpretation may arrive at different results (cf. Part 2, 1.2, 3.1.h below).

193 Al-risāla, 503 f.; transl. in Khadduri, 304 f.; cf. also al-Shāfi'ī, Kitāb al-umm, vol. 7, 155 f.

194 Muslehuddin, Islamic Jurisprudence, 4, 52 ff.

195 Cf. Mahmassani, Falsafat, 85 ff.; Muslehuddin, Islamic Jurisprudence, 53 ff.; Kamali, Principles, 267 ff.

196 Cf. Salqīnī, Al-muyassar, 86.

197 Cf. Ibn Qudāma, Rawḍat al-nāzīr, 537 ff.; al-Ghazālī, Al-mustaṣfā, vol. 1, 284 f.; Salqīnī, Al-muyassar, 159 ff.

198 Cf. Salqīnī, Al-muyassar, 159 f. with further references.

The third category, for which there are no textual references (*naṣṣ*), is subject to controversy. The presumed basis in this case is that the entire legal system was created for the benefit of people,¹⁹⁹ and only comprehensive consideration of the universal good (protection of the classic five goods religion, person, reason, offspring and property²⁰⁰) would do this justice. At the same time *istiṣlāḥ* would allow the inevitable adaptation to changed circumstances. In practice it was often employed to refute a theoretically binding conclusion by analogy. As in the case of *istiḥsān*, opponents suspect improper deduction of laws.

The rule – which offers wide scope for interpretation in specific cases – according to which certain legal provisions have no validity in an emergency, is also part of this area.²⁰¹ Necessity (*ḍarūra*) is thus accepted as a type of source of law.²⁰² The Ottoman Mecelle of 1876 codifies it explicitly in Art. 17. The phrase ‘necessity knows no laws’²⁰³ is, after all, familiar to us in the West as well. The much-quoted²⁰⁴ tradition by the caliph ‘Umar provides an instance: ‘theft’ of foodstuffs is not punished in times of need.²⁰⁵ Ibn Taymiyya even states that the consumption of alcohol is permitted to the Muslim Tatars, as it would not stop them praying but rather stop them murdering, kidnapping and pillaging.²⁰⁶ 67

Overall, *istiṣlāḥ* offers a wide basis for the consideration of the ‘weak human nature’ emphasised frequently by the Quran.²⁰⁷ In addition the question of *maṣlaḥa*, the universal good, opens the door to the dynamic interpretation of regulations with reference to the respective time or place. This is particularly true of those which allow greater scope to the rational cognitive faculty.²⁰⁸

199 Cf. Al-Ghazālī, *Al-mustaṣfā*, vol. 1, 288; Salqīnī, *Uṣūl al-fiqh*, 148.

200 Cf. only Ibn Khaldūn, *Muqaddima*, 288; al-Shāṭibī, *Al-muwāfaqāt*, vol. 2, 8; Hamidullah, *Administration*, 163 ff., 171.

201 Cf. e.g. sura 2:173, 185, 239; 5:4; 6:119, 145; 16:115; 22:78; Muslehuddin, *Islamic Jurisprudence*, 60 ff.

202 Cf. Muslehuddin, *Islamic Jurisprudence*, 60 with further references.

203 Cf. the many references for this and other statements with the same gist in K. F. W. Wander (ed.), *Deutsches Sprichwörter-Lexikon*, vol. 3, 1051 ff. (reprint of the Leipzig 1867 edition), Stuttgart 1987.

204 Cf. Muslehuddin, *Islamic Jurisprudence*, 49.

205 Cf. e.g. Ibn Qayyim al-Jawziyya, *Iʿlām*, vol. 3, 17 f.

206 Cf. Mahmassani, *Falsafat*, 117; Muslehuddin, *Islamic Jurisprudence*, 55 f.

207 Cf. sura 2:185, 286; 4:28; 7:42; 8:66; 22:78; cf. also sura 5:6.

208 Cf. Opwis, *Concept*, 62 ff.

8 The Opinions of (Individual) Prophet's Companions (*madhhab al-ṣaḥābī*)

Under certain circumstances the opinions of individual prophet's companions are recognised as possessing normative character.²⁰⁹ There is a high degree of agreement on the fact that the prophets' companions' practice is binding in matters concerning the afterlife; the same is true of consensus decisions on secular legal matters. There is furthermore agreement that opposing statements by prophet's companions neutralize one another, as it were – one cannot be used as a source of law against another.²¹⁰

There is continuing controversy on the normative character in the case of statements by a companion which have not been confirmed as a consensus decision but which were not contradicted at the time by other rules, either. Supporters of the binding effect (Hanafites, Malikites, some Hanbalites) base themselves on sura 7:199, on a prophetic tradition²¹¹ and on the *ṣaḥāba*'s proximity to the event of the revelation. Opponents (Shafites and other sections of the Hanbalites) point out the fallibility of the prophet's companions and historical examples to the contrary.²¹²

68 Legal differences emerge, depending on the recognition or rejection of this source of law, for instance with regard to the position under inheritance law of a woman who was divorced irrevocably, and thus with legally binding effect (*muṭallaqa bā'in*), by a dying man who then dies during the statutory period of waiting before she may remarry (*'idda*). Advocates of a legal obligation refer to a statement by the caliph and prophet's companion 'Uthmān, who supported the claim to inherit. Opponents base their argument on the general discontinuation of the claim to inherit once the divorce has been made final.²¹³

209 Cf. e.g. Kamali, Principles, 235 ff. With prudent differentiation: al-Shāfi'ī, Al-risāla, 295 f., with the comment that there were hardly any cases where the statements of individual prophet's companions remained without contradiction.

210 Cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 203 ff.; Salqīnī, Al-muyassar, 171.

211 'My companions are like the stars; you will be rightly guided whichever one you follow' (*aṣḥābī ka-l-nujūm bi-ayyihim iqtadaytum ihtadaytum*); cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 269.

212 Cf. Salqīnī, Al-muyassar, 172.

213 Cf. al-Zuḥaylī, Al-fiqh, vol. 7, 452 f. with further references.

9 Customary Law (*ʿurf*) and Custom (*ʿāda*)

From the point of view of works of sharia theory, customary law (*ʿurf*) is accepted as long as it does not contradict the mandatory rules of the sharia. This is often expressed in such a way that all customary law may be recognised if it does not prohibit what is permitted and permit what is forbidden.²¹⁴ Its validity as a source of law is supported by sura 7:199 and a prophetic tradition.²¹⁵ Some scholars also adduce *istiṣlāḥ*.²¹⁶ Contemporary scholars of the Indian Islamic Fiqh Academy even give common custom (*ʿurf-e ʿāam*) precedence over *qiyās* and allow *qiyās* to be abandoned following a widespread special custom.²¹⁷

A practical instance of recognised customary law is the specification of gifts the groom (*khātib*) gives the bride (*makhṭūba*²¹⁸) on the occasion of their betrothal as presents (*hiba*) rather than as part of the obligatory dower (*mahr*). Another instance is taking possession of purchased goods after being told their purchase price. This is seen as the consensus necessary in order to conclude a contract (offer and acceptance; cf. 4.4.d below).²¹⁹ Further instances are the tacit agreement to pay in the respective national currency, goods being free from faults even without prior agreement, or the tacit agreement to pay the customary fee (*ujrat al-mithl*) for commercial services.²²⁰

Customary law could be strengthened by means of putting the relevant mechanisms of finding the law into written form; the Moroccan *ʿamal* literature of the fifteenth to seventeenth centuries is often adduced as an instance.²²¹ Thus the term *ʿamal* also occurs as a synonym for (local) customary law, especially with the connotation of actually applied law.²²² The fact that Islam

214 *La yuḥrim al-ḥalāl wa la yuḥill al-ḥarām*; cf. Salqīnī, *Al-muyassar*, 165; Kamali, *Principles*, 283 ff.; on its extensive social acceptance as something 'Islamic' see Rosen, *The Justice*, 85 ff.

215 *Ma raʾāhu l-muslimūna ḥasanan fa-huwa ʿinda Allāhi ḥasan*; in al-Ghazālī, *Al-mustaṣfā*, vol. 1, 267 f. with criticism.

216 Salqīnī, *Uṣūl al-fiqh*, 152.

217 Islamic Fiqh Academy (India), *Juristic Decisions* (2009), 33 para. 4.15.

218 The linguistic forms – 'groom' as the active participle of the verb, 'bride' as the passive one – indicate the ideas of who plays which part in preparing the way for a marriage.

219 Cf. al-Zuhaylī, *Al-fiqh*, vol. 4, 99 f. and also Art. 175 of the Ottoman Mecelle.

220 Cf. Ibn Qayyim al-Jawziyya, *Iʿlām*, vol. 3, 3.

221 Concerning the controversy over the interpretation of the texts in question cf. Rosen, *The Justice*, 25 f., 34 ff. with further references.

222 Cf. al-Yaḥṣūbī, *Tartīb al-madārik*, vol. 1, 19 ff., 22 ff. and already the discussion in Mālik ibn Anas and Ṣaḥnūn's works (references in Ch. Müller, *Sitte*, 34 n. 57).

generally recognised customary law is likely to have been a decisive factor in its expansion.²²³ To this day we find ways of life in many parts of the Islamic world, which have closer ties to pre-Islamic customs or specific local practices than to the detailed doctrines of Islamic law. This may be the reason why there is only little information on customary law to be found in classical as well as modern juristic literature. Another explanation might be that it is hardly possible to generalise local customary law, which is consequently of little interest as a genre within a discussion on fundamental principles of the law. In general, customary law seems to be most widespread in societies based on strong tribal or extended family structures in weak states. It was observed that stable conflict resolution supported by the whole collective involved often trumps the enforcement of individual rights in case of conflict.²²⁴

A widespread distrust of this source of law is, however, also discernible, as it has led and still leads to a significant restriction of sharia norms in many places; frequently, although not always,²²⁵ to the disadvantage of women.²²⁶ The Libyan law on the protection of women's right to inherit of 1959 (Law no. 6 of 1959) is representative: more than a millennium after the Islamisation of the country it was enacted to ensure that the provisions of Islamic law in favour of women's right to inherit were not undermined by local customary law to their disadvantage.²²⁷ It is reported of the Bedouins of the Arabian peninsula that during the first half of the twentieth century daughters had no part in their father's estate if there were brothers.²²⁸ The author's research among Muslims in India has found that there, too, women are frequently denied their share

223 Cf. e.g. M. Ismail, *Les normes*, 27, 52 ff.

224 Information given by Yemeni participants of a conference on German-Yemeni scientific cooperation in Berlin on 17 December 2013. For the judiciary in Yemen in the last century cf. Messick, *The Shari'a Judiciary*, 149, 153 ff.

225 Concerning the Malay customary law, now adopted into Islamic legislation, according to which a wife has a claim to a share in property acquired by the husband during the marriage (*Harta spencarian*) cf. Nik Noriani, Nik Badli Shah, *Marriage*, 2001, 124 ff. with further references.

226 For examples from India cf. Part 3, 2.2.6 below; regarding Egypt in the first half of the twentieth century see Shaham, *Family*, 224 ff. and *passim*. There is also a multitude of relevant instances in An-Na'im (ed.), *Islamic Family Law in a Changing World*, 2002.

227 Reference in Mahmood, *Statute of Personal Law*, 150; 30. Cf. Hess, *Beduinen*, 137. For the competing application of sharia and customary law in Libya cf. Layish, *Shari'a and Custom in Libyan Tribal Society*, 2005; for the Bedouins of the Judean desert cf. Layish, *Legal Documents*, 2011.

228 Cf. Hess, *Beduinen*, 137.

of an inheritance.²²⁹ With regard to the tribal regions of Pakistan (North West Frontier Province) the Pakistani jurist Shaheen Sardar Ali describes women's position as follows: 'Women, in customary law, are legal non-entities at worst; at best they are perpetual legal minors under the guardianship of a male relative'.²³⁰

Even in the heartland of the Islamic world legal customs survive to the present which are in clear opposition to scholars' jurisprudence.²³¹ Among these is the widespread practice of so-called 'honour killings', which on the whole cannot be legitimised by the provisions of Islamic law (cf. Part 2, 3.4.c below).²³²

Overall recognition of customary law as a source of law and the multitude of opinions on almost every point of law allows a wide scope of application. In large areas of the Islamic world Islamic law as we find it in the works of legal scholars is practised only in part or not at all. Consequently there will be many cases in which a study of expert opinions and documents will yield more information on everyday legal practice than the frequently stereotypical, repetitive remarks in textbooks.

It is important to distinguish between the institution of customary law and the consideration of local or social traditional forms of action and thought as evidence of the existence of certain preconditions for legal relations. This is frequently described by the term *'āda* (custom, tradition). Despite the vague terminology it is possible to say that the legal system will not accept every *'āda* as customary *law* and that, unlike customary law, it has to be substantiated

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229 Thus e.g. Dr Zafarul-Islam Khan, editor-in-chief and publisher of the Milli Gazette, in a conversation with the author on 10 May 2006 in New Delhi; he added that officially this is denied, but it is indeed a fact (similarly Prof. Imtiaz Ahmad in conversation on 10 May 2006 in New Delhi, Asghar Ali Engineer during a conversation in Mumbai on 14 June 2006 and Yusuf Hatim Muchhala, Member of the executive committee of the AIMPLB during a conversation in Mumbai on 15 June 2006); the women frequently do not insist on their rights in order to preserve family peace.

230 Ali, Gender and Human Rights, 175.

231 Cf. Gräf, Rechtswesen, e.g. 42 ff.: execution of a thief by pushing him off a cliff, homicide upon breach of marriage norms: Moors, Women, Property and Islam, 48 ff.; Ebert, Das Erbrecht, esp. 129 f.

232 Cf. Wehler-Schöck's in-depth study, Ehrenmorde, 41 ff., 59 and *passim*; cf. also Welchman, Honour, 139 ff., 147 ff., which includes a section on the debate surrounding a husband killing his wife or her partner caught 'in the act'; Eisner, M./Ghuneim, L., Honor killing attitudes, 405 ff.

in every case.²³³ However, the terms *ʿurf* and *ʿāda* frequently follow one another indiscriminately.²³⁴

Every legal practitioner will have to consider these customs, even if he means to apply the provisions of Islamic law. Lawrence Rosen, who studied Moroccan court hearings extensively, reports a quarrel between a wife, who had since returned to her family of origin, and her husband, who wanted to force her to return to him. The wife produced 50, later 12 witnesses related to her from her home town, who testified to the (effective) one-sided divorce pronounced by the husband. The husband for his part brought 12 witnesses from the place where the marital home was situated, who testified that the marriage had been contracted in a legally effective fashion and not been dissolved. The court decided against the wife, on the grounds that the witnesses produced by the husband were more credible as they were living closer to the place of (possible) events and consequently would have known of a divorce having taken place. Furthermore the husband's readiness to take the judicial road in order to continue the marriage spoke against a wish for divorce on his part (of course, he might just have changed his mind). After all, the wife did not accuse him of ill-treatment, and consequently it seemed as if her family were trying to disrupt the marriage for some reason.²³⁵ This example illustrates the interaction between the application of the law and the interpretation of facts derived from observations related to social types, which do of course document a clear preconception of gender roles (cf. 4.2 below). This might be said to be one of the most interesting subjects for study; but it would require excellent command of the language and willingness to undertake painstaking field work. It is possible that certain collections of fatwas might serve to illuminate the darkness further.

It is not possible to go into the fact that a considerable proportion of ancient Arab customary law was incorporated into the development of classical Islamic law. According to Samil Balić²³⁶ this portion of the sharia's inheritance is so great that Oriental customary law might be called the fifth source of *fiqh* (besides Quran, sunna, *ijmāʿ* and *qiyās*). In this, he is aiming at the necessity of reinterpretation (more on which in Part 2, 1.2 below).

233 Cf. Ch. Müller's erudite paper, *Sitte, Brauch und Gewohnheitsrecht im mālikitischen fiqh*, 17 ff.

234 Cf. Gräf/Falaturi, *Brauch/Sitte und Recht*, 29, 32 ff.

235 Rosen, *The Justice*, 9 f.

236 Balić, *Islam für Europa*, 85.

10 'Blocking the Means' (*sadd al-dharāʿī*)

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Literally translated *sadd al-dharāʿī* means 'blocking the means', the access, meaning that everything which might lead to something prohibited is itself prohibited.²³⁷ This provides a corrective on the content level for formalistic views of the law which tolerate de facto avoidance of the law as long as external forms are kept up. The provision is based on suras 2:104, 6:108f. and 20:43f. as well as prophetic traditions and decisions by prophet's companions. Its scope of application differs clearly between schools. Malikites and Hanbalites, who overall focus more strongly on the *forum internum* (*nīya*, intention), allow it a wider application.²³⁸ Hanafites and Shafites, on the other hand, restrict the rule to cases where the intention appears to be in all probability to avoid a prohibition in the abstract as well as the concrete view.²³⁹

The gift from a debtor to a creditor provides an example, as it might be an infringement of the classical interpretation of the prohibition of charging interest, or the prohibition on this basis of giving gifts to officials, in order to prevent corruption.²⁴⁰ Further examples may be found in regulations concerning prejudice (e.g. excluding a judge from decisions concerning his wife or children; ignoring a spouse's testimony in favour of the other spouse because of the former's – possible – advantages under inheritance law).²⁴¹ Present-day Syrian legislature has employed *sadd al-dharāʿī* as grounds for legal restrictions of polygamy:²⁴² The command in sura 4:129 to treat several wives equally has traditionally been seen as 'only' a moral command. Now it is used as the starting point for regulations to prevent that unequal treatment should occur. Consequently polygamy, which was traditionally unrestricted, is interpreted as a means that might lead to prohibited actions, thus significantly enhancing the status of the command in sura 4:129.

At this point it seems that a look at present-day Europe would be appropriate. According to the author's information, among Muslims focused on scripture the application of the Islamic doctrine of norms appears to decide e.g. the question of whether Muslims might be permitted from a religious point of view to attend functions during which alcohol is consumed. Those who deny this

237 Cf. Ibn Qayyim al-Jawziyya, *I'lām*, vol. 3, 108 ff., esp. 109; Kamali, *Principles*, 310 ff.

238 E.g. Ibn Taymiyya, *Majmū'āt al-fatāwā*, vol. 23, 214 f., is very discriminating; unlike the Maliki opinion, he would not apply this rule in case of need (*hāja*).

239 Cf. Salqīnī, *Al-muyassar*, 172 f.; al-Raysuni, *Imam al-Shatibi's Theory*, 56 ff.

240 al-Raysuni, *Imam al-Shatibi's Theory*, 58 f.

241 Cf. Salqīnī, *Al-muyassar*, 185 f.

242 Cf. Coulson, *A History*, 208 f.

ultimately refer to the rule of *sadd al-dharāʾiʿ*: one should not put oneself into the way of temptation at all. Others argue that such a rule might be justified in a society where Muslims are in the majority, but that circumstances are different in an environment where temperate consumption of alcohol on certain occasions is a social, or at least an accepted, custom. One might exclude oneself from important conversations and social events; this is outweighed by the benefit (cf. the argument of *maṣlaḥa* in 7 above) of (abstinent) participation.

11 ‘Continuance’ (*istiṣhāb*) and ‘Norms of Those before Us’ (*sharʿ man qablanā*)

Another instrument of reasoning is the so-called *istiṣhāb*, literally ‘adhering (to sth.)’.²⁴³ This includes the presumption according to which a legal position will continue to exist once it has been established and no definite change has occurred. In the absence of this presumption – e.g. of the continuance of acquired possessions – structured legal relations would simply be impossible. The rule is based on sura 4:29; 6:145 and 17:15 as well as prophetic traditions and consensus.²⁴⁴

One example is the continuance of a marriage if there are doubts regarding the divorce.²⁴⁵ The principle of *ibāḥa aṣliyya* mentioned above (1.) – the basic freedom from obligations – is also justified in this way.²⁴⁶

Beyond the Shafiite school, *istiṣhāb*, however, only has limited scope. The presumption of continuance should be effective only with regard to existing legal positions, thus preserving the law, but not beyond. Examples of its application may be found in al-Sarakhsī’s works, e.g.²⁴⁷ in the case of the right of inheritance of a missing person (*mafqūd*) who is neither known to be alive or dead. His property is not distributed, as the continuance of the status quo is presumed (i.e. that he is still living).²⁴⁸ This simply takes into account the necessity of not burdening later legal processes with insecurity and insoluble difficulties in case of reversal. If the presumption of continuance were valid without restriction, the missing person would in turn have a right to inherit.

243 Cf. e.g. Kamali, Principles, 297 ff.

244 Cf. Salqīnī, Uṣūl al-fiqh, 175.

245 Cf. *ibid.*

246 Cf. Kamali, Freedom, Equality and Justice, 56.

247 Kitāb al-mabsūṭ, vol. 30, 54.

248 In this case judicial administration of the estate is established. The estate is used to e.g. settle maintenance claims; cf. al-Marghīnānī, Al-hidāya, vol. 1, 423.

Some scholars are of this opinion, which means that for them *istiṣḥāb* can be a factor in finding the law. The Hanafites reject this as being pure fiction.²⁴⁹

If Islam's sources of law do not contain a definitive rule, the principle of continued application of traditional regulation, from the Torah (*tawrāt*) and the Bible (*injīl*), applies. After all, Islam sees itself as the correction of misguided developments in the book religions Judaism and Christianity and as their 'true' continuation.

In the opinion of many the corpus of legal rules found in the holy scriptures of Judaism and Christianity is *shar' man qablanā* ('rules of those who came before us'), as long as it was not abrogated later.²⁵⁰ This opinion is based on suras 6:90; 16:123 and 14:13, as well as prophetic traditions and the oneness of divine law. Sura 10:94 commands clearly that the 'people of the book' (in particular Jews and Christians) must be consulted in case of doubt, including in the context of the so-called *isrā'īliyyāt*, narratives from Biblical tradition.²⁵¹ Indeed, the Hanafite Abū Yūsuf goes so far as to describe the pre-Islamic sunna that was not abrogated by Islam as unalterable even in extreme cases. This meets with contradiction from Malikites and Shafites who maintain that not even Islamic law is unalterable in extreme cases.²⁵² The opponents of *shar' man qablanā* refer to sura 4:48 and other traditions.²⁵³

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The practical significance of *shar' man qablanā* is comparatively small. It is relevant e.g. with regard to the owner's liability if freely grazing livestock causes crop damage. Opponents of *shar' man qablanā* rule out the liability with reference to a prophetic tradition, while the supporters refer to David's and Solomon's decision, described in sura 21:78, according to which liability exists in the case of damage caused overnight.²⁵⁴

All in all we can see clearly that there has been a gradual development of a self-referential system of sources of law and instruments of finding the law, within which the Quran and the sunna (*naṣṣ*) are the most prominent. The other institutes are more or less controversial and consequently comparatively easy to re-interpret. During the classical period, the widely followed doctrine of *taqlīd* (1., 4. above) precluded this. After all, the potential of adapting to the requirements of the times is also inherent in classical Islamic law.

249 Cf. Salqīnī, *Al-muyassar*, 190, 192.

250 Cf. Salqīnī, *Uṣūl al-fiqh*, 160 ff.

251 Bobzin, *Der Koran*, 112 f.

252 Cf. al-Balādhurī, *Futūḥ*, 448; Schacht, *Elements*, 9, 10 f.

253 Cf. Hamidullah, *Sources*, 205, 210 f.; Sanhoury, *La responsabilité*, 1, 18 f.

254 Cf. Salqīnī, *Al-muyassar*, 179 f. with further references.

Judgments and Opinions

Judicial proceedings were concluded by a verdict on a regular basis. As has been mentioned before, there were no stages of appeal.

Expert legal opinions (Ar. *fatāwā* or *fatāwī*, sg. *fatwa*)¹ were delivered in response to concrete inquiries. They are by no means among the sources of the law, they are not legally binding but effective only through the expert's (*al-muftī*) authority. It is true that muftis were often part of the resolution of lawsuits.² The expert was not required to have been formally trained, but much was written on the subject of his qualifications. In keeping with their high rank, one classical text calls them 'the prophet's representatives'.³ In addition al-Shāṭibī remarks on the orientation required when delivering opinions: that a medium course (*wasatīyya*) between indulgence (*tarakhkhuṣ*) and excessive severity (*tashaddud*) must be chosen, as indeed all of the sharia is characterised by moderation (the search for the middle course).⁴

Expert opinions were an important aid in finding the law, especially since they mainly dealt with very concrete issues. Characteristically, the great medieval jurist al-Nawāwī names as one prerequisite for someone to be able to deliver legal opinions as a mufti that he must know the habits and situation of the people inquiring and be familiar with them, their way of speaking and their point of view.⁵ This illustrates clearly that the results were also dependent on these factors to a significant degree.

Only few expert opinions survive from the time of origin of the Islamic law until modern times.⁶ During the late classical period, important collections of opinions of great practical value were composed.⁷ Worth mentioning are the *Fatāwā Hindīyya* or *Ālamgīrīyya* collated by a commission under the Mughal emperor Aurangzeb Alamgir in the seventeenth century, which fol-

1 Cf. Benzings, *Rechtsgutachten*, 4 ff.; Masud/Messick/Powers, *Muftis, Fatwas, and Islamic Legal Interpretation*, 4 ff. with further references.

2 Regarding the Maghreb under the Marinid dynasty cf. Powers, *Law*, 229 ff.

3 *Al-muftī qā'im maqām al-nabī*, al-Shāṭibī, *Al-muwāfāqāt*, vol. 4, 148.

4 Op. cit. 158 f.

5 Imam Nawawī, *Adab al-Fatwa*, 31.

6 Cf. Diem, *Ein arabisches Rechtsgutachten*, 7 ff. with further references.

7 Cf. Masud/Messick/Powers, *Muftis*, 10 ff. with further references.

low al-Marghīnānī's standard work *Al-hidaya*.⁸ There are also the Ottoman registers and collections of the şeyh ül-Islām's fatwas⁹ as well as the voluminous collection of individual scholars' fatwas such as e.g. the Hanbalite Ibn Taymiyya's 37 volumes,¹⁰ the Malikite al-Burzulī's (d. 841/1438) seven volumes¹¹ and the Malikite al-Wansharīsī's (d. 914/1508) thirteen-volume collection¹².

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Among the Sunnis the system of expert legal opinions would later be institutionalised in such a way that a chief expert (*muftī*) was appointed for a particular area, such as e.g. the şeyh ül-Islām in Istanbul.¹³ Some countries continue this custom to the present day. It is not, however, uncontroversial, as it links finding the law closely to the exercise of political power.¹⁴ The possible practical effectiveness of fatwas may be illustrated by an example from nineteenth-century Iran¹⁵: the Iranian Shah had assigned the monopoly of marketing the Iranian tobacco production to a British company at the expense of the native wholesale trade and banking system. The result were protests by merchants and clerics together, followed by a fatwa, allegedly issued by the highest Shi'ite authority at the time, *Marjā'-e taqlīd* Shīrāzī, judging the consumption of tobacco to be hostile to the occulted imam. This resulted in pipes being removed from coffee houses and all of Iran giving up smoking. Once the now worthless monopoly had been rescinded, a further fatwa by the same scholar immediately appeared, declaring smoking tobacco to be permissible.

In the present day, the culture of expert legal opinions is spreading all over the world. Originating in Saudi-Arabia in particular we see serious initiatives aimed at influencing Muslims all over the world following the Wahhabi ideology. To further this cause fatwa texts are translated into English and circulated

8 Cf. Guenther, *Hanafi Fiqh*, 209 ff.

9 Cf. Krüger, *Fetwa und Siyar*, 72 ff. with further references.

10 *Majmū'āt al-fatāwā*, al-Manṣūra 1419/1998.

11 *Fatāwā*, Beirut edition 2002.

12 Aḥmad ibn Yaḥyā al-Wansharīsī, *Al-mi'ār*, Beirut edition 1401–1403/1981–1983; for his biography and work cf. Powers, *Aḥmad al-Wansharīsī*, 375 ff.

13 Cf. Gerber, *State*, 79 ff.; Repp, *The Mufti of Istanbul*, 1986.

14 Cf. e.g. the state-run assessment of the peace treaties with Israel; see Hadler, *Modernes politisches Iftā'*, 101 ff. More detailed in Hadler's MA thesis (Erlangen), *Religiöse Legitimation staatlichen Handelns – Ägyptische Fatāwā zu den (Friedens-)Verträgen der Jahre 1956 und 1979* (unpublished). Concerning Syria cf. Böttcher's study, *Syrische Religionspolitik unter Asad*, esp. 45 ff., 149 ff., which covers a wealth of facts.

15 In Halm, *Der schiitische Islam*, 139 f.

at clearly highly subsidised prices; in some cases even free of charge.¹⁶ Online fatwa portals as well as television programmes on the subject are constantly gaining in importance.¹⁷

16 Cf. Rohe, *Islamismus und Schari'a*, esp. 146 ff. with further references.

17 On Yusuf al-Qaraḏāwī's impact cf. Albrecht, *Islamisches Minderheitenrecht*, esp. 49 ff. with further references.

Overview of the Areas Governed by Classical Islamic Law

1 Introduction: Theory and Practice

Only very few texts survive from the time when Islamic law was first developed, which are not usually structured into an ordered canon. The first great works of the late second/eighth and third/ninth century prepared the ground for a body of juristic literature that would gradually become more firmly structured as to its form and contents. Christian Wichard¹ writes that the law became more ‘systematic’, ‘Islamic’, and also more formal during this time. From the fourth/tenth century onwards in particular – which may thus be seen as the beginning of the ‘classical’ time of Islamic law – the juristic literature composed was standardised to a great extent and unified as to its basic points of view. During this time the jurists were striving to provide information on all imaginable points of law, and as exhaustively as possible. The majority of texts from the earlier time were taken into account – much survived indirectly in this way – had commentaries and supercommentaries added to them, or collated in simplified shorter versions.² On the whole we can discern a tendency of using the recently developed instruments of legal theory to ‘retrospectively rationalise’ the results arrived at in a more pragmatic fashion during the early time. A further characteristic is the ramification into, in part, very subtle issues.

From the classical period onwards legal texts have usually been very comprehensive and follow an essentially fixed subject structure. This is characterised by the division into a first part dealing with ritual provisions (the so-called *ibādāt*) and a second one dealing with points of law (*mu‘āmalāt*). To provide an example, there is an appendix detailing the structure of the main, juristic section of the great Hanafite scholar al-Sarakhsī’s (d. 483/1090) major work, the *Kitāb al-mabsūṭ fi l-furū‘*. This work is a detailed commentary on Muhammad ibn Muhammad al-Marwazī al-Ḥākim’s (d. 334/945) *Kitāb al-kāfi*, which in turn was based on Shaybānī’s (d. 334/945) *Kitāb al-aṣl*. The work is divided

1 Wichard, *Zwischen Markt und Moschee*, 51 ff., 55.

2 Cf. the critical references from works of Muslim legal history quoted in Krawietz, *Hierarchie*, 75 f.

77 in thirty sections and comprises a total of 3149 printed pages in the edition referred to here.³ To this day it ranks among the most frequently quoted works of juristic literature and is called a ‘masterpiece’.⁴ The chapter headings do not always agree with the subsequent subject matter, as these often contain general remarks. Thus the chapter on the right to withdraw from a contract on water rights⁵ states that the right to withdraw will lapse if the purchaser makes use of the water rights during the period of withdrawal; i.e. the chapter discusses the universal principle of the irrelevance of one’s own contrary action (*protestatio facto contraria*).

The various areas of the law are discussed in greatly differing thoroughness in the classical legal texts. This may well be due to the respective sources: personal status, family and inheritance laws are regulated comparatively thoroughly by high-ranking legal sources; consequently they are discussed extensively and in great detail. These are precisely the areas regarding which jurists found and still find practical professional employment. In other areas of the law, such as constitutional law and administrative law, there were only a few and comparatively vague sources. These areas were discussed only briefly, and many important legal works contain hardly any information on them. The few texts which are relevant are of mainly theoretical character, showing an adaptation to the actual political situation in later times (see 8. below).

In the eyes of older research, classical Islamic law as it was evolved in the transmitted texts was on the whole a construct largely lacking practical relevance. More recent studies have shown, however, that Islamic law dominated legal practice to a much greater extent than previously assumed. Personal status law and inheritance law are the areas in which theory and practice corresponded most closely, and still do, unless opposed by – very widely occurring – local and regional customs (cf. 2.9 above on customary law).

Still, it seems that on the field of commercial law, which was comparatively flexible, there were also attempts at implementing the arguments found in legal texts. There is evidence of this in accounts of court practice in Cordoba during the fifth/eleventh century.⁶ Studies of fatwas in Mamluk Egypt, using

3 The page numbers of books and the number of chapters disagree because the first pages of a book are often not identified as a separate chapter.

4 Cf. only Mallat, *Islam and Public Law* (‘ranks among the master legal books of mankind’), viewed on 28 August 2014 on <http://www.soas.ac.uk/cimel/materials/public.html>.

5 Vol. 24, 195 f.

6 Cf. Ch. Müller’s excellent study, *Gerichtspraxis*, e.g. 221 ff. (concerning endowments), 249 ff., 262 ff., 275 ff.; summary 388 ff.

the example of the contract for work and materials (*istiṣnāʿ*; cf. 4.b below),⁷ also show that people would indeed consult the relevant opinions of the law schools on the respective subject. However, this instance also illustrates how differences of opinion might be employed to assert concrete interests. Thus the question of who would be liable for raw materials paid for by the customer of the contractor which were (said to have been) lost by the latter was answered differently in fatwas by Shafiʿites – who rejected this type of contract – from those by members of other schools. 78

Depending on which scholar one asked, the results might thus be more agreeable, or less. It is still largely unclear who would have been able to decide in case of dispute which of several possible instances of arbitration could have been appealed to, and whether the opposing party would in such a case have been forced to agree to this decision. The problem becomes particularly relevant in cases where different schools' known opinions diverged, and where consequently results could be calculated depending on the choice of forum. Flexibility – at the expense of the stability of the law – was possible because no Muslim had to commit himself in a legally binding fashion to any one school.

We find a spectacular case of this kind in nineteenth-century India: a Shafiʿite father had demanded that his daughter's – who was of age – first marriage be annulled as it had been contracted without his consent. According to Shafiʿite marriage law the complaint should have been upheld, but the court dismissed it as the daughter claimed to have entered into the marriage as a Hanafite, and according to Hanafite law she did not require the consent. A simple declaration was deemed sufficient in order to change one's affiliation with one particular school (regarding the selection of school opinions through the so-called *takhayyur* cf. Part 2, 2.4.a below).⁸ For more examples from the author's research into the subject in India cf. Part 3, 2.2.c.bb below); on a case of 'exchange of judges' with a similar result, cf. 2.b.gg below.

It has also not been clarified sufficiently whether e.g. the plaintiff could choose the forum he found most agreeable, or whether the defendant was able to claim any, and which, legal protection. According to Fyzee,⁹ the decision would have been taken depending on the affiliation of the defendant. According to a legal manual of the eighth/fourteenth century, the place of trial should normally be at the defendant's place of residence, unless a particular judiciary,

7 Haram, Use and Abuse, 72 ff.

8 Verdict of Bombay High Court in the case Muhammad Ibrahim v. Ghulam Ahmad (1864) 1 Bom HCR 236, quoted in Fyzee, Outlines, 78 f., 130, 210, and in Mulla, Mohammedan Law, 119 and 200.

9 Outlines, 79 f.

such as the military, was involved.¹⁰ This would correspond to the principle, already found in Roman law, that *'actor sequitur forum rei'*.¹¹ The author's own enquiries on the subject among Indian judges have yielded mixed results; some allow e.g. the husband (as an involved party!) to decide this matter in the case of family quarrels.

79 In some areas, finally, it can be shown that the practice of entirely ignoring transmitted opinions was widespread among legal scholars, e.g. in tax law (see 10 below).

All of which leads us to the sobering conclusion that, with the exception of very selective studies,¹² the current state of research does not allow us to conclude which of the different legal rules were applied in practice during the time before the laws in question were codified and the courts organised formally.

2 Personal Status, Marriage and Family Law

a *Introduction: Basics*

Personal status, marriage and family laws also show divergences between the opinions of different law schools; in some details even within one and the same school. In the following we shall list the characteristic rules and interpretations; however, these cannot be representative of the legal situation at all times and in every place. Consequently separate studies are always necessary which, however, we are unable to undertake, not least because they would exceed the space available in this book.

Conferring rights and duties with complete effect presupposes majority, including sufficient soundness of mind in the subject. Only then can someone become *mukallaf*, the full bearer of rights and duties.¹³ In the classical view majority is defined either in concrete terms as the onset of puberty (*bulūgh*),¹⁴ where the generally presumed minimum age is between nine and twelve years

10 Najm al-Dīn al-Ṭarsūsī (Hanafite chief justice of Damascus, d. 758/1356 or 760/1358), *Kitāb al-i'lām*, edited in part and published by Guellil, *Damaszener Akten*, 339.

11 Kaser/Knütel, *Römisches Privatrecht*, para. 82 Rn. 2.

12 Cf. e.g. Gabriela Guellil's commendable studies, *Damaszener Akten*, and Ch. Müller's *Gerichtspraxis im Stadtstaat Cordoba*, Leiden etc., 1999.

13 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 8, 194 ff. Legal and religious duties have generally been recorded.

14 For details see *Wizārat al-awqāf, Al-mawsū'a*, vol. 8, esp. 188 ff.

for boys,¹⁵ and nine years for girls,¹⁶ and as attaining the maturity of mind of an adult (*rushd*¹⁷), although the terminology is not entirely consistent.¹⁸ Majority may also be attained by defining a particular age (*bulūgh bi-l-sinn*) at which puberty is assumed irrefutably to have occurred (usually 15 lunar years).¹⁹ In order to contract one's own marriage legal capacity is also a requirement; people with mental disabilities may be married under certain circumstances. The different schools follow different sets of rules in all these matters. In the classical Shi'ite view, a girl is considered of marriageable age at nine years, a boy at twelve.²⁰ Below this age, the guardian (*al-walī*) – this is usually the father – must represent them.

Detailed regulations and sometimes rather too detailed interpretations may be found in family law and inheritance law. The Quran itself does contain a considerable number of norms, for instance regarding marriage law,²¹ guardianship²² and succession.²³ The works of early legal scholars also discuss these subjects in some breadth.²⁴ 80

The legal position of women was – at least in the eyes of Islamic tradition – improved significantly in some major areas by Islamic norms.²⁵ Thus the Quran prohibits 'bequeathing' women after their husband's death, which appears to have been possible before.²⁶ It also seems that new-born girls were often killed

15 Wizārat al-awqāf, Al-mawsū'a, vol. 8, 192 f.: on completion of nine lunar years in the Malikite and Shafi'ite view, ten years according to the Hanbalites and twelve according to the Hanafites.

16 Wizārat al-awqāf, Al-mawsū'a, vol. 8, 193.

17 Cf. Wizārat al-awqāf, Al-mawsū'a, vol. 22, 212 ff.

18 The statement in Wizārat al-awqāf, Al-mawsū'a, vol. 8, 188 is incisive: everyone who is *rashīd* is also *bāligh*, but not everyone who is *bāligh* is also *rashīd*.

19 Wizārat al-awqāf, Al-mawsū'a, vol. 8, 192 with further references; according to other views also 16, 17, 18 or 19 years (*ibid.*); cf. also al-Marghīnānī, Al-hidāya, vol. 2, 281.

20 Cf. Al-'Allāmat al-Ḥillī, Mukhtalaf al-shi'a, vol. 7, 64 f.; al-Qāḍī al-Nu'mān, Da'ā'im al-Islām, vol. 1, 214.

21 E.g. sura 2:226 ff.; 4:3 f., 22 ff., 34 f., 127 ff.; 5:5; 33:50, 60:10.

22 E.g. sura 4:2 and 5 f.

23 E.g. sura 4:11 ff., 33, 176; 2:180, 240 f.

24 Cf. Motzki's research (Anfänge, 68 ff.) into early Meccan jurisprudence.

25 The sources are scant; cf. Linant de Bellefonds, Traité, vol. 2, 17 ff. Present-day authors base their considerations on reforms on this aspect among others; cf. only Lamchichi, Femmes et Islam, 83 ff.

26 Cf. sura 4:19. Regarding pre-Islamic marriage law cf. Smith, Kinship, 104 ff. with further references.

in pre-Islamic times.²⁷ The Quran ensures a (limited) right to inherit for the first time, limits polygamy and practices of one-sided divorce by the husband, and has the bride price paid to the bride herself rather than her father.²⁸ On the other hand, the classical interpretation as well as the application of the provisions of family and civil status law are informed by the unequivocally patriarchal view of the gender roles²⁹ that was also prevalent in Western legal systems for a long time: the husband and father was responsible on principle and absolutely for financial support. He was the external representative and had the final say in all important matters, the reasons given frequently, even nowadays, for the one-sided right of divorce without grounds (*ṭalāq*) (to which only the husband is entitled) being symptomatic of this.

Muslim authors of all persuasions frequently point out that men and women are accorded equal dignity by Islam. This is often followed by explanations that due to the different disposition of the sexes, legal equality is impossible.³⁰ Ziba Mir-Hosseini puts these attitudes, which have survived to the present day, in a nutshell: 'In classical fiqh texts, gender inequality is taken for granted, a priori, as a principle. It reflects the world in which the authors of these texts lived, a world in which inequality between men and women was the natural order of things (...). It is a world in which biology is destiny, and there is no overlap

27 Cf. the references in sura 16:58 f.; 81:8 f.; Muslim, *Ṣaḥīḥ*, vol. 12 (Beirut edition 1392/1972), 12; J. A. Badawi, *Status*, 14 f.

28 Cf. Mayer, *Islam and Human Rights*, 97 ff.

29 Some also see this as a departure from greater pre-Islamic liberality and orientation towards matrilinear structures; cf. Sonbol, *Introduction*, 3f. in ead. (ed.), *Women*. Cf. also the interesting study of classical Islamic legal texts by Degand, *Geschlechterrollen und familiale Strukturen im Islam*, 1988, and Largueches' study, *Confined, Battered and Repudiated Women*, 267 ff., concerning the – as far as we know – unique prison-like *dār yuwad* in nineteenth-century Tunisia, an institution for women who e.g. refused a marriage, wished to enter into marriage of their own accord or requested a divorce.

30 Cf. e.g. Mayer, *Islam and Human Rights*, 83 ff.; Stowasser, *Women and Citizenship*, 36 ff. with further references. After his investigation into judicial practice in Cordoba during the fifth/eleventh century, Ch. Müller comes to the conclusion: 'The court reports show unequal treatment of women and men which must be assessed as systematic discrimination when viewed from the modern point of view of gender equality. Legal rules and their interpretation by the jurists together with social conventions lead to the limitation of the judicial courses of action open to women (...)' (Müller, *Gerichtspraxis*, 195 and ff. with further references). Of course, measuring the past with the yardstick of the present would be ahistorical. However, these references are important where historical texts are taken into account and imbued with authority until the present. For corresponding contemporary statements cf. the references in Mir-Hosseini, *The Construction of Gender*, 95, 109 f.

between gender roles: a woman is created to bear and rear children; in the divine plan, this is her primary role and most important contribution to society. It is a world of duties where the very notion of ‘women’s rights’ – as we mean it today – has no place and little relevance.³¹

Usually the classical as well as modern texts state that the legal courses of action open only to men must be used responsibly and respectfully. Religious commands of ‘decent behaviour’ are in place to ensure this. From a legal perspective it must be pointed out, however, that these supporting rules tend to be without effect precisely when someone is not acting ‘decently’ but still able to employ courses of actions to which he is entitled under the law. In this respect differentiation is necessary between the religious and moral sphere and the legal sphere. Research into court documents shows that courts repeatedly distance themselves from rigid interpretations found in the literature and instead decided in favour of women involved, e.g. in divorce cases, legal consequences of divorce or child custody litigation.³²

81

b *Marriage Law*

aa Introduction

Contracting and dissolving a marriage are at the centre of family law.³³ Marriage is a purely secular contract; some scholars consider entering into a marriage on Friday in the mosque as commendable,³⁴ but it is not a requirement. A marriage is usually preceded by a betrothal³⁵ (*khiṭba*), which is often confirmed by reciting the first sura of the Quran (*al-Fātiḥa*) and by exchanging gifts. It is not a legal requirement,³⁶ has hardly any legal effect and may be dissolved at any time.³⁷ Existing impediments to marriage also render a betrothal invalid. A betrothal may develop legal relevance if gifts given in connection with it are to be returned; the kind and scale of claims for reimbursement are

31 Mir-Hosseini, *The Construction of Gender*, 95, 96 f. Regarding criticism see also M. Charfi, *Islam and Liberty*, 41 ff.

32 Cf. the analysis of Syrian and Palestinian expert opinions and court acts from the seventeenth and eighteenth centuries in Tucker, *In the House*, 179 ff.

33 There is a concise examination of the formative and the classical period in Spector, *Women in Classical Islamic Law*, 2012; regarding the Sunni schools cf. the detailed account in Wizārat al-awqāf, *Al-mawsū‘a*, vol. 41, 205–355 under ‘*nikāḥ*’.

34 Cf. Wizārat al-awqāf, *Al-mawsū‘a*, vol. 41, 221 with further references.

35 Cf. *ibid.*, 223 ff., as well as the overview in Nasir, *Islamic Law*, 45 ff., which mostly contains examples from current law.

36 Cf. only Ibn Qudāma, *Al-mughnī*, vol. 6, 375: demanded by Dāwūd (al-Zāhiri) only.

37 Cf. Nasir, *Islamic Law*, 46 ff. with references from contemporary legal orders.

debated between the schools of law. Entitlement to damages arising from a broken betrothal are mostly rejected, the main argument being in the recognised statement that legitimate action must not result in compensation claims. If they were allowed here, they could lead to an indirect compulsion to contract the marriage.

82 bb The Prerequisites for Entering into a Marriage

According to the Sunni and Ismaili view, marriage is entered into for life³⁸ and unconditionally,³⁹ although there are a number of ways of dissolving it (see *gg*) below). If conditions are made anyway, these are usually disregarded as long as the marriage as such continues.⁴⁰ Twelver Shi'ites also allow a marriage for a set time (the so-called *mut'a*)⁴¹ – subject to occasionally harsh Sunni criticism.⁴² But at present, so-called '*misyār*'-marriages are widespread e.g. in Saudi-Arabia, which are practically equivalent to the Shi'ite *mut'a*.⁴³ Based on sura 4:3, polygamy with up to four wives at the same time is seen as permissible, not restricted to the orphans mentioned in the passage. Besides, slave women in unlimited number may be kept as concubines (cf. sura 4:24).

Anyone who is of age and has legal capacity (cf. 2.q above) may enter into a marriage. Special regulations applied to slaves. There are a number of impediments to marriage, some based on reasons of kinship or blood relationship, some on reasons of status and some religious.

The Quran already mentions permanent prohibitions of marriage due to kinship (sura 4:22 f.). For a man they exist with respect to former wives of his own father or his biological sons, his own mother and maternal grandmother, daughters, sisters, maternal and paternal aunts, nieces; also in respect of his own nurses and foster-sisters, certain stepdaughters and two sisters together. From the interpretation of these verses it follows that for instance former wives of other agnate relatives than father and sons, e.g. of the grandfather and the grandson, are also covered by the prohibition, as are great-aunts and

38 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 41, 219.

39 Cf. e.g. *Ibn Qudāma, Al-mughnī*, vol. 6, 375.

40 *Wizārat al-awqāf, Al-mawsū'a*, vol. 41, 242 f., 305 ff.

41 Cf. e.g. *al-Kulaynī, Furū' al-kāfi*, vol. 3, 455 ff.; *al-Ṭūsī, Tahdhīb*, vol. 7, 223 ff.

42 Cf. e.g. *Ibn Rushd, Bidāyat al-mujtahid*, vol. 4, 325, with extensive commentary. According to *al-Marghīnānī (Al-hidāya*, vol. 1, 190), who rejects it as well, *Mālik* considered it permissible; cf. also *Sindawi, Temporary Marriage*, esp. 42 ff.

43 Cf. *Osmani, Misyar Marriage*, 297 ff. This instrument is used e.g. by travellers who are already married. The second wife waives her usual rights to maintenance, abode, etc.

great-nieces. There are also temporary prohibitions of marriage, which might not apply under certain circumstances. An impediment to marriage exists in the case of women who are already married and those who have not completed the time allocated (*'idda*) after a divorce (three months, cf. sura 2:228) or after the husband's death (four months and ten days, cf. sura 2:234). There is disagreement on whether this marriage must be dissolved after it has been consummated, or whether the dissolution can be confirmed at the end of this time. A further impediment to marriage exists in the case of the irrefutably divorced wife; according to sura 2:230 the wife must marry someone else before the first husband may remarry her. Shi'ites and Ibādīs also prohibit the marriage between parties guilty of unlawful intercourse.⁴⁴

There are also prohibitions of marriage with respect to different religious affiliation. Shi'ites generally forbid marriage between Muslims and non-Muslims.⁴⁵ In the Sunni view, this depends on the respective gender of the parties involved. Based on suras 2:221 and 60:10 a Muslim woman is not able to contract a valid marriage with a non-Muslim man. The rule in sura 5:5, on the other hand, is interpreted as an exception to the universal prohibition⁴⁶ and as permitting the marriage of a Muslim man and non-Muslim woman as long as she is a member of a recognised scripture-based faith (*ahl al-kitāb*).

83

This shows how much patriarchal ideas can be reflected in the law: even modern authors justify the unequal treatment with the claim that the 'infidel' woman is a gain for the (dominant) husband and the Muslims in general, while a woman married to an 'infidel' – together with her future children – is an unacceptable 'loss'.⁴⁷ Furthermore it is alleged that a Muslim woman would not be able to live her faith in a marriage with a (naturally dominant) non-Muslim,⁴⁸ while Islam recognises the faith of the people of the book. As a consequence a previously legally effective marriage between Muslims is seen as dissolved if the husband renounces Islam, as is the marriage of a woman who converts to Islam to a man who does not convert.⁴⁹ However, even the – according to the Sunni view – permissible marriage to a woman

44 Cf. al-Nami, *Studies*, 96 with further references.

45 Cf. al-Kulaynī, *Furū' al-kāfi*, vol. 3, 266, 361ff.

46 Cf. e.g. al-Shāfi'ī, *Kitāb al-umm*, vol. 5, 8f.

47 Thus the gist of the justifying argument proposed by the Islamist thinker Sayyid Qutb, *Fī zilāl al-Qur'ān*, vol. 1, 7th ed., Beirut 1971, 351; similar in 'Abd al 'Ati, *The Family Structure*, 142f.; cf. also Forstner, *Die Stellung der Frau*, 282, 312f. with further references.

48 Thus al-'Awwa, *Al-fiqh al-islāmī*, 77.

49 When it comes to details, there are manifold opinions on the question at which point in time and under which precise circumstances a marriage becomes void.

from a recognised scripture-based faith is seen as undesirable by many, not least because of the many restrictions under inheritance law.⁵⁰ Occasionally the marriage between non-Muslims is referred to, which is seen as permissible according to their rules. In one partial volume of an encyclopaedia of (classical) Islamic law, published in 2005 by the Kuwaiti Ministry of Foundations and Islamic Affairs, we read that possible impediments between different faiths (of the *ahl al-dhimma*) should be ignored as ‘unbelief is one single faith only, as it is a denial of the Lord.’⁵¹

As far as the practical application of the further requirement of the husband’s equal status (*kafā’a*) is concerned, different authors and schools list different criteria, such as descent, physical integrity, property, manner of occupation, religious affiliation and devoutness. Some scholars consider equal status to be irrelevant. The majority, who demands equal status, does not see it as a requirement for legal effectiveness but only as a possibly material defect.⁵² Consequently the absence of equal status does not as a rule result in the marriage being declared void, but may provide a reason for dissolution at the behest of the guardian.⁵³

84 cc The Formalities of Marriage; Parties Involved

A marriage is a formal contract and as such requires two identical declarations of the two parties willing to enter into a marriage or their legal representatives. According to a widely held view a generic declaration of the intention is sufficient; no particular terms or wording are required. Some scholars, however, only allow the relevant Quranic terms *nikāḥ* or *tazwīj*.⁵⁴ During the classical

50 Cf. e.g. al-Shāfi‘ī, Kitāb al-umm, vol. 5, 10.

51 Wizārat al-awqāf, Al-mawsū‘a, vol. 41, 319; *li-anna l-kufr kulluhu milla wāḥida, idh huwa takdhīb al-rabb*. Similar, in the context of questions of interreligious inheritance law, al-Marghīnānī, Al-hidāya, vol. 4, 537.

52 Cf. only the overview in al-Zuḥaylī, Al-fiqh al-islāmī, vol. 7, 230 ff. with further references.

53 Cf. al-Zuḥaylī, Al-fiqh al-islāmī, vol. 7, 234 ff. with further references; cf. also the overview in El Alami, The Marriage Contract, 68 ff. A case is reported from present-day Saudi-Arabia where the half-brother of a 34-year-old married woman with two children went to court to have her divorce her husband, because the latter belonged to an allegedly lower social class – against the wishes of the happily married couple; cf. the report ‘Fatima A.’; amnesty journal 05/2007, 33. Unlike the other schools of law the Hanbalite school prevailing there permits a marriage to be dissolved even after its consummation and at the instigation of any possible guardian.

54 Thus al-Shāfi‘ī, Kitāb al-umm, vol. 5, 60 f.; regarding the divergent opinions cf. al-Zuḥaylī, Al-fiqh al-islāmī, vol. 7, 38 ff.; Wizārat al-awqāf, Al-mawsū‘a, vol. 41, 234 ff.

period people discussed whether it was necessary to employ Arabic. The majority denied this, but some demanded it in the case of those who were able to speak Arabic. Classical Islamic law contains no specific formal requirements for a marriage contract.⁵⁵

It is possible, and frequently required,⁵⁶ for a marriage to be contracted by the (marriage) guardian (*al-walī*) of the woman or a man who is not legally competent; this probably corresponds to the social reality. The guardian has the – legally not fully defined – duty of looking after the woman's interests e.g. in negotiating the marriage contract; this allows him to safeguard his own or other interests as well. In principle, the guardian is the nearest man in the ascending or descending male line, with disagreement on whether the son (or on his death, his son) or the father takes precedence.⁵⁷ Next comes the paternal grandfather, his father etc., then brothers and other male⁵⁸ collateral relatives.⁵⁹ A non-Muslim may not be the guardian of a Muslim woman. It is possible to delegate the role of guardian at a marriage to an appropriate representative.⁶⁰ In this way 'proxy marriages' become possible, during which the actual marriage partners are not present in person. Shafi'ites, Malikites, Hanbalites and Ismailis generally demand a guardian's involvement as a prerequisite of the legal effectiveness of the marriage.⁶¹ Hanafites and Twelver Shi'ites do not demand this in the case of women who are of age, while some postulate restrictions in cases of where the husband is not of equal status.⁶²

55 Cf. al-Zuhaylī, *Al-fiqh al-islāmī*, vol. 7, 37, and Powers' lucid study of inheritance law, *Studies*, esp. 189 ff.

56 Cf. *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 41, 247 ff. with numerous references.

57 Cf. op. cit. 275 ff.: Shafi'ites and Hanbalites prefer the father, Malikites and many Hanafites the son.

58 The opinion of the majority – in opposition to voices from, in particular, the Hanafite school – does not allow women to be marriage guardians; cf. *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 41, 254 f. with further references.

59 Cf. e.g. al-Shāfi'ī, *Kitāb al-umm*, vol. 5, 23.

60 Cf. only *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 41, 241 f.; 246 f.; 286 ff.

61 Cf. e.g. al-Shāfi'ī, *Kitāb al-umm*, vol. 5, 22 f.: 'No woman may enter into marriage without her guardian's consent'; concerning the opinions of the other Sunni schools cf. only al-Jazīrī, *Kitāb al-fiqh*, vol. 4, 51; regarding the Ismailis cf. al-Qāḍī al-Nu'mān, *Da'a'im al-Islām*, vol. 2, 218.

62 As for the Hanafites, cf. e.g. Ibn al-Humām, *Sharḥ fath al-qadir*, 255 ff.; for the Twelver Shi'ites al-Kulaynī, *Furū' al-kāfi*, vol. 3, 395; cf. also El Alami/Hinchcliffe, *Islamic Marriage*, 5.

In principle the consent of both parties to the marriage is required.⁶³ According to classical marriage law, under certain circumstances it was permissible for a guardian⁶⁴ to force girls, and in the view of some authors also minor or mentally ill boys⁶⁵ (*zawāj al-jabr* or *wilāyat al-ijbār*), to marry.⁶⁶ While Hanafites and Twelver Shi‘ites considered this authorisation to cease with the onset of puberty, according to Malikite, Shafi‘ite and Ismaili Shi‘ite opinion it continued with regard to all women who had come of age in the case of their first marriage.⁶⁷ In the view of individual Hanafite scholars a ‘declaration of consent’ given under duress by a woman who is of age is valid, a retraction of the self-determination granted in principle.⁶⁸ In addition, a virgin’s silence in response to a proposal of marriage is generally seen as consent, based on prophetic traditions.⁶⁹ A woman who is of age may (in theory) demand the dissolution of a marriage contracted during her minority against her will.⁷⁰

Sunni schools agree that two witnesses must be present at the marriage.⁷¹ However, there is no agreement on the legal consequences of ignoring this formality. Many Hanafites, Shafi‘ites and some Hanbalites consider the presence of two witnesses to be a requirement for the legal effectiveness of the contract, based on a prophetic tradition and the argument that the contract does not only affect the parties to the marriage but also their (future) children, in whose interest there must be clarity.⁷² Instead of two men, one man and two women may be present as witnesses. There is no agreement on whether, on the

63 Cf. only al-Shāfi‘ī, *Kitāb al-umm*, vol. 5, 33 f., which lists the exceptions.

64 This is generally the father in the first instance, and exclusively according to some authors.

65 Cf. *Wizārat al-awqāf*, *Al-mawsū‘a*, vol. 41, 262.

66 *Wizārat al-awqāf*, *Al-mawsū‘a*, vol. 41, 259 ff., concerning the conditions op. cit. 263 ff.; cf. also El Alami/Hinchcliffe, *Islamic Marriage*, 6, as well as Lohlker’s detailed study (*Islamisches Familienrecht*, 2002) on Malikite law.

67 *Wizārat al-awqāf*, *Al-mawsū‘a*, vol. 41, 259 ff., 267 ff.; Fyzee, *Outlines*, 210.

68 Cf. Linant de Bellefonds, *Traité*, vol. 2, 82 f., El Alami/Hinchcliffe, *Islamic Marriage*, 6.

69 Cf. e.g. al-Sarakhsī, *Kitāb al-mabsū‘*, vol. 5, 2 ff.; al-Ṭaḥāwī, *Al-mukhtaṣar*, 172; Linant de Bellefonds, *Traité*, vol. 2, 79 with further references; on present-day law (Yemen) see Würth, *Aṣ-Šarī‘a fi Bāb al-Yaman*, 84; Shahbūn, *Al-shāfi‘ī*, vol. 1, 47. Cf. also the divergent opinion of the Islamische Religionsgemeinschaft Hessen on the occasion of the written hearing in the Hessen Parliament regarding the problem of forced marriages of 6 Nov. 2006, p. 6, viewed on 9 Nov. 2006 on http://www.irh-info.de/nachrichten/nachrichten/2006/dok/IRH-STN20061106_Zwangsverheiratung.pdf.

70 Cf. Würth, *Aṣ-Šarī‘a fi Bāb al-Yaman*, 85 ff.

71 Cf. al-Zuḥaylī, *Al-fiqh al-islāmī*, vol. 7, 70 f. with further references.

72 *Wizārat al-awqāf*, *Al-mawsū‘a*, vol. 41, 295.

occasion of a Muslim marrying a non-Muslim woman suitable because of her religious affiliation, members of the latter religion may be asked as witnesses.⁷³ The Shi'ites, finally, recommend the presence of witnesses but do not elevate this to the level of a requirement for legal effectiveness.⁷⁴

dd The Dower (*mahr, ṣadāq*); Marriage Contracts

The dower mentioned in suras 4:4 and 33:50 is not the 'purchase' price for the woman, but a payment made exclusively to her.⁷⁵ It serves to secure her financially and at the same time is a formal confirmation of the intention to marry. There are indeed payments made to the bride's family not only in the rejected ancient Arab tradition,⁷⁶ but also in societies under Muslim rule, e.g. possibly until the present day in parts of Turkey (the so-called *başlık*, 'bounty'⁷⁷) or Yemen (*shart*);⁷⁸ they are not, however, based on the provisions of Islamic law.⁷⁹

A contractual agreement concerning the payment of the dower (*mahr, ṣadāq*) by the husband to the bride is customary but not a requirement. If no specific dower (*mahr musammā*) has been agreed, the 'customary dower' (*mahr al-mithl*) must be paid.⁸⁰ Agreements on (inadmissible) exemption from the dower are on the whole considered to be void, while the marriage contract itself remains valid. Only the Malikites consider the contract to be contestable in this case (*fāṣid*),⁸¹ but they also distinguish between consummated and unconsummated marriage. In the latter case the marriage should continue, and the customary *mahr* will be due.⁸² Legal texts often treat the dower in great detail and discuss it in manifold ramifications, which may be seen as evidence of its particular social significance.

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73 Cf. Ibn Qudāma, *Al-mughnī*, vol. 6, 316.

74 Cf. Nasir, *Islamic Law*, 57 with further references.

75 Cf. al-Shāfi'i, *Kitāb al-umm*, vol. 5, 104.

76 Cf. Smith, *Kinship*, 92 ff.

77 Cf. Rumpf, *Einführung*, para. 13, marginal no. 12, with further references; Serim Timur, *Charakteristika der Familienstruktur in der Türkei*, in Abadan-Unat (ed.), *Die Frau in der türkischen Gesellschaft*, 2nd ed., Frankfurt/Main 1993, 71 f.

78 Cf. Würth, *Aṣ-Ṣarī'a fi Bāb al-Yaman*, 154 with n. 2.

79 Consequently the treatment in LG Köln IPRspr. 1980 no. 83 is inappropriate; cf. Rohe, *The Application*, 19, 25. Cf. now the thorough study on the *mahr* and other related legal institutions by Yassari, *Die Brautgabe*.

80 Cf. al-Zuhayli, *Al-fiqh al-islāmī*, vol. 7, 265 ff.

81 Cf. op. cit. 254.

82 Cf. Saḥnūn, *Al-mudawwana al-kubrā*, vol. 2, 216.

The following excerpts from a contract on the dower from Fayyum/Egypt transmitted from 444/1052⁸³ may serve as an instance:

This is what Mallūk ibn Surūr ibn Kīsān has determined to be the dower to his wife Fāṭima, daughter of ‘Abd al-Raḥmān ibn Barmūde (...) He has determined as her dower, which he has given to marry her and acquire conjugal bonds with her, namely twenty dinar of the gold currency (...) used in Egypt (...), thus rendering the marriage legally binding and the marriage contract legally valid (...); namely before he shall lie with her and have relations with her, ten dinar, and he will still owe ten dinar⁸⁴ (...) and his duty is to ensure the pleasurable manner of their mutual relations, and a union in deep affection, and the legitimacy of their mutual relationship in accordance with the conditions set by God, who has set them down in his book for the benefit of wives and at the expense of husbands, that the latter must keep them in a benevolent fashion or release them respectably. And her duties towards him (i.e. the husband) are the same as his towards hers, the husband being one rank higher, just as the sublime God, to Him be praise, said: the men are a rank above them, and God is all-powerful and all-wise.⁸⁵ And the marriage ceremony with him⁸⁶ was attended by her brother Zikrī ibn ‘Abd al-Raḥīm at her behest and with her authority and consent (...) after she had provided for his benefit (i.e. the husband’s) two witnesses on her behalf to testify to her situation, namely (...). They both know her very well, her person, name, descent and status.⁸⁷ And at this time (of the marriage) she is a maid, an adult virgin, sound of body and mind, legally competent with effect both for and against herself. And he (the husband) accepted the (declaration of) marriage from him (the guardian) (...). The acknowledgement (of the husband) was witnessed because of what he has given her as a dower, some payable immediately and some deferred; once everything in this document (...) had been read to them both, from the beginning to the end and word by word, so they should both know, understand and accept that

83 In Grohmann/Khoury, *Papyrologische Studien*, 7 ff.; their translation of the original document has been changed in some places. Further examples of Egyptian marriage contracts may be found in Sonbol, *History*, 167 ff.

84 This is a typical division clause regarding the settlement date for the dower.

85 Reference to sura 2:228.

86 The brother is acting as her marriage guardian, *walī*.

87 This is relevant for the prerequisite of ‘equal status’, *kafā’a*.

they knew and understood it, and all this being of sound mind and body and legally competent, voluntarily and at their own desire, not forced, coerced or under duress (...). 87

The dower is generally payable in total on consummation of the marriage⁸⁸ or in the case of the husband's dying before this. The wife is entitled to refuse to fulfil her conjugal duties until the dower has been paid. If a marriage is divorced before having been consummated, the bride generally has a claim to half of the dower (sura 2:237).

The dower may be employed as a protective measure for the benefit of the wife to uphold the marriage, if repayment is agreed for the case of one-sided divorce by the husband (*ṭalāq*) (cf. gg) below).⁸⁹ Overall, people often avail themselves of the alternative of dividing the dower into a, frequently rather symbolic, payment on the occasion of entering into the marriage (*mahr mu'ajjal/muqaddam*) and deferred payment(s) of the balance (*mahr mu'ajjal/mu'akkhar*).⁹⁰ This can ease the husband's financial burden as well as result in the wife's contributing to any hoped-for increase in property. Critical opinions by scholars such as Ibn Taymiyya⁹¹ point to cases where for reasons of prestige great sums were agreed, which were never meant to be paid and, indeed, never were paid. Among the less wealthy, the dower is likely to have been small. In Ibn Taymiyya's opinions, remarks by Muhammad, his companions and early scholars are quoted, which recommend agreeing on small sums.⁹² In present-day India, amounts of around ten euros [ca. £8.50] are common, but they are not always actually paid. Registered amounts do not always correspond with the amounts agreed upon and paid for various reasons; consequently only field-work studies can shed light on the latter.⁹³

88 There is disagreement on whether the marriage must have been consummated, or whether it is sufficient for there to have been an opportunity for the consummation; the latter opinion is held by Hanafites and Hanbalites; cf. e.g. al-Zuhaylī, *Al-fiqh al-islāmī*, vol. 7, 321 ff.

89 Cf. Rapoport's analysis of the relevant documents in *Matrimonial Gifts*, 1, 14 ff.; concerning twentieth-century Palestine see Moors, *Women, Property and Islam*, 127 ff., 139.

90 Regarding similar modes of payment in the late Middle Ages cf. Rapoport, *Marriage*, 53 ff. with further references; suitable suggestions regarding the wording are found in al-Ṭahāwī, *Al-shurūṭ*, vol. 2, 671 ff.

91 Ibn Taymiyya, *Majmū'at al-fatāwā*, vol. 32, 122.

92 Op. cit., 121.

93 Cf. e.g. Moors, *Registering a Token Dower*, 85 ff.

The marriage contract may furthermore set down clauses which significantly improve the woman's legal position. It is possible to grant her an easier right of divorce, by giving her the authority to pronounce the divorce 'as her husband's representative' in accordance with the easier conditions applying to him (*ṭalāq al-tafwīd*).⁹⁴ Furthermore a second marriage entered into by the husband may be assessed to be a 'damage' (*ḍarar*), which will open the right to divorce to the first wife.⁹⁵ Whether these kinds of provisions could be implemented within society, the current state of research can only show in very few instances.⁹⁶

ee Consequences If Individual Preconditions for Legal Effectiveness are Absent

88 Overall we see a clear tendency that actually contracted marriages should not be regarded as void (*bāṭil*) if individual preconditions for legal effectiveness are lacking, but merely as contestable (*fāsid*) or, in the case of the guardian's required consent being missing, provisionally invalid (*ghayr nāfidh*)⁹⁷, in particular if the marriage has already been consummated. In this way it will not be classed as an illicit relationship, and the penal consequences can be avoided,⁹⁸ which also benefits children resulting from the marriage, whose legitimacy is then assured.⁹⁹ Impediments to marriage seen as fundamental (*sharā'it al-in'iqād*)¹⁰⁰, however, result in the marriage becoming void, such as the impediment for reasons of blood kinship or the faith difference between a Muslim woman and a man from a different religion.

ff The Spouses' Rights and Duties

Marriage involves a multitude of rights and duties for the spouses. The fact that sexual relations are permitted only within marriage assumes a social dimen-

94 Cf. Wizārat al-awqāf, Al-mawsū'a, vol. 29, 45 ff.

95 Cf. Fyze, *Outlines*, 158 f.

96 E.g. Fyze describes them at the middle of the twentieth century as 'beginning to be fairly common in India' (*Outlines*, 159); the tendency is similar in Ottoman Egypt, Abdal-Rehim, *The Family and Gender Laws*, 96, 103.

97 Cf. Wizārat al-awqāf, Al-mawsū'a, vol. 29, 45 ff.

98 The juxtaposition in Wizārat al-awqāf, Al-mawsū'a, vol. 41, 318, is succinct: After the consummation of a incorrectly contracted marriage the *mahr* is due, while the *ḥadd* punishment for illicit sexual relation does not apply because of the legal doubt (*shubha*) caused by the contract.

99 Wizārat al-awqāf, Al-mawsū'a, vol. 41, 319; cf. also El Alami/Hinchcliffe, *Islamic Marriage*, 10 ff.

100 Cf. Wizārat al-awqāf, Al-mawsū'a, vol. 41, 303 ff.

sion as well (concerning the punishable nature of extra-marital relationships see 7.b.cc below).¹⁰¹ Remarks in the classical texts show clearly that sexuality – as long as it is legitimised by marriage – is seen as a necessity for both sexes. However, men and women are regarded very differently: we frequently find the statement that the husband is always entitled to sexual intercourse unless there are clear objections such as menstruation, illness or recent childbirth, which might harm the wife if disregarded.¹⁰² With respect to women there are discussions of at what intervals they may demand intercourse, but the figures vary from every four days to every four months; some scholars demand single consummation only.¹⁰³ In the case of unjustified refusal or absence, a right to divorce is presumed.¹⁰⁴

Rights and duties within marriage correspond to a fixed division of roles which was characteristic of European legal systems, too, even until the present. The received image is that of the husband as the provider, representative of the family in relations with the outside world, and head of the family, while the wife's duties lie in overseeing the household and motherhood. Insofar as reasons are given at all for the different assignment of roles, they often point to the assumption that men are more strongly guided by reason, while women are more emotional, not least during menstruation. With slight exaggeration it might be said that the duties are 'bearing responsibility' in the case of the husband, and 'obedience' (*tā'a*) for the wife.¹⁰⁵ Support for the husband's dominant role is found in sura 4:34, which reflects the fundamental division of roles according to the classical view, even granting the husband the right to chastise

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101 Relations with female slaves, permissible according to classical law, are a special case. The extent of permitted sexuality becomes apparent in the article headed *nikāh* in the encyclopaedia of Islamic law, published by the Kuwaiti Ministry for Foundations and Islamic Affairs, which mentions this aspect as characteristic of marriage according to most schools (Wizārat al-awqāf, Al-mawsū'a, vol. 41, 205).

102 Al-Zuhaylī's demand, Al-fiqh al-islāmī, vol. 7, 335, is clear: the wife must obey her husband when he calls her to the conjugal bed (as long as she will suffer no harm from it); cf. also Wizārat al-awqāf, Al-mawsū'a, vol. 41, 314.

103 Cf. al-Zuhaylī, Al-fiqh al-islāmī, vol. 7, 329 ff.

104 Cf. op. cit., 330.

105 Cf. e.g. al-Qurṭubī, Al-jāmi', vol. 5, 173 ff.; Wizārat al-awqāf, Al-mawsū'a, vol. 28, 324f. Even today we read in a work published in Canada: 'In marriage, all the duties of the wife are summed up in one word, *ta'a*, or obedience to her husband.' The husband, on his part, ought to treat the wife well and generously (Ali Mubarak, The Muslim Handbook, Toronto 2001, 273, 276, 308).

the wife.¹⁰⁶ In the view of some scholars¹⁰⁷ this applies in particular in cases of refusing intercourse, running away, and also refusing to pray and subsequently insulting the husband. Sura 2:228 is also quoted to support the fact that the husband has more rights vis-à-vis the wife than vice versa.¹⁰⁸ Thus a woman ought never to leave the house without her husband's permission, except to perform her religious duties or to attend to urgent family affairs.¹⁰⁹ The husband is also entitled to determine the place of residence.¹¹⁰ Ibn Qudāma¹¹¹ quotes hadiths and statements by scholars which even tie visits to ailing parents or attending their funeral to the husband's permission. If the wife transgresses this rule, she would be a 'rebel' (*nāshiza*¹¹²) and forfeit her claim to maintenance.¹¹³

Marriage property law stipulates separate property. The wife retains control of her property and is – unlike in older European systems of family law – not limited as to her capacity to act.¹¹⁴ Thus she would be able to undertake a guarantee; according to the Malikite opinion this would be limited to a third of her property without her husband's agreement.¹¹⁵ Spouses of the same religion are entitled to mutual inheritance to different levels (see 3. below). The husband must provide a suitable abode as well as maintenance (*nafaqa*), especially for

106 Cf. e.g. al-Nawāwī, *Al-minhāj*, vol. 8, 230; chastisement as the ultimate option must not be painful according to a widely held view; cf. also Ibn Taymiyya, *Majmū'at al-fatāwā*, vol. 32, 176; al-Zuhaylī, *Al-fiqh al-islāmī*, vol. 7, 104f., 339f. Regarding modern interpretations which reject chastisement altogether cf. e.g. Zentrum für Islamische Frauenforschung und Frauenförderung (ed.), *Ein einziges Wort und seine große Wirkung. Eine hermeneutische Betrachtungsweise zum Qur'an, Sure 4, Vers 34, mit Blick auf das Geschlechterverhältnis im Islam*, Cologne 2005.

107 Cf. al-Sarūjī, *Kitāb adab al-qaḍā'*, 223 with further references; Ibn al-Ṣalāḥ al-Shahrazūrī, *Fatāwā*, vol. 2, 432 (no. 376); Rapoport, *Marriage*, 76 with further references, also concerning the opposing restricting view.

108 *Wizārat al-awqāf, Al-mawsū'a*, vol. 41, 313: *ḥuqūq al-zawj 'alā zayjatihi a'zam min ḥuqūqihā 'alayhi*.

109 Op. cit., 314.

110 Op. cit., 314 ff.

111 *Al-mughnī*, vol. 7, 15f.

112 Regarding 'rebellion' (*nushūz*) and its consequences cf. only al-Shāfi'ī, *Kitāb al-umm*, vol. 5, 284 ff.; on losing the alimony e.g. *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 58.

113 *Wizārat al-awqāf, Al-mawsū'a*, vol. 41, 56.

114 Research into court records from seventeenth-century Istanbul prove – despite the unequal treatment of men and women before the law in general – a considerable amount of independent economic activity on the part of women; cf. Zarinebaf-Shahr, *Women, Law, 81, 86 ff., 91, 94.*

115 *Wizārat al-awqāf, Al-mawsū'a*, vol. 34, 298 with further references.

food, clothing, and shelter during the marriage.¹¹⁶ There is disagreement on whether maintenance is to be determined according to the husband's financial capacity, the wife's standard of living before her marriage or a combination of the two.¹¹⁷ According to the Hanafite view a woman can only demand payment of (maintenance) arrears if this has been contractually agreed determined by a court, as unlike the other schools the Hanafites see an element of gift in maintenance (regarding the principles of maintenance law cf. below).¹¹⁸

Not even a wealthy wife needs to contribute to the financial upkeep of the family; the only exceptions are with reference to children if the husband is unable to provide maintenance for them (cf. ii below). She does, however, have the duty of raising the children. There is disagreement on whether she must also look after the household; sometimes this is differentiated according to social status or according to what may customarily be expected and what is beyond her obligations.¹¹⁹ The wife's contributions are not, however, taken into account financially in case of divorce or the husband's death; there is no adjustment for the gains acquired during the marriage, to which typically only the husband has a claim. In addition it is likely that many women contribute significantly to the running of the household, even without a clearly stated obligation to that effect, and often also to the family income, which is not taken into account by the law at all.¹²⁰ Furthermore, the wife's post-marital claim to alimony ends after the three months she has to wait (*'idda*) before she may lawfully enter into another marriage.¹²¹ A husband who has several wives must treat them all equally and provide separate living quarters for all of them.¹²²

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Neglecting essential duties may be regarded as grounds for divorce, which is particularly important for wives in practical terms, as unlike their husbands they are able to bring about a divorce only under very narrowly defined conditions.

116 Cf. e.g. the detailed statements in al-Sarakhsī, *Kitāb al-mabsūt*, vol. 5, 180 ff. They are of interest as regards cultural history as well where they list what is due in detail; cf. also *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 42, 43 ff.

117 *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 41, 39 ff. with further references.

118 El Alami/Hinchcliffe, *Islamic Marriage*, 21.

119 Cf. *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 41, 316; cf. also e.g. Ibn Qudāma, *Al-mughnī*, vol. 7, 16; El Alami, *Marriage Contract*, 101.

120 Regarding the current situation in Iran and Morocco cf. Mir-Hosseini's research in *Marriage on Trial*, 119 ff.

121 Cf. only al-Marghīnānī, *Al-hidāya*, vol. 2, 290.

122 *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 41, 317 f.; cf. also e.g. al-Qayrawānī, *Al-risāla*, 178.

In addition there is a multitude of religious-moral duties necessary for good relations.¹²³ Many scholars even see the place of marriage as close to acts of worship (*'ibādāt*).¹²⁴ While it is true that these duties do indeed contribute to the social view of marriage, they will not be discussed any further here as they lack legal implications. However, it must be said that presuming men to possess a higher level of reason and consequently granting them the power of decision results in a structural imbalance in case of conflict: if a husband does not behave in a god-fearing or 'rational' fashion and chooses to ignore the appeals to treat his wife well, he may have to fear retribution in the other world. The wife, on the other hand, has only very limited means of action, such as divorce in particularly serious cases (cf. gg) below). This will always result in her losing constant access to her children. In this context the factors of privilege become particularly clear: the stronger the wife's support from her birth family, and the more closely the husband is tied to a social context connected to them, the smaller the danger of any abuse of her legal position; but the reverse is also true. On the whole the number of divorces appears to have been fairly high. We have information from fifteenth-century Cairo stating that three out of ten marriages ended in divorce.¹²⁵

91 gg Ending a Marriage

A marriage ends either with the death of one of the spouses or with divorce or forms similar to a divorce. There are also ways of challenging the declaration of marriage (*faskh*), but their application is defined very narrowly. If there are tensions between the spouses, two mediators from both families should be called in (cf. sura 4:35), concerning whose competences opinions differ.¹²⁶ There is no evidence that according to the classical interpretation this mediation would be a condition for the validity of dissolving the marriage.

There are differing ways in which a divorce may be brought about, and husbands clearly have more avenues open to them than wives. Classical as well as modern authors defend the fact that only the husband may be granted far-reaching rights by referring to his being allegedly more detached and,

123 Cf. e.g. suras 2:228; 4:19; 30:21; al-Zuhaylī, *Al-fiqh al-islāmī*, vol. 7, 327 ff.; *Wizārat al-awqāf, Al-mawsū'a*, vol. 41, 310 f.

124 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 41, 217 ff. with further references.

125 Cf. Rapoport, *Marriage*, 5, based on the analysis of 'Abd al-Rahmān al-Sakhāwī's (d. 902/1497) *Kitāb al-nisā'*.

126 For details cf. e.g. al-Shāfi'ī, *Kitāb al-umm*, vol. 5, 286 f.; *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 530 ff.

compared to women, less influenced by emotions.¹²⁷ The husband is also seen as having a greater interest in maintaining the marriage, as he would suffer great financial loss in case of a divorce, as when he must pay the deferred portion of the dower.¹²⁸ What they do not mention is that women generally suffer much more serious legal and social disadvantages. Thus simply threatening divorce could be used to exert pressure on wives.¹²⁹ There are differing views concerning nearly all individual topics, even within the respective law schools. In practice this means that the attitude of those who decided in these cases (presumably nearly invariably men) was of the greatest significance.¹³⁰

By far the most frequent form of divorce, to which only the husband is entitled, is the one-sided ending of the marriage by means of the so-called *ṭalāq*, mentioned in suras 2:229 and 65:1f.¹³¹ No grounds are required.¹³² According to Sunni majority opinion it is valid even if there was no genuine wish (*niyya*) to bring about a divorce, as long as it has been expressed with sufficient clarity.¹³³ The Shi'ites, on the other hand, have very strict requirements for declaring a divorce and demand the presence of the corresponding intent.¹³⁴ Sunni schools allow the *ṭalāq* to be informal, although the presence of witnesses is seen as desirable;¹³⁵ for the Shi'ites the presence of two witnesses is obligatory.¹³⁶ According to classical law there is no need to involve a court or administrative agency. According to classical Hanafite law it is not even necessary to inform the wife of the declaration of divorce in order for it to become legally valid.¹³⁷ In addition the Hanafites consider the *ṭalāq* valid if it was expressed in a state of self-induced inebriation; the other schools reject this.¹³⁸

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127 al-Zuhaylī, *Al-fiqh al-islāmī*, vol. 7, 461; El-Bahnassawi, *Die Stellung der Frau*, 195.

128 Cf. only al-Qasīr, *Al-mar'at*, 54 ff.; Wānli, *Al-rajul*, 319.

129 Cf. Rapoport, *Marriage*, 71 f. with further references.

130 According to Rapoport's research (*Marriage*, 74) into Mamluk Egypt and Syria, women could expect hardly any help if they sought a divorce against their husbands' wishes.

131 For details see the extensive article headed *ṭalāq* in *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 5 ff.; cf. also El Alami/Hinchcliffe, *Islamic Marriage*, 22 ff.

132 We find the explanation that this serves to keep family secrets, protects the wife's honour and good reputation (!) and that providing evidence in such cases would be difficult anyway; cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 12.

133 Op. cit., 26 ff.

134 Cf. Fyzee, *Outlines*, 151.

135 Cf. al-Kāsānī, *Badā'i' al-ṣanā'i'*, vol. 3, 264.

136 Cf. Badrān, *Al-fiqh al-muqāran*, vol. 1, 328, 378; cf. also Fyzee, *Outlines*, 151.

137 Cf. Badrān, *Al-fiqh al-muqāran*, vol. 1, 319, 321, 324.

138 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 16: the reason given by the supporters is that this

There is a revocable (*rajʿī*) and an irrevocable (*bāʿin*) form of *ṭalāq*. Only the revocable one, which stipulates that the divorce becomes valid only at the end of the period of waiting (*ʿidda*; generally three months) after the declaration, is recognised absolutely. It may take place in two different ways. The most respected procedure (*aḥsan*) is divorce by an unrevoked declaration of divorce at the end of the period of waiting. In this case, revoking it in words or by intercourse within the period of waiting will cause the marriage to continue as before.¹³⁹ Also accepted (*ḥasan*) is the way in which there are three declarations of divorce within three consecutive menstrual cycles, even if the previous declarations were revoked. The legal consequence in both cases is irrevocable divorce. The same is true of the declaration of divorce before the consummation of the marriage.¹⁴⁰

The irrevocable *ṭalāq* ends a marriage with immediate effect. This form of divorce by means of specific affirmation is seen by some Sunnis, in particular Hanafites – but not the Shiʿites – as sinful (*bidʿa*, inadmissible ‘innovation’), but still legally effective.

Irrevocability – either at the end of the period of waiting in the case of revocable divorce, or immediate irrevocability – is in turn divided into two sub-categories: the smaller and the greater irrevocability (*baʿnūna ṣuḡhrā* or *kubrā*), with the classes of cases interpreted differently in the different schools.¹⁴¹ If the irrevocable divorce has been pronounced once, the marriage may be reinstated by means of a new marriage contract; this is also possible after the end of the period of waiting after a revocable divorce as long as the divorce was not pronounced more than twice. If the divorce has been pronounced three times in succession, based on sura 2:230 a marriage can only be reinstated if the wife marries another man (*muḥallil*) first, consummates the marriage with him¹⁴² (some devices to circumvent this were thought up), and that marriage has then been dissolved. Fyzee¹⁴³ explains this regulation with the intention of ending a pre-Islamic practice according to which women could endlessly be cast out and then taken back. Unlike the other schools the

would be a punishment for the husband (the wife’s interests are not mentioned); regarding criticism cf. Ibn Taymiyya, *Majmūʿat al-fatāwā*, vol. 33, 61; Fyzee, *Outlines*, 156.

139 *Wizārat al-awqāf*, *Al-mawsūʿa*, vol. 29, 29 and ff.

140 Cf. sura 33:49.

141 Cf. *Wizārat al-awqāf*, *Al-mawsūʿa*, vol. 29, 29 ff.; Linant de Bellefonds, *Traité*, vol. 2, 405 ff. with further references.

142 Cf. Linant de Bellefonds, *Traité*, vol. 2, 407, 413 ff. with further references.

143 Fyzee, *Outlines*, 154.

Hanafites see a triple declaration of divorce within one menstrual cycle as entailing a greater and irrevocable divorce.¹⁴⁴ 93

Classical marriage law knows other forms of divorce besides the *ṭalāq*; these were probably very rare in practice. In the case of *ilā'* the husband swears that he will not have intercourse with his wife for four months (cf. sura 2:226 f.). According to Hanafite opinion the marriage is then dissolved. The other schools allow the wife the right to institute legal proceedings in which the judge would prompt the husband to resume conjugal relations with his wife, or declare the divorce. If the husband refuses, then the judge himself will pronounce the divorce.¹⁴⁵

In the case of *zihār* – which was frowned upon by religion – the husband compares the wife to a relative in respect to whom there would be an impediment to marriage, e.g. with the formula 'You are to me like the back (*zahr*) of my mother'. The legal consequences, according to the majority of scholars, are limited to the prohibition of further conjugal relations and the payment of a fine (*kaffāra*). Only a few scholars include actual divorce as a consequence if, as in the case of *ilā'*, no intercourse takes place for at least four months, or if the declaration of *zihār* constitutes a disadvantage (*ḍarār*).¹⁴⁶

The *li'ān*, finally, has the husband accuse the wife of having had illicit intercourse and swear to this according to a particular form, whereupon the wife swears an oath to the contrary. The legal consequences are debated. Malikites, Shafi'ites and Twelver Shi'ites consider the marriage to be at an end with immediate effect, while the majority of Hanafites and Hanbalites are of the opinion that the judge must ask the husband to pronounce the divorce, or pronounce it himself in case the husband refuses to do so. Thus the husband has the option to withdraw his accusation, even though he would then be culpable of wrongful accusation of illicit intercourse (*qadhf*).¹⁴⁷

The wife¹⁴⁸ is granted a legal right of divorce (*tafriq, taṭliq*), enforceable by law, in certain justified cases. The Hanafites restrict it to the universally recognised cases where the husband is impotent and the marriage was contracted

144 Wizārat al-awqāf, Al-mawsū'a, vol. 29, 32; regarding 'triple *ṭalāq*' see also Part 3, 2.2.c.bb below.

145 Op. cit., 322.

146 Cf. al-Zuhaylī, Al-fiqh al-islāmī, vol. 7, 601ff., esp. 603f.

147 Thus the summary of the legal consequences in El Alami/Hinchcliffe, Islamic Marriage, 26f.

148 Many also allow the husband the right to divorce in comparable cases, but the main importance of the rights mentioned is for those women who have no other way of dissolving their marriage.

without this circumstance having been known,¹⁴⁹ and also in case of the husband's apostasy.¹⁵⁰ In the former case it is difficult to provide evidence. The husband is able to contest the charge simply by confirming conjugal relations under oath.¹⁵¹ Some scholars extend the possible divorce to cases where the husband suffers from certain illnesses (*uyūb*, such as e.g. mental illness or venereal disease).¹⁵² On the whole the preconditions are viewed strictly rather than generously.¹⁵³ However, it seems that in practice ways of easing the situation were often found. Thus an expert opinion from seventeenth-century Palestine shows that a wife who received insufficient financial maintenance was enabled to bring about a divorce by means of the Hanafite judge, who was not authorised to proceed in the matter himself, appointing a Shaf'ite representative who, according to the opinion of his school, was entitled to decide such an issue.¹⁵⁴

The other schools allow additional solutions also in cases when the husband is permanently unable to pay the *mahr* due or to provide maintenance (*i'sār*),¹⁵⁵ sometimes also if he is absent over long periods of time (*ghā'ib*)¹⁵⁶ or abstains from intercourse without reason over a long period of time (Hanbalites). The position of an imprisoned husband is debated. In the view of the majority a divorce is not possible, as his place of abode is known and he is not absent in the legal sense, or because the imprisonment and the consequent absence are against his wishes. The Malikites are the only ones to allow a divorce after a year's imprisonment due to the disadvantage to the wife.¹⁵⁷

In addition the wife may work towards having her husband legally declared dead if he is lost (*mafqūd*). However, depending on the situation in which the

149 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 29., 73; the other schools differentiate between individual infirmities in respect of ruling out divorce due to agreement.

150 Concerning the relevant legal situation in Egypt cf. Hamad, *Legal Plurality*, 219 ff.

151 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 75.

152 Among the Hanafites with reference to mental illness e.g. al-Nasafī, *Al-baḥr al-rā'iq*, vol. 4, 206 f.; cf. also *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 67 ff.

153 *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 67.

154 Cf. Tucker, *In the House*, 78 with further references.

155 *Wizārat al-awqāf, Al-mawsū'a*, vol. 41, 66 ff. with further references, 323; vol. 29, 57 ff.; here, too, there are differences of opinion between the individual schools. The Hanafites and a few others allow the woman only the right to take up an occupation to earn her own maintenance.

156 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 63 ff. with further references on the diverse opinion; among the supporters the minimum period of absence varies between half a year or a whole year and up to three years.

157 Regarding all this *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 66 f.

husband disappeared, and also depending on the school, different periods of time are stated, thus at least four years by those who permit divorce due to lengthy absences. The others postulate his (hypothetically) attaining a typical age of dying, usually stating 70 or 80 years,¹⁵⁸ but we also find 120.¹⁵⁹

The Malikite school permits a further option of dissolving a marriage if the husband can be proved to have caused harm (*ḍarar*) to the wife. This may be in the case of severe beatings (on the right to chastise see ff) above), refusing to have intercourse, or insulting the wife. If the wife is unable to prove such harm, Malikite doctrine allows her, based on the rule in sura 4:35, to present the facts of serious marital discord before two mediators from both families. Depending on the gravity of the discord and the degree of culpability of the respective spouse, these would then be authorised to pronounce an irrevocable divorce either against payment of compensation or without this.¹⁶⁰

Besides the divorce pronounced by a court there are also some forms of dissolving a marriage out of court. In one case the husband may transfer the right to the one-sided divorce (*talāq*) to the wife (*talāq al-tafwīḍ*).¹⁶¹ Based on sura 2:229 and one hadith it is also considered permissible to allow the wife further rights to divorce by means of a contract, in the form of *khul'* (right to dissolution). This does not require any justification beyond the wish not to continue the marriage. It is customary that in this case the wife has to repay the dower, or waive the portions owing, or pay another agreed sum. While only the Shafi'ites, Zāhirites and Shi'ites consider this to be a precondition of the legal effectiveness,¹⁶² it is likely that in practice such payments are the rule.

If no sum has been agreed, the Shafi'ite view is that the customary *mahr* must be paid.¹⁶³ According to Hanafite opinion, mutual financial claims of the marriage will become void depending on the wording of the declaration of divorce and the respective assets.¹⁶⁴ Consequently a *khul'* might improve the financial

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158 Op. cit., 64 ff.

159 Al-Marghīnānī, Al-hidāya, vol. 1, 424.

160 Cf. Wizārat al-awqāf, Al-mawsū'a, vol. 29, 54 f.; cf. also Linant de Bellefonds, Traité, vol. 2, 463.

161 Regarding the disparate details cf. e.g. al-Marghīnānī, Al-hidāya, vol. 1, 236 ff.; Linant de Bellefonds, Traité, vol. 2, 332 f.

162 Linant de Bellefonds, Traité, vol. 2, 424 with further references; regarding compensation for other equalisation demands by means of the customary dower cf. al-Shāfi'i, Kitāb al-umm, vol. 5, 295.

163 Linant de Bellefonds, Traité, vol. 2, 424.

164 Cf. e.g. the differing examples in al-Nasafī, Al-baḥr al-rā'iq, vol. 4, 132 f.; different opinion e.g. al-Shāfi'i, Kitāb al-umm, vol. 5, 295.

position of the husband demanding a divorce, while exercising the one-sided right to divorce might lead to disadvantageous financial consequences (payment of the deferred dower).¹⁶⁵ It is thus not surprising that there are reports of cases where wives were forced to bring about a *khul'*.¹⁶⁶ It is not by accident that with Art. 17 of the new Family Law the Moroccan legislative created a norm which gives wives, who have demanded *khul'* due to threats from their husbands, the right to claim back the assets involved.

The legal status of executing a *khul'* is debated.¹⁶⁷ On the whole the effective *khul'* is equal to the irrevocable divorce. A further form mentioned is the *mubāra'a*, the release on both sides, with the Hanafites considering the latter as identical to the *khul'*.¹⁶⁸

The legally effective divorce puts an end to most of the legal relations between the spouses. In the case of a revocable divorce, the wife's claim to alimony always ends with the period of waiting for a possible remarriage (*'idda*, generally three months); in the case of an irrevocable divorce the claim ends at that time at the latest.¹⁶⁹ If a portion of the dower has been deferred with a view to possible divorce (*mahr mu'ajjal*), this does not have to be paid until the end of the period of waiting. There are special regulations applying to the time after the third *ṭalāq* has come into effect; this is seen in principle as ending the mutual right to inherit with immediate effect,¹⁷⁰ while it continues during the period of waiting in the case on a revocable divorce.

96 A pregnant wife has a right to receive alimony during the period of waiting; according to Hanafite, Shafi'ite and Malikite opinion based on suras 2:241 and 65:6 this applies to all wives. There is disagreement concerning the amount,¹⁷¹

165 Regarding a legal case in point, from Palestine in 1913, cf. Agmon, *Muslim Women*, 126, 127 ff.; concerning similar agreements in Ottoman Egypt see Abdal-Rehim, *The Family and Gender Laws*, 96, 105 f.

166 Cf. the references in Rapoport, *Marriage*, 72 f.

167 Cf. al-Shāfi'i, *Kitāb al-umm*, vol. 5, 290 f.; *Wizārat al-awqāf, Al-mawsū'a*, vol. 19, 234 ff.; Ibn Taymiyya, *Majmū'at al-fatāwā*, vol. 32, 203 ff.; Linant de Bellefonds, *Traité*, vol. 2, 425 ff. with further references; regarding differences between opinions in legal practice see the case study in Powers, *Law*, 53, 70 f.

168 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 19, 236 f.; Fyze, *Outlines*, 163 f.

169 This is Hanafite doctrine; according to a different view only a pregnant divorced woman is to continue to receive maintenance, others again differentiate between accommodation (which should still be provided) and further maintenance, which should not be provided; cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 41, 57 f. with further references.

170 Regarding this and the exception in the case of irrevocable divorce by a fatally ill husband cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, 49 f.

171 Cf. op. cit., vol. 41, 39 ff.; Linant de Bellefonds, *Traité*, vol. 2, 270 ff.

and also on the husband's duty to pay the *mut'a*, a payment meant for the wife's post-marital upkeep – according to the Shafi'ite view, not less than 30 dirham¹⁷² – which is not connected to a possible dower. It is mentioned in sura 2:241 (in the form *matā'*), but does not appear to have been customary, or indeed enforced often.¹⁷³ Some limit it to cases where no dower had been agreed, or to the status of a mere recommendation which is not legally binding.¹⁷⁴ In the present day it is sometimes used to compensate for the very low claims to post-marital alimony, but against the grim resistance of traditionalists (in more detail exemplified by circumstances in India, Part 3, 2.2.c.cc below).

hh Law of Parent(s) and Child

Children born within a marriage are regarded as legitimate offspring of the spouses.¹⁷⁵ Legally descent is recognised through the mother and the father married to her. There is no provision for illegitimate children as a legal category: after all, illegitimacy would imply accusing the parents of the crime of illicit intercourse (*zinā*). Considerable softening may be achieved in practice by the husband's acknowledging paternity (a form of *iqrār*). Acknowledging extra-marital offspring, however, is not permitted; it is limited to clarifying the effectiveness or the duration of the *existing* conjugal bond.¹⁷⁶

Direct acknowledgement of paternity confers the legal position of biological offspring. There is also a possibility of indirect acknowledgement, if for instances someone recognises someone else as his biological brother, but the resulting legal rights are limited by the relationship with the acknowledging person.¹⁷⁷ In addition the possible period of pregnancy may be extended to four or five years by means of the institute of 'sleeping pregnancy' recognised by

172 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 36, 96 f.; the other schools do not usually state an amount.

173 Cf. e.g. the account of a decision by the early judge Shurayḥ, who saw this clearly as only a religious-moral obligation (account in Ibn Ḥayyān, *Akhbār al-quḍāt*, part 3, 413).

174 Cf. Rapoport, *Marriage*, 71 with further references; id., *Matrimonial Gifts*, 1, 17 ff. with further references.

175 Thus the rule *al-walad li-l-firāsh* 'the child belongs to the (marriage) bed'; cf. only al-Kāsānī, *Badā'ī'*, vol. 2, 490; for details cf. Linant de Bellefonds, *Traité*, vol. 3, 26 ff. with further references.

176 Cf. Fyzee, *Outlines*, 192 ff.; Nasir, *Status*, 176 ff. According to Linant de Bellefonds (*Traité*, vol. 3, 17 ff.), a very generous treatment of similar cases may be observed within Islamic Law.

177 For details cf. Linant de Bellefonds, *Traité*, vol. 3, 48, 64 ff. with further references.

some;¹⁷⁸ in cases where the husband has been absent for a long time before the birth of a child or where a divorce has taken place, procreation within the marriage is still assumed. It would be a rewarding field of study, but presumably one fraught with some difficulty, to investigate whether, and to what degree due to social reasons, legal formalities are used in order to cushion extra-marital procreation.

97 Unlike pre-Islamic usage, adoption (*al-tabannī*) is rejected, based on sura 33:4–5, 37.¹⁷⁹ However, the institute of *kafāla*¹⁸⁰ was developed, which ensures personal care and support for a child within the extended family, without changing the child's status. This is legitimised by sura 3:37, where Zachariah's (Zakariyyā) assuming the care of Mary (Maryam) is referred to using this term,¹⁸¹ furthermore by a hadith¹⁸² and in Muhammad's own biography.¹⁸³

The law of custody of children distinguishes between the actual care of the person (*ḥaḍāna*) and guardianship, for instance in matters of care of the child's estate (*wilāya, walāya*). The father is entitled to the latter on principle, while in the case of the former, decisions are based on age. Occasionally we find remarkably 'modern' deliberations which are aimed not at the status of the parents but at the child's well-being.¹⁸⁴ Thus al-Sarakhsī discusses a case in which the wife was allowed a right to divorce under the marriage contract, but on condition that the children would remain with the father. He declares the agreement on the right to divorce to be legally effective; not, however, the condition: maternal custody of a child is the right of the child, as it would be better looked after with the mother. However, the child might stay with the father if the mother remarries or if she is a slave, as in these cases there would be no benefit for the child: its mother would be busy serving a new husband

178 Cf. Fyzee, *Outlines*, 190 f.; Nasir, *Islamic Law*, 146.

179 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 10, 120 f. Before the prohibition, Muhammad himself adopted a son; *op. cit.*, 121; concerning the practice, in some cases divergent, cf. Linant de Bellefonds, *Traité*, vol. 3, 62 f.

180 The term is ambiguous; it usually refers to a surety agreement, especially a contract of guarantee; cf. only al-Nasafi, *Al-baḥr al-rā'iq*, vol. 6, 346. Al-Rāzī (*mukhtār al-ṣiḥāh*, 575) distinguishes between the terms for guarantor (*kāfil*) and the assignee of a guardianship (*kāfil*).

181 For details see e.g. al-Ṭabarī, *Tafsīr*, vol. 6, 345 ff.

182 Source and explanation of hadith no. 2983 in al-Nawawī, *Al-minhāj*, vol. 11, 408: maintenance, clothing, education etc. are mentioned here.

183 Ibn al-Qayyim al-Jawziyya, *Zād al-ma'ād*, vol. 1, 76: here the term *kafāla* is used to describe Muhammad's grandfather 'Abd al-Muṭṭalib and later his uncle Abū Ṭālib taking care of him.

184 Examples from the Syrian–Palestinian area may be found in Tucker, *In the House*, 113 ff.

or master – and here ends the modernity of the train of thought.¹⁸⁵ Upon remarrying the mother generally loses the right to custody of the children from the first marriage.¹⁸⁶ This is a major reason for many women not to remarry.

ii Maintenance Law

Maintenance law reflects types of living together in patriarchal structures of extended families. Details vary greatly; the following remarks describe shared characteristics.

Traditionally the duty of providing maintenance fell nearly exclusively on men (regarding modern developments cf. Part 2, 3.1.1 below). Women have a duty to provide maintenance only with respect to their children if the husband and father has no means; the next in line are, in the view of the majority (except the Malikites), the children's grandfathers and grandmothers.¹⁸⁷

The decision-making competence within the family is closely linked to the duty to provide maintenance: significant neglect in either area is one of the few grounds on which a woman may divorce her husband. There are even discussions (and some affirmation) concerning whether a woman has a right to divorce even if a third party is providing maintenance for her in the husband's place.¹⁸⁸

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This division of duties explains the (only) nowadays entirely different pre-conception in the context of legal cultural debates concerning the position of women: while Western systems of family law have evolved a total equality of the sexes and criticise unequal treatment (in actual fact often to women's disadvantage), men used to legal systems shaped by traditional Islamic law tend to emphasise the heavy burden of maintenance resting on them alone, which is frequently exacerbated by high demands for dower.¹⁸⁹

Primarily, wives and needy¹⁹⁰ dependent children are entitled on principle; sons until they are of age (meaning legally competent), daughters until they marry and after the husband's death or after a divorce has taken effect and

185 Al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 6, 169.

186 *Wizārat al-awqāf, Al-mawsū'a*, vol. 17, 307.

187 *Op. cit.* 41, 74 f. with further references.

188 *Op. cit.* 41, 70 f. with further references.

189 The legal picture is often changed considerably by social phenomena. Frequently women contribute 'voluntarily' to maintenance, besides looking after the household, e.g. in case of the husband being unemployed; on the other hand, extended families often expect financial support from men, independently of the legal basis.

190 *Wizārat al-awqāf, Al-mawsū'a*, vol. 41, 79 with further references.

the claim to alimony becomes void.¹⁹¹ Only this relationship gives entitlement even in case of different faith,¹⁹² and the widely-held opinion (among Malikites, Hanbalites and parts of the Shafi'ites) is that only these cases do not depend on the debtor's financial capacity.¹⁹³ Other needy family members, such as parents, grandparents and grandchildren,¹⁹⁴ may also claim a right to maintenance; furthermore, according to Hanafite opinion,¹⁹⁵ all collateral relations (*al-ḥawāshī*) of a degree which would constitute an impediment to marriage (*dhawū al-arḥām*), and according to Hanbalite opinion the hypothetical legal heirs of the person liable for maintenance.¹⁹⁶

In the case of adult males related in a relevant degree, the requirements that constitute neediness are particularly strict. Furthermore, the liability for the maintenance of more distant relations applies to wealthy debtors only. According to the *Fatāwā 'Ālamgīriyya* (cf. III. above) the amount should be determined in relation to the hypothetical shares in the inheritance.¹⁹⁷ If more than one person is entitled to claim maintenance, the solutions recommended differ widely. Collateral relations would always have to take second place behind those in the direct line. There is disagreement in particular concerning the competition between the parents and the children of the person liable for maintenance. The debate is dominated by Quranic passages and hadiths, rather than by considerations of differing degrees neediness.¹⁹⁸

99 There are divergent opinions regarding the question of whether the claim to maintenance does a priori meet the criteria of a legally effective debt obligation (*dayn*), or whether it acquires this status only due to a judge's decision. The answer to this question decides whether maintenance in arrears may be claimed for the past, or whether in the absence of a judge's decision this claim is invalid after lapse of time.¹⁹⁹

191 Fyze, *Outlines*, 214.

192 *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 41, 72 ff., 79 f.; *al-Marghīnānī*, *Al-hidāya*, vol. 1, 292.

193 *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 41, 72 ff.; however, the person liable for the maintenance of offspring is permitted to cover his own requirements first; *op. cit.*, 79.

194 According to Malikite opinion the grandparents and grandchildren are not entitled; cf. *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 41, 73, 76, 79.

195 *Op. cit.*, 72, 89 ff.

196 *Ibid.*; but cf. also the Hanafite *al-Marghīnānī*, *Al-hidāya*, vol. 1, 292, who uses the absence of a right to inherit as argument to support the absence of the interreligious claim to maintenance in the collateral line.

197 Quoted in Fyze, *Outlines*, 215; similarly also already *al-Marghīnānī*, *Al-hidāya*, vol. 1, 293.

198 Cf. *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 41, 82 ff. with further references.

199 Regarding the differing opinions cf. *op. cit.*, 71 f.; Hanafites follow the former, Shafi'ites and Hanbalites the latter view.

Finally it is worth noting that there are also discussions concerning animals' claims to maintenance on their owner. The answer is overall affirmative, but there are different opinions when it comes to possible penalties for transgressions. Some reject the possibility of judicial intervention with the argument that animals are not triable; others support penalties, either in the form of forcing the owner to take care of the animal, or taking the animals from him and either sell them, give them away or donate them.²⁰⁰

3 Inheritance Law

a Overview

The essential outlines of classical inheritance law, which on the whole applies to this day,²⁰¹ are found in a few Quranic rules. It is characterised by the division of the estate among relatives and spouses partly according to fixed portions, partly according to variable portions, depending on the situation. The residuary estate is divided once the relevant liabilities such as debts, burial costs and (effective) legacies have been deducted.²⁰² Sura 4:11 and 12 contain the crucial norm, in the following form:²⁰³

God charges you, concerning your children: to the male the like of the portion of two females, and if they be more than two women, then for them two-thirds of what he leaves, but if she be *one*, then to her a half; and to his parents to each one of the two, the sixth of what he leaves, if he has children; but if he has no children, and his heirs are his parents, a third to his mother. If he has brothers, to his mother a sixth, *after* any bequest he may bequeath, or any debt. Your fathers and your sons – you know not which out of them is nearer in profit to you. So God apportions; surely God is All-knowing, All-wise.

And for you a half of what your wives leave, if they have no children; but if they have children, then for you of what they leave a fourth, *after* any bequest they may bequeath, or any debt. And for them a fourth of what you leave, if you have no children; but if you have children, then for them

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200 Cf. Wizārat al-awqāf, *Al-mawsū'a*, vol. 41, 94 with further references.

201 Cf. Pattar's thorough monograph, *Islamisch inspiriertes Erbrecht*, esp. 77 ff. on classical law and the country reports on the present-day law of Egypt, Tunisia and Morocco, 281 ff.

202 Cf. Khan, *Islamic Law*, 30.

203 Verse numbers after Paret, *Der Koran*; translation after Arberry, *The Koran*.

of what you leave an eighth, after any bequest you may bequeath, or any debt (...).

Verse 176 adds:

God pronounces to you concerning the indirect heirs. If a man perishes having no children, but he has a sister, she shall receive a half of what he leaves, and he is her heir if she has no children. If there be two sisters, they shall receive two-thirds of what he leaves; if there be brothers and sisters, the male shall receive the portion of two females.

The regulations based on these passages supplemented by other sources of law are shared by all the Sunni law schools and stipulate certain proportions of the estate for certain relatives of the deceased. Compared to the law previously in force, Islamic law contains significant innovations. Depending on the constellation children and parents are heirs to different shares. If there are relatives in the direct line (*baʿḍiyya*) entitled to inherit, they largely exclude collateral relatives (*kalāla*²⁰⁴). Descendants (children, grandchildren etc.) generally take precedence over the ascendants (parents, grandparents etc.). However, parents are entitled to inherit besides descendants. For the rest, the previously developed rules remain in force, with some divergent details in the separate schools.²⁰⁵

Heirs are distinguished according to whether they are 'quota-heirs' (with fixed proportions according to the Quranic provisions; *aṣḥāb al-farāʾiḍ*²⁰⁶) or residuary heirs. A wife is always a quota-heiress, sons always residuary heirs, as are daughters besides sons.²⁰⁷ Quota-heirs take precedence over residuary heirs. If the quotas do not exhaust the estate, the most widely-held opinion has them supplemented proportionately (*radd*);²⁰⁸ other scholars, Malikites in particular, allocate the remainder to the treasury (*bayt al-māl*) as residual

204 Regarding the development of the interpretation cf. Cilaro, The Qurʾānic Term Kalāla, esp. 20 ff., 48 ff.

205 There is an overview in Spies/Pritsch, Klassisches islamisches Recht, 230 ff.; in more detail: H. Khan, Islamic Law of Inheritance, 21 ff.

206 Cf. Coulson, Succession, 35 ff.; Aftab Husain, Islamic Law of Succession, 62 ff.

207 Cf. Minhas, Inheritance, 41 ff., 44, 58 ff.; Coulson, Succession, 41 ff.; Doi, Sharīʿah, 300 and *passim*; Wizārat al-awqāf, Al-mawsūʿa, vol. 3, art. *Irth*, 36 f. (no. 37, 39).

208 For examples of calculations according to Sunni and Shiʿite law cf. Fyzee, Outlines, 417 f.; 460 ff.

heir.²⁰⁹ In the reverse case there will be reductions (*awl*);²¹⁰ according to Shi'ite opinion this applies only to the variable quotas.²¹¹ There is no inheritance by proxy according to classical inheritance law, which means that the offspring of a predeceased descendant (e.g. orphaned grandchildren) may be excluded by collateral relatives.²¹²

It is furthermore possible to dispose of a maximum of a third of the estate by will (*waṣīyya*) (as indicated in sura 2:180).²¹³ There are restrictions in some schools with regard to the group of people who might benefit. Sunnis and Ismailis reject the provision that people who may already be legally entitled to inherit could receive an additional legacy under the deceased's will²¹⁴ without the consent of the other heirs,²¹⁵ while the Twelver Shi'ites generally allow this.²¹⁶ In the case of married partners of different faith, which may result in limitations of the legal title to inherit, a will, insofar as it is permissible,²¹⁷ may offer a starting point for individual solutions.

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b *The Gender Ratio*

If there are descendants entitled to inherit, the wife is quota-heiress to one-eighth of the estate.²¹⁸ In the reverse case of the wife predeceasing the husband, the husband would inherit a fixed quota of a quarter. Several sons and daughters are entitled to the same share, the share of a son always being double that of a daughter.²¹⁹ Many Muslim scholars explain and justify this obvious disparity between husbands and wives, and sons and daughters, with the fact that according to traditional maintenance law only husbands and sons are liable for maintenance, but not wives and daughters, and that the double share is meant

209 Cf. Coulson, *Succession*, 49 ff.

210 For examples of calculations according to Sunni and Shi'ite law cf. Fyzee, *Outlines*, 416 f.; 462 ff.

211 Spies/Pritsch, *Klassisches islamisches Recht*, 233.

212 Cf. Aftab Khan, *Inheritance*, 34 ff.; 152 ff. (regarding modern reforms).

213 For details cf. e.g. Coulson, *Succession*, 213 ff.; Rohe, *Testierfreiheit*, 178 ff. with further references.

214 According to Hanafite opinion consent is only effective after the event of succession; cf. Fyzee, *Outlines*, 366.

215 Cf. op. cit., 366 f.; also Powers' impressive study, *Studies*, 21 ff. with further references.

216 Coulson, *Succession*, 239 ff.; Fyzee, *Outlines*, 366.

217 Restrictions are stated to be existing between e.g. the inhabitants of the territory under Islamic rule (*dār al-Islām*) and those from outside its borders (*dār al-ḥarb*); cf. al-Marghīnānī, *Al-hidāya*, vol. 4, 537.

218 Cf. Minhas, *Inheritance*, 44.

219 Cf. op. cit., 48.

as overall compensation.²²⁰ They are also fond of pointing out that, unlike legal provisions in place previously, Islamic law allows women a share of the inheritance at all and puts an end to the alleged earlier practice of including widows and their property in the husband's inheritable estate.²²¹

Classical Islamic inheritance law may indeed be regarded as progress compared to the practice previously in place, despite the disparities described. There are many regions where women were and still are entirely barred from inheriting, despite Islamic legal positions, such as in Pashtun territory and in parts of the Maghreb.²²² However, the comparatively strict Islamic regulations could be circumvented by means of legal transactions – even with future heirs – during one's life. Until the beginning of the period of dying (*marad al-mawt*) the owner was free in principle to determine how to dispose of his property. A corresponding practice appears to have developed, as shown by studies of *tawliḥ* – a controversial form of property transfer onto one's children during one's lifetime.²²³ Business transacted during the period of dying – certainly if it exceeds the third of the property open to testamentary disposition – is rejected by many as being invalid due to the dying man's increased vulnerability to manipulation.²²⁴

102 c *Differences between Sunnis and Shi'ites*

There are clear differences between Sunni and Twelver Shi'ite inheritance law (concerning the divergent recognition of the relevant sources of law see 1.2 above).²²⁵ According to the latter there is one group of heirs only, based on reasons of kinship, which is divided into three competing classes (ascendants of the first degree and descendants; more distant ascendants and siblings as well as the latter's offspring; other collateral relatives depending on the degree).²²⁶

220 For more detailed information cf. e.g. Rohe, Gutachten Nr. 25 (Libysches Erbrecht) in Deutscher Rat für Internationales Privatrecht, Gutachten zum internationalen und ausländischen Privatrecht 2002, Bielefeld 2004, with further references. Regarding the argument's lack of sustainability when applied to the present cf. Part 3, 4.3.b. below).

221 Cf. H. Khan, Islamic Law of Inheritance, 21 f., 26.

222 Cf. Rosen, The Justice, 89 f.

223 Cf. Powers, The Art of the Legal Opinion, 98 ff. Powers, (op. cit., 112) emphasises the remarkable fact that in the fatwa examined, the thorough argumentation is based on verdicts, formularies, earlier fatwas and textbooks, but not on Quran and sunna.

224 Cf. e.g. al-Marghīnānī, Al-hidāya, vol. 4, 526 ff.; in detail Coulson, Succession, 259 ff.

225 For more details and regarding the facets of Shi'ite inheritance law according to the different schools cf. Coulson, Succession, 108 ff.; H. Khan (Inheritance, 127 ff.) lists fundamental differences.

226 Cf. Fyze, Outlines, 442; Spies/Pritsch, Klassisches islamisches Recht, 233.

Unlike in Sunni law there is no provision for privileging agnate relatives. This is a deliberate step on the part of the Shi'a to distance itself from the strictly agnate-centred pre-Islamic inheritance law.²²⁷ A practical example of the differences described is the question of what the share of the deceased's daughter amounts to compared to that of more distant relatives such as uncle, aunt or cousin as the only living heirs. According to Sunni inheritance law the daughter would inherit only half the estate besides these relatives, while according to the Shi'ite doctrine of the classes of heirs and their being 'filled' according to precedence she would be the sole heir. If she had predeceased the decedent and left a daughter, the latter would also be the sole heir.²²⁸

d *Interreligious Issues*

Besides the unequal treatment of the sexes there are far-reaching restrictions of the interreligious title to inheritance. According to the Sunni schools, inheritance between Muslims and non-Muslims is impossible in either direction,²²⁹ an instance of the historical antagonism between the religions (cf. 9 below). Shi'ite inheritance law permits inheritance only in favour of Muslims.²³⁰ The potential for abuse is obvious if we consider that one surviving Muslim dependent would exclude all non-Muslims from the succession even if they were more closely related and that converting to Islam is easily and quickly done.²³¹ The influential contemporary scholar Yūsuf al-Qaraḏāwī also embraces the view, based on classical sources, that the title is one-sided and Muslims may inherit from non-Muslims. He draws a parallel to the impediment to marriage which is also one-sided and emphasises that it must be better to help Muslims to inherit property as long as the law permits it, than 'grant it to the unbelievers to enjoy and to devise malicious schemes against Muslims'.²³² We can see a very clearly prejudiced image of the enemy here.

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In addition it must be borne in mind that the details of Islamic inheritance law are an extremely complex subject. Besides the intricate ratios of the shares

227 Fyze, *Outlines*, 464f.

228 Concerning the diverse traditions consulted and the corresponding results regarding the Shi'a see al-Kulaynī, *Furū' al-kāfī*, ch. 61, 109ff.; regarding the Sunna see the traditions in al-Bukhārī, *Ṣaḥīḥ*, vol. 3, *Thesaurus Islamicus Foundation* edition 2000, 1361ff. (no. 6819ff.) and Bakhīt/al-'Alī, *Al-wasīṭ*, 59, 67; cf. also EI II, vol. 7, art. 'Mīrāth', 110 (J. Schacht).

229 Cf. only H. Khan, *Inheritance*, 42f.; Menhofer, *Religiöses Recht*, 76ff., 236ff. with reference to present-day Egypt.

230 Cf. Fyze, *Outlines*, 464.

231 Cf. Thoms, *Nichtmuslimische Minderheiten*, 81f.

232 Al-Qaraḏāwī, *Fiqh of Muslim Minorities*, 119.

of an inheritance in an extended family group, questions as delicate as the one whether a hermaphrodite would receive a man's or a woman's portion must be solved.²³³ It is no coincidence that Muhammad is quoted as having said it would be wise to study inheritance law as it amounts to the half of all knowledge.²³⁴ In view of the complexity of the subject, some may prefer to devote themselves entirely to studying the other half. But it has to be said that the challenges posed by the law have spurred on the sciences, including mathematics: the magnum opus of one of the greatest Arab mathematicians, al-Khwarizmi,²³⁵ the *Kitāb al-mukhtaṣar fī ḥisāb al-jabr wa-l-muqābala* dating from the ninth century AD, deals in great detail with the challenges of apportioning an inheritance.²³⁶ However, we are not able to go into any detail here.²³⁷

4 Contract Law and Commercial Law

a Overview

Contract law and commercial law are regulated only in part by provisions of Islamic law. Classical Islamic contract law was developed over the first centuries of Islamic rule. However, there are only rare instances of systematic descriptions of the mechanisms of legal transactions, of the system for reviewing contracts and of the processing of effective and of failed contracts. What we do have are descriptions of individual important contract types within the framework of which points of law are discussed by way of examples. As in many other legal systems, the purchase contract is the model for the discussions. We also find exhaustive representations of the slave trade, which was a significant factor in the economy of earlier times.

Individual types of contract, such as purchase, endowment, loan or credit, are often dealt with in great detail and with considerable casuistry, at the same time offering interesting insights into the economic and social structures

²³³ Cf. only H. Khan, *Inheritance*, 49.

²³⁴ Cf. the references in al-Bahūti, *Kashshāf al-qinā'*, vol. 4, 490 with further references.

²³⁵ The name al-Khwarizmi is the origin of the term algorithm; the section *al-jabr* of the abovementioned book is the origin of the word algebra; cf. Vernet, Juan, *Mathematik, Astronomie, Optik*, in Schacht, Joseph/Bosworth, Clifford E. (eds), *Das Vermächtnis des Islams*, vol. 2, Munich 1983, 238, 244 ff.

²³⁶ Cf. Jagonak, Martin, *Die arabische Naturwissenschaft*, in Nagel, Tilman (ed.), *Begegnung mit Arabien. 250 Jahre Arabistik in Göttingen*, Göttingen 1998, 57 f.

²³⁷ For examples of calculations cf. e.g. Husain, *Islamic Law of Succession*, 439 ff.

they reflect. The variety of opinions is abundant in every case, which is why the present frame will allow a discussion of basic issues and widely agreed principles only. This would furthermore seem justified because by now contract law is codified in nearly all countries with an Islamic history and consequently classical literature is consulted only rarely for reference. 104

The most enlightening texts are those containing practical legal instructions. Thus as early as the classical period we find formularies (*shurūṭ*)²³⁸ as well as instructions on how intelligent manipulation of the law is able to reconcile practical requirements with certain rigid and obstructive rules (*ḥiyal*). The existence of this kind of literature in particular is a clear indication that Islamic law was, at least in the area of contract law, not merely 'lifeless letters', but did inform everyday legal practice to a significant degree.²³⁹

The partial interdependence of legal and religious regulations becomes clear in some aspects of contract law. Actions relevant under civil law were also subject to the five stages of the scale of evaluation: *wājib* (necessary, unavoidable) – *mandūb / mustaḥabb* (desired, praiseworthy) – *jā'iz* (permitted) – *makrūh* (disapproved of, frowned upon) – *ḥarām / bāṭil* (prohibited, invalid) (cf. Introduction, II). The categories *mandūb / mustaḥabb* and *makrūh* in particular concern infringements of rather more transcendent regulations: legal actions remain effective even if they are disapproved of; the category 'desired' has no legal consequences at all. The greater the importance ascribed to the transcendental element, the sooner infringements against religious rules will have legal consequences in this world. This is illustrated using the example of contracts concluded in the mosque. Characteristically, the work by al-Jazīrī referred to here discusses the issue not in the chapter on contracts but that on prayer.

The Hanafites classify the conclusion of exchange agreements such as purchase or rental contracts as disapproved of. Endowments, on the other hand, are permitted. Marriage contracts are even desirable. Other contracts are permitted, as long as they are not of a commercial nature. The Malikites see exchange agreements as disapproved of if they include an inspection of the goods; otherwise they are permitted. This is not the case, however, for contracts which have been negotiated by commercial brokers (*simsār*): they are void. Endowments are permitted, marriage contracts desirable. This only refers to

238 Transmitted for instance in a seventh-/fourteenth-century text on the subject by Muhammad b. 'Abd al-Mun'im al-Jaramānī, *Al-kawkab al-mushriq fihī yaḥtāj ilayhī al-muwaṭṭiq li-'ālim al-shurūṭ*.

239 Cf. Wichard, *Zwischen Markt und Moschee* (an excellence reference work for classical contract law), 17 with further references; Diem, *Arabischer Terminkauf*, esp. 27 ff.

the declarations required to conclude the contract, not to conditions which are not classed as preconditions for legal effectiveness. Furthermore, there should not be much talk. The Hanbalites classify the conclusion of exchange agreements such as rental or purchase contracts as void; marriage contracts are desirable. The Shafites, finally, declare exchange agreements such as purchase
 105 contracts void if their conclusion desecrated the mosque or disturbed someone at prayer; otherwise they are only disapproved of. Marriage contracts are permitted.²⁴⁰

In issues such as these the Hanafite school in particular frequently occupies a pragmatic, worldly standpoint. Thus the security deposit for a demand on the sale of wine is seen as legally effective, even if the transaction against which the security was furnished may have been void (because of the prohibition of alcohol).²⁴¹ Another example is the conclusion of a contract of purchase on a Friday at the hour of prayer, in contravention of the commandment in sura 62:9. The majority view disapproves of this (*makrūh*), while the contract itself remains valid according to the opinion of many scholars. The Maliki school, however, declares such contracts as being without legal effectiveness, if all those involved would have had an obligation to pray. They will be merely open to challenge (*muntaqid*) if one of the people involved was not subject to the duty to prayer.²⁴²

It is furthermore worth mentioning that religious aspects also appear with reference to possible subjects of contracts. Thus the question of the validity of purchase contracts concerning wine and pork is debated, occasionally in subtle deliberations regarding interreligious or interterritorial transactions in these goods.²⁴³ There are generally two opposed positions: authors of a more religious inclination tendency consider such goods (exclusively) from the Muslim point of view as *res extra commercium* and refuse any legal protection. Others limit the religious norms to Muslims, distinguished from the legal challenges facing all of society (cf. also 9.d.aa below). At the same time Hanafite jurists in particular distinguish between (irremediable) deficiencies in the contractual basis (*aṣl*, *dhāt*) which would render the contract void (*bāṭil*), and

240 Summary of the sources in al-Jazīrī, Kitāb al-fiqh, vol. 1, 287.

241 Cf. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 20, 85.

242 Cf. Salqīnī, Uṣūl al-fiqh, 208; in detail under the heading *bay' manhī 'anhu* in Wizārat al-awqāf, Al-mawsū'a, vol. 9, 223 ff. Ibn al-'Arabī (Ahkām, vol. 4, 1805) notes the reverse argument, that the Friday sermon (*khuṭba*) is an obligation (*wājib*) because the Friday prayer renders purchase agreements (concluded at this time) void.

243 Cf. e.g. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 11, 53, 96, 102 ff., vol. 13, 137.

lesser/remediable infringements within the attendant circumstances (*wasf*) which render the contract merely open to challenge (*fāsīd*).²⁴⁴

Islamic contract law and commercial law evolved in an environment that was comparatively advanced. Like many of the people around him, Muhammad was a merchant. Sura 4:29 contains the central basis: 'O believers, consume not your goods between you in an unlawful fashion, unless you are trading, [agreeing together].'²⁴⁵ Occupation and economic success are not merely accepted, they are praised. The bustling activity of Oriental cities shows that people will indeed live their lives accordingly, if they are left to do so.

All of this, however, the Quran points out, must not take place in an unlawful fashion; as a consequence it becomes necessary to supervise economic transactions. If the supervision grows too strict, people – in the Islamic world as well – will start looking for ways of evading its constraints wherever possible.

The coordination of interests within corporations according to legal form is usually uncontroversial. Classical Islamic law had already developed several forms of cooperation under corporate law – some of them exemplary for Europe – ('limited partnership' or silent partnership, *muḍāraba*;²⁴⁶ 'general partnership', *mufāwada*; 'agricultural company', *muzāra'a*). Overall it is supportive of the economy. Proprietary rights are guaranteed and trade is desirable. This is the environment in which instruments of cashless money transfer recognised by Islamic law emerged, which was immensely important for security reasons: *hawāla*,²⁴⁷ a form of remittance similar to a bill of exchange,²⁴⁸ or the similar *suftaja*, which also allowed such a transfer.

The influence of such oriental commercial forms can be seen in terms which were Europeanised later, such as 'aval', meaning a surety for payment, from Ar. *hawāla*. During the heyday of Islamic culture we tend to see a one-sided cultural export into the west in this area. Thus in the draft of a general German book of trade law we find regulations of the 'Sensal'; this hides the Persian-Arabic term

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244 Cf. Abdullah, Gharar, esp. 43 ff. with further references. Other jurists do not distinguish between the two terms and interpret them both as 'void'.

245 When Paret translates the term *bi-l-bāṭil* as 'in betrügerischer Weise', i.e. 'in a deceitful way' or 'with intent to defraud', this is too narrow. The author agrees with Wichard's (Zwischen Markt und Moschee, 89, n. 1) criticism; *bāṭil* is what is void, contravenes the law, and indeed has a place in legal terminology according to this meaning.

246 Cf. e.g. al-Ḥuwayṭir, Al-muḍāraba, 2006.

247 On research into legal facts cf. Thung, Written Obligations, 1, 4 ff.; cf. also Duri, Arabische Wirtschaftsgeschichte, 89 with further references.

248 Cf. e.g. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 20, 52 ff.; Wichard, Zwischen Markt und Moschee, 177 f., 247 with further references.

simsār,²⁴⁹ ‘trade broker’. Finds around the Baltic and the British Isles of Abbasid and Samanid coins from the ninth and tenth centuries may give us an idea of the currents of trade. In the eighth century the Anglo-Saxon king Offa of Mercia even had the Islamic creed *lā ilāha illa Allāh*, customary in the Islamic world, minted on his coins,²⁵⁰ possibly in order to gain recognition for his currency.

b *An Outline of Contract Law; Freedom of Scope and Its Limits*

After the law of torts (cf. 7 below), contract law is one of the oldest manifestations of human legal culture. Unlike the law of torts, however, it presupposes not only that interests are balanced in a regulated way and according to legal form, but also a stable allocation of property. Contract law must thus in particular regulate processes of meeting a need (the exchange of an item which is present but seen as comparatively expendable for an absent, preferred one). It also comprises one-sided, or two-sided but incomplete, transfers of goods, in which case it would not be an ‘exchange’ merely from a materialistic point of view; after all, the sense of well-being upon giving a gift has its own value. However, this kind of transaction is particularly susceptible to misunderstanding, rash and ill thought-out actions or overcharging. Consequently most legal systems subject them to a separate examination of their integrity, for instance by means of specific formal requirements.

These are all insights gained by means of comparative legal study, which span the borders between traditional ‘spheres of culture’. Contractual obligation appears to be part of the human condition in settled societies whose economy is based on the division of labour. Islamic law includes appropriate regulations.

Freedom of contract in the modern sense is not known to classical Islamic law. Rather, it looked to a typology of permitted and prohibited contracts and contractual clauses. The most prominent characteristic of contract law is the endeavour to guarantee the integrity of exchange transactions and the prevention of overcharging. A commitment to perform a service or deliver goods is never binding without a consideration in return.²⁵¹ Usury, speculative transactions and exploiting monopolies are prevented where possible.

A certain flexibility is achieved, however, by allowing certain types of contract whose consideration will of necessity occur in the future. Thus forward

249 Cf. Buṭrus al-Bustānī, Muḥīṭ al-muḥīṭ, under ‘*simsār*’.

250 One specimen is part of the British Museum’s collection; cf. Blunt, C. E./Dolley, M. A., A Gold Coin of the Time of Offa, *The Numismatic Chronicle* 8 (1968), 151–160.

251 This corresponds to e.g. the English principle of consideration.

purchase (*salam*)²⁵² and contracts for work and materials (*istiṣnāʿ*)²⁵³ are permitted in exceptional cases, contravening the rule according to which the object of purchase must be certain. The Hanafite school relies on this custom even in its doctrine of finding the law, by basing the institution of *istiḥsān* on, among others, the permissibility of *salam* and *istiṣnāʿ* (cf. 2.6 above).

Thus limited freedom of contract dominates in Islamic contract law. The Quran (sura 2:275) already explicitly mentions the purchase contract (*bayʿ*) as a type of permitted contract. Early law books contain discussions of individual types – purchase often serving as a prototype – but no general contract theory. Classical legal literature evolved further types, such as loan, (interest-free) loan, partnership agreements etc. Based on the legal maxim that everything which is not forbidden is allowed (*ibāḥa aṣliyya*),²⁵⁴ it was possible to develop other types of contract as well. Jurists, however, would attempt to integrate these into the already existing types, while there was no justification of more extensive freedom of contract.²⁵⁵

There were significant restrictions in the shape of the prohibitions of *ribā* (usury, interest) and *gharar* (speculation). The more strictly these prohibitions were applied the smaller the scope for individually devised types of contract, which might lead to the suspicion that people might find ways of avoiding these restrictions. In the case of strict application we can at least speak of a certain ‘Typenzwang’ (the necessity to make use of established types of contracts only), also characteristic of other early legal systems.²⁵⁶ The restriction is substantiated by the statement that settlement agreements (*ṣulḥ*) are permissible only insofar as they do not permit what is forbidden and forbid what is permitted.²⁵⁷ This is essentially a description of binding law limiting the freedom of action in general, even though determining the actual limits in individual cases may be difficult.

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252 Thus the prophetic tradition ‘whoever concludes a contract for forward purchase must only do this concerning items fixed as to their weights and measures, and for a set date’ (*man aslama fa-l-yuslim fi kaylīn maʿlūm wa-waznīn maʿlūm ilā ajlīn maʿlūm*), Bukhārī, Ṣaḥīḥ, vol. 3, 43 f.

253 Cf. Mahmassani, *Falsafat*, 85; Wichard, *Zwischen Markt und Moschee*, 237 ff.

254 Ibn Taymiyya’s model of contract law is based on this to a great extent; cf. Laoust, *Essai*, 445 ff. Cf. the references in Ramadan, *Das islamische Recht*, 68 ff.; al-Qaradawi, *Erlaubtes und Verbotenes im Islam*, 21 ff.

255 On the question of freedom of content/freedom of scope cf. esp. Wichard, *Zwischen Markt und Moschee*, 244 ff.

256 Regarding these and similar restrictions in Roman Law and their gradual dissolution cf. Kaiser/Knütel, *Römisches Privatrecht*, para. 33.2.f.

257 Cf. al-Māwardī, *Al-aḥkām*, 91.

c *Types of Contracts and the Mechanics of Concluding Contracts*

The most important types of contracts are:

- purchase (sales, *buyūʿ*) including the important pre-emptive right²⁵⁸ (*shufʿa*) and the special forms of forward purchase (*salam*, purchase with advance payment) and *murābaḥa* (purchase with transparent calculation of the purchase price from the cost price²⁵⁹),
- (money) exchange (*ṣarf*) and other exchange (*muqāyada*),
- contracts regarding water rights (*shirb*),
- deposit (*wadʿa*),
- loan, (interest-free) credit (*qarḍ*, *qirāḍ*) and gift²⁶⁰ (*hiba*),
- rent, when renting items or persons in order to provide a service or manufacture goods (*ijāra*)
- works and materials (*istiṣnāʿ*),
- pledge contracts (*rahn*) and other surety agreements (*kafāla*),²⁶¹
- compromise agreements (*ṣulh*),
- company agreements such as those regarding *muḥāwada* (comparable to the present-day ‘general partnership’), *muḍāraba* (corresponding to a ‘limited partnership’ or silent partnership²⁶²), or the special form of the *muzāraʿa* (agricultural company).

The subject of the contract may be a specific thing (*ʿayn*, species) or a debt obligation (*dayn*, type). Fulfilling the obligation is possible in the form of *ʿayn* (specific, concrete item) only. Thus e.g. commodity futures deals are excluded. The case of money is different; in the Hanafite view it cannot be concrete at all, but is only ever a ‘placeholder’ for other items. Nowadays this provides the basis for cashless payments.²⁶³

258 Cf. Ullah, *The Muslim Law of Pre-Emption*, Lahore, n. d. (ca. 1942), which evaluates classical sources.

259 On this subject in detail: Wichard, *Zwischen Markt und Moschee*, 110, 260 ff.

260 Cf. Linant de Bellefonds’ monograph, *Des donations en Droit Musulman*, Paris, n. d. (ca. 1937).

261 In modern times, *kafāla* is used in some Gulf states to keep foreign workers in a status close to slavery, the domestic *kāfil* (sponsor) being the inevitable intermediary to residence rights, wages etc.; cf. e.g. Barjacharya, Roojaa, “Kafala” or “Sponsorship System”, available at <http://ceslam.org/mediastorage/files/Kafala%C3%A2%E2%82%AC%E2%84%A2%20or%20%C3%A2%E2%82%AC%CB%9CSponsorship%20System%C3%A2%E2%82%AC%E2%84%A2.pdf> (last accessed 2 June 2014).

262 Cf. Bälz, *Das internationale Vertragsrecht*, 2443, 2444.

263 Cf. Wichard, *Zwischen Markt und Moschee*, 135 f.

Starting with the basic idea of contract as exchange, a gift is impossible to agree with legal effectiveness or implement with validity. However, the law's religious and social roots might be able to alleviate rigidity in this context. Thus withdrawing a gift in a family or neighbourly environment may well have been fraught with difficulty. Furthermore, while a gift cannot be enforced by law, it is binding before the *forum internum*; a retraction would consequently give rise to fear of retribution in the afterlife. It would be short-sighted – and this is true for all of the Islamic law – if we were to rely exclusively on the written records concerning points of law without taking into consideration the context of the implementation or social systems of sanctions.

A more flexible approach became possible if the economically desired outcome, which was not possible within the framework of the type of contract 'actually' intended for it, was then brought about by selecting different contractual structures. For instance, (economically desired) pawning entailed risks for the pledgee as the prevailing principle of dead pledge together with the extensive parallelisation of possession and risk-bearing meant that the pledgee had to bear the risk of the accidental loss of the pledge.²⁶⁴ In the case of pledges susceptible to damage this was a considerable risk and might prevent the transaction taking place altogether. In order to avoid the risk falling on the pledgee it was possible to declare the pawning contract as a purchase with the 'seller' retaining the property (in a purchase contract this was possible, unlike a pawning contract). If the 'seller' should be unable to return the item, he would have to repay the 'purchase price' (in commercial terms: the loan), because the risk rested with him. If he repaid the 'purchase price' (the loan) as agreed, this might at least be seen as an offer to rescind the 'purchase contract'; in order to ensure a more reliable surety for the 'seller', a right of withdrawal might be agreed, which would be tied to the repayment of the 'purchase price'. Wichard²⁶⁵ sees this structure correctly as a kind of transfer by way of security.

For the rest, contract clauses (*shurūt*) which run counter to the purpose of the contract are always invalid. Thus in the case of a purchase, the ownership of the object of purchase benefits the buyer in its entirety (unlike in the case of rent, loan etc.). Al-Shāfi'i infers from this that agreements which impede the immediate transfer of property are not permissible.²⁶⁶

²⁶⁴ Cf. op. cit., 83 with further references.

²⁶⁵ Ibid.

²⁶⁶ Cf. Wichard, *Zwischen Markt und Moschee*, 93 with further references.

110 A further area where it is necessary to draw a line between contractual freedom of scope and absolute regulations is found in the law of torts which is part of both penal and civil law (more in 7 below). Al-Sarakhsī²⁶⁷ discusses this issue in the context of settlement contracts on the consequences of criminal actions (implementing talion law or demanding the wergild, *diyya*). As regards contents, talion law, or payment of *diyya*, is understood as a settlement under private law (concept of compensation) and is consequently generally open to interpretation.

d *Concluding Contracts and Their Binding Effect*

A person is legally competent (*mukallaf*) and consequently able to create an obligation under civil law if they are of age, of sound mind, and free (*bāligh āqil*;²⁶⁸ concerning special features of marriage law cf. 2.a above). Mentally ill persons (*majnūn*) and minors incapable of discerning (*ghayr mumayyiz*) are not legally competent; minors capable of discerning²⁶⁹ have limited legal competence (*mahjūr*): in principle they must have the consent of their legal representative, but they are independently legally competent with regard to advantageous business transactions.²⁷⁰ No definite age has been set for this.²⁷¹ The position of weak-witted persons (*ma'tūh*²⁷²) is debated; some say they are the same as mentally ill persons, others that they are equal to a minor with limited legal competence.

The Quranic passage 4:29 mentioned above sets out the fundamental conditions for the legal validity of contracts (*uqūd*, sg. *'aqd*): *tijārat 'an tarāḍin minkum* denotes a *transaction concluded in mutual agreement*. This agreement may be achieved by coinciding declarations, offer (*ījāb*) and acceptance (*qabūl*). This is a matter of course to most authors, and they do not even mention it. The basic idea is that negotiations for a contract must be held in a *majlis* (literally: session, meeting, meeting place). However, transactions are also possible at a distance. The aim of the legal institution of the *majlis* is primarily to determine more closely the circumstances under which a contract may be concluded. Thus the acceptability of an offer has a time limit at the end of

267 Kitāb al-mabsūṭ, vol. 21, 9 and ff.

268 Concerning this issue and the diverse preliminary stages cf. Wizārat al-awqāf, Al-mawsū'a, vol. 7, 154f. (sub-section 11) and *passim*.

269 This refers to the ability to distinguish between what is advantageous and what is disadvantageous; cf. Wizārat al-awqāf, Al-mawsū'a, vol. 14, 32.

270 Op. cit., 34f.

271 Op. cit., vol. 27, 21 (sub-section 8) with further references.

272 Regarding the different variants and opinions cf. op. cit., vol. 29, 275f.

the *majlis*. It is debated whether a contract may be concluded through actions implying an intent, e.g. by exchanging services.²⁷³

The binding effect of exchange transactions arises from the coinciding expressions of intent alone; the actual exchange of goods or services is not a condition. The commitment (*luzūm*) is established by the declaration of acceptance.²⁷⁴ A right of withdrawal (*khiyār, khiyār al-shart*) may be agreed in principle.²⁷⁵ It is debated whether a time limit is necessary; many advocate a maximum time of three days.²⁷⁶

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One-sided commitments are binding under religious rules, but not under the law. However, as procedural declaration (*iqrār, confession*) or extra-procedural declaration before witnesses,²⁷⁷ they may bring about binding effect in a context of litigation. Fulfilled one-sided commitments, such as in the case of gifts, are also reversible as a rule. Thus a gift should be revocable if the giver expected some kind of recompense for it. Only gifts given for family reasons and as alms ought to be irrevocable.²⁷⁸ As regards the recompense, equivalence between service and consideration is not necessary: the very smallest consideration fulfils the requirement for recompense.²⁷⁹ The interests of the bona fide rights protection are provided for in that reversal is impossible if the donee has already disposed of the item given.²⁸⁰

Classical contract law does not contain any formal requirements. The special provision in sura 2:282 regarding credit transactions which ought to be put in writing is seen as a mere recommendation. In order to ensure provability in case of litigation, the presence of witnesses is, of course, necessary. The professional notarial witness represents the practical transition to documentary evidence (cf. 1.5 above).

We frequently find detailed discussions regarding the issue of proxy (*wikāla*) subject to conditions/ special contractual clauses (*shurūt*).

Overall the function of the regulations on concluding contracts in connection with the doctrine of the types of contracts is to establish the greatest possible transparency in business transactions. Thus contracts are normally permissible only concerning precisely defined items. Someone who knows the

273 Cf. Wichard, *Zwischen Markt und Moschee*, 113 with further references; Doi, *Shari'a*, 357.

274 Cf. Wichard, *Zwischen Markt und Moschee*, 115.

275 Cf. e.g. al-Sarakhsī, *Kitāb al-mabsūt*, vol. 13, 38 ff.

276 Cf. Wichard, *Zwischen Markt und Moschee*, 248 ff. with further references.

277 Cf. op. cit., 104 with further references.

278 References in Wichard, *Zwischen Markt und Moschee*, 106 with n. 20.

279 Similarly the 'peppercorn theory' in (English) Common Law.

280 Reference in Wichard, *Zwischen Markt und Moschee*, 108, n. 37.

conditions may decide freely on the service and the consideration. A certain flexibility in the shape of *salam* and *istiṣnāʿ* goes some way towards meeting the requirements of economic life. Purchase on approval/on inspection (*khiyār al-ruʿyā*) is also possible, and according to Hanafite law so is agreeing on an alternative obligation from among several fixed items (*khiyār al-taʿyīn*). The latter is legitimised through *istiḥsān* e.g. in cases where it becomes necessary to consult an expert when selecting the item. Prices are not monitored except in the special situations discussed below.

At the same time it becomes clear that it is not possible for obligations to arise prior to the contract. Associated regulatory tasks linked to them might possibly be handled by the law of torts, if at all; however, the latter does not include any general protection of assets (cf. 6., 7 below).

Transactions under property law are linked to contract law in most instances, although they differ according to individual contractual relationships. Thus the transfer of ownership due to purchase is subject to the principle of consensus,²⁸¹ while in the case of a gift, ownership is transferred only at the time of entering into possession. The seller is safeguarded by the right of retention until the purchase price has been paid.²⁸² The danger of accidental deterioration or accidental loss is only transferred to the buyer at the time of the transfer of the goods. In cases of rent and borrowing only the right of use (*manfaʿa*) is transferred to the entitled party.

e *Content Monitoring and Evasive Transactions (ḥiyal)*

Monitoring contract content is required under Islamic contract law, especially because of the prohibitions in place. However, opinions are greatly divided concerning their scope of application.

aa The Prohibition of (Usurious) Interest (*ribā*)

Islamic law prohibits *ribā*, often translated as ‘usury’ or ‘interest’. The Quran²⁸³ sets out the opposition of permitted trade and prohibited *ribā*. What exactly it refers to is not defined and consequently open to interpretation.²⁸⁴ Classical doctrine leads to results which exclude not only any discrepancy between the service and the consideration (*quid pro quo*), but effectively every kind of

²⁸¹ Cf. op. cit., 124 f. with further references.

²⁸² Ibid.

²⁸³ Suras 2:275 f., 278, 280; 3:130; 4:160 f.; 30:39; cf. in detail: Wichard, *Zwischen Markt und Moschee*, 182 and ff.

²⁸⁴ Cf. Muslehuddin, *Islamic Jurisprudence*, 40 f. with further references.

interest.²⁸⁵ It is likely that historically the so-called *ribā al-jāhiliyya* (*ribā* according to pre-Islamic practice) had the greatest significance. It refers to the ‘deposit’ demanded – frequently double or triple of a sum – to grant deferment on the settlement date.²⁸⁶ This was employed especially to take advantage of poor people in times of need; one typical case is the necessary acquisition of seed grain without sufficient capital. *Ribā al-faḍl* (*faḍl khālin ‘an al-‘iwāḍ*), additional outlay without consideration within the same commodity, is covered, as is the so-called *ribā al-nasrā*, interest-bearing credit.²⁸⁷ A further aspect of *ribā* is the relationship between goods and money. Classical Islamic law does not distinguish between the (abstract) value of money and its (concrete) metal value.²⁸⁸ This refers to gold and silver coins; coinage minted from base metals is not relevant in this context. When regarded in this way, purchase is essentially an exchange as well. This view is supported by a much-quoted hadith: ‘Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, the same amount for the same amount, hand(ful) for hand(ful), and any one-sided surplus is *ribā*.’²⁸⁹ A broader interpretation also prohibits contracts which do not specify the amount of consideration, such as the sale of fruits or grains before the harvest. Agreements of this kind are seen as possible openings for *ribā*; consequently they are also defined as *ribā*. From the legal point of view, the rule adduced is the one according to which anything leading to prohibited action is itself prohibited (*sad al-dharā’i*; cf. 2.10 above).²⁹⁰

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A remark of al-Sarakhsī²⁹¹ on the subject of law of agency may serve as an example of the extent of the prohibition: in the case of a compromise

285 Cf. e.g. Wichard, *Zwischen Markt und Moschee*, 190ff.; Amereller, *Hintergründe*, 133ff.; Lohlker, *Das islamische Recht im Wandel*, 1999; Saleh, *Unlawful Gain*, 39 ff., all containing numerous references.

286 Cf. Wichard, *Zwischen Markt und Moschee*, 184 with further references.

287 Regarding the variety of definitions and the classification in groups cf. only *Wizārat al-awqāf*, *Al-mawsū’a*, vol. 22, 50, 53 and ff.; Wichard, *Zwischen Markt und Moschee*, 189 ff. with further references.

288 Concerning differences regarding the question of whether money is a good or merely a ‘placeholder’ (*waṣīla*) for goods cf. Wichard, *Zwischen Markt und Moschee*, 94 ff., esp. 98 f. Practical problems also arise out of the circumstance that the weight of coins as well as their degree of purity could vary greatly in spite of unchanging nominal value.

289 *Al-dhahab bi-l-dhahab wa-l-fidḍa bi-l-fidḍa wa-l-qamḥ bi-l-qamḥ wa-l-sha’ir bi-l-sha’ir wa-l-tamr bi-l-tamr wa-l-milḥ bi-l-milḥ*, *mithlan bi-mithlin*, *wa-l-faḍlu ribā*; mentioned e.g. in al-Shaybānī, *Kitāb al-aṣl fi l-furū’*, *kitāb al-buyū’*, 1. Versions of similar traditions are found e.g. in Muslim, *Ṣaḥīḥ*, vol. 2, 676 (no. 4145).

290 Cf. *Wizārat al-awqāf*, *Al-mawsū’a*, vol. 22, 53 f. (marginal no. 7).

291 *Kitāb al-mabsūṭ*, vol. 19, 152.

settlement concerning the payment of wergild for head injuries any agency on behalf of the claimant is void insofar as the agreed settlement is higher than the wergild specified by law (500 dirham in the case of negligent injury); the amount exceeding this he calls *ribā*.

This concept, evolved in the Middle Ages, of a general prohibition of interest in business among Muslims²⁹² corresponds to the understanding also prevalent in other legal systems of the time which were either formulated with reference to, or at least inspired by, religion. Christian²⁹³ as well as Jewish law include a similar prohibition with respect to fellow believers. This is a result of the religious and ethical appeal to fairness and the willingness to give to those in a financially weak position. Granting interest-free credit is one of man's more challenging tasks, as illustrated not least by the biblical context of Luke 6:35, which lists the commandment to lend without interest immediately after the similarly cumbersome one of loving one's enemies.

These appeals, despite being presented in the form of laws, were mostly fruitless in real life, as shown everywhere by manoeuvres designed to circumvent the commandments. Thus the Order of the Knights Templar, wealthy thanks to travelling pilgrims and booty from the crusades, became the financier of the Western nobility, avoiding the Church's prohibition on interest by demanding instalment payments the sum of which far exceeded the credited amount.²⁹⁴ Contractual clauses dealing with interest payments are furthermore found even from the early Islamic period.²⁹⁵ With the aid of records from seventeenth-century Kayseri, Ronald Jennings²⁹⁶ has shown that annual interest of 20% was not only common practice but was also dealt with by official legal and administrative bodies in the regular course of business. Overall the prohibition of the broadly interpreted *ribā* is likely to have been of minor importance in practice. The widely used legal 'stratagems' contributed significantly to this state of affairs (see ee below).

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292 Cf. Ibn Rushd, *Al-muqaddima*, vol. 2, 178f., with references for the opinion according to which this would not be valid in relations with non-Muslims.

293 Cf. the short summary in Hans Peter Schwintowski, *Legitimation und Überwindung des kanonischen Zinsverbots*, in Brieskorn, Norbert et al. (ed.), *Vom mittelalterlichen Recht zur neuzeitlichen Rechtswissenschaft*, Paderborn etc. 1994, 261 ff.

294 Gidal, *Die Juden in Deutschland*, 40.

295 Cf. Thung, *Written Obligations*, 7, regarding default interest in an Egyptian document from the year 290/903.

296 Jennings, *Studies*, 201, 213 ff.

bb The Prohibition of Speculative Transactions (*gharar*)

Besides the broadly interpreted prohibition of *ribā*, contractual freedom of scope is limited in classical Islamic law by the prohibition of speculative/high-risk transactions²⁹⁷ (*gharar*). Instances of this are found in e.g. sura 2:219; 5:90 f.; 4:29, as well as in the sunna.²⁹⁸ In places the argumentation coincides with the prohibition of *ribā*, e.g. regarding the restriction of exchange transactions of raw and processed fruit.²⁹⁹ As a general rule, contractual services must be sufficiently defined and performable.³⁰⁰ This is another area in which an extensive casuistry developed. The schools' opinions are divided on, for instance, whether the buyer of an item which he had not seen at the time of concluding the contract should be granted a right of withdrawal after a later inspection (*khiyār al-ru'yā*)³⁰¹ or whether it would be permissible to grant general powers (*wikāla āmma*).³⁰² On the other hand there is fundamental agreement on the permissibility of hedging transactions such as surety or guarantee,³⁰³ even though in these cases it is impossible that all circumstances could be known at the conclusion of the contract. This is especially true of the decisive aspect of whether there is a risk of default. The extent of the prohibition of *gharar* becomes significant especially with regard to modern forms of commercial transactions (see Part 2 3.2 below).

cc The Prohibition of Hoarding (*ihtikār*)

Hoarding goods or the dishonest exploitation of monopoly positions is subject to the prohibition of *ihtikār*. This had particular significance for societies in which a shortage of goods was a fairly regular occurrence. The most important measures against such actions were in the hands of the market inspectorate (*ḥisba*, cf. 1.6 above), or even more far-reaching penal regulations. There is furthermore a number of regulations illustrating a fundamental mistrust of intermediate trade insofar as it would typically create or exploit situations which

297 Cf. e.g. Wichard, *Zwischen Markt und Moschee*, 148 ff. with further references.

298 Mālik ibn Anas, *Al-muwatṭa'*, vol. 2, 664, no. 75.

299 Thus Mālik ibn Anas, *Al-muwatṭa'*, vol. 2, 665 f., who discusses this issue in connection with the prohibition of *gharar*.

300 Cf. the summarising remarks in Wichard, *Zwischen Markt und Moschee*, 148 f.

301 The Hanafites are in favour, based on a hadith and 'need' (*hāja*); regarding the debate cf. Wichard, *Zwischen Markt und Moschee*, 153 ff. with further references; *Wizārat al-awqāf, Al-mawsū'a*, vol. 31, 153 f.

302 The Shafiites and Hanbalites are against it because of the great momentum of uncertainty; cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 31, 163.

303 *Op. cit.*, 162 f. with further references.

gave rise to shortage of goods, making dishonest use of its position without running any risk itself. Thus in the opinion of many scholars there must not be any sale of goods in advance of taking possession of them (including the assignment of claims), in particular with regard to food products.³⁰⁴ (The only exception is the permissible forward purchase.) There is also criticism – on the whole
 115 without any sanctions under civil law – of the practice of intercepting caravans with the intention of hoarding goods or causing a shortage.³⁰⁵ Finally – as in European medieval legal systems – the sale of the standing crop and fruit on the tree is inadmissible as it would not only include the speculative aspect discussed above but also the more far-reaching opportunity of influencing prices in times of need.³⁰⁶

Cartelization does not appear to have been seen as a universal problem, as long as it did not exploit exceptional emergencies. Exploiting emergencies is seen as one of the case groups of the prohibition – which is interpreted quite broadly – of speculative transactions. In other areas, cartels might even be desirable. Thus there were regulations forbidding wholesale or long-distance trade to be mixed with selling to the final customer. The fact that those in power were interested in acquiring as many taxes as possible may have contributed to the establishment of these regulations. A certain parallel may be found in the medieval system of guilds in the West; societies very similar to guilds existed during long periods of Islamic economic and social history.

In two areas, cartels, or courses of action determined by them, have survived until the present. On the one hand such phenomena exist in agriculture: Palestinian village councils determined and still determine certain days for the start of the olive harvest in order to prevent competition due to advance marketing of produce.³⁰⁷

On the other hand the structure of the market (Ar. *sūq*, Pers.–Turk. *bāzār*) comprises forms of close cooperation which do not encourage competition.³⁰⁸ Typically shops with similar goods on offer are situated in the same street or alley; the arrangement depending on the social prestige of the merchandise. The range of goods is limited; consequently the conditions are there for true competition in close proximity.³⁰⁹ Pricing is determined to some degree by

304 Cf. Wichard, *Zwischen Markt und Moschee*, 170 ff., with respect to the *gharar* prohibition.

305 Cf. op. cit., 271 with further references.

306 Cf. op. cit., 165 ff.; 271 f. with further references.

307 Cf. Amiry/Tamari, *Palestinian Village Home*, 35.

308 The following remarks are based on the author's extensive purchasing activities during several years' sojourns in various countries of the Islamic region.

309 This proximity generally increases the market transparency and may consequently also

the individual bargaining skills of the buyer; merchandise and services are not offered for sale at set prices in competition with other vendors. While one's own achievements are advertised, and frequently in a colourful fashion, this is never done with reference to other traders. Enticing someone else's customers away is considered bad form. On the contrary, a neighbouring trader might feel impelled to represent his absent neighbour's interests if customers show an interest in the latter's merchandise, rather than trying to lure them away. On the other hand it is quite common for one trader to help himself to a 'competitor's' merchandise if the item required is not found among his own goods.

dd Further Prohibitions

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The prohibition of overcharging is furthermore reflected in individual regulations for certain types of contract. There are divergent opinions in this area as well. One instance is the pledging of a ward's property:

There is agreement that a guardian may not use his ward's property to pay his own debts; the question is whether he is entitled to pledge it against his own debt. The *qiyās* – with Abū Yūsuf – would be opposed to this course of action as in the event of default the property would be used for the guardian's own ends, and without good cause. Others, like Abū Ḥanīfa and al-Shaybānī opposed this with the *istiḥsān*: it is undisputed that the guardian may deposit the ward's property for safekeeping. In this case the keeper, unlike a pledgee, would not be liable for the loss of the property. In addition the ward would be granted a title for compensation against the guardian in case the pledged property should be used in the event of default.³¹⁰

It is also forbidden to force up prices at an auction through rigged bidding (*najas*). However, a contract concluded under these circumstances and agreeing an excessive purchase price is not challengeable just because of *najas*.³¹¹

ee Legal Stratagems (*ḥiyal*) As a Method of Covering One's Economic Needs

The restrictions of legal scope described above were often contrary to economic needs. However, it was hardly possible to deviate from legal rules once these

increase the overall demand to the advantage of all concerned, even though competitive constraints will grow without cartelization; cf. Engel, review by Richter/Furubotn, *Neue Institutionsökonomik*, 324, 326.

310 Cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 21, 102; Abū Zahra, *Mawsū'a*, vol. 1, 417; Salqīnī, *Uṣūl al-fiqh*, 140.

311 Cf. Wichard, *Zwischen Markt und Moschee*, 269 with further references.

had been established. Consequently other paths had to be followed in order to find viable solutions.

If the strict prohibition of interest set down in legal treatises was not to be simply ignored, people had to attempt to circumvent it while keeping up an appearance of following the law. The necessary flexibility could be achieved by means of legal stratagems (*ḥiyal*, sg. *ḥīla*), recognised by the Hanafite school in particular. Texts discussing practical legal instructions are particularly illuminating. Thus we find formularies (*shurūt*) during the classical period as well as advice on how practical requirements may be reconciled with certain rigid and obstructive regulations (*ḥiyal*). Standard texts on the subject are, e.g., al-Shaybānī's 'Book of loopholes in legal stratagems' (*Kitāb al-makhārij fī l-ḥiyal*)³¹² and the 'Book of legal stratagems and loopholes' (*Kitāb al-ḥiyal wa-l-makhārij*) by al-Khaṣṣāf, another Hanafite author from the third/ninth century.³¹³ A corresponding Shafī'ite work – although admittedly less frank and with clearly fictitious examples in some places – may be found in Abū Ḥātim Maḥmūd ibn al-Hasan al-Qazwīnī's *Kitāb al-ḥiyal fī l-fiqh*.³¹⁴

Using legal stratagems might result in disapproval in the afterlife, but in legal practice in this life, what counted was only that appearances should conform to legal form. The Hanafites themselves did not, of course, see these *ḥiyal* as avoidance but as an instrument conforming to the law which would produce results permitted but not demanded by the law. Al-Sarakhsī³¹⁵ apostrophises the opponents simply as people who, due to their ignorance and lack of reflection on Quran and sunna, arrive at arbitrary results. Thus marriage, he says, which is clearly permitted, could be seen as a *ḥīla* to reach the desired woman; divorce as a *ḥīla* to be rid of her if desired, and the revocation of divorce as the suitable *ḥīla* in case of remorse.³¹⁶ Opponents point out that permitting legal stratagems contradicts the rule of *sadd al-dharā'ir* (what leads to forbidden actions is itself forbidden; cf. 2.10 above).³¹⁷ Overall, however, the *ḥiyal* – which are obviously widely applied – should be interpreted as an expression of

312 Al-Shaybānī, Muhammad ibn al-Hasan, *Kitāb al-makhārij fī l-ḥiyal*, ed. by Joseph Schacht, Leipzig 1930.

313 Al-Khaṣṣāf, Abū Bakr Ahmad ibn 'Umar al-Shaybānī, *Kitāb al-ḥiyal wa-l-makhārij*, ed. by Joseph Schacht, reprint of the 1923 Hanover edition, Hildesheim 1968; for his biography cf. Hennigan, al-Khaṣṣāf, 107 ff.

314 Ed. and transl. by Joseph Schacht, reprint Hildesheim etc. 2004.

315 Al-Sarakhsī, *Kitāb al-mabsūt*, vol. 30, 209: *ba'd al-muta'assifin li-jahlihim wa qillat ta'ammulihim fī l-qur'an wa-l-sunna*.

316 Op. cit., vol. 30, 210.

317 Cf. Ibn Qayyim al-Jawziyya, *I'lām*, vol. 3, 126 ff.

law in everyday life rather than as a rejection of legal rules. Someone who seeks legal stratagems to reconcile rules and needs is showing respect for those rules' claim to validity.³¹⁸

The broadly interpreted prohibition of interest and the strict prohibition of high-risk transactions were special impediments. A developed economy requires the accumulation of capital for the purpose of investments. However, capital which does not yield interest is not likely ever to be available in sufficient amounts. Duplicate purchase (*bay'atān fi l-bay'a*) is a standard instance of the connection between an actual loan and the provision of securities.³¹⁹ In this case it is agreed that the buyer will purchase an item which he will sell back to the original seller after a set time and at a higher price. This does indeed disguise an interest-bearing loan; in relation to the period elapsed between the first and second date, the interest rate follows from the difference between the first and second purchase prices. At the same time the original buyer in his guise as the de facto lender receives the object of purchase as security. In a similar fashion it is possible to circumvent the *shuf'a*, the neighbour's pre-emptive right, if the seller first gives the buyer the border strip next to the neighbour's property as a present. This puts an end to the neighbour's pre-emptive right. An alternative is for the seller to keep a narrow strip of land himself.³²⁰

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5 Company Law

Classical Islamic company law is developed in comparatively great detail, rather than arranged systematically. It is based on a number of (business) partnership types with different internal structures. The abstract form of the legally independent corporate body was not developed. However, modern legislation based on Islamic law has been able to incorporate this concept without difficulty.

The guiding principle of Islamic company law is to combine the chance of making profit and the risk of making a loss. Accordingly profits as well as losses must benefit, or be borne by, all concerned. In this way the prohibition of speculative transactions is taken into account. The most important types of companies are the *muḍāraba*, the *sharika/shirka* or *mushāraka*, the *muzāra'a* and the *musāqāt*. The terminology is not, however, consistent throughout. There are

³¹⁸ Also Chehata, *Études*, 43; Wichard, *Zwischen Markt und Moschee*, 87.

³¹⁹ Detailed remarks under this headword in *Wizārat al-awqāf*, *Al-mawsū'a*, vol. 9, 264 ff.

³²⁰ Cf. Paras Diwan, *Muslim Law in Modern India*, 39.

furthermore numerous types of companies with very specific delimitations.³²¹ The type treated in the greatest detail is usually the *muḍāraba*, which is comparable in substance to the limited partnership or the silent partnership.³²² Al-Sarakhsī devotes more than 170 pages to it in his *Kitāb al-mabsūt*.³²³ The introductory remarks specify the basic structure: the director (*muḍārib*) earns his share of the profit besides the capital provider (*ṣāhib al-māl*) thanks to his efforts.³²⁴ This type of company thus allows, especially, the acquisition of capital for more costly business ventures requiring corresponding capital investment, as well as bundling capital for major enterprises. It is likely to have been the model for the limited company introduced and spread in Europe by Italian trading cities.

Sharika/shirka or *mushāraka* denotes the common interest of several persons in certain items, or as parties to a contract.³²⁵ It subsumes a variety of types of transactions,³²⁶ e.g. the controversial³²⁷ so-called *mufāwāḍa*. It includes types of cooperation within which the initial investment – or contractual obligations agreed – and the share in the profit – or the contractual rights – relate to one another to a degree not entirely determined. It is overall not dissimilar to the general partnership (Offene Handelsgesellschaft or OHG) of German trade law. It is debated between the schools whether sharing the capital is a requirement, or whether individual shares of capital may continue to exist in legally distinguishable form.³²⁸ Nowadays most business partnerships refer to themselves as *sharika*.

The *muzāraʿa*, which is not universally recognised,³²⁹ and its subtypes are also discussed in great detail, with al-Sarakhsī³³⁰ devoting no fewer than 160

321 Regarding the development and the terminological differences cf. Udovitch's detailed study, Partnership, 19 ff.

322 The designation of limited partnership is widely used, although Bälz (Das internationale Vertragsrecht der islamischen Banken, 2443, 2444) rightly points out that it is more like a silent partnership in the sense of para. 230 HGB (German Commercial Code). For details cf. e.g. al-Khuwaythir, Al-muḍāraba, 2006.

323 Kitāb al-mabsūt, vol. 22, 17 ff.

324 Op. cit., vol. 23, 17 f.

325 Cf. e.g. al-Sarakhsī, Kitāb al-mabsūt, vol. 11, 151 ff. In more detail Udovitch, Partnership, 19 ff.

326 E.g. also the community of heirs, cf. al-Sarakhsī, Kitāb al-mabsūt, vol. 11, 151.

327 Cf. Udovitch, Partnership, 47 ff. with further references.

328 Concerning the restrictive Shafite doctrine of the *mufāwāḍa* cf. Udovitch, Partnership, 34 ff. with further references.

329 Cf. Johansen, The Islamic Law, 52 ff.; Yanagihashi, A History, 253 and *passim* with further references.

330 Kitāb al-mabsūt, vol. 23, 2 ff.

pages to it, discussing different types of cooperation between the owners of titles to agricultural plots and those people who are expected to do the required work on this land. Some space is devoted, and this is characteristic of classical legal texts, to matters which touch the actual question at best marginally, such as whether an apostate or an inhabitant of enemy territory may have a share as well.³³¹ Irrigated cultivation is included in the specific subtype *musāqāt*.³³²

The *murābaḥa*, finally, is a means of transacting sales and acquisitions without violating the prohibition of *ribā*. To this end, several purchase contracts are linked in succession, with the financier purchasing the goods first and selling them on immediately to the true purchaser. He may add a profit onto the purchase price, which has to be disclosed.³³³ The function of this added charge is to replace the interest rate on a loan (which is considered to be prohibited). The structure is not a company in the true sense but rather partial link by means of several interconnected contracts. Consequently al-Sarakhsī³³⁴ discusses it in the chapter on sales law.

6 Property Law

According to Islamic law, property is an asset of great importance for people's lives and protected accordingly. Legal treatises relatively rarely enter into in-depth descriptions or debates regarding property, as compared to family or inheritance law. In principle, property (*māl*) counts among the basic goods protected by sharia rules.³³⁵ The matter is not discussed separately but is spread over remarks on, e.g., sales law or law of evidence. Specific regulations have been developed with regard to real estate, trust property and items which are of concern from a religious point of view (e.g. wine, pork, ostentatious tableware; cf. 7.b.ff, 10 below). The institution of intellectual property is unknown to classical Islamic law.

The acquisition of property is considered to be valid once and for all (cf. 2.11 above). Difficulties under the law of evidence are met with a presumption

331 Op. cit., 118ff. This shows that fundamental research into Islamic law ought to refer to the existing texts in all their breadth if possible, to avoid limiting itself to highlighting individual issues only. Regarding this type of cooperative in more detail cf. Johansen, *The Islamic Law*, 51 ff.

332 Cf. *Wizārat al-awqāf, Al-mawsū'a*, vol. 37, 112 ff.

333 For details cf. Wichard, *Zwischen Markt und Moschee*, 260 ff. with further references.

334 *Kitāb al-mabsūṭ*, vol. 13, 78 ff.

335 Cf. al-Shāṭibī, *al-muwāfaqāt* vol. 3, 77, vol. 2, 8, 39.

120 which is very close to the present day para. 1006 BGB (German Civil Code): the possession of goods allows the conclusion as to their ownership.³³⁶

Besides private landed property the allocation of state-owned lands and their use or their tax yields was of pre-eminent importance. Military and official 'fiefs' (usually restricted to financial aspects and obligations, i.e. without the far-reaching feudal obligations of European fiefs), tax farming and similar types (*iqṭā'*, *muqāṭa'a*, *tīmār*)³³⁷ dominated essential sections of the economic life for a long time, frequently to the disadvantage of the rural population and to the detriment of genuinely necessary investments.³³⁸ Despite this significance, books on jurisprudence do not look at these institutions very much at all; they were probably accepted as being part of the exercise of power/the administration, or simply ignored in silence.

Private titles to land could also be acquired by means of the permitted cultivation of certain remote waste lands which had no known owner (*iḥyā' al-mawāt*, 'reviving the dead [lands]'). This was also possible for non-Muslims. If the land was not cultivated over a longer period, the ruler might allocate it to someone else.³³⁹ Legal debates dealt with the issue of whether the cultivation of unused public land was dependent on the permission of the imam, the definition of such lands and its taxation.³⁴⁰

The allocation of water rights is of similarly great importance to people in regions where water shortage is a regular occurrence. As with other matters there is a distinction between ownership (*milk*) and right of use (*manfa'a*). Natural water sources such as rivers and springs are ownerless and open to everyone (*mubāḥ*) as long as they meet everyone's needs. This rule is based on, among others, sura 21:30 ('We made from water every living thing') and a hadith saying 'Muslims have common share in three (things): grass, water and fire'.³⁴¹ The same is true of public wells (as opposed to private ones). On the other hand, private titles to water (privately built wells or channels) are equally recognised. In his treatise on land tax, Yaḥyā b. Ādam reports that the Prophet

336 Cf. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 63; vol. 10, 112 ff.

337 Cf. only Wizārat al-awqāf, Al-mawsū'a, vol. 6, 80 ff.

338 Cf. e.g. Løkkegaard, Islamic Taxation, 14 ff.; Duri, Arabische Wirtschaftsgeschichte, 107 ff., 141 ff.; Cahen-Endreß, Der Islam I, 203 f., 296 f. and *passim*; v. Grunebaum (ed.), Der Islam II, 37, 93 ff., 256 and *passim*.

339 Cf. only al-Marghīnānī, Al-ḥidāya, vol. 2, 383 ff.

340 Cf. al-Māwardī, al-aḥkām, 223 ff.; al-Zuhaylī, al-fiqh al-Islāmī vol. 5, 503 s; 543 ss.; Maktari, Water Rights 13 ff. with further references; Løkkegaard, Islamic Taxation, 50, 58 f.

341 Reported by Abū Dāwūd, Sunan, vol. 2, no. 3469 (p. 596).

forbade digging new wells in the bordering area of existing water rights, to avoid negative impact on the quality and quantity of the existing water usufruct.³⁴² On this basis, there is a consensus on the existence of a zone of protection (*ḥarīm*) surrounding water supply facilities which is not open for new activities or additional use by third parties (*iḥyāʾ al-mawāt*) which would infringe the existing rights to usufruct.³⁴³

In case of shortages the community's universal right of use must take everybody's needs into account, such as for instance when irrigation canals are built.³⁴⁴

Given the shortage of naturally watered lands in many parts of the Islamic world, irrigation is encouraged by the law: The land tax (*kharāj*) for artificially watered lands amounts to only half of the sum due for naturally watered ones.³⁴⁵ In addition, regarding artificial irrigation systems the schools are unanimous in accepting private property among the owners according to their shares.³⁴⁶ As for the transfer of water rights, there are considerable differences if the water is not sold in receptacles, but in time slots or as a whole. For example, the Hanafite school accepts inheritance of these rights, but does not permit the isolated sale, since according to this school rights to usufruct (*manāfiʿ*) are not given the quality of property rights (*māl*).³⁴⁷ The Malikite school generally permits all sorts of commercial transactions regarding water rights, including temporary usage.³⁴⁸

Public wells are also accessible to everyone, while private wells are commonly open only to the person who has dug them, with the requirement that he must give water to those who are thirsty. Similarly, canals are always part of the land owner's private property. A concrete modern example based on ancient traditions is provided by the management of water rights to jointly built canals

342 Yahyā b. Ādam (d. 203/818), *Kitāb al-kharāj*, Leiden 1896, 75); cf. Pfaff, *Historisch-kritische Untersuchungen*, 49 s.

343 *Wizārat al-auqāf wa l-shuʿūn al-islāmīya*, al-Kuwait, *Al-mawsūʿat al-fiqhiya*, vol. 2, article 'Iḥyāʾ al-mawāt', sect. 18 s. The details are disputed in the various schools, particularly whether fixed measures could be applied, or whether the circumstances of every single case have to be considered. Cf. also Maktari, *Water Rights*, 25 f.

344 For the whole subject matter cf. EI II, vol. 5, art. 'Mā', 859–889; on a concrete quarrel concerning water rights which dragged on for nearly 150 years in the Marinid Maghreb see Powers, *Law*, 95 ff.

345 Cf. Pfaff, 37 ff. with further references.

346 Cf. e.g. al-Māwardī, *Al-aḥkām*, 226.

347 Cf. *Wizārat al-auqāf wa l-shuʿūn al-islāmīya*, al-Kuwait, *Al-mawsūʿat al-fiqhiya*, vol. 36, article 'Māl', sect. 2.

348 Mālik b. Anas, *Al-muwaṭṭaʾ*, vol. 10, 121–122.

(*falaj*) in Oman:³⁴⁹ Here, the private water rights are separate from land ownership. After the construction of the irrigation system has been finished, the water rights are allocated as a separate item (*khabūra*) to the parties involved, proportional to their contribution to the construction and/or the upkeep, with some being kept back for sale. The proceeds are used for the maintenance of the system unless it benefits from government schemes to support infrastructure. The remaining shares are, in accordance with Ibadite legal opinion, saleable and inheritable; they are subject to the usual inheritance regulations (equal division of property). Sales take place at regular intervals (every seven weeks) in the form of auctions; in this way a market can be established. Prices differ greatly between the dry and rainy periods. Legal confirmation may be provided by registry documents or by witnesses.

Fluctuations in the flow of water may be neutralised by dividing the rights of use into time slots³⁵⁰ and allocating them in a cycle (often seven weeks) at different times of day. Attempts are made to solve local problems regarding allocation and pollution by dividing the system into zones (publicly accessible drinking water zone; publicly accessible zone for washing and laundry; irrigation zone). The problem of excessive use remains unsolved. While a formal path of obtaining well licences from the ministry has been provided, a risk remains of influence being exercised through private relationships in which case excessive use might be ignored or deliberately concealed.³⁵¹

Classical Islamic law did not evolve a systematisation of liability law beyond the damage to legal interests of persons as covered by *qīṣāṣ* (cf. 7.d below). Individual liability cases are mentioned sporadically in a variety of legal contexts (cf. 2.11 above in regard of damage caused by grazing animals). Occasionally we find chapters discussing the consequences under civil law of property crimes that do not fall under the heading of Quranic theft, such as the (simple) unlawful removal of goods (*ghasb*). The consequences demanded are either returning the property or paying compensation for the loss suffered.³⁵² In the context of these remarks we sometimes also find controversial discussions relating to property law, such as concerning the question of whether the owner loses his property if the goods have been processed (such as when natural produce is processed, or coins minted using stolen precious metal).³⁵³ Overall it can be

349 Information gathered by the author in a number of conversations with members of the Omani Water Department on 31 Dec. 1997 in Muscat.

350 Ar. *radda*, 24 hours; *bāda*, 12 hours; *athar*, half an hour; *qiyās*, 1.25 minutes.

351 A discussion of the difficulties in a university setting is said to be forbidden.

352 Cf. only al-Marghīnānī, *Al-hidāya*, vol. 4, 296 ff.

353 Cf. the references in al-Marghīnānī, *Al-hidāya*, vol. 4, 299 ff.

said that the wrongdoer is liable for deliberate and negligent damage to property. A more extensive canon of legal interests was not developed. Any further liability issues within the context of contract law or law of tort, for instance with regard to the exclusion of liability in case of force majeure, or the privileged position as to liability for some parties involved, are subject to the generally prevailing casuistry.³⁵⁴

7 Criminal Law and Law of Tort

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a Introduction

Classical Islamic law did not evolve a categorial separation between criminal law as a mechanism for sanctions imposed by the state on the one hand and law of tort as a mechanism for private compensation on the other. Consequently there is a combined system of the kind also found in European legal systems until the Enlightenment.

Classical literature often has a tripartite division of the subject: *ḥudūd*, comprising crimes mentioned in the Quran; *ta'zīr*, usually discussed only rudimentarily, which fulfils the function of all remaining penal sanctions; and *qiṣāṣ*, finally, regulating talion law, i.e. the invariably private compensation for culpable homicide and bodily harm. On closer inspection it becomes clear that the regulations classed under *ḥudūd* and *ta'zīr* correspond in large parts to modern criminal law and law governing administrative offences, while the *qiṣāṣ* corresponds to European private criminal law of the Middle Ages.

Further instances of extra-contractual liability beyond the *qiṣāṣ* are not developed as an independent issue and usually referred to only sporadically. Liability (*damān*) in case of breach of contract, especially with regard to reduced opportunity to make use of the subject of the contract, is usually treated under case law in the respective context. H. Yanagihashi³⁵⁵ has, however, discovered that even within liability law an endeavour may be found to combine the chance for profit and the risk of liability.

354 Concerning specific groups of cases cf. Spies, *Die Lehre*, 79 ff.

355 Yanagihashi, *A History*, 120 f. and *passim*.

b *The Quranic Crimes (ḥudūd)*

aa Introduction

Criminal law is based above all on the Quranic regulations on the issues of highway robbery (*ḥirāba*/*muḥāraba*/*qaṭ' al-ṭariq*),³⁵⁶ theft (*sariqa*),³⁵⁷ fornication (*zinā*),³⁵⁸ wrongful accusation of fornication (*qadhf*)³⁵⁹ and 'consumption of alcohol' (*shurb al-khamr*).³⁶⁰ These are called *ḥudūd* (literally 'boundaries').³⁶¹ Occasionally apostasy from Islam (*ridḍa*/*irtidād*) and rioting (*baghy*)³⁶² are added to these as well. Classical literature³⁶³ usually refers to the early Islamic disagreement with the Khārijites as an instance of the last-named.

123 The elements of some of these offences are based entirely on Quranic sources, others are based on the sunna in some significant aspects. Literature on the subject often discusses in great detail the individual elements of how the crime is committed, or the evidence. Classical literature includes hardly any instances of more general deliberation on the aims of punishment or possible inferences as to how the subject matter was implemented.³⁶⁴

According to al-Sarakhsī,³⁶⁵ the *ḥudūd* contain the rights of God, and ignoring them will be followed by certain consequences. But who is protected by the corresponding regulations? Especially in the context of Quranic criminal law there were discussions as early as the classical period concerning whether the crimes in question must be avoided for God's sake (*ḥuqūq Allāh*, 'rights of

356 Sura 5:33 f.

357 Sura 5:38 f.

358 Sura 24:2 f.

359 Sura 24:4 f.

360 Sura 5:90.

361 Concerning the development of the concept in early and classical literature cf. El Baradie, Gottes-Recht, 96 ff. with further references. Besides the specific denotation of Quranic criminal law, which already emerged during the early period, it is also used in other senses in the Quran, thus e.g. in connection with God's commandments as such (sura 2:229–231; 9:97, 112), rules for fasting (sura 2:187), inheritance quotas (sura 4:12 f.), atonement for using a prohibited divorce formula (sura 58:4), and the period a woman must wait before remarrying (sura 65:1).

362 Cf. al-Māwardī, Al-aḥkām, 73 and ff.; cf. also El Baradie, Gottes-Recht, 125 ff. with further references.

363 Cf. e.g. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 10, 124 ff., as well as Abou El Fadl's extensive study, Rebellion and Violence in Islamic Law, Cambridge 2006.

364 An exception may be found in Ibn Qayyim al-Jawziyya's work – which was not taken into account any further in this respect (I'lām, vol. 2, 47 ff., 71 ff.; cf. El-Awa, Punishment, 24).

365 Kitāb al-mabsūṭ, vol. 9, 36.

God') or for the sake of humans (*ḥuqūq al-ādamiyīn*, *ḥuqūq al-'ibād*, 'rights of humans') as holding the title to a legally protected interest.³⁶⁶

The concept of *ḥuqūq Allāh* in particular is multi-faceted. Modern literature often equates it with the interest of the general public.³⁶⁷ It is not possible to gather this immediately from the classical sources. They limit themselves to using the respective classification to settle points of law such as whether repentance can exempt a perpetrator from punishment, or whether the victim can prevent the punishment etc.

References to the 'rights of God' having an impact on this world are, however, found where the idea of deterrent (*zajr*, *rad'*) is put forward,³⁶⁸ or in cases where the intention of applying the *ḥadd* punishment to non-Muslims is expressed. Interestingly al-Shīrāzī³⁶⁹ does not deduce a *dhimmī*'s criminal liability in cases of infringements of 'God's rights' immediately from an internal command to apply Islamic law, but infers it from the parallel consideration of their 'own' law: if their own religion punishes certain actions, the perpetrator would be aware of the prohibition and could consequently be subjected to the punishment under Islamic law. The comparison between the prerequisites and the aims of non-Islamic and Islamic criminal law is remarkable.

However, this idea was not universally taken into account. In contrast, the separation between the aims of punishment with a focus on this world on the one hand and the *ḥudūd* insofar as they protect God's rights on the other becomes apparent in the discussion of the question of whether a *musta'min* (a non-Muslim foreigner with individual protected status; cf. 9.d.bb below) would be subject to the *ḥadd* punishment for theft. One would think that the prevailing interest in – universal – protection of property would indeed result in this. However, there are important voices from among Hanafites and

366 Cf. Emon's enlightening remarks, *Huqūq Allāh*, 325ff. El Baradie, *Gottes-Recht und Menschen-Recht*, 1983, has much detail on the subject.

367 The interpretation in al-'Awwā, *Uṣūl*, 74, is comparable; Abū Zahra, *Falsafat*, 6f., 11; Jamāl al-Dīn, *Fi l-sharī'a*, 445; Hiba, *Mūjaz*, 161ff.; Wellhausen, *Das arabische Reich*, 19; Gräf, *Todesstrafen*, 8; Coulson, *State*, 49, 51. El Baradie, *Gottes-Recht*, 181, 185f. criticises the 'secularisation' of these offences by such interpretations. Krčsmàrik's interpretation (*Beiträge*, 91), according to which the *ḥuqūq Allāh* correspond to criminal offences automatically rendering the accused liable to prosecution (as opposed to those criminal offences requiring a complaint to be made by the victim for prosecution to be initiated), is not supported by the sources.

368 Cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 141, 143, 145, 168; al-Bājī, *Al-muntaqā*, vol. 7, 158; Ibn Qudāma, *Al-mughnī*, vol. 8, 180.

369 *Al-muhadhdhab*, vol. 2, 253, 255f.

Shafi'ites who ultimately reject this liability to punishment and support the victim's claims under civil law only, as offering sufficient protection.³⁷⁰

124 In individual cases the concept of *ḥuqūq Allāh* is also used to help clarify the competing question of how the rights of people affected by certain circumstances, e.g. the victims of theft, are related to the imposition of official sanctions (regarding competing questions see also b.ff, d below). The question of whether repentance (*tawba*) can exempt a perpetrator from punishment or not is also linked to this concept (e.g. in the case of infringements against the *ḥuqūq Allāh*). The partial connection between religion and law becomes clear in instances where the punishable offence is a religious one such as the consumption of alcohol. It is, however, possible in this area as well to separate penalties in this world and those in the next in principle. This becomes particularly apparent in the context of the much-debated issue of whether non-Muslims are subject to the punishments associated with *ḥudūd*.³⁷¹ Those who emphasise the religious aspect of these offences will restrict them to Muslims (especially in the case of consuming alcohol), while those who see them as infringements of public security will include non-Muslims. Conversely, according to the widely held Hanafite view the *ḥadd* classification should not apply to offences committed beyond Islamic territory, as their enforcement is tied to the caliph's authority.³⁷²

If not all the elements of a *ḥadd* crime can be established and the conditions for the particularly strict punishments are not met, an offence may be punished according to the more lenient norms of the *ta'zīr* (cf. c) below).

bb Highway Robbery with Violence

The offence and the legal consequences of *ḥirāba/ muḥāraba* or *qaṭ' al-ṭarīq* – the terms are used synonymously – are defined with varying precision in the Quran (sura 5:33f.). Those to be punished are they 'who fight against God and His Messenger, and cause disaster on earth'. The offence was not defined according to the possible, very broad interpretation, but on the contrary restricted to circumstances which – always allowing for considerable terminological vagueness – comprise mainly cases of highway robbery with

370 Cf. Abū Yūsuf, *Al-radd*, 94 ff.; id., *Ikhtilāf*, 157 f.; al-Shaybānī, *Al-siyar*, 172 f.; al-Sarakhsī, *Uṣūl*, vol. 2, 18; id., *Sharḥ*, vol. 4, 1491, vol. 5, 1582 f.; al-Ṭabarī, *Kitāb al-jihād*, 54 ff.; al-Muzanī, *Mukhtaṣar*, 264. Cf. also Heffening, *Fremdenrecht*, esp. 65 f.

371 Cf. El Baradie, *Gottes-Recht*, 104 with further references, and the following chapter on theft.

372 Cf. Ibn 'Ābidīn, *Radd al-mukhtār*, vol. 4, 165 ff.

violence.³⁷³ The fact that some of the legal consequences are exceedingly drastic is likely to have played a part in this classification: the perpetrator is to be either killed (Arberry: 'slaughtered') or crucified or have the opposite hand and foot cut off, or be expelled from the country. These are only the punishments in this world; further formidable retribution is to be expected in the afterlife. Different rules would apply to those who repent before (human pursuers) lay hand on them, for God is merciful and willing to forgive (sura 5:34). There are a great many more and detailed doctrines and opinions as to which case group should be subject to which of the punishments named and which cases should be classed as not falling within the area of Quranic offences but are to be dealt with according to *ta'zīr*.³⁷⁴

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cc Fornication

The offence of fornication (*zinā*) is discussed in sura 24:2 f. If a man and a woman commit fornication (together) both are to be given a hundred lashes in public. There are further regulations in sura 4:15 (evidence rules) and sura 17:32. Sources from the sunna are also adduced. Overall there is a multitude of differing views on the offence and the legal consequences, here, too. Some only class illegal,³⁷⁵ fully consummated intercourse between a man and a woman³⁷⁶ as an offence according to the Quran, listing other sexual activities under the purview of *ta'zīr*. Others apply a broader interpretation and include homosexual intercourse in particular, or also bestiality.³⁷⁷

In the view of most scholars the commandment in sura 4:15 f. (being detained in the house) and the corresponding punishment for men has been abrogated by the regulation in sura 24:2 f. and corresponding hadiths.³⁷⁸ Some, however, wish to retain it with regard to homosexual intercourse.³⁷⁹

373 The definitions in al-Kāsānī, *Badā'ī*, vol. 7, 135, and al-Māwardī, *Al-aḥkām*, 77 f., serve as good examples. Concerning detail cf. e.g. El-Awa, *Punishment*, 7 ff.; El Baradie, *Gottes-Recht*, 117 ff.

374 Cf. only El Baradie, *Gottes-Recht*, 118 ff. with further references; El-Awa, *Punishment*, 7 ff. with further references.

375 Intercourse is legal between husband and wife, and according to classical opinion also for men with their concubines; cf. only El Baradie, *Gottes-Recht*, 102.

376 Cf. e.g. al-Kāsānī, *Badā'ī*, vol. 7, 49 ff.

377 Cf. Ibn Farḥūn, *Tabṣira*, vol. 2, 195; El Baradie, *Gottes-Recht*, 101 f. with further references; with only a restrictive interpretation El-Awa, *Punishment*, 14.

378 El-Awa, *Punishment*, 14 f. with further references.

379 Cf. Ibn Kathīr, *Tafṣīr*, vol. 2, 205 f.; El-Awa, *Punishment*, 15.

The combination of Quranic passages and hadiths has led to most scholars distinguishing between fornication committed by unmarried people and by married people. According to the predominant view,³⁸⁰ a married person over the age of criminal responsibility (*muḥṣan*) is to be put to death by stoning, unlike an unmarried person.³⁸¹ In the view of some scholars this is evident not only from the sunna but also from a former Quranic verse which was abrogated only in the text but not in substance (*naskh al-naṣṣ dūna l-tilāwa*; cf. 2.2 above).³⁸²

Proof of the offence is furnished by the statement of four adult male Muslim eye-witnesses (cf. sura 4:15) or by a confession. Doubt may lead to the *ḥadd* punishment being ruled out.³⁸³ An insufficient number of witness statements, or false witness statements, will lead to the people involved being culpable of defamation (*qadhf*). According to some scholars, culprits who have confessed ought to be called to repent by the judge, who would suggest that the matter be left to the afterlife.³⁸⁴ There is consequently also discussion of controversial legal stratagems which can lead to the *ḥadd* punishment being dropped and open the door to the more lenient *ta'zīr*. Thus Ibn Qayyim al-Jawziyya mentions the legal stratagem (which he himself rejects)³⁸⁵ of making a confession after four witness statements which would, according to widely accepted doctrine, lead to the witness statements becoming invalid. Subsequently the confession may be retracted, which the prevalent opinion allows until the punishment is executed.³⁸⁶ On the other hand there are scholars who allow evidence in the absence of witnesses or confession. Thus the birth of a child out of wedlock is recognised as proof of the offence.³⁸⁷

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380 The Khārijite view was divergent, thus al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 36 f.

381 Cf. op. cit., 36; El Baradie, *Gottes-Recht*, 102 with further references; regarding the dogmatic condemnations cf. El-Awa, *Punishment*, 15 ff. with further references. Cf. the parallel regulation in 3 Moses 20:10 ff., to which e.g. El-Awa (*Punishment*, 17) refers explicitly: the similarity of the two sets of rules is seen as a result of the divine nature of the two systems; but cf. also John 8:5.

382 Cf. Ibn Ḥazm, *Al-muḥallā*, vol. 11, 234 f. (*nusikha lafẓuhā wa-baqīya ḥukmuhā*); al-Suyūṭī, *Al-itqān*, vol. 1, 25; El-Awa, *Punishment*, 15.

383 For details cf. El Baradie, *Gottes-Recht*, 102 ff. with further references.

384 Cf. the references in El Baradie, *Gottes-Recht*, 105 with n. 48. Present-day practice in states which do apply *ḥadd* punishments tends to show the opposite.

385 Ibn Qayyim al-Jawziyya, *I'lām*, vol. 3, 236; cf. El Baradie, *Gottes-Recht*, 106 n. 51 with further references also concerning the divergent view as well as further legal stratagems.

386 Cf. only Hussein, *Basic Guarantees*, 35, 47.

387 Cf. Ibn Farḥūn, *Tabṣira*, vol. 2, 196; cf. El-Awa, *Punishment*, 130 f.

dd False Accusation of Fornication

Corresponding to the offence of *zinā*, the false accusation of fornication (*qadhf*) is subject to punishment. The basis for this rule is found in sura 24:4. If four suitable witnesses do not come forward with the relevant statement, the accuser is to be punished with eighty lashes. Sura 24:19 and 23 furthermore promise punishment in the afterlife.

On the one hand the offence of *qadhf* may have a 'neutralising' effect with respect to the offence of fornication, as the accusation entails a risk of the accuser being punished if he does not produce a sufficient number of witnesses (which would not seem a matter of course in any case regarding this particular offence). On the other hand there are documented cases from the present day where e.g. women in Pakistan or Somalia who have been raped are in addition subsequently prosecuted for false accusation if they – as was only to be expected – are not able to produce witnesses for the crime committed against them.³⁸⁸ In such cases it is clearly the victim who is being punished. Besides the accusation of *zinā* – false witnesses may, after all, be found – may be used as blackmail in order to intimidate women intending to bring about a divorce or otherwise refractory.³⁸⁹

ee The Consumption of Alcohol

The prohibition of consuming alcohol (*shurb al-khamr*) took place in several steps (cf. 2.2 above) and finally led to the universal prohibition as expressed in sura 5:90. In the Hanafite school the view prevails that the consumption of alcoholic drinks other than wine is to be punished only if inebriation has ensued.³⁹⁰

The secular punishment is deduced from the sunna and from the practice of the early caliphs who set forty or eighty lashes; consequently opinions in the

388 Cf. only Peters, *Crime*, 177, and the reports 'Human Rights in Pakistan' in *South Asian Voice*, July 2002, viewed on 26 Sept. 2007 at http://india_resource.tripod.com/grpakistan.html and 'Pakistan: Reform Hudood Laws Now', *Human Rights News* 14 Nov. 2006, viewed on 26 Sept. 2007 at <http://hrw.org/english/docs/2006/11/14/pakist14576.htm> and '13-jährige in Somalia gesteinigt', *NZZOnline* on 1 Nov. 2008, viewed at http://www.nzz.ch/nachrichten.international/somalia_gesteinigt_1.1203257.htm.

389 Regarding the whole area cf. 'Der strafbare Wunsch nach Gerechtigkeit. Frauen in Pakistan: Wehrlos den islamischen Gesetzen ausgeliefert', *Süddeutsche Zeitung* on 14 Jan. 1994, 3; N. H. Shah, *Koranic Punishments in Pakistan*, 195 f.

390 Cf. Anwarullah, *Criminal Law*, 197; El Baradie, *Gottes-Recht*, 122; al-Māwardī, *Al-aḥkām*, 284.

127 different schools vary as regards the degree of the penalty.³⁹¹ Occasionally we see a glimmer of understanding for the offender. Thus al-Suyūṭī³⁹² reports that the Abbasid caliph al-Manṣūr had a wine drinker punished with the statutory eighty lashes, but the man who had brought him before the governor, with a hundred.

ff Theft: An Example

Classical literature allows the conclusion that the members of the Hanafite and Shafi'ite schools in particular endeavoured to limit the scope of application of the *ḥadd* offences with their severe penal consequences in favour of the more lenient *ta'zīr*. We shall illustrate this using the example of *sariqa* ('theft');

According to sura 5:38 [5:42] *sariqa* is punished with draconian corporal chastisement:³⁹³ 'And the thief, male and female: cut off the hands of both, as retribution for what they have committed, and a punishment exemplary from God'.³⁹⁴ While the legal consequence is thus comparatively clear, it is not explained what exactly and specifically constitutes *sariqa*. The basic elements of the offence were evolved in the law books until the end of the second/eighth century. Until the fourth/twelfth century an extensive casuistry was constructed on this basis which we will sketch in the following, using the example of the four great Sunni schools. The later books in particular debate not only the specific constituting elements of the offence but also, in connection with them, more generic issues such as criminal responsibility, how to treat several perpetrators acting in concert as well as aspects of the criminal proceedings and even competing questions.

A first essential restriction arises from the widely held opinion according to which the stolen goods must have a certain minimum value (*niṣāb*).³⁹⁵ Lesser offences such as the theft of food or of goods of low value consequently fall under the purview of *ta'zīr*. Only very few authors as well as the Khārijites

391 El-Awa, Punishment, 45 with further references; El Baradie, Gottes-Recht, 122.

392 Ta'riḫ al-khulafā', 249.

393 Corporal punishments were a firmly established part of criminal law for a long time; cf. only the description by a member of Frederick Barbarossa's crusade: 'Those pilgrims who had inflicted damage on their companions had their hands cut off immediately according to local custom; orders were given to behead others who were accused of breaking the market-peace.' (Der Kreuzzug Friedrich Barbarossas, 82).

394 German translation by the author, different from Paret's interpretation. English translation after Arberry, The Koran.

395 Cf. e.g. al-Sarakhsī, Kitāb al-mabsūt, vol., vol. 9, 136f.; al-Bājī, Al-muntaqā, vol. 7, 185; al-Shāfi'ī, Al-risāla, 111–113, 223f.; Ibn Qudāma, Al-mughnī, vol. 8, 167.

and the Zāhirites³⁹⁶ omit this restriction, basing their view on one hadith in particular, which the others consider to have been abrogated or interpret differently.³⁹⁷ The minimum value and the ratio between the values of gold and silver is debated among the schools: Hanafites³⁹⁸ set it at ten dirham (silver) = one dinar (gold); Malikites, Shafīites and Hanbalites³⁹⁹ at three dirham = a quarter dinar. These two basic opinions are inferred from a number of traditions, most of them dismissed,⁴⁰⁰ which set a direct minimum value of one, three, five, ten or forty dirham, respectively a quarter, one or four dinar,⁴⁰¹ or a value corresponding to the price of a shield (*mijann*), which amounted to three or ten dirham, or a quarter or one dinar. According to al-Ṭaḥāwī⁴⁰² the traditions are contradictory and consequently not suitable as a source of law. Hence one should fall back on the consensus, which had been established only in the case of the (highest) minimum amount of ten dirham. Al-Sarakhsī⁴⁰³ employs the argument that the traditions setting a lower minimum value had been abrogated. He refers to sura 2:106 [2:100] as the basis of the abrogation ('And for whatever verse We abrogate or cast into oblivion, We bring a better or the like of it'). Clearly in his opinion 'better' is merely a rule which raises the minimum value and consequently restricts the criminal liability. It is worth mentioning only in passing that some authors also discuss the question of whether in order to calculate the value one ought to assume the weight or the market value of dinars and dirhams, and even of how the value of counterfeit coins ought to be estimated, and to what degree fluctuations in value before or after the crime is committed ought to be taken into account. Another problem discussed by some is how to calculate the minimum value in the case of a crime committed in several stages or by several perpetrators. Some dispense with the *ḥadd* punishment if the minimum value is not reached at each individual stage,

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396 Named by al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 136.

397 According to which the thief of an egg or a rope must have his hand cut off, too; cf. only al-Bukhārī, Ṣaḥīḥ, vol. 8, 15; Ibn Māja, Sunan, vol. 2, 862.

398 Cf. only al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 136–138.

399 Cf. e.g. Saḥnūn, Al-mudawwana, vol. 16, 65; al-Shāfi'ī, Al-risāla, 67; Ibn Qudāma, Al-mughnī, vol. 8, 167 ff.

400 E.g. in al-Nasā'ī, Sunan, vol. 2, 259 (*qaṭ' al-sāriq*).

401 As reported by Ibn Ḥanbal, Musnad, vol. 1, 169; vol. 2, 6, 145, 186; vol. 3, 464; vol. 4, 140; vol. 6, 36, 81, 466; Abū Dāwūd, Sunan, vol. 1, 270 f.; vol. 2, 224 f.; al-Tirmidhī, Ṣaḥīḥ, vol. 2, 273; Mālik, Al-muwatṭa', vol. 2, 831–833; al-Bukhārī, Ṣaḥīḥ, vol. 8, 16–18; Ibn Māja, Sunan, vol. 2, 862; al-Dārimī, Sunan, vol. 2, 94; al-Nasā'ī, Sunan, vol. 2, 258–260; Muslim, Ṣaḥīḥ, vol. 5, 112 f.

402 Sharḥ, vol. 2, 94 f.; for his biography cf. Tsafirir, Abū Ja'far al-Ṭaḥāwī, 123 ff.

403 Kitāb al-mabsūṭ, vol. 9, 136 ff.

while others reject this as being an inadmissible evasion.⁴⁰⁴ In this respect Ibn Qudāma⁴⁰⁵ distinguishes according to the duration of the time interval between the individual stages.

There are furthermore some, in part exceedingly subtle, deliberations regarding which items (movable goods, *manqūlāt*) would be suitable as object of the crime. Thus there is debate on whether free minors or slaves should be included in this category, as it is considered doubtful whether they have 'custody' of themselves, this being a precondition of *sariqa* (more in the following). Some Malikite authors in particular⁴⁰⁶ suggest that in this context non-Arabised majors, e.g. black people or Sicilians, should be classed as minors. The majority opinion, however, holds that humans in general do not possess the capacity to be property in this sense (*māliyya*) and could consequently not be the object of theft. This is fiercely debated with regard to slaves, the majority arguing in favour of slaves not fulfilling the requirements for a classification as items.⁴⁰⁷ A similarly elaborate casuistry has evolved concerning natural produce as potential thieves' loot. Goods excluded are usually those which anyone may appropriate in any case.⁴⁰⁸ In some instances scholars differentiate according to whether 'custody' of items had already been established or not.⁴⁰⁹

404 Cf. al-Bājī, *Al-muntaqā*, vol. 7, 158; al-Shīrāzī, *Al-muhadhdhab*, vol. 2, 277; M. b. J. al-Shāfi'ī, *Maqṣad*, 142.

405 *Al-mu'nī*, vol. 8, 178.

406 Cf. Mālik, *Al-muwaṭṭa'*, vol. 2, 838; Saḥnūn, *Al-mudawwana*, vol. 16, 81; al-Bājī, *Al-muntaqā*, vol. 7, 176f., 181. The other schools reject this view on the whole; cf. only al-Qudūrī, *Al-mukhtaṣar*, 112; M. b. J. al-Shāfi'ī, *Maqṣad*, 142; Ibn Qudāma, *Al-mughnī*, vol. 8, 169.

407 Cf. e.g. the references in al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭaḥāwī, *Mukhtaṣar*, 273f.; al-Muzanī, *Mukhtaṣar*, 264; Ibn Qudāma, *Al-mughnī*, vol. 8, 169f. Abū Yūsuf is said to have rejected this view, as slaves, being part of the human race, were originally free and being a slave could not change this.

408 Abū Yūsuf (*Kitāb al-kharāj*, 172f.) lists e.g. soil, rocks, plaster, chalk, clay, red ochre, antimony, arsenic, glass, water, fruit stones, wood and firewood, straw, herbs, scented plants and flowers among the generally permitted goods, while among the protected ones he lists vinegar, oils and perfumes such as aloe, musk, ambergris, also oak galls, myrobalan, dried medicinal herbs, precious stones and pearls. Sedge, teak and other woods are only considered protected once they have been worked. Interestingly al-Sarakhsī (*Kitāb al-mabsūt*, vol. 9, 153) claims that in the last-named instance Abū Yūsuf was not referring to the processing but the taking possession of woods. This might be due to an incorrect quotation, or he might be referring to a lost source which could support a possible change of opinion.

409 Thus in particular Malikites, Shafi'ites and Hanbalites, cf. e.g. Saḥnūn, *Al-mudawwana*, vol. 16, 78; al-Bājī, *Al-muntaqā*, vol. 7, 159, 176, 182; Ibn Qudāma, *Al-mughnī*, vol. 8, 178f.

Similar arguments are used with regard to the unlawful taking of fruit before and after the harvest.⁴¹⁰ These cases are instances proving that statements in the Quran or the sunna regarding points of law are hardly ‘unambiguous’. We also find a quarrel, most interesting in this respect and with a dogmatic aspect, concerning those of Muhammad’s traditions considered authoritative by all authors, according to which fruit, palm cores and shoots (*thamar wa-kathar*) were not subject to *ḥadd* punishment, and fruit on the tree or in a cluster are only seen as protected (*jarīn*) once they have been transferred into a barn.⁴¹¹ Al-Sarakhsī⁴¹² assumes the perishable nature of the fruit mentioned in the traditions to be the reason why they are exempt from *ḥadd* punishment. Consequently, unlike the other schools he maintains that one should not focus on how the fruit is kept, as this would mean that the reason (*ratio*) of the rule was being reinterpreted. Indeed, the Hanafites broaden the exception to include other easily perishable goods such as milk or meat. The other schools interpret the traditions to the effect that the *ḥadd* punishment depends on whether the goods are being kept safe (in the barn) or not yet.⁴¹³

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Most authors rule out the *ḥadd* punishment in the case of offences dealing with goods in which the thief himself has a real or imagined share, such as stealing shared property,⁴¹⁴ war booty (*ghanīma*),⁴¹⁵ or the property of a foundation⁴¹⁶ by those who benefit under it, or state property (*bayt al-māl*).⁴¹⁷

410 Regarding the conflicting views cf. e.g. al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭaḥāwī, *Mukhtaṣar*, 272, 274 f.; al-Muzanī, *Mukhtaṣar*, 263; al-Shīrāzī, *Al-muḥadhdhab*, vol. 2, 277 f.; al-Bājī, *Al-muntaqā*, vol. 7, 159, 176, 182; Ibn Qudāma, *Al-mughnī*, vol. 8, 178 f.

411 E.g. Mālik, *Al-muwaṭṭaʿa*, vol. 2, 831; no. 22, 839, no. 32.

412 *Kitāb al-mabsūt*, vol. 9, 139, 153, 155, 164, 180.

413 Cf. Mālik, *Al-muwaṭṭaʿa*, vol. 2, 831, 839; Saḥnūn, *Al-mudawwana*, vol. 16, 77 ff.; al-Shāfiʿī, *Al-risāla*, 67; al-Shīrāzī, *Al-muḥadhdhab*, vol. 2, 277 f.; M. b. J. al-Shāfiʿī, *Maqṣad*, 142.

414 Cf. al-Qudūrī, *Al-mukhtaṣar*, 112; M. b. J. al-Shāfiʿī, *Maqṣad*, 142.

415 Cf. al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭaḥāwī, *Mukhtaṣar*, 27; M. b. J. al-Shāfiʿī, *Maqṣad*, 142; Ibn Qudāma, *Al-mughnī*, vol. 8, 191; the Malikite opinion differed, cf. only al-Qayrawānī, *Al-risāla*, 260, which sets down a differentiated diverging opinion to the effect that only if someone significantly exceeds his own concrete portion should the punishment be applied. It is noticeable that in this area the deliberations of early authors are often more detailed than those of the later ones, possibly because of the decreasing military expansion and the topic’s concomitant loss of importance.

416 Al-Shīrāzī, *Al-muḥadhdhab*, vol. 2, 283; Ibn Qudāma, *Al-mughnī*, vol. 8, 191 f.

417 Cf. al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭaḥāwī, *Mukhtaṣar*, 27; M. b. J. al-Shāfiʿī, *Maqṣad*, 142; the Malikites held different views, cf. only al-Qayrawānī, *Al-risāla*, 260.

As regards the last-named, reference is made to the relevant practice of the caliphs 'Umar and Ali.⁴¹⁸

Religious aspects also play a part in the debate of whether taboo items may be the objects of a theft subject to *ḥadd* punishment. Wine and other inebriating beverages and also pork are generally classified as not 'suitable' for theft.⁴¹⁹ This also applies in the case of non-Muslim owners. Ibn Qudāma⁴²⁰ emphasises that the Muslim view, according to which such things are *ḥarām*, is the decisive one. Opinions are divided even in the case of items such as butchers' knives used for pigs and vessels used to transport wine: while some point out that these items may be converted to an approved use and should consequently be protected, others are of the opinion that as possible means to forbidden actions they themselves ought to lose all claim to legal protection.⁴²¹ Non-Islamic ritual items are not within the scope of the *ḥadd* punishment on principle. Valuable Christian ritual vessels, on the other hand, ought to be protected according to majority opinion⁴²² because of the high metal value they retain even after having been destroyed; Hanafite doctrine disagrees.⁴²³

130 There is widespread doubt concerning musical instruments which might spur on immoral desires, as well as board games. Hanafites and Hanbalites refuse protection under criminal law, as it might be commendable to destroy these items for moral reasons, based on the universal principle *al-amr bi-l-ma'rūf wa-l-nahy 'an al-munkar* (cf. suras 3:104, 110, 114; 7:199), i.e. the rule of doing what is decent and avoiding what is offensive.⁴²⁴ This principle might give rise to relevant doubt from a legal point of view, which would result in the action not being punishable. Others again differentiate between permitted (drums) and forbidden (flutes, lutes) instruments: theft of the latter would only be punishable if the material value after they are destroyed still exceeds the

418 Reported in Ibn Qudāma, *Al-mughnī*, vol. 8, 191. He mentions al-Shāfi'ī's allegedly approving view, which is not mentioned in the Shafi'ite literature.

419 Cf. al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭahāwī, *Mukhtaṣar*, 273, 275; al-Muzanī, *Mukhtaṣar*, 265; M. b. J. al-Shāfi'ī, *Maqṣad*, 141; Saḥnūn, *Al-mudawwana*, vol. 16, 70f., 78f.; al-Bājī, *Al-muntaqā*, vol. 7, 156 f.; Ibn Qudāma, *Al-mughnī*, vol. 8, 188 f.

420 *Al-mughnī*, vol. 8, 189 (*fa'inna l-i'tibār bi-ḥukm al-Islām*). Only 'Aṭā's opinion differs, quoted *ibid*.

421 In Ibn Qudāma, *Al-mughnī*, vol. 8, 189.

422 Al-Bājī, *Al-muntaqā*, vol. 7, 157; al-Shīrāzī, *Al-muhadhdhab*, vol. 2, 280; Ibn Qudāma, *Al-mughnī*, vol. 8, 189.

423 Cf. al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭahāwī, *Mukhtaṣar*, 273.

424 Cf. al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭahāwī, *Mukhtaṣar*, 273; al-Muzanī, *Mukhtaṣar*, 265; Ibn Qudāma, *Al-mughnī*, vol. 8, 189.

required minimum value.⁴²⁵ Conversely some Hanafites and Hanbalites support exempting the theft of copies of the Quran (some of them differentiate according to the degree of decoration in the manuscript) from *ḥadd* punishment, as they assume that the thief would wish to read the stolen Quran rather than benefiting from the material value of the book.⁴²⁶ The analogy with the theft of vessels filled with wine, where the thief is thought to be interested in the contents rather than the vessel, is suggestive.⁴²⁷

A further significant restriction of offences classified as *ḥadd* arises from the universal⁴²⁸ requirement that the item must be removed from some kind of 'safekeeping' (*ḥirz*). Here we have a clear delimitation from other crimes, which are subject to *ta'zīr* rather than *ḥadd*, such as misappropriation (*khiyāna*) or damage to property (*itlāf*).⁴²⁹ The treatment of grave robbery (*nabsh*) is controversial; according to al-Ghazālī⁴³⁰ it could be subject to *ḥadd* punishment by applying analogy. The 'safekeeping' must have been breached completely, consequently an attempted theft is not punishable under *ḥadd*.⁴³¹ Most authors distinguish between safekeeping by a person and safekeeping at a place (*ḥirz bi-l-ḥāfiẓ* vs. *ḥirz bi-l-makān*).⁴³² Unlike the other schools the Hanafites adhere to the doctrine that safekeeping at a place supersedes safekeeping by a person, i.e. the latter is only necessary where there is no place for safekeeping. As a result a thief who has been granted access to a place, for instance by a host, cannot then go on to breach a person's safekeeping. Tolerant Hanafite doctrine already tries to avert *ḥadd* punishment if the perpetrator merely claims to have been granted access. Detailed deliberations deal with the condition of safekeeping

425 M. b. J. al-Shāfi'ī, *Maqṣad*, 141; al-Bājī, *Al-muntaqā*, vol. 9 (Beirut edition 1410/1999), 179 f.

426 Al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭaḥāwī, *Mukhtaṣar*, 272; al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 152; Ibn Qudāma, *Al-mughnī*, vol. 8, 170 f. Shafi'ites and Malikites hold a different view, cf. Saḥnūn, *Al-mudawwana*, vol. 16, 77; al-Bājī, *Al-muntaqā*, vol. 7, 156; al-Muzanī, *Mukhtaṣar*, 264.

427 Thus al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 152 f.

428 Al-Qudūrī, *Al-mukhtaṣar*, 112; al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 136; al-Qayrawānī, *Al-risāla*, 258; al-Shāfi'ī, *Al-risāla*, 111–113; Ibn Qudāma, *Al-mughnī*, vol. 8, 171 ff.

429 Cf. al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭaḥāwī, *Mukhtaṣar*, 272; al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 151; Saḥnūn, *Al-mudawwana*, vol. 16, 65; M. b. J. al-Shāfi'ī, *Maqṣad*, 142.

430 Al-mustaṣfā, vol. 2, 331–335 with detailed consideration of the analogy (for his biography cf. Moosa, *Abū Ḥāmid al-Ghazālī*, 261 ff.); most other authors hold a different view; cf. e.g. the detailed argumentation in al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 159 f.

431 Al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 139, 147, 156; al-Shīrāzī, *Al-muhadhdhab*, vol. 2, 279 f.; Saḥnūn, *Al-mudawwana*, vol. 16, 72; Ibn Qudāma, *Al-mughnī*, vol. 8, 176 ff.

432 Cf. only al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 150, 155, 162, 179; al-Muzanī, *Mukhtaṣar*, 263; Ibn Qudāma, *Al-mughnī*, vol. 8, 172, 175 f.

with regard to sleeping persons, mosques, in detached houses (*bayt*) and residential complexes (*dār*), among partners in rent or loan contracts, in shops, markets, baths and in the street, outside of settlements within a caravan and within a camp etc. They also address details of the breach of safekeeping,⁴³³ e.g. with regard to the question of whether entering or – as is the prevalent view – reaching etc. into premises constitutes a breach. According to al-Sarakhsī only as complete a breach of safekeeping as possible – i.e. entering – is sufficient; besides other supporting arguments he adduces an attributed saying of Ali's to the effect that the hand of a clever perpetrator who acts in this very way (i.e. by reaching inside) was not to be cut off.⁴³⁴

Further discussion is devoted to the question of responsibility, i.e. whether safekeeping is to be considered breached if the conveyor of the stolen goods is a person without legal capacity, an animal or running water. Most authors would answer in the affirmative. The question of whether, and under what circumstances, perpetrators acting in concert would be subject to *ḥadd* punishment is also discussed. Frequently those involved who did not actively breach the safekeeping are exempt from the punishment.⁴³⁵ Hanafites and other early authors also regard the perpetrator who actually gains access as being exempt from punishment if the other perpetrator is the one carrying off the stolen goods – for instance through an opening in a wall. In this case the first one would not have removed the goods (*ikhrāj*), which is one of the elements of the offence. Similarly detailed considerations are devoted to cases in which several people are involved and gain access together, but not all of them actively remove the goods from safekeeping (cf. 2.5 above). These deliberations are then continued vehemently regarding whether each of the perpetrators involved must have received the set minimum value of stolen goods, or whether in this case responsibility may be attributed individually as well.⁴³⁶

433 Cf. e.g. al-Qudūrī, *Al-mukhtaṣar*, 112 f.; al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 147 f., 156; al-Muzanī, *Mukhtaṣar*, 263; Ṣaḥnūn, *Al-mudawwana*, vol. 16, 71; M. b. J. al-Shāfiʿī, *Maqṣad*, 142; Ibn Qudāma, *Al-mughnī*, vol. 8, 172 ff.

434 *Kitāb al-mabsūṭ*, vol. 9, 147.

435 Cf. al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭaḥāwī, *Mukhtaṣar*, 272 f.; al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 147 f.; Ṣaḥnūn, *Al-mudawwana*, vol. 16, 73; al-Bājī, *Al-muntaqā*, vol. 7, 186; al-Muzanī, *Mukhtaṣar*, 263; M. b. J. al-Shāfiʿī, *Maqṣad*, 142; Ibn Qudāma, *Al-mughnī*, vol. 8, 196.

436 Hanafites in particular demand this kind of proportionate minimum value for each perpetrator; cf. al-Qudūrī, *Al-mukhtaṣar*, 112; al-Ṭaḥāwī, *Mukhtaṣar*, 270; al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 143 f.; the other schools have a more differentiating approach, cf. Ṣaḥnūn, *Al-mudawwana*, vol. 16, 68 f.; al-Bājī, *Al-muntaqā*, vol. 7, 178; al-Muzanī, *Mukhtaṣar*, 263; M. b. J. al-Shāfiʿī, *Maqṣad*, 142; Ibn Qudāma, *Al-mughnī*, vol. 8, 194 f.

A further restriction and delimitation arises from the similarly universally required ingredient that the goods must be taken away in secret (*al-akhdh khif-yatan*).⁴³⁷ Consequently cases in which the crime is committed by overpowering or duping someone and then quickly (*ikhtilās*) or forcibly (*intihāb*) taking something from them are exempt. Debate continues, and sometimes differentiates according to the manner in which the crime was committed, on how to deal with a cutpurse.

There is unanimity on the issue of criminal responsibility, which applies once a person has reached mental and sexual maturity (*‘aql* and *bulūgh*).⁴³⁸ When it comes to individual details, we find a multitude of differing opinions here as well, for instance with regard to the question of whether a drunk perpetrator is culpable,⁴³⁹ or regarding which characteristics and what age – which may be determined to have normative character – would indicate that sexual maturity has been reached.

Further restrictions of the *ḥadd* punishment arise in the case of offences committed against particular relations, spouses, the debtors of a right to return in the case of the owner's taking matters into his own hands, or against thieves; there is a multitude of views when it comes to the details.⁴⁴⁰ Reference is made frequently to the circumstance that the *ḥadd* punishment does not apply because clearly defined safekeeping is not possible among relatives, or because the thief has some claim to the loot or because there is at least justifiable doubt under the law.

Theft in an emergency is universally recognised to be justified. This is usually supported by the practice of caliph ‘Umar who did not punish some starving slaves who out of desperation had killed a valuable she-camel belonging to their master for food, but it applies in general famines as well.⁴⁴¹ This is in turn

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437 Cf. al-Qudūrī, *Al-mukhtaṣar*, 112 f.; al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 136, 140, 151, 159; al-Muzanī, *Mukhtaṣar*, 264, 273; Saḥnūn, *Al-mudawwana*, vol. 16, 25, 80 f.; M. b. J. al-Shāfi‘ī, *Maqṣad*, 142; Ibn Qudāma, *Al-mughnī*, vol. 8, 166 f.

438 Cf. only al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 184; al-Muzanī, *Mukhtaṣar*, 263; Saḥnūn, *Al-mudawwana*, vol. 16, 75, 92 f., 95; M. b. J. al-Shāfi‘ī, *Maqṣad*, 141.

439 Al-Shīrāzī, *Al-muhadhdhab*, vol. 2, 77, 277 differentiates according to whether the perpetrator is drunk for excusable reasons (e.g. for medical purposes) or not; he is to be punished only in the latter case.

440 Cf. e.g. al-Qudūrī, *Al-mukhtaṣar*, 112 f.; al-Ṭaḥāwī, *Mukhtaṣar*, 270 f.; al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 145 f., 151 f., 188–190; al-Muzanī, *Mukhtaṣar*, 263; Saḥnūn, *Al-mudawwana*, vol. 16, 69, 76; M. b. J. al-Shāfi‘ī, *Maqṣad*, 142; Ibn Qudāma, *Al-mughnī*, vol. 8, 189 ff.

441 Cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 140; al-Shīrāzī, *Al-muhadhdhab*, vol. 2, 277, 282; Ibn Qudāma, *Al-mughnī*, vol. 8, 192.

the basis for modern attempts at reform which work towards restricting *ḥadd* crimes very firmly, or suspending them altogether (cf. Part 2, 3.4 below).

A serious restriction of *ḥadd* punishment, finally, is posed by the institutions of doubt relevant under the law (*shubha*) and active repentance (*tawba*), which may lead to the perpetrator who has breached one of the 'rights of God' avoiding punishment (cf. suras 4:16; 5:34; 5:39).⁴⁴² According to Hanafite and Shafi'ite doctrine relevant doubt arises as soon as the perpetrator claims to be the owner of the goods (e.g. because he bought them before the crime, or due to the expiry of a pledge).⁴⁴³ According to a widely held view, a criminal who shows active repentance (*tawba*) by returning the stolen goods before the trial starts should escape *ḥadd* punishment, even though the sources are comparatively vague.⁴⁴⁴

Exemption from punishment (*'afw*, pardon) at the instigation of the victim or the agency applying the punishment is universally rejected.⁴⁴⁵ However, al-Māwardī⁴⁴⁶ reports that for the first time under the rule of Islam the caliph Mu'āwiya allowed himself to be moved by a criminal's and his mother's entreaties (in beautifully crafted verse) and did not impose the *ḥadd* punishment. The Hanafites also de facto allow a type of pardon by classing the perpetrator's lawfully acquiring ownership rights to the stolen goods (e.g. by means of gift, purchase or inheritance) before the end of the trial as a bar to proceedings: it would result in the victim no longer taking part in the proceedings, which according to Hanafite opinion is a requirement.⁴⁴⁷ The same is true of the victim's opportunity, allowed by Hanafites, Shafi'ites and some Hanbalites, to claim that the thief himself was the owner of the stolen goods. This would result in the basis of the proceedings being vitiated, even in spite of proof to

442 Cf. El Baradie, *Gottes-Recht*, 214 ff.; his comparatively clear structure is not, however, supported everywhere by early sources.

443 Cf. al-Qudūrī, *Al-mukhtaṣar*, 113; al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 149 f., 179, 185; M. b. J. al-Shāfi'ī, *Maqṣad*, 142; al-Shīrāzī, *Al-muhadhdhab*, vol. 2, 282; Ibn Qudāma, *Al-mughnī*, vol. 8, 197. Malikite opinion diverges, cf. Saḥnūn, *Al-mudawwana*, vol. 16, 66 f., 74; al-Bājī, *Al-muntaqā*, vol. 7, 164 f.

444 Cf. al-Shaybānī, *Al-jāmi'*, 360; al-Ṭaḥāwī, *Sharḥ*, vol. 2, 96; al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 136, 176, 186, vol. 10, 110; al-Shīrāzī, *Al-muhadhdhab*, vol. 2, 279. Malikite opinion diverges, cf. Saḥnūn, *Al-mudawwana*, vol. 16, 66 f., 74; al-Bājī, *Al-muntaqā*, vol. 7, 168, 177.

445 Cf. al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 186; Saḥnūn, *Al-mudawwana*, vol. 16, 86, 89; al-Shīrāzī, *Al-muhadhdhab*, vol. 2, 283.

446 *Al-aḥkām*, 283 f.

447 Al-Qudūrī, *Al-mukhtaṣar*, 112 f.; al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 164, 186–188; Ibn Qudāma, *Al-mughnī*, vol. 8, 196 f.

the contrary, or at the very least result in relevant doubt which could lead to exemption from punishment.⁴⁴⁸

There is overall great inconsistency within the traditional opinions on the question of whether a *ḥadd* action may be brought only by the victim, and whether the victim must of necessity take part in the proceedings and claim back the stolen property. Only the Maliki school presents a unanimous view, dispensing with the victim's participation and accepting a *ḥisba* action (cf. 1.6 above).⁴⁴⁹ The other schools' opinions are full of unclear and even contradictory statements.⁴⁵⁰ This is due to the similarly ambiguous classification of the offence as breaching a right of God or a right of humans, and the concomitant, much-debated issue of competition between penal sanctions and restitution of the stolen goods according to civil law.

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Only a confession (*iqrār*, *ʿtirāf*) or a witness statement (*shahāda*) are admissible evidence. Opinions differ with regard to the exertion of pressure or force on the presumed criminal. Some scholars reject this in all cases,⁴⁵¹ others differentiate between the preliminary investigation (pressure or force permitted) and the court proceedings (pressure or force prohibited)⁴⁵² or the degree of suspicion.⁴⁵³ Some authors⁴⁵⁴ demand a reiterated confession based on a hadith, Ali's practice and an analogy with the required number of witnesses. Nearly all allow the accused to retract (*rujūʿ*) his or her confession. In addition the chairman of the court may call the confessed offender to retract the confession; Hanafites, Shafīʿites and Hanbalites see this as recommended.⁴⁵⁵

448 Al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 186–188; al-Shīrāzī, Al-muḥadhdhab, vol. 2, 282; Ibn Qudāma, Al-mughnī, vol. 8, 185f. Maliki opinion differs, cf. only al-Bājī, Al-muntaqā, vol. 7, 164f.

449 Cf. Saḥnūn, Al-mudawwana, vol. 16, 66, 68f., 96; al-Bājī, Al-muntaqā, vol. 7, 183f.

450 Cf. only Abū Yūsuf, Ikhtilāf, 152f., 156; al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 69, 139, 142f., 191–193; al-Māwardī, Al-aḥkām, 273; al-Shīrāzī, Al-muḥadhdhab, vol. 2, 282f.; Ibn Qudāma, Al-mughnī, vol. 8, 186, 193ff.

451 Thus al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 184f.

452 Thus al-Māwardī, Al-aḥkām, 174.

453 Thus al-Bājī, Al-muntaqā, vol. 7, 166, who supports a certain amount of violence if there are solid grounds for suspicion – whip lashes might be permissible, torture not; where he would draw the line between the two remains his secret.

454 Thus al-Ṭāḥāwī, Sharḥ, 96f. and Mukhtaṣar, 272; Ibn Qudāma, Al-mughnī, vol. 8, 192f.

455 Cf. al-Ṭāḥāwī, Sharḥ, 96f.; al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 141, 182, 191; al-Muzanī, Mukhtaṣar, 264; Saḥnūn, Al-mudawwana, vol. 16, 97; al-Shīrāzī, Al-muḥadhdhab, vol. 2, 343–345; M. b. J. al-Shāfiʿī, Maqṣad, 141f.; Ibn Qudāma, Al-mughnī, vol. 8, 194.

Witness evidence may be provided only by two Muslim male,⁴⁵⁶ free, adult and blameless witnesses. According to al-Qudūrī, someone who e.g. visits the baths without a loincloth is not blameless, nor are those who take interest, play chess or nard, or eat or urinate in the street.⁴⁵⁷ Opinions differ on whether witness evidence by hearsay is admissible.⁴⁵⁸ Detailed statements on the perpetrator, the object of the offence and the sequence of events are required.⁴⁵⁹ As with the confession, many authors recommend dispensing with witness statements; some also recommend that besides admonishing the witness to speak the truth, the judge should also suggest he retracts his evidence.⁴⁶⁰

Only very few classical scholars discuss the issue of possible time limitations (*taqādum*). Hanafites in particular⁴⁶¹ but also some others such as al-Ṭabarī⁴⁶² support the use of limitations. The time set ranges from a month to a year or is determined by the judge according to the circumstances of individual cases.⁴⁶³

134 Al-Sarakhsī's⁴⁶⁴ argumentation discussing the subject in the context of witness evidence is remarkable. At first, he says, the witness has the choice between silence and speaking. Silence in the beginning is proof of an inclination to being silent. A later statement would thus not be an action in keeping with a duty (*ḥisba*) but rather prompted by hostility towards the offender. In a case dealing with a breach of the rights of God, he continues, this could not be the basis on which to make a statement, especially as it is incumbent on the Muslim to prevent the *ḥadd* punishments. Consequently a later – and thus too late – statement should be irrelevant.

456 Al-Sarakhsī (Kitāb al-mabsūṭ, vol. 9, 169) infers this from the special regulation in sura 2:282.

457 Al-Qudūrī, Al-mukhtaṣar, 125.

458 Affirmative: Saḥnūn, Al-mudawwana, vol. 16, 85; M. b. J. al-Shāfi'ī, Maqṣad, 154 f.; the Hanafites reject it, cf. only al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 169 f. and al-Shīrāzī, Al-muhadhdhab, vol. 2, 337.

459 Cf. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 147, 162 f., 177–179, 191; Saḥnūn, Al-mudawwana, vol. 16, 65, 71, 81, 83; al-Shīrāzī, Al-muhadhdhab, vol. 2, 336 f., 339; M. b. J. al-Shāfi'ī, Maqṣad, 154 f.; Ibn Qudāma, Al-mughnī, vol. 8, 193.

460 Cf. al-Qudūrī, Al-mukhtaṣar, 124; al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 142, 146; al-Shīrāzī, Al-muhadhdhab, vol. 2, 336 f.; M. b. J. al-Shāfi'ī, Maqṣad, 154 f.

461 Cf. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 69 f., 142, 171 f., 176, 186 with further references. E.g. Saḥnūn, Al-mudawwana, vol. 16, 86, holds a different view.

462 Kitāb al-jihād, 66.

463 Cf. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 9, 70 with further references.

464 Op. cit., 69.

All schools are in agreement that the punishment for a first offence is to cut the offender's right hand off; after a second offence his left foot will be cut off.⁴⁶⁵ In the case of later offences, Malikites, Shafi'ites and Ahmad ibn Ḥanbal⁴⁶⁶ support first cutting off the other hand and then the other foot, while Hanafites and others⁴⁶⁷ support only *ta'zīr* punishments from then onwards. There is even discussion on how to punish a fifth offence,⁴⁶⁸ even though it would be quite difficult to commit. All scholars agree that the punishment should be executed with care, not least to prevent the offender dying.⁴⁶⁹ The punishment is described as dating from pre-Islamic times⁴⁷⁰ and appears to be linked to the archaic concept of retribution, according to which the body part active in the crime must be punished.⁴⁷¹

gg Apostasy

Apostasy in the sense of renouncing Islam (*ridḍa*, *irtidād*) occupies a special position.⁴⁷² The Quran lists God's curse and torment in the afterlife as sanctions.⁴⁷³ In addition, according to classical doctrine the apostate (*murtadd*) will lose his rights as a citizen⁴⁷⁴ and will be punished by death. This is based in

465 Cf. e.g. al-Ṭaḥāwī, *Mukhtaṣar*, 274 f.; Saḥnūn, *Al-mudawwana*, vol. 16, 82, 88; Ibn Qudāma, *Al-mughnī*, vol. 8, 179 ff.

466 Cf. Mālik ibn Anas, *Al-muwattaʿa*, vol. 2, 835 f.; al-Bājī, *Al-muntaqā*, vol. 7, 165–167; al-Muzanī, *Mukhtaṣar*, 264; al-Shīrāzī, *Al-muḥadhdhab*, vol. 2, 283; Ibn Qudāma, *Al-mughnī*, vol. 8, 182 (regarding Ahmad ibn Ḥanbal).

467 Cf. e.g. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 140 f., 166–168.

468 Cf. e.g. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 166, 168; Saḥnūn, *Al-mudawwana*, vol. 16, 82; al-Shīrāzī, *Al-muḥadhdhab*, vol. 2, 283; Ibn Qudāma, *Al-mughnī*, vol. 8, 183; putting the culprit to death, as demanded by the Zāhirites, is rejected unanimously.

469 Cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 168, 185; Saḥnūn, *Al-mudawwana*, vol. 16, 93 f.; al-Bājī, *Al-muntaqā*, vol. 7, 167 f.; al-Shīrāzī, *Al-muḥadhdhab*, vol. 2, 283; Ibn Qudāma, *Al-mughnī*, vol. 8, 180.

470 E.g. in al-ʿAskarī, *Al-awāʿil*, vol. 1, 64; Ibn Qutayba, *Kitāb al-maʿārif*, vol. 1, 552; al-Thaʿalibī, *Laṭāʿif*, 12.

471 Cf. Ibn Qudāma, *Al-mughnī*, vol. 8, 179. Comparable sanctions are found e.g. in the Old Testament (Deuteronomy 25:11) or in Medieval German Law (cf. the references in Günther, *Idee der Wiedervergeltung*, 198–201, 255 with n. 198, and in Blanchet, *L'amputation*, 254–256).

472 Cf. S. M. Zwerner, *The Law of Apostasy in Islam*, London 1924 (German: *Das Gesetz wider den Abfall vom Glauben*, Gütersloh 1926); S. A. Rahman, *Punishment of Apostasy in Islam*, New Delhi 1996.

473 Cf. suras 2:217; 3:86–91; 16:106–109; cf. also sura 4:137.

474 Different opinions are found concerning e.g. whether his property should come to his (legal) heirs as it would have done if he had died naturally, or to the public purse; cf.

part on sura 4:88–89 – the wording of which, however, refers to the hypocrites among the Muslims⁴⁷⁵ – on sura 48:16 and also on prophetic traditions.⁴⁷⁶ Many understand active repentance as justification for repealing the punishment and demand that the offender should be called to repent or be given three days respite.⁴⁷⁷

El Baradie summarises the elements of the offence as set out in the classical sources: apostasy is ‘when a Muslim denies the doctrinal principles of Islam or the validity of the absolute commands and prohibitions of the “Sharī‘a” and acts accordingly.’⁴⁷⁸ While the violation of these norms is considered a sin and thus subject to specifically assigned penalties, it is not interpreted as apostasy.⁴⁷⁹ Rejecting or agreeing with something that is controversial among Muslims is not classed as apostasy either.⁴⁸⁰ ‘Reviling the Prophet’ (*sabb al-nabī*), on the other hand, is widely understood to be a form of apostasy, with many authors not even admitting repentance as a means of avoiding punishment.⁴⁸¹ Here we see a starting point of the persecution of people of different faith e.g. in present-day Pakistan which may go as far as murder of critics or violent protests against the publication of caricatures of Muhammad.

Historically the draconian punishment for *ridda* can probably be explained with the wars on the Arabian Peninsula during the early years of the Islamic community and the widespread renouncing of Islam after Muhammad’s death (for modern interpretations cf. Part 2, 3 4.b) below). Repentance (*tawba*) is seen as a justification for exemption from punishment, with a widely held opinion limiting the period within which this is possible to four days.⁴⁸² There is great potential of danger especially in the context of broader interpretation of the

al-Sarakhsī, Kitāb al-mabsūṭ, vol. 10, 100 ff.; al-Shaybānī also discusses the subject in some detail already, quoted in Khadduri’s translation of the *Siyar* (The Islamic Law of Nations, 195 ff.).

475 The great Quranic commentaries on sura 4:89 interpret its content from a historical perspective and do not mention that this passage might be the basis for the secular sanction of *ridda*. The modern Mawsū‘a of *Wizārat al-awqāf* (vol. 22) does not mention the passage in the extensive article entitled ‘*Ridda*’ (180 ff.).

476 Cf. e.g. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 10, 89 and ff.

477 Cf. e.g. Ibn al-Humām, *Sharḥ*, vol. 6, 68; *Wizārat al-awqāf*, *Al-mawsū‘a*, vol. 22, 191f. with further references.

478 Gottes-Recht, 123 with further references.

479 Op. cit., 124 with further references.

480 Anwarullah, *The Criminal Law*, 204.

481 Cf. Peters, *Crime*, 65; Anwarullah, *The Criminal Law*, 206f.; *Wizārat al-awqāf*, *Al-mawsū‘a*, vol. 22, 184f.

482 Cf. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 10, 98.

elements of the offence. Thus Ibn Rushd⁴⁸³ defines someone who declares usury (*ribā*; cf. 4.e.aa above) to be permitted as an infidel (*kāfir*) whose blood may be shed freely and who would be killed unless he repented. This attitude provides the context in which we must see the persecution of the Baha'i in Iran and Egypt, of the Ahmadiyya in Pakistan, Bangladesh and elsewhere,⁴⁸⁴ and also Khomeini's fatwa (legal opinion) against Salman Rushdie (cf. also Part 2, 3.4.b) below).

Even if the threshold of apostasy has not been crossed, alleged religious deviation may be punished with great severity – not consistently at all times and in all places. Thus there is a report of the crucifixion of the former court witness Ibn Khātim al-Ṭulayṭulī in 464/1072 in Cordoba, because of alleged 'heresy' (*zandaqa*). He was accused of having made blaspheming statements, among them denying the attributes of God, reviling Muhammad, 'Ā'isha, 'Umar and Ali, and also denying the inevitability of destiny (*qadar*) and the necessity of undergoing ritual cleansing if one found oneself in a state of great ritual uncleanness (*janāba*). In connection with this case it was also debated whether his property should come to his legal heirs or whether it should benefit the community.⁴⁸⁵

hh Legal Practice

There is only little information on legal practice before the sixteenth century. Johannes Damascenus (675–749) includes two reports of thieves who were punished by flogging.⁴⁸⁶ It is not, however, clear whether these cases did not apply the usual *ḥadd* punishment, or whether the elements of *ḥadd* crimes were not present and the offences consequently tried under *ta'zīr*. The Ottoman chronicler al-Muḥibbī reports of an important judge of the late seventeenth century who had an adulteress incriminated by four witnesses stoned to death on the At-Maydan in Istanbul.⁴⁸⁷ Al-Muḥibbī adds that this had not happened since the early Islamic period, and then tells us that the judge was instantly removed from office. The examination of court documents from seventeenth-century Aleppo confirms this hostile attitude. There is, however,

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483 Ibn Rushd, *Al-muqaddima*, vol. 2, 177; for his biography and work cf. Serrano Ruano, *Ibn Rushd al-Jadd*, 295 ff.

484 Cf. S. A. Rahman, *Punishment*, 6, on the controversy surrounding the stoning of an Ahmadi in Kabul at the beginning of the twentieth century.

485 Cf. Ch. Müller, *Gerichtspraxis*, 204 ff. with further references.

486 *Patrologia*, vol. 94, 159: 'Quia praecipiant nos fornicatorem et furem flagellare'; vol. 96, 1338: 'Inveniuntur quoque legislatores (...) furem exorciari'.

487 *Khulāṣat al-athar*, vol. 1, 181 f.

also evidence from eighteenth-century Istanbul that in two cases thieves had their hands cut off.⁴⁸⁸

On the other hand there are cases where instead of the prescribed *ḥadd* or *ta'zīr* penalties individual punishments were imposed. Wolfgang Aigen includes an account of events in Aleppo in the seventeenth century: 'Whores and adulterers will be tied without further ado and sat on a donkey. The woman has to hold the donkey's tail in her hand, and on their heads will be put the innards and all the filth of a sheep. They are led back and forth through the city and made an example of. They will be accompanied by scores of naughty urchins who cover them in dung incessantly.'⁴⁸⁹ Vámbéry reports in the nineteenth century from Maymana in Afghanistan where the local khan sold offenders in the slave market in Bukhara, which appears to have been a thriving business.⁴⁹⁰ This kind of economic consideration is likely to have played a part in sentencing criminals to become galley slaves, which was widely practised in the Ottoman Empire.⁴⁹¹

More recent studies have brought to light that officials, in particular those who were not themselves judges, would take independent measures beyond the boundaries of literary doctrine in criminal proceedings, albeit under the supervision of the courts and according to existing administrative regulations (*qānūn*, pl. *qawānīn*; cf. also Part 2, 2.1.a) below).⁴⁹² On the other hand there are reports dating from the second/eighth and third/ninth century regarding cases where judges imposed typical *ta'zīr* penalties such as imprisonment or flogging.⁴⁹³ On the whole, the boundaries between the competences of the judiciary and the (police) administration have always been very unclear (cf. 1.6 above). Ibn Khaldūn's⁴⁹⁴ account of a mistake made by the Baghdad prefect of police in the fourth/tenth century illustrates that that expert advice by legal scholars was not always welcome: he assigned legal advisers to the police (*fuqahā' ya'mal ahl al-shurṭa bi-fatwāhum*), with the consequence that the

488 Cf. Zarinebaf, *Crime*, 74 with further references. Also Semerdjian, 'Off the Straight Path', 29 ff., 61 ff.

489 Aigen, *Sieben Jahre in Aleppo*, 37 f.; Salomon Schweigger already reports similar punishments (Eine neue Reyßbeschreibung, 174) for counterfeiters, false witnesses and for 'gemeyne Hurerey' ('common fornication') among Christians and Jews.

490 Mohammed in Asien, 304 f.

491 Cf. Zarinebaf, *Crime*, 74, 164 ff.

492 Cf. e.g. Peters' study *Crime*, esp. 69 ff., 187 f.; Heyd, *Studies*, 111 ff.; id., *Qānūn*, 2 ff., 8.

493 Al-Kindī, *Kitāb al-umarā'*, 383, 439, 444, 459, 469, 470.

494 Al-'ibar, 388.

number of thefts increased and insecurity grew everywhere.⁴⁹⁵ However, there are also instructions to the administrative authorities (*wulāt*) to adhere to the procedural rules as set out in the *fiqh*.⁴⁹⁶

Still, the comparatively restricted application of *ḥadd* punishments does not automatically lead to the frequently-drawn conclusion that this should be seen as an example of the chasm between theory and practice. At least where Hanafite or Shafi'ite law was applied this may even be seen as confirming that the *ḥadd* punishments were restricted in accordance with the ideas expressed in the literature and that the usually more lenient *ta'zīr* began to take their place.⁴⁹⁷

c *Non-Quranic Law on Criminal and Civil Offences*

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The area of *ta'zīr* deals with offences not subject to specific legal sanctions ('sin', *ma'sīyya*) beyond the scope of *ḥudūd* and *qisās*,⁴⁹⁸ but it also includes safeguarding measures.⁴⁹⁹ In addition it covers those cases in which *ḥadd* punishment cannot be applied because the specific element of this particular *ḥadd* crime is not present. Thus for instance misappropriation, namely the unlawful removal of an item without breaching someone else's safekeeping, is subject to *ta'zīr* punishment. The same is true of theft of goods of lesser value which do not reach the minimum value required in Quranic theft (*niṣāb*).

Due to the absence of statutory provisions the authorities responsible have broad scope of action when determining the elements of a crime and their concrete application (*siyāsa shar'iyya*; cf. 1.3 above; Part 2, 2.1 below).⁵⁰⁰ According to the most widely held opinion – not, however, Malikite doctrine – the punishment should be less than that for comparable *ḥadd* offences.⁵⁰¹ In later times we find diverging regulations, such as e.g. capital punishment for repeat

495 Ibid.

496 Cf. the remarks of the chief judge Abū Yūsuf, *Kitāb al-kharāj* (ed. by Muhammad Ibrāhīm al-Bannā, Cairo 1981), 343f.

497 Similar Johansen, *Eigentum*, 1, 44; a different opinion is expressed by e.g. Goldziher, *Muhammedanische Studien Teil 2*, 354f., who calls large sections of *fiqh* 'lifeless letters, thought up by people sitting in studies (...) but neglected and pushed to the back in real life'.

498 Cf. al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 36; al-Māwardī, *Al-aḥkām*, 293.

499 Cf. El Baradie, *Gottes-Recht*, 147, 165 with further references; al-Sarakhsī, *Kitāb al-mabsūt*, vol. 9, 159 on the subject of the imam's competence to choose between *ḥadd* and *ta'zīr*.

500 Cf. e.g. Ibrahim/Mehemeed, *Basic Principles*, 17, 22; El Baradie, *Gottes-Recht*, 156ff. and *passim*.

501 Cf. al-Māwardī, *Al-aḥkām*, 293f.; El Baradie, *Gottes-Recht*, 149; Hentati, *La prison*, 160.

offenders under Ottoman administrative rules (*qānūn-nāmeḥ*).⁵⁰² Classical literature does not discuss this subject much at all.⁵⁰³ Still, some texts even contain deliberations on the aims of punishment, which may be found in its deterrent effect (*zajr*) or in the perpetrator mending his ways (*ta'dīb*).⁵⁰⁴

The delimitation of competences is particularly unclear, which might have far-reaching consequences for the concrete application of the law. While court proceedings had comparatively strict procedural rules, especially regarding evidence, police investigations had a multitude of possible courses of action open to them. According to al-Māwardī confidential information, circumstantial evidence, confessions under duress and witness statements by non-Muslims may all be used. Remanding suspects in custody and beating them in order to find out the truth is said to be permissible, as is putting the suspect under oath and forcing him to repent.⁵⁰⁵ In this context Ibn Qutayba reports that in the first century AH a prefect of police in Kufa had suspects in cases of theft whipped 300 times if the evidence was inconclusive.⁵⁰⁶

138 The domain of non-Quranic criminal law thus includes, besides 'conventional' measures such as imprisonment,⁵⁰⁷ a variety of archaic punishment practices similar to those found in Europe at the same time as well. Until the nineteenth century public denunciation of perpetrators was employed as being a socially particularly painful method.⁵⁰⁸ The abovementioned Aigen reports of the adulteration of weights and measures – which was practised everywhere and at all times: "Those who adulterate weights and measures are nailed to their own stall or shop by the right ear, their hands are bound and their faces covered in honey, so that flies will incessantly torment the nailed person all day long."⁵⁰⁹ In the Ottoman Empire corporal punishments such as bastinado (blows with a stick on the soles of the feet) were common. The theologian Salomon Schweigger from Tübingen describes an exacerbated type where the offender 'must pay an *asper* or half a *batz* for each blow/ that is a horrible pain.'⁵¹⁰ As a logical consequence settlement out of court appears to have been a preferred course of action. Schweigger reports: 'If a quarrel breaks out in the street/ everyone who

502 Cf. Heyd, *Studies*, 111 ff.

503 Comparatively detailed in al-Māwardī, *Al-aḥkām*, 293 ff.

504 Cf. Hentati, *La prison*, 153 with further references.

505 *Al-aḥkām*, 273 ff.

506 'Uyūn, vol. 1, 16.

507 Cf. Hentati, *La prison*, 149, 155 ff. with numerous references from classical sources.

508 Cf. Lange, *Legal and Cultural Aspects*.

509 *Sieben Jahre in Aleppo*, 38.

510 *Eine neue Reyßbeschreibung*, 173 f.

passes/ takes it upon himself to settle the matter/ even if he is not acquainted with either of the two parties/ in order that they may not find themselves punished by the authorities/ and that the authorities may not be too burdened/ and this is a praiseworthy custom.⁵¹¹

Reports from the Khiva Khanate of the late nineteenth century, on the other hand, tell us that *zinā* and other offences were punished by death with so little forbearance that the ulama had to dampen the khan's zeal in this respect.⁵¹²

d *Talion Law (qiṣāṣ)*

Talion law (*qiṣāṣ*) and its replacement by wergild payments (*diyya*) applies in cases of premeditated homicide and bodily harm. Unlike especially the *hudūd* it is regarded as a mechanism to compensate for a breach of exclusively human rights.⁵¹³ Consequently it may be executed by the injured party or his legal successors (*awlīyā' al-dam*⁵¹⁴). The fundamental rule is found in sura 2:178f. [2:173f.]: 'O believers, prescribed for you is retaliation for those who were slain; freeman for freeman, slave for slave, female for female. But if a man is pardoned by his brother for something, let the pursuing be honourable, and let the payment be with kindness. That is a lightning granted you by your Lord, and also a mercy.'⁵¹⁵ This system of sanctions reflects a social order based on reliance on extended family groups with no further social security. It is always applied proportionately in cases of premeditated and/or deliberate bodily harm.⁵¹⁶ The victim's 'clan' (*āqila*) is entitled to decide on corporal punishment (talion) or wergild payment; the perpetrator's 'clan' has the corresponding duty, unless there are legitimising grounds. These might be self-defence, the rightful execution of a death sentence, or the killing of enemies or apostates.⁵¹⁷ The schools disagree on whether the duty to pay the wergild instead of talion depends only on the decision of the person entitled on the injured side, or whether the party bound by law must agree as well (thus Hanafites, Malikites and Hanbalites⁵¹⁸).

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511 Op. cit., 176.

512 Vámbéry, Mohammed in Asien, 184.

513 Cf. al-Sarakhsī, Kitāb al-mabsūt, vol. 9, 36; Ibn al-Humām, Sharḥ, vol. 5, 212; El Baradie, Gottes-Recht, 130 f.; the UAE High Court has described it (verdict of 1 Oct. 1994; printed in Ḥammādī, Qaḍā, 181) as predominantly right of humans.

514 Cf. only Peters, Crime, 44 ff.

515 German translation by Paret, English translation after Arberry.

516 Cf. El Baradie, Gottes-Recht, 143 ff. with further references.

517 Cf. e.g. Wizārat al-awqāf, Al-mawsū'a, vol. 32, 321 f.; El Baradie, Gottes-Recht, 134.

518 Cf. al-Kāsānī, Badā'i' al-ṣanā'i', vol. 7, 347, 356 ff.; Ibn Rushd, Bidāyat al-mujtahid, vol. 6, 37; El Baradie, Gottes-Recht, 139 f.

A difference arises especially in cases where the person under the obligation of talion dies: according to the latter opinion the wergild does not apply any more, while according to the former opinion the freedom of choice makes way to a title to wergild.⁵¹⁹

Wergild is payable in cases of wilful (*ʿamd*),⁵²⁰ conditionally wilful (*shibh al-ʿamd*) and negligent (*khataʿ*) homicide or bodily harm (*mā dūna l-nafs*, ‘what does not cause death’⁵²¹),⁵²² The ‘equal value’ between victim and perpetrator mentioned in sura 2:178 is rejected by many if the victim is not a Muslim;⁵²³ consequently the talion punishment does not apply here (while *taʿzīr* still does).

In cases of merely conditionally wilful⁵²⁴ and negligent homicide or harm, talion law does not apply; rather, following sura 4:92, the wergild must be paid and a slave freed. The wergild for injuries is calculated, depending on the gravity, in fractions of the corresponding wergild for homicide.⁵²⁵ For a Muslim man, a hundred camels – or the equivalent value – are stipulated; for a Muslim woman, half as much.⁵²⁶ The wergild for killed people under protection (*dhimmīs*) is debated, with some scholars calling for the same amount as for Muslims, others for only half.⁵²⁷

The question of the relative precedence (*tadākhul*)⁵²⁸ of individual sanctions is also frequently controversial. Problems of delimitation are sometimes discussed with the subtlest of argumentation. Thus there are debates on whether the execution of a penalty for theft as defined by the Quran (*sariqa*) invalidates the liability to the victim to return the stolen goods, or to compensate for them, and vice versa. The concrete subject of the discussion is the

519 El Baradie, *Gottes-Recht*, 140 with further references.

520 For details of the, overall rudimentary, literature on the subject cf. op. cit., 134 ff. with further references.

521 Cf. only al-Marghīnānī, *Al-hidāya*, vol. 4, 462 ff.

522 Al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 26, 59 ff.; on a modern case in Palestine see al-Labadi, *Diya between shariʿa and customary Law*, 164 ff.; regarding the development of categories for different types of guilt cf. e.g. al-Māwardī, *Al-aḥkām*, 287 ff.

523 Cf. e.g. al-Muzanī, *Mukhtaṣar*, (al-umm, vol. 9), 251 and ff.; El Baradie, *Gottes-Recht*, 136 f. with further references also concerning the Hanafites’ divergent view with regard to *dhimmīs*.

524 For details cf. El Baradie, *Gottes-Recht*, 141.

525 For details cf. e.g. op. cit., 129 ff., esp. 145 with further references.

526 *Wizārat al-awqāf*, *Al-mawsūʿa*, vol. 21, 59 with further references; cf. e.g. al-Kāsānī, *Badāʿi*, vol. 7, 475.

527 Cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 13, 84 ff.

528 Cf. El Baradie, *Gottes-Recht*, 191 ff. with further references.

question of the ratio between the ‘right of God’ covered by the offence of *sariqa* and the ‘right of humans’ (in this case the victim of the theft). Some differentiate according to whether the stolen goods are still in existence, i.e. could – and in that case, must – be returned, or whether restitution of the value (*damān*) is required.⁵²⁹ To present the contrary opinions systematically: Al-Sarakhsī employs the words of sura 5:38 as an argument: ‘*jazā’an*’ (cutting off a hand in punishment) has a final meaning.⁵³⁰ According to al-Shāfi‘ī, on the other hand, the rights of God and the rights of humans are not mutually exclusive.⁵³¹ The execution of the punishment does consequently not influence the settlement claims. Strangely, Abū Ḥanīfa, who advocates a strict mutual exclusion of the rights of God and the rights of humans, recognises the exempting effect of the later gift of the stolen goods to the thief.⁵³²

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8 Constitutional Law and Administrative Law

a Introduction

Constitutional law and administrative law are only developed to a very basic degree and characterised by many fundamental uncertainties, in particular with regard to the question of who should lead the community and what should be the relation between the government and legal scholars.⁵³³ The main topic was and is the legitimation of the secular power – which is controversial on the whole – including its authority to interpret in legal matters. The issue of religious leadership is less clear, as the event of the revelation has come to an end with the death of Muhammad, the ‘seal of the prophets’ (*khatam al-anbiyā’*). The only group not to adhere to this tenet is the Ahmadiyya movement which dates from the nineteenth century and whose followers believe their founder

529 Cf. e.g. al-Bāji, *Al-muntaqā*, vol. 7, 161, 168, 183; al-Muzanī, *Mukhtaṣar*, 264; al-Qayrawānī, *Al-risāla*, 258; Ibn Qudāma, *Al-mughnī*, vol. 8, 186; al-Qudūrī, *Al-mukhtaṣar*, 113; al-Shāfi‘ī, *Kitāb al-umm*, vol. 6, 137, 139, 141 f.; vol. 7, 47, 51, 139 (Cairo edition 1324/25); al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 9, 143, 145, 156, 158, 164, 169, 172–175, 182 f., 185, 191 f.; id., *Uṣūl*, vol. 1, 129 f.; al-Shīrāzī, *Al-muhadhdhab*, vol. 2, 284; al-Ṭahāwī, *Mukhtaṣar*, 269 ff.

530 *Uṣūl*, vol. 1, 129 f.

531 Thus al-Muzanī, *Mukhtaṣar*, 264.

532 Quoted in al-Māwardī, *Al-aḥkām*, 387.

533 A concise description of developments (in German) may be found in Johansen, *Contingency*, 265 ff.; Kamali, *Constitutionalism*, 11 f. Cf. also Nagel, *Staat und Glaubensgemeinschaft im Islam*, 1981 (which, while it contains a wealth of material, lacks structure of thought).

Mirza Ghulam Ahmad to be the promised messiah (*maḥdī*);⁵³⁴ it is disputed between two factions of the movement whether he was a prophet (*nabī*) or not.⁵³⁵

As early as the middle of the first/seventh century the question of legitimate leadership led to the schism between Sunnis and Shi'ites, which persists to this day. The same is true of Ibādism in North Africa and Oman, which devoted a large part of its legal reasoning to this issue.⁵³⁶ The question was asked in a more concrete form within the sunna as well. Thus the genealogically further removed Umayyads (related through Muhammad's great-grandfather) had to contend with challenges to their legitimation throughout their rule (40/661–132/750, lasting longer in al-Andalus until the fifth/eleventh century). The rebellion of 'Abdallāh Ibn al-Zubayr and other ones could be defeated only with difficulty, and anti-Umayyad opposition remained active in Medina. In the end the Abbasids, who were more closely related to Muhammad (through his grandfather 'Abdalmuṭṭalib), were able to assert themselves. We must, however, bear in mind that the question of legal legitimation was only part of the success of the Abbasid revolution. What seems to have been particularly important was that the Abbasids declared themselves advocates of those groups who felt discriminated against, especially the *mawālī* ('clients') of the old Persian ruling class who were feeling unfairly treated despite having converted to Islam, which was quite at odds with their feeling of cultural superiority.

Later, when the Islamic world experienced repeated conquests and upheaval, the issue of legitimation was raised only marginally. On the whole, the population would submit to those in power, as long as they were not actively opposed to central Islamic norms and prevented people from worshipping freely. It is important to bear in mind that until the nineteenth century neither the relation between political system and society nor the separation of state and religion were discussed in a framework of legal theory to any great degree. The slogan *al-Islām dīn wa-dawla* (Islam is religion and state) which took hold especially among Islamists and only in the twentieth century (cf. Part 2, 3.3.b below) only acquires meaning in the context of such abstract debates. Consequently present-day attempts at constructing a clear Islamic political system out of the sources of the past are doomed from an academic point of view.

534 Cf. only the corresponding self-portrayal in Hazrat Mirza Bashir Ahmad, *Spiegel der Schönheit*, Frankfurt/M. 1992, 11 ff.

535 Cf. the article 'Aḥmadiyya' in *EI II*, vol. 1, 301f; *EI III*, fasc. 2007–1, 80–86.

536 Cf. Al-Nami, *Studies*, 45 ff., 72 ff. with further references.

b *Fundamental Issues of Constitutional Law*

Classical Islamic constitutional law was concerned particularly with the issue of the legitimacy of leadership. The historical and legal model was the leadership of the prophet Muhammad. From the Muslim emigration (Hidjra) from Mecca to Medina in 622 – the date which would soon afterwards be fixed as the beginning of the Islamic calendar – onwards he combined the highest secular–judicial and spiritual–religious authority in his person.⁵³⁷ Later his successor/representative (*khalifa*, ‘caliph’) would assume this position. Constitutional law usually describes this as the function of an imam, not referring in this instance to the prayer leader in the mosque but to the head of the entire Muslim community. It states that obedience is due to him; not only as a matter of reason but also because law (*sharʿ*) decrees it. This is often supported by sura 4:59 [4:62]: ‘O believers, obey God, and obey the Messenger and those in authority among you (*ūlī l-amr*)!’⁵³⁸ It remains unclear who the last-named are. Classical commentaries⁵³⁹ name secular rulers (*umarāʾ*, *sultān*)⁵⁴⁰ as well as religious (*ahl al-qurʾān wa-l-ʿilm*) or legal scholars (*fuqahāʾ*).

Sunni majority opinion considers the historical events following Muhammad’s time to be legitimate and upholding, even shaping, the law. The first four caliphs, Abu Bakr (632–634), ‘Umar (634–644), ‘Uthmān (644–656) and Ali (656–661) were appointed by a council of leading men, are uncontested among the Sunnis and are given the special rank of ‘rightly-guided caliphs’ (*al-khulafāʾ al-rāshidūn*). In addition they are important authorities of hadith (cf. 2.3 above). The Umayyad dynasty that followed, on the other hand, was always exposed to hostility due to its tenuous kinship with the prophet and its allegedly not very Islamic politics. Their rules of dynastic succession also met with criticism – they were said to have caused the caliphate to degenerate into (illegitimate) kingship (*mulk*).⁵⁴¹ The only exception was the caliph ‘Umar ibn ‘Abd al-‘Azīz (717–720), on whose word many legal scholars of later times would rely as well.

It is not until the Abbasid era that we find systematic discussions of issues of constitutional law.⁵⁴² The concept of a state (*dawla*) also appears for the first

537 Cf. only Tyan, *Institutions*, 11 ff.

538 Cf. al-Māwardī, *Al-aḥkām*, 5 f.

539 Cf. al-Qurṭubī, *Al-jāmiʿ*, vol. 5, 261 f.

540 Cf. Ibn Kathīr, *Tafsīr*, vol. 2, 304.

541 Cf. Goldziher, *Muhammedanische Studien*, Teil 2, 31 f.; Tyan, *Institutions*, 677 f.

542 Cf. only the extensive description of Sunni and Shiʿite theory of constitutional law in Tyan, *Institutions*, 668 ff.; 748 ff.

time with this connotation ('dynasty').⁵⁴³ This is the time when the unity of the Islamic state had already been fractured by the foundation of the Umayyad emirate in al-Andalus. Later there would even be several competing caliphates, thus in the tenth century the entirely powerless one in Baghdad, the Fatimid one in Cairo and the Umayyad one in Cordoba. The caliph's power was merely nominal in many regions of the Islamic world. After the traumatic effects of the Abbasid fall before the Mongols in 1258, the last remains of any pretence to political unity were shattered.⁵⁴⁴ Later powerful empires such as the Mamluks in Egypt, the Ottoman Empire or the Mughal Empire in India were unable to establish any claim to political unity. Since the dissolution of the Ottoman caliphate in 1924 the discussion of the legitimate leadership of the Islamic world has been conducted separate from classical concepts of law, at least insofar as it could and can be conducted at all under the dictatorships prevailing in the area (concerning the Islamist debate see Part 2, 3.3.b below).

Early works on the theory of constitutional law drew on the political realities described only to a limited degree. Thus the prevailing doctrine maintained that there could be only one imam/caliph.⁵⁴⁵ Consequently legal doctrine hardly discussed the issue of the legal relations between several sovereign Muslim territories at all.⁵⁴⁶ Furthermore, reality did not live up to the demand that the ruler must belong to the Quraysh, Muhammad's tribe, which was for instance not the case for the later Ottoman caliphs.⁵⁴⁷

143 Another question discussed was whether the caliph should be regarded as Gods' representative (*khalīfat Allāh*) or merely as the Prophet Muhammad's successor (*khalīfat rasūl Allāh*) (cf. 1.3 above). At the end of the third/ninth century the final outcome was the victory of the scholars over the caliph's claim. From the middle of the century onwards the caliphate found itself increasingly firmly in the hands of its 'protectors' against the power intrigues among the Arab military elite. In his new residence Samarra the caliph became the puppet of Turkish military slaves. From 945 onwards (until 1055) the Shi'ite Buyid dynasty ruled in Baghdad, whose leader pulled the strings of political power as 'commander-in-chief' (*amīr al-umarā'*). The caliph only had nominal

543 Cf. EI II, vol. 2, art. 'Dawla' (F. Rosenthal), 177 f; Cahen-Endreß, *Der Islam* I, 248.

544 This becomes clear e.g. in the case of coins of the Artuqid rulers of Mardin: in the place where the caliph's name was inscribed until the fall of the caliphate, after 1258 the ruler Najm al-Dīn Ghāzī had the creed inscribed.

545 Cf. Tyan, *Institutions*, 690 ff. with further references.

546 Cf. only Krüger, *Fetwa und Siyar*, 124 f., 130 f.

547 Concerning the corresponding legitimisation issue cf. *op. cit.*, 102 ff. with further references.

sovereignty. Parallel with these developments the term and concept of *sultān* emerged, describing the position of the actual secular ruler.

It was not until the end of the twelfth century that the Abbasids were able to reconquer true power for a few decades. Their caliphate came to an end with the Mongol conquest of Baghdad in 1258. It had struggled with two anti-caliphs ever since the tenth century (the Umayyads in al-Andalus from 929 to 1030; Shi'ite Fatimids from the tenth century until 1171). From 1258 onwards only a controversial 'shadow caliphate' remained in Mamluk Egypt; only in modern times did the caliphate regain political authority in the hands of the Ottomans.

This historical situation played a most significant part in the later development of Sunni constitutional law. The very first great author of works on constitutional law, al-Māwardī (364–450/974–1058), only saw a caliphate with severely restricted political power. In his standard text *Al-aḥkām al-sultāniyya*, which was probably addressed to the Abbasid caliph,⁵⁴⁸ he does not show himself to be greatly impressed by the real power structure. He begins by stating his requirements of the incumbent, according to which the imam must be entirely just, fulfil all the requirements needed for independent judicial reasoning (*ijtihād*) and must be in possession of all his senses, be physically healthy, insightful, courageous and fearless, and he must be a member of the prophet's clan, the Quraysh. Among his tasks are, according to al-Māwardī, the preservation and assertion of the faith as well as law enforcement, protection of law and order in the realm and applying Quranic criminal law (cf. 7 above). He must fortify the external borders, conduct jihad against those who are adamant in their opposition to Islam, ensure the collection of portions of war booty as well as alms tax, set the levels of state benefits and payments and organise the administration and supervise it in person.⁵⁴⁹

In the wake of the total loss of Abbasid power, the legitimacy of state authority was defined increasingly generously. Ibn Taymiyya, a scholar of the fourteenth century (d. 728/1328) who is widely recognised to this day, was of the opinion that a Muslim has a duty of obedience only to God and his messenger; believers must deliberate among themselves in their respective areas of expertise according to the principle of *mushāwara*.⁵⁵⁰ According to this view, the Muslim community is also able to exist in the form of a multitude of political units led by different rulers. In this way Ibn Taymiyya was able to separate his central concern, the application of sharia norms, from a particular type of

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548 Cf. Gibb, *Studies*, 152.

549 *Al-aḥkām*, 18f. Cf. the translation by Wahba, *The Ordinances*, 16.

550 Ibn Taymiyya, *Al-siyāsāt al-shar'iyya*, 135f.; Laoust, *Essai*, 301f.

government.⁵⁵¹ Badr al-Dīn ibn Jamā'a, a scholar and chief judge of the fourteenth century (d. 733/1333)⁵⁵² does not retain much of al-Māwardī's theoretical edifice, either.⁵⁵³ His theory of the imamate reflects the changing times when he differentiates between an imamate of choice and a forced imamate.⁵⁵⁴ His idea of an imamate of choice corresponds to al-Māwardī's to some degree. However, even if the imamate has been usurped using brute military force, the office should still retain its legal validity, 'in order that the unity of the Muslims and their unanimity should be maintained'; the ruler's ignorance or sinfulness should not change this.⁵⁵⁵ For the same reason the caliph ought to confer power onto a king (*malik*) who has taken a country by force, and the latter also has a claim to obedience from his subjects, as long as he does not order sinful actions. His foremost duty is to defend the country and establish a suitable military order; only later does Ibn Jamā'a quote al-Māwardī's list of duties. Even if the imam or the sultan lapsed into sinfulness, it was recommended not to depose them so as to prevent upheaval.

The interpretation of sura 4:59 is remarkable: not only the caliphs are commanders, but also their 'representatives', namely those very usurpers. Ultimately constitutional law evolved towards the pragmatic concept that unjust rule is preferable to anarchy. In this context we find the much-quoted statement that sixty years under an unjust imam are preferable to one night without a sultan.⁵⁵⁶ It is logical, then, that according to a Syrian legal textbook of the eighth/fourteenth century⁵⁵⁷ the appointment of judges should be valid even if it was carried out by an unjust ruler, as long as the judge is able to dispense justice at all.

145 This gradual renouncing or restricting of the principles of the past is ultimately a reflection of the historical reality of the Islamic world ever since its earliest days: the structures of power alone decided and decide the respective types of government. Tribal loyalties and proportional representation for ethnic or social groups, or for regions, take priority when it comes to allocating power. Questions of legitimacy under Islamic law were only significant in some

551 Cf. Pohl, *Islam*, 41ff.; Heine, Article 'Staat/Staatslehre', in Khoury et al., *Islam-Lexikon*, vol. 3, Freiburg etc. 1991, 688.

552 Regarding his biography and his significance cf. Kofler in Ibn Jamā'a, *Handbuch*, 350f.

553 Regarding his and Ibn Taymiyya's teachings cf. Lambton, *State*, 138ff.

554 Ibn Jamā'a, *Handbuch*, 356.

555 *Op. cit.*, 357.

556 Ibn Taymiyya, *Al-siyāsāt al-shar'iyya*, 139.

557 Najm al-Dīn al-Ṭarsūsī (Hanafite chief judge of Damascus, d. 758/1356 or 760/1358), *Kitāb al-i'lām*, edited in part by Guellil, *Damaszener Akten*, 330.

specific situations and were even then accompanied by struggles over the distribution of political influence, as for instance in the context of the Abbasid revolution. The reasons for the lack of assertiveness in the Sunni theories of the caliphate are expressed succinctly by Baber Johansen: 'Firstly, there is no model for a fixed definition of the kind. Secondly, in reality the state refuses obstinately to conform its actions to the theory of the caliphate. Thirdly, the legitimacy of a government is at the very least also determined on the functional level. Consequently a state apparatus may increasingly be considered legitimate even if it deviates formally from the traditional juristic ideals.'⁵⁵⁸

Ultimately the question of legitimate rule remains open. Nevertheless, one requirement is stated unfailingly: it must be just.⁵⁵⁹ The religious component of the theory of government was in all likelihood undisputed as well. However, the caliph was not seen as an absolute ruler by any means; he acquired legitimation primarily by fulfilling the tasks described subsequently and in greater detail. Some scholars explicitly call him the guardian and representative of the Muslim community (*umma*).⁵⁶⁰ It is also recommended that he should consult with advisers (*shūra*, *mushāwara*),⁵⁶¹ which Emile Tyan sees as the beginnings of a democratic concept.⁵⁶² While people submitted to the real power as the lesser evil, the desired form of leadership was by no means forgotten. In addition there were voices against law books which contradicted the norms of Islamic law. Thus Ibn Kathīr denounces certain rules of the Mongolian Yassa (legal code), such as capital punishment for people who lie, use magic, nourish prisoners or urinate in standing water, as contrary to the sharia. According to the Muslim consensus it would be apostasy to follow such rules.⁵⁶³

Shi'ite constitutional law went its own way (cf. 1.2 above). It evolved out of the opposition against Sunni rule, which was seen as illegitimate, but from the sixteenth century onwards also against the Shi'ite secular political powers. Overall over the centuries we can distinguish a tendency of assigning to legal scholars the position of temporarily 'filling in' for the ruler until the expected Mahdi should return. Developments were helped along in particular by Shi'ite scholars of the twelfth to fourteenth centuries who thoroughly studied the Shafi'ite Sunni doctrine. In the sixteenth century the *uṣūlī* trend, which would

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558 Johansen, Contingency, 281 f.

559 On the concept of justice cf. Krämer, Justice, 23 ff. with further references.

560 Cf. the references in Tyan, Institutions, 709.

561 On this multi-faceted concept cf. Badry's monograph, Die zeitgenössische Diskussion, 1998 with further references.

562 Tyan, Institutions, 709 ff.

563 Ibn Kathīr, Al-bidāya, vol. 7, 128.

ultimately prevail (cf. 1.2 above), evolved the theory of these very scholars' general representation (*niyāba 'amma*) of the occulted imam. Akhbārī opposition resistance against the concomitant institutionalisation of the Shi'ite school⁵⁶⁴ and this claim remained futile.⁵⁶⁵ In the eighteenth century the scholar Bāqir Wāḥid Behbehānī even went so far as to declare the Akhbārīs infidels (Ar./Pers. *takfīr*).⁵⁶⁶ The theosophy school of Isfahan, which had a more mystic approach and resisted against the influence of the mullahs, was broken up at the same time.

High-ranking scholars (*mujtahids*) would gradually be entrusted with all the important offices: collecting the alms tax and the fifth (*khums*⁵⁶⁷), administering religious trusts (*awqāf*), leading Friday prayers, executing Quranic punishments (*ḥudūd*) and declaring the jihad. This would ultimately pave the way for the present-day doctrine of the rule of legal scholars (*welāyat-e faqīh*) and their assumption of government – which, however, is controversial (see also Part 2, 3.3.b below). We must also bear in mind that there was a centuries-long conflict with the secular rulers who prevailed for a long time, that furthermore an influential section of the Twelver Shi'ites demands the relinquishing of all secular power, and that finally there were always famous scholars who regarded cooperation even with secular powers as legitimate.⁵⁶⁸

Remarks regarding the circle of people who could appoint the caliph ('people of dissolving and connecting', *ahl al-ḥall wa-l-'aqd*), finally, are altogether unclear.⁵⁶⁹ According to Sunni opinion in the early period the recognised leaders of society were supposed to conduct the 'act of determination' (*bay'ā*, homage).⁵⁷⁰ Soon, however, dynastic ambitions emerged, which could also be justified out of the legal theory, such as the appointment – generally recognised among Sunnis – of the second caliph 'Umar by his predecessor Abu Bakr.⁵⁷¹ Fur-

564 A concise summary of the development of the Shi'ite clergy may be found in Halm, *Der schiitische Islam*, esp. 115 ff.

565 Cf. Stewart, *Islamic Legal Orthodoxy*, 246 f.

566 Halm, *Der schiitische Islam*, 129; for his position in the conflict, his biography and work cf. Gleave, *Muḥammad Bāqir al-Bihbihānī*, 415 ff.

567 Cf. op. cit., 104 ff.

568 Cf. also op. cit., 110, 121 and *passim* with further references.

569 Al-Māwardī (*Al-aḥkām*, 6 and ff.) focuses on justice, knowledge and discernment, while the leaders of society in the residence (*man kāna fī balad al-imām 'alā ghayrihi min ahl al-bilād*) had priority merely due to custom and because of their actual proximity to events. Entirely unclear are statements e.g. by Ibn Jamā'a, *Handbuch*, 356.

570 Ibn Jamā'a (*Handbuch*, 356) refers in this context to the appointment of Abu Bakr as the first caliph. Cf. also Tyan, *Institutions*, 126 ff., 136 ff.

571 This example is adduced by Ibn Jamā'a (*Handbuch*, 356).

thermore, changes of ruler were not infrequently violent and beyond the scope of any doctrine.

c *Administrative Law*

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No administrative law grounded in legal theory and defined with anything resembling clarity was evolved during the classical period. There are no explicit regulations in the recognised sources of the law. We can find some disparate rudiments in discussions of issues of the competence to apply legal norms (*sīyāsa*; cf. 1.3 above), of the organisation of the judiciary or of legal remedies and individual administrative authorities such as the market inspectorate (cf. 1.6 above). Al-Māwardī's fundamental work, written in the fifth/eleventh century, has remained unique.⁵⁷² In the administrative field in particular, theory and practice frequently (albeit not always) took different paths. From some regions and eras voluminous administrative documents or formularies have come down to us.⁵⁷³ Their numbers increase noticeably from the ninth/sixteenth century onwards. Due to the majority of materials and records having been lost, it is not possible to make the earlier period accessible to a similar extent.

9 Law Relating to Aliens and International Law

a *Introduction*

Islamic scholars have discussed issues which modern understanding would subsume under 'international law' from the earliest sources onwards. This is remarkable indeed, considering that according to its own theological pretension Islam regards itself as a religion for all humans, spreading which is commendable. Questions discussed include whether and under which conditions peace treaties or armistices may be concluded, how one should comport oneself in times of war as well as peace on enemy territory, and how spoils of war should be distributed.

Law relating to aliens has two aspects in a legal system with a partially religious dimension. 'Alien' in this sense are not only those who are not members of the religious community who do not live within its borders but also those who have more or less permanent abode there.

572 Al-Māwardī, *Al-aḥkām*.

573 Regarding the Great Seljuk Empire and the empire of the Khwarazm-shahs cf. Horst, *Die Staatsverwaltung*.

There are only few dedicated texts on either of these aspects. They discuss an abundance of individual issues, but do not develop a universal basis for law relating to aliens or international law. This would have been the place for reconciling two conflicting approaches: the general concern of expanding the Islamic territory on the one hand and the frequently practised peaceful cooperation with foreign territories and their inhabitants on the other.

148 **b** *Framework and Legal Sources*

The earliest extant sources on the subject date from a period during which the Islamic sphere of influence enjoyed military superiority over neighbouring enemy kingdoms. The wave of Islamic conquests up to the early days of the Abbasid caliphate led to a great number of non-Muslim subjects under its rule. While there were numerous conversions, there would be areas with a majority of non-Muslim population even in core regions of Muslim rule. In these areas the question arose of how to deal under the law with non-Muslims within the territory of Islam. The first surviving fundamental work – the *Kitāb al-siyar al-kabīr*⁵⁷⁴ – was written by the Hanafite Muhammad al-Shaybānī towards the end of the second/eighth century. This and other sources tell us that a systematic juristic canon on the issues of international law and law relating to aliens was evolved around the middle of the second/eighth century and subsumed under the heading of *siyar*.⁵⁷⁵

The framework is represented on the one hand by the benevolent remarks on freedom of religion – whose scope is debatable – such as sura 2:256 ('No compulsion is there in religion') and on the position of the followers of monotheistic precursor religions, especially Jews and Christians ('owners of scripture', *ahl al-kitāb*), e.g. in sura 2:148 [2:143]: 'Every man has his direction to which he turns; so be you forward in good works'.⁵⁷⁶ Ibn Kathīr, the great Quranic commentator of the eighth/fourteenth century, interprets this statement as clearly having a wide scope of application: 'There is no compulsion in religion, that is:

574 The text survives in al-Sarakhsī's (d. 495/1102) edition with commentary; cf. Hatschek, *Der Musta'min*, 25 ff. Khadduri has translated this text into English (*The Islamic Law of Nations. Shaybānī's Siyar*, 1966), Hamidullah into French (*Le Grand Livre de la Conduite de l'Etat*, 4 vols., 1989–1991).

575 Concerning the definition cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 10, 2 (German translation in Krüger, *Fetwa und Siyar*, 32; regarding the characteristic subjects dealt with in the text cf. *id.*, 33).

576 Regarding the origins of the Quran and the relations with Jews, Christians and followers of other religions, cf. Paret, *Mohammed und der Koran*, esp. 55 ff., 92 ff., 102 ff., 126 ff.; Bobzin, *Mohammed*, 103 ff.

do not force anyone to join Islam; this is a completely clear statement (...)’⁵⁷⁷ After all, Muhammad himself is said to have been willing to submit to a neutral arbitrator in litigation with other communities, such as in the case of the mediated quarrel with the Banū Qurayza in Medina.⁵⁷⁸ On the other hand there are statements demanding clear delimitation and even battle, as in sura 9:29: ‘Fight those who believe not in God and the Last Day and do not forbid what God and His Messenger have forbidden – such men as practise not the religion of truth, being of those who have been given the Book – until they pay the tribute out of hand and have been humbled.’

Considering these very different statements the relevant Quranic basis is extremely vague and open to a wide range of possible interpretations.⁵⁷⁹ Consequently the part of the framework which is not made up out of law acquires particular significance. The major part of the relevant literature was composed in times of armed confrontation, beginning with the heyday of the Abbasid caliphate, then during the Crusades, the Reconquista, and finally in the wake of the increasing conquests during the age of colonialism. These circumstances have left a recognisable mark.⁵⁸⁰

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c *Legal Relations with Territories Not under Muslim Rule and the Legal Situation of Muslims Living There*

Beginning with the classical texts on Islamic law a fundamental bipartition of the world was evolved which would remain – with some modifications – the basis of all deliberation until well into the twentieth century. The Islamic territory (*dār al-Islām*, House of Islam), within which sharia norms were applied, was in opposition to the rest of the world, regarded as fundamentally hostile and lawless, the House of War (*dār al-ḥarb*).⁵⁸¹ Classical doctrine did not

577 Ibn Kathīr (701–774/1300–1373), Tafsīr, vol. 1, 521: *lā ikrah fi l-dīn, ay lā tukrihū aḥadan ‘alā l-dukḥuk fi dīn al-Islām, fa’innahu bayyin wāḍiḥ* (...). Cf. also the references to divergent opinions (some, for instance, explicitly including the followers of scripture religions) in al-Qurṭubī, Al-jāmi‘, vol. 3, 277 ff.

578 Romahi, Diplomacy, 253, 257, Later the tribe of the Banū Qurayza was exterminated; cf. Ibn Hishām, Al-sīra, vol. 3, 145 ff.; Paret, Mohammed, 110 ff.

579 For a modern approach cf. the paper by Maḥmūd Shaltūt, the Shaykh of the Al-Azhar University from 1958–1963, quoted in Peters, Jihad, 60 ff.

580 Cf. e.g. the comparatively intense contacts the Syrian al-Awzā‘ī maintained with the hostile Byzantine Empire: see Bouzenita, ‘Abdarrahmān al-Awzā‘ī, 194 f.; cf. also Krüger, Fetwa und Siyar, 34 with further references.

581 Regarding problems and uncertainties in the delimitation cf. e.g. Krüger, Fetwa und Siyar, 90 ff. with further references.

allow lasting peace treaties but only temporary armistices in cases where the Muslim forces were inferior. For the rest, the commitment to expand the faith (*jihad*) – which the scholars undoubtedly saw as a primarily military enterprise – in the sense of increasing Muslim territory remained the religious duty of a sufficient number of believers (*fard kifāya*).⁵⁸² It was not possible to enact a restriction of jihad, giving it a defensive intention applying only to those countries under non-Muslim rule which were in conflict with Islamic rule.⁵⁸³ Classical doctrine did not refer to those Quranic verses which express only a defensive attitude against attack, but considered these to have been abrogated by the ‘sword verses’ in sura 9:29 ff. (regarding abrogation cf. 2.1 above).⁵⁸⁴ It is probably no coincidence that this doctrine was formulated during the time of military expansion under the Umayyads and the early Abbasids.

The verses which call the faithful to battle against the ‘unbelievers’ or ‘idolaters’ are nowadays seen as referring (only) to the pagan Meccans of Muhammad’s lifetime.⁵⁸⁵ Extant texts require interpretation; the exegetes’ opinion – which is shaped significantly by different political and social environments – being of crucial significance.⁵⁸⁶

150 Originally jihad means nothing more than ‘effort, striving’ for the expansion of Islam. Translating it as ‘Holy war’ is at the very least misleading. The means are not defined. Authors commenting on the subject emphasise the religious aspect of jihad, which ought to be different from merely secular military enterprises. The prominent Malikiite scholar Ibn Abī Zayd al-Qayrawānī’s (310–386/922–996) *Kitāb al-mawādir wa-l-ziyādāt*, which also takes into account the

582 In contrast to this are the duties incumbent on every individual believer, such as the duty of ritual prayer, so-called *fard ‘ayn*. For examples from classical and modern sources including the fundamentally changed modern views cf. the references made available by Peters and the author’s concise introduction (Jihad, 1ff.). Cf. also Afsaruddin, *The Siyar Laws*, 45 ff., with references of a solely defensive reading from the early period.

583 Cf. Khadduri, *The Islamic Law of Nations*, 58 with further references; Afsaruddin, *The Siyar Laws*, 45 ff.

584 Cf. Ibn Sallām, *Kitāb al-nāsikh wa-l-mansūkh*, 156 ff.; al-Nakhkhās, *Kitāb al-nāsikh wa-l-mansūkh*, 165 f.; Peters, *Jihad*, 2 f.; al-Bouti (*Le jihad*, 147 ff.) attempts to interpret these verses as defensive with the aid of classical references.

585 Mustafa Fadel (erstwhile president of the High Court of the United Arab Republic), *Islamic Law*, 90.

586 Cf. the distich, introduced appositely by Wild (*Mensch, Prophet und Gott im Koran*, Münster 2001, 33) and indeed universally applicable: ‘Jedermann sucht seine Dogmen in diesem heiligen Buche – Jedermann findet zumal, was er gesucht darin’ (Everybody seeks his own dogma within this holy book – Everybody will find what he was seeking within) [by Peter Werenfels (1627–1703); G.G.].

earlier works of the Malikite school, may serve as an example.⁵⁸⁷ To begin with the author mentions a much-quoted statement attributed to Muhammad himself: when asked what the best possible actions were he replied, 'Having faith in God and striving to follow his path' (*imān bi-Allāh wa-jihād fī sabīlihi*).⁵⁸⁸

The contents of the subsequent chapters show that this should be understood as striving in a military fashion, as the topics discussed include: matters of army organisation, formal conditions for waging war – such as rejecting the call to convert to Islam or submit to its secular rule⁵⁸⁹ –, the limits in theory of military enterprises with regard to people and goods, the observation of religious rules in enemy territory, the distribution of spoils of war, the treatment of re-conquered territories and the property found there, furthermore the treatment of prisoners and the subjected population including enslavement and manumitting slaves.⁵⁹⁰ While this jihad might be of a defensive character, as e.g. in the Ethiopian Wollo region in the nineteenth century in order to fend off forced Christianisation and the prohibition of practising Islam,⁵⁹¹ it might also be waged as a war of aggression.

There are clear differences between Sunni and Shi'ite doctrine in one significant aspect: according to Shi'ite opinion only the rightful imam (who has been occulted since the ninth century according to Shi'ite doctrine; cf. 1.2 above) may declare the jihad. It was not until the nineteenth century that Shi'ite teachings were developed which granted the scholars as the imam's temporary representatives the power of declaring defensive jihad.⁵⁹²

587 Concerning the work and the author cf. Muranyi, *Materialien*, 1984, 1ff.; v. Bredow, *Der Heilige Krieg*, 1994.

588 Quoted by way of introduction by al-Qayrawānī, *Kitāb al-nawādir*, 2, with comparable hadiths to the same effect.

589 Cf. al-Qayrawānī, *Kitāb al-nawādir*, 35 ff.; the statements quoted here, however, do not define much or clearly what exactly this 'call' is. It does not seem to refer to forced conversions, or to mere non-violent missionary work, but fundamentally to the expansion of the empire. Cf. also the translation of a relevant Ottoman source in v. Hammer, *Staatsverfassung*, vol. 1, 162 ff.

590 Cf. only the German overview in v. Bredow, *Der heilige Krieg*, 63ff. and the English translation of the relevant passages from Ibn Rushd's (Averroes) *Bidāyat al-mujtahid* in Peters, *Jihad*, 29 ff. The important Hanafite scholar Ibn 'Ābidīn (*Radd al-mukhtar*, vol. 3, 3) still links it easily with killing and subjection.

591 Cf. Ahmed, *Islam in Nineteenth-Century Wollo*, 178, concerning Shaykh Ṭalḥa's call to jihad in 1884.

592 Peters, *Jihad*, 4.

The religious facet of the classical concept of jihad is clearly visible for instance in the idea of the martyr (*shahīd*, pl. *shuhadā'*) fallen in such a battle who achieves paradise immediately.⁵⁹³ In the view of some scholars, it was not permissible to deploy non-Muslim auxiliaries as due to their religious affiliation they were not qualified to fight a jihad.⁵⁹⁴ The explanation given for defeats is that the fighters were not guided by pure religious zeal but by worldly greed for booty or indulgence in prohibited sensual delights.⁵⁹⁵ In the context of the failed siege of Vienna in 1683 the Grand Master of Ceremonies of the Sublime Porte describes among the causes of the defeat: 'Among our army there was an innumerable mass of merchants who had only come along because of greed. (...) Besides these (...) causes the fourth was that it was neglected throughout the army to give the required thanks to Allah the all-kind, for the irresistible force and the rich spoils He had granted the army of Islam at the beginning of the campaign. Also that instead of giving praise to Allah for these bounties, people had the temerity to commit many atrocities and sins. (...) For instance, when the Muslims saw the vast quantities of wine which had been captured, even the most abstinent among them surrendered to drink, and began committing the greatest variety of evil deeds and quite unbelievable turpitude. Even though the siege took place during the holy quarter of the Islamic year (...) they indulged in whoring, sodomy and intoxicated themselves to such a degree that they forgot to thank the all-powerful for His benevolence and thus incurred His wrath.'⁵⁹⁶

Legal texts and in particular political practice from the origins of Islam onwards also show that military conflict with neighbouring territories did not have to be the rule. While we know but little concerning early Islamic diplomacy, and later sources are unreliable at least in part,⁵⁹⁷ the biography of the prophet universally recognised among Muslims⁵⁹⁸ does show him as being willing to conclude settlement agreements (*muwāda'a*, *mu'āhada*, *ṣulḥ*⁵⁹⁹) and

593 Cf. only the hadith on the subject in al-Bukhārī, *Ṣaḥīḥ*, vol. 2, 541 f. (no. 2821); Peters, *Jihad*, 5.

594 Cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 10, 23, who himself follows the divergent opinion.

595 Regarding the separation between religious and military aspects cf. only Balić, *Ruf vom Minarett*, 108.

596 Kreutel (ed.), *Kara Mustafa vor Wien*, 82, 85, 115.

597 Regarding the account of the treaty between Muhammad and the Banū Taghlib cf. Fattal, *Le statut*, 22, and id. *On the treaty with Damascus*, op. cit. 41 ff.

598 Cf. Ibn Hishām, *Al-sīra*, vol. 3, 196 ff., 202 ff.

599 Synonymously used by al-Kāsānī, *Badā'i' al-ṣanā'i'*, vol. 7, 161.

armistices (*hudna*). In the classical period peace and commercial treaties were concluded with a number of non-Muslim countries.⁶⁰⁰ Trade across borders was clearly being promoted.

The Shafī'ite school in particular overcame the dichotomy between the two camps *dār al-Islām* and *dār al-ḥarb*, which was very clearly defined in the theory, by postulating the intermediate category of *dār al-ʿahd* or *dār al-ṣulḥ* ('house of truce/ peace treaty').⁶⁰¹ Against the principles of legal doctrine,⁶⁰² this included not only submission treaties which granted the subjected peoples certain rights,⁶⁰³ but also treaties with territories not under Muslim rule.⁶⁰⁴ Classical literature listed a number of conditions for this case.⁶⁰⁵

Thus in theory the only permissible option was the peace agreement (*hudna*), with a maximum term of ten years demanded with reference to early Islamic practice.⁶⁰⁶ Al-Kāsānī states quite clearly that fighting was to be suspended only in case of weakness, with the express intention of resuming later.⁶⁰⁷ In his study on alliances and treaties in the Middle East at the time of the Crusades, Michael Köhler has shown, however, that in spite of these restrictions in the theory, in practice a system developed which he describes appositely as 'integration of the Frankish polities into the political landscape'. Compared to this, the ideologies of crusade or jihad were of only minor significance. It was entirely possible that due to vague clauses and simple extension, agreements with, in theory, limited terms might end up being as good as unlimited.⁶⁰⁸ The consequence might well be internal pressure on both sides: the

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600 Romahi, *Diplomacy*, 253.

601 Cf. al-Māwardī, *Al-aḥkām*, 174 ff.; Khadduri, *War*, 144 f.; art. *Dār al-ʿahd* in *Wizārat al-awqāf*, *Al-mawsūʿa*, vol. 20; ʿAbd al-Qādir, *Fiqh al-aqalliyāt*, 59 ff. as well as the references in EI 11, vol. 2, art. 'Dār al-ṣulḥ' (D. B. Macdonald), 131.

602 Cf. e.g. Pohl, *Islam*, 74 f. with further references.

603 Thus al-Māwardī's concept in *Al-aḥkām*, 217: he distinguishes according to whether the subjected people keep their landed property (in which case the obligation to pay land tax would end with the owner's conversion to Islam) or not (in which case the obligation to pay land tax will remain in force in any case).

604 Cf. e.g. Köhler, *Allianzen*, 372 ff.

605 Cf. e.g. al-Qalqashandī, *Ṣubḥ al-ʿashā*, vol. 14, 7 f.; preconditions are e.g. a benefit to the Islamic community and the avoidance of conditions not compatible with Islam such as surrendering Muslims or their property.

606 Concerning the corresponding agreement between Muhammad and the pagans of Mecca in 628 cf. Ibn Hishām, *Al-sīra*, vol. 3, 196 ff.; Pohl, *Islam*, 80.

607 *Badāʾiʿ al-ṣanāʾiʿ*, vol. 7, 161.

608 Köhler, *Allianzen*, in his conclusions 429 f.

Emperor Frederick II, already excommunicated, was harshly criticised for the peaceful re-conquest of Jerusalem in 1229, as was his contracting partner, the Ayyubid sultan al-Kāmil.⁶⁰⁹

Among other clauses which deviate from pure doctrine is for instance the one in the treaty between Murcia and Christian Castile in 1243, where the Muslim side takes on the obligation to pay tribute.⁶¹⁰ This is likely to have happened even more clearly in the case of diplomatic missions which aimed to form alliances with non-Muslim rulers against internal, Muslim opponents. One example is the Abbasid caliph al-Nāṣir's (r. 575–622/1180–1225) attempt at forming an alliance with the pagan Mongol ruler Genghis Khan against the Muslim Khwarazm-Shah Muhammad.⁶¹¹ Köhler's results are confirmed by Rüdiger Lohlker's study of Islamic international law using the example of the external relations of the Naṣrid emirate of Granada: they illustrate that it is possible to build equal relationships on the basis of Islamic law with non-Muslim kingdoms, relationships which will lead to some 'articles of faith' concerning Islamic international law being modified.⁶¹² Lohlker aptly remarks that purely normative observation overlooks that Islamic law was and is more than mere 'lawyers' law' (*fiqh*).⁶¹³

153 On the other hand the concept of jihad is often exploited for political reasons. Thus an Ottoman scholar of the eighteenth century was able – albeit not without objections being raised – to describe the Shi'ite Persians as enemy aliens who must be fought (*ahl al-ḥarb*).⁶¹⁴ Jihad declared by dictators, such as Saddam Hussein during the war against Iran and Kuwait, is a modern instance of this. The Ottoman fatwa – which had but little effect – against the allied opponents in the First World War is also remarkable, as it included their Muslim populations and declared war against Germany and Austria to be a grave sin.⁶¹⁵

609 Cf. the description in Horst, *Der Sultan*, 64 ff.

610 Quoted in al-Qalqashandī, *Ṣubḥ al-'ashā*, vol. 14, 24 ff.; the Hanafite al-Kāsānī (*Badā'ī*, vol. 7, 162), however, declares this for permissible in exceptional circumstances.

611 Cf. Muir, *Caliphate*, 588; Pohl, *Islam*, 58.

612 Lohlker, *Islamisches Völkerrecht*, 143.

613 *Op. cit.*, 29 and 144 to the same effect. For more references cf. H. Theunissen's study *Ottoman-Venetian Diplomats with its impressive wealth of material*, *EJOS* 1 (1998), 1–689.

614 Krüger, *Fetwa und Siyar*, 93 with further references.

615 Cf. Peters, *Jihad*, 55 f. A German translation is printed in *Der Islam* 5 (1914), 391–393.

d *The Legal Situation of Non-Muslim Individuals and Communities in Territories under Muslim Rule*

aa Individuals with Permanent Residency

Non-Muslim individuals and communities enjoyed basic legal protection and, up to a point, freedom of religion and legal autonomy. After all, there were treaties with non-Muslim tribes and religious groups even during Muhammad's lifetime and under the first caliphs – with the Khaybar, Tabūk, Najrān or Banū Taghlib.⁶¹⁶ This was by no means standard procedure during the early time of the Islamic law and should be seen as remarkable progress in its time.⁶¹⁷ On the other hand Islamic law reserved supremacy for itself, and consequently legal relationships not only among Muslims but also between Muslims and non-Muslims were usually regulated by Islamic rules and courts.⁶¹⁸

As to the status of non-Muslims, Islamic rules distinguish between members of scripture religions (*ahl al-kitāb*; referring to Jews and Christians) and the Sabians, who enjoyed some degree of protection, on the one hand and the 'polytheists' or 'idolaters', who were without legal protection, on the other. The religious infrastructure of these last-named communities was in fact thoroughly destroyed in the course of the Muslim conquests until the present day.⁶¹⁹ Still, on the whole the Muslim rulers found pragmatic solutions. A possible course of action was to count them among the mysterious group of the Sabians, who were mentioned in the Quran and protected.⁶²⁰ Another option was to interpret the relevant Quranic verses as referring to Arab idolaters only.⁶²¹ A modern Iranian scholar,⁶²² for instance, simply lists the Zoroastrians together with Jews and Christians as belonging to the 'three divine religions'.

The members of scripture religions, on the other hand, enjoyed far-reaching protection. On an individual level this protection covered the integrity of the person and his or her property against everyone; including access to public institutions. On the collective level, they were granted a considerable degree

616 Cf. Fattal, *Le statut*, 18 ff. with further references.

617 The standard text on the subject for Islamic Studies is still Fattal, *Le statut*, 1958. An extensive primary source is found in Ibn Qayyim al-Jawziyya's three-volume work *Aḥkām ahl al-dhimma*; cf. also Goitein, *The Four Faces*, 37.

618 Concerning this and other questions of the conflict of laws cf. the concise remarks in Krüger, *Fetwa und Siyar*, 139 ff. with further references.

619 The last, spectacular act being the blowing up of the monumental statues of Buddha in Bamiyan in Afghanistan by the Taliban regime in 2001.

620 Cf. sura 2:62; 5:69; 22:17; also e.g. Ibn Kathīr, *Tafsīr*, vol. 1, 182 ff.; Bobzin, *Mohammed*, 58.

621 Cf. Salem, *Islam*, 107 f. with further references.

622 Mohaqeq Damad, *Legal and Civil Aspects*, 57, 62.

154 of freedom to practise their religion. Internal autonomy was granted on the field of personal status (personal status law, family law and inheritance law) including religious judicial authorities.⁶²³ In case of legal conflict involving Muslims, however, Islamic law was – and is – generally preferred.

Thus the people of the book were (and are) protected to some degree, but they are by no means treated as equals. Retrospective idealisation is consequently out of place (regarding the tax system see below and cf. sura 5:17 ff., as well as, in particular, sura 9:29–33⁶²⁴).⁶²⁵ If they were living within the territory now under Muslim rule, they were granted the protected status of *dhimmī*.

According to unanimous opinion based on several Quranic verses, *dhimmīs* should not occupy important offices of the state or government.⁶²⁶ Sometimes they were able to rise to high offices after all, at other times they were excluded.⁶²⁷ This lack of full participation in the running of the state is also illustrated by the fact that – despite some historical instances to the contrary⁶²⁸ – they were forbidden, according to many scholars, to enter into the military. Al-Sarakhsī,⁶²⁹ who does consider this occupation permissible, documents it not only with an instance from Muhammad's own practice but also with the statement that after all, dogs were also employed for military tasks.⁶³⁰

Non-Muslims⁶³¹ had to pay a specific tax applying only to them (*jizya*, 'poll tax'), often interpreted as compensation for not having to do military service. Early treaties concluded during Muhammad's lifetime show that the tax was

623 Cf. Fattal, *Le statut*, 344 ff. with further references; Heffening, *Fremdenrecht*, 58 with further references.

624 Cf. only Ibn Qayyim al-Jawziyya, *Aḥkām ahl al-dhimma*, vol. 1, 79 and ff.

625 In detail Fattal, *Le statut*, 85 ff. with further references. We should bear in mind that in Europe, too (and beyond the National Socialist illegal laws, or 'Unrechtsgesetzgebung'), there were until well into the twentieth century legal regulations discriminating against people of different faiths, such as the prohibition of marriage between Christians and non-Christians, declaring apostasy from Christianity as a valid reason for disinheriting someone, or penal codes of the nineteenth century in which persuading someone to apostasy or spreading doctrine contrary to Christianity were defined as elements of a crime; cf. Bair, *Das Islamgesetz*, 5.

626 Cf. sura 3:28, 118; 4:115, 141, 144; 5:51, 57; 60:1.

627 Cf. the numerous references in Fattal, *Le statut*, 240 ff. and Tritton, *Caliphs*, 18 ff.

628 Cf. Fattal, *Le statut*, 233 ff. with further references.

629 Al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 10, 23.

630 *Ibid.*

631 It is debated in the classical literature whether groups such as the Zoroastrians (*majūs*) or Sabians (*ṣāʿiba*) are included besides Jews and Christians; cf. Ibn Qayyim al-Jawziyya, *Aḥkām ahl al-dhimma*, vol. 1, 80 ff.; 231 ff.

sometimes imposed as a simple war-related payment of fixed amount.⁶³² Later a coherent system of this tax was developed. It applied to adult, free men,⁶³³ graded according to the property they owned.⁶³⁴ Some authors interpreted it as, among other things, a punishment for unbelief of those affected, as acknowledgment of their submission⁶³⁵ and demanded that payment should be collected in a humiliating fashion.⁶³⁶ Non-Muslims ought not to be permitted to sit in a seat of honour, should make way in the street by stepping into a corner; Muslims, on the other hand, ought not to rise before them, not greet them first, not congratulate them or condole with them.⁶³⁷ However, non-Muslims were not liable to pay the Islamic alms tax (*zakāt*), but they had to pay the half-tithe (*ʿushr*).⁶³⁸ When it came to retribution or financial compensation for killings or bodily harm as regulated by criminal law, majority opinion states that there was considerable discrimination against non-Muslims.⁶³⁹

The first chief judge of Baghdad, Abū Yūsuf, already addressed in some detail issues such as attire and demeanour of non-Muslims in public, and ensuring that these were generally lower in status than those of Muslims. The Abbasid caliph al-Mutawakkil (in 235/850) and the Fatimid caliph al-Ḥākim (386/996–411/1021) issued drastic regulations of attire.⁶⁴⁰ This is in keeping with the custom of the period, as Canon 68 by the Fourth Lateran Council of 1215 decreed that Jews and Saracens had to wear clothes that distinguished them from Christians, in order that the ‘cursed interaction between them and Christians by mistake’ could be prevented.⁶⁴¹ Still, regulations of this kind were not issued or enforced everywhere or at all times.⁶⁴² Most recently the

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632 Regarding the treaties with Aylāʾ and Adhruḥ cf. Fattal, *Le statut*, 20 f.

633 Cf. al-Māwardī, *Al-aḥkām*, 183.

634 Cf. Abū Yūsuf, *Kitāb al-kharāj*, 122 and ff.: according to which people who are well off must pay 48 dirham, people who are reasonably well-to-do, 24 dirham, and the needy (he mentions peasants and manual labourers), 12 dirham per annum.

635 Cf. *Wizārat al-awqāf*, *Al-mawsūʿa*, vol. 15, 157 f., 162 with further references.

636 Cf. al-Ṭabarī, *Tafsīr*, vol. 9, 109 f.; opposing views expressed by e.g. Yūsuf ibn Ahmad al-Bakrī/Shākīr ibn Tawfīq al-ʿĀrūnī, the editors and commentators of Ibn Qayyim al-Jawziyya's *Aḥkām ahl al-dhimma*, vol. 1, Editors' preface, 10.

637 References in Fattal, *Le statut*, 94 ff., 114 and *passim*; cf. also Huweidi, *Non-Muslims*, 84, 90.

638 Abū Yūsuf, *Kitāb al-kharāj*, 123.

639 Cf. already 7.d above and Fattal, *Le statut*, 113 ff. with further references.

640 Cf. the references in Fattal, *Le statut*, 101 ff.

641 This is the origin of e.g. the yellow ring worn on clothing as a mark for Jews; cf. Gidal, *Die Juden in Deutschland*, 43.

642 Cf. e.g. Fattal, *Le statut*, 102 f. with further references.

Taliban in Afghanistan applied them to non-Muslim minorities such as Sikhs and Hindus.⁶⁴³

Dhimīs were ultimately subject to Islamic law. However, the rules applying to them were not the same that members of the Muslim community had to follow. This is true of e.g. religious rules such as the prohibition to consume alcohol and pork, or to sell either. Contracts among them dealing with these goods were considered valid.⁶⁴⁴ However, it may be observed until the present day that trading in alcohol and pork will meet at the very least social restrictions and frequently cannot be engaged in openly. In addition, there have always been attacks by Muslim fanatics, especially in times of unrest. However, it seems that there were also times when the application of these rules of religious law was comparatively relaxed. Al-Jāhīz⁶⁴⁵ has an impressive list of the drinking customs of a number of Umayyad and Abbasid caliphs.⁶⁴⁶ Sometimes taverns would be subject to specific duty.⁶⁴⁷

Freedom of worship was also severely restricted in some areas, especially with respect to sacred buildings. Overall the determining factor was whether a place had been conquered by force (*‘anwatan*) or had come under Muslim rule thanks to a peace treaty (*ṣulḥan*).⁶⁴⁸ In the latter case, the population would be able to enjoy the freedoms agreed in the treaty. Jewish and Christian sacred buildings under this protection were not to be destroyed,⁶⁴⁹ although in reality this happened repeatedly, not least with the destruction of the Church of the Holy Sepulchre in Jerusalem in 401/1009 under the Fatimid caliph al-Ḥākīm.⁶⁵⁰ Except in rare cases⁶⁵¹ it was forbidden to build new synagogues and churches.⁶⁵² Repairs were generally possible, but opinion was divided on

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643 Report by representatives of Afghan minorities during a conference of the South Asian Council for Minorities on 8 March 2008 in Delhi.

644 Cf. the references in Fattal, *Le statut*, 151 ff.

645 Al-tāj fi akhlāq al-mulūk, 151 ff.

646 Ibid.

647 Cf. e.g. al-Maqrīzī, *Al-khiṭaṭ*, vol. 1, 103; vol. 2, 80 concerning the taxes imposed by the caliph al-Mahdī in 167/783.

648 Cf. e.g. Ibn Qayyim al-Jawziyya, *Aḥkām ahl al-dhimma*, vol. 3, 1198 ff. On the historiography dealing with the subject cf. the remarks in Balādurī, *Futūḥ al-buldān*.

649 Cf. Ibn Qayyim al-Jawziyya, *Aḥkām ahl al-dhimma*, vol. 3, 1168 ff. In territories conquered by force it ought to be the ruler's decision whether to save or destroy them, *op. cit.*, 1210 f.

650 Cf. Fattal, *Le statut*, 192.

651 Cf. *op. cit.*, 182 and ff. There were churches in, for instance, the Palestinian city al-Ramla, founded by the Umayyad caliph Sulaymān.

652 Cf. e.g. Abū Yūsuf, *Kitāb al-kharāj*, 138; Fattal, *Le statut*, 174 ff. with further references.

whether they could only be carried out as long as they were not visible externally.⁶⁵³ To this day the construction and repair of non-Muslim sacred buildings is subject to considerable restrictions, even in the supposedly secular Turkish republic.⁶⁵⁴

As the power and influence of European Christian states increased, systems of patronage eventually developed in the Ottoman Empire, which benefited Christian minorities by e.g. granting them trade and tax privileges and at the same time strengthening them politically.⁶⁵⁵ This may, of course, also have been the first step to the widely held suspicion that these groups were agents of the Western protector and colonial powers, which found expression in numerous pogroms, e.g. in Damascus in 1860, in Trabzon in 1895 or in Adana in 1909.

bb Individuals with Temporary Residency

Non-Muslims from territories not under Islamic rule who stayed on Islamic territory for a limited time only enjoyed a special status. In the theory they were usually seen as enemy aliens (*harbī*) whose blood and property were not protected by law and who might thus be killed without fear of punishment. In practice, however, this would of course have rendered desirable contacts with foreign territories, for instance for purposes of trade, impossible. Consequently these people were given a guarantee of safe conduct (*amān*⁶⁵⁶) conveying the status of *musta'min* which granted them legal protection of the person and property.⁶⁵⁷ Travel accounts describe the accordingly benevolent attitude of the Islamic authorities and hospitable conduct towards pilgrims and traders, even though they were never entirely free from harassment.⁶⁵⁸ According to the scholar of constitutional law al-Māwardī, every Muslim, man or woman, free or slave, was entitled to grant such an 'individual' guarantee of safe conduct.⁶⁵⁹ While the *musta'min* enjoying such *amān* would be subject to the Islamic

653 Ibn Qayyim al-Jawziyya, *Aḥkām ahl al-dhimma*, vol. 3, 1218. The supporters (of whom Ibn Qayyim was not one) argued that publicly visible repairs were comparable to new construction.

654 In more detail Rohe, *Die Türkei und die EU*, 259 ff.

655 Cf. Shalit, *Nicht-Muslime*, 20 ff.

656 On the subject of such an individual guarantee of safe conduct being granted cf. Hatschek, *Der Musta'min*, 51 ff.

657 Cf. the monographs on the subject: Hatschek, *Der Musta'min and Heffening, Fremdenrecht*.

658 Cf. the references in Heffening, *Fremdenrecht*, 100 ff.

659 Cf. al-Māwardī, *Al-aḥkām*, 64; cf. also Heffening, *Fremdenrecht*, 15 ff.

legal system, he would generally be exempt from its specific rules.⁶⁶⁰ Different rules applied in the case of taxation: poll tax and land tax did not have to be paid, while customs and other rates could be imposed. It is said of the caliph ‘Umar that he favoured the principle of retorsion when taxing foreign merchants: they should be taxed in the same way as Muslim merchants were in the respective foreign country.⁶⁶¹ After a longer stay – one year is named as a relevant period⁶⁶² – the foreigner’s status changed from *musta’min* to *dhimmi*, and he would from then on be liable to, in particular, poll tax and land tax.⁶⁶³

Mecca and Medina and the surrounding area as well as the Hejaz were subject to special regulations.⁶⁶⁴ It was demanded that non-Muslims should be prohibited from visiting the area; in the case of Mecca and Medina the prohibition remains in force to this day.

One example of regulations by means of international treaties, and at the same time a model for later developments, is the French–Ottoman agreement of 1535: it granted the subjects of the French king freedom of movement and protection of the person and property; also freedom of religion and exemption from taxes. The French consul would have exclusive jurisdiction in case of internal disagreement; in other cases formalised access to the Ottoman authorities and courts including a translator was guaranteed.⁶⁶⁵

The legal position of European non-Muslims living in the Islamic world over longer periods became increasingly important. They developed at the same time as the coordinates of power shifted in favour of the West. The Ottoman Empire’s political dominance was still noticeable in the sixteenth century. Salomon Schweigger reports in outrage from the Ottoman court, which he visited as preacher to the legation in 1577 and later. He comments on the fact that the legates were forced to prostrate themselves before the Ottoman sultan: ‘This is truly diabolical pride and arrogance/ that these Barbarians dare to show such disrespect and derision to the Roman Emperor/ that the Emperor’s ambassadors must prostrate themselves before this beast (...) for all to see/ that these louts do not think much of the Roman Emperor, the greatest leader of Christendom, or of his majesty, power and might.’⁶⁶⁶

660 For details see Hatschek, *Der Musta’min*, 14 ff., 29 ff.; Heffening, *Fremdenrecht*, 39 ff.

661 Romahi, *Diplomacy*, 253, 255.

662 Cf. only Hatschek, *Der Musta’min*, 15.

663 Cf. only Ibn al-Humām, *Sharḥ*, vol. 6, 31.

664 Cf. only al-Māwardī, *Al-aḥkām*, 199 ff.

665 Cf. Shalit, *Nicht-Muslime*, 19 ff.

666 Schweigger, *Eine neue Reyßbeschreibung*, 55.

It seems that during the seventeenth century in Aleppo one could move quite freely and safely, but not entirely without the risk of arbitrary attacks from the authorities who hoped to make money in this way.⁶⁶⁷ This is the only explanation of why the resident foreign merchants created a joint fund from which the fines imposed ‘for reasons of tyranny’ of the local authority were paid. The British ambassador Heneage Finch who left Istanbul in 1669 after an eight-year-long stay there, wrote about his relief at finally having escaped numerous dangers, among which he listed the arbitrary actions of the state.⁶⁶⁸

Like the abovementioned French–Ottoman agreement, the Prussian–Ottoman capitulation of 1761 includes, besides mutual prohibitions of enslavement, customs privileges and consular immunity, regulations of how disagreements among Prussians must be exempt from the jurisdiction of the local authorities as well as specific procedures for disagreements between Ottomans and Prussians (Art. 5).⁶⁶⁹ In the end, the British Under-Secretary for Finance in Egypt Alfred Milner deplors the degree to which the former capitulations have changed to nearly comprehensive warrant for any manner of behaviour.⁶⁷⁰ Milner writes that, for instance, the near-complete inviolability of the properties inhabited by the beneficiaries under the agreements made it very difficult not only to arrest criminals but also bring evidence against them or execute punishments.⁶⁷¹ Certain consulates, he says, even cooperated in thieves, forgers and even murderers evading punishment altogether.⁶⁷² Until the creation of the Mixed Courts⁶⁷³ in 1876, even the most arbitrary damage claims against the

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667 Thus the report by Wolfgang Aigen from Nuremberg, *Sieben Jahre in Aleppo*, 77 f.

668 Reference and in-depth examination in van den Boogert, *Capitulations*, 117 ff.

669 Cf. Scheel, *Die Schreiben*, 1, 42 ff. (Translation of the text of the capitulation).

670 *England in Egypt*, London 1894, 46 ff. The tendentious nature of the statement is clear, even though we may have to bear in mind that Milner is a representative of the British government which saw itself as called upon to put an end to the chaos described.

671 ‘Before a foreigner’s domicile can be entered (...) his consul or some representative of his consulate must be present. But, in hundreds of cases, the consul takes good care to be out of the way, until the incriminating articles – the stolen goods, or the contraband (...) have been carefully removed. (...) Another common instance of abuse of the Capitulations is that of a foreign criminal or gang of criminals, taking refuge upon the premises of another foreigner of different nationality. Here, at least two consular agents are necessary before the police can act (...), op. cit., 48 f.

672 Op. cit., 50 f.

673 Regarding their competences and the – in the majority Western – membership cf. Milner op. cit., 55 ff.

weak state of Egypt were carried in civil actions.⁶⁷⁴ The dominance in power politics had clearly been reversed.

Overall we can say that resident non-Muslims and foreigners were not without rights under Islamic law. It is important to mention this as it is not a matter of course if we look at the time when Islamic law began to develop. On the other hand they were not even remotely treated equally with Muslims. It was not until the Hatt-ı Şerif of Gülhane in 1839, confirmed and extended by the Hatt-ı Hümayun of 1856, that the non-Muslim minorities in the Ottoman Empire were theoretically given equal status with the Muslims to a great extent.⁶⁷⁵ It is likely that besides inner conviction the Empire's weakness as well as political pressure from Europe were significant contributing factors. Most importantly, the poll tax and the prohibition to bear arms and serve in the military were abolished. It seems that in practice one might be exempted from military service against a compensation payment.⁶⁷⁶

e *Muslims in Non-Muslim Territories*

To begin with, the status of Muslims in non-Muslim countries was discussed only in passing. The precedent is once more the treaty of al-Ḥudaybiyya,⁶⁷⁷ between the Muslims and the non-Muslim Meccans. Under the terms of this treaty it was accepted that Muslims would not return to non-Muslim enemy territory. While this kind of visit would have been permissible according to the opinion prevalent among scholars of religious law at the time, it would not have been desirable in principle. Maintaining trade relations or travelling in order to redeem slaves were widely seen as acceptable justifications.⁶⁷⁸ Long-term residence of Muslims under non-Islamic rule, on the other hand, was a marginal phenomenon at times when the Muslims were the superior political power. It was not until the time of the Crusades and the Reconquista that the literature on the subject became more extensive, when greater numbers of Muslims found themselves living under hostile dominion. This gave rise to the

674 Op. cit., 53 ff. Milner sums up: 'the man who was lucky enough to have a case against the Government could regard his fortune as assured'.

675 Cf. Matuz, *Das Osmanische Reich*, 225 f., 230; Fattal, *Le statut*, 267; Shalit, *Nicht-Muslime*, 14 f.

676 Cf. Shalit, *Nicht-Muslime*, 15 with further references.

677 Cf. Ibn Hishām, *Al-sira*, vol. 3, 196 ff.

678 For instance, al-Qayrawānī, *Kitāb al-jihād min kitāb al-nawādir wa-l-ziyāda* (ed. by v. Bredow), Stuttgart 1994; Mālik ibn Anas is said to have rejected this fiercely, e.g. by Ibn Rushd, *Al-muqaddima*, vol. 2, 285.

question if Muslims might be permitted to live under non-Muslim rule, possibly because they were forced to.⁶⁷⁹

In the greatest works of legal scholarships deliberations of the issue are not usually collected in one chapter only, but are spread throughout the most diverse topics.⁶⁸⁰ Thus the Malikite jurist al-Qayrawānī mentions in the context of rules of prayer that it would be impossible for Muslims to make their home beyond the borders of Muslim rule.⁶⁸¹ The Quranic commentator al-Qurtūbī⁶⁸² as well as the scholar and judge Ibn Rushd⁶⁸³ expressed the simple opinion that everyone who converted to Islam had a duty (*wājib*) to leave the *dār al-ḥarb*.

This is an expression of the misgivings held by many scholars, that staying away from the *dār al-Islām* over longer periods would stop the Muslims carrying out their religious duties.⁶⁸⁴ This is in part a reflection of the historical experiences from the time of the Reconquista.⁶⁸⁵ Christian rulers in Spain, on the other hand, at times forbade their Muslim subjects to leave the country.⁶⁸⁶ During the colonial era scholars faced even greater challenges as great swathes of formerly Muslim empires had come under the rule of non-Muslim colonial powers. The most comprehensive argumentation was proposed by the Indian scholar Syed Ahmad Khan who opposed waging jihad against the British colonial power after India was completely subjected in 1857. He argued that Muslims would still be able to practise their religion under British rule, that India would remain part of the *dār al-Islām* and that consequently Muslims ought to be loyal subjects. Based on this position it was possible to allow

679 Cf. sura 4:97–100; Abou El Fadl, *Islamic Law and Muslim Minorities*, 141 ff.; Lewis, *Legal and Historical Reflections*, 1–18; Hagemann/Khoury, *Dürfen Muslime*, 70 ff. with further references; Turki, *Pour ou contre la légalité*, 43 ff.

680 For an overview cf. e.g. Khoury, *Toleranz*, 124 ff., esp. 128–133 with further references.

681 Al-Qayrawānī, *Kitāb al-jihād*, 373; *dār al-ḥarb laysat bi-dār iqāma*.

682 Al-Qurtūbī, *Al-jāmiʿ*, vol. 5, 309. Regarding comparable, but also divergent, sources cf. Lohlker, *Islamisches Völkerrecht*, 135 ff.

683 Ibn Rushd, *Al-muqaddima*, vol. 2, 285 and ff.

684 Cf. Ibn Rushd, *Al-muqaddima*, vol. 2, 286; al-Qayrawānī, *Kitāb al-jihād*, 486 (regarding him cf. Muranyi, *Materialien*, 234 ff.); Khoury, *Islamische Minderheiten*, 128 ff.; Miller, *Muslim Minorities*, 258 ff.

685 Cf. only Dresendörfer, *Islam unter der Inquisition*, 1971. For fatwas demanding emigration cf. Verskin, *Oppressed*, 21 ff., 39 ff., 55 ff.

686 Cf. Müller, *Muslim Minorities*, 256, 260 f., but also Koningsveld/Wiegers, *The Islamic statute*, 19, 44 ff.

Muslims to join the army and the administration.⁶⁸⁷ Other fatwas from the Middle Ages to the present have shared this view.⁶⁸⁸

In spite of the legal and social circumstances being entirely different, even today we can find traditionalist scholars, some of them extremely anti-Western and anti-Christian (cf. also Part 2, 3.3.d, e; Part 3, 4.4), who hold views which adhere to the theoretical opposition between the worlds.⁶⁸⁹ The discussion always centres on fears that the dominion of Islam could be weakened by migration, always before the background of an image of two fundamentally hostile camps.

However, not even classical Islamic law is dominated by a strict dichotomy between Islamic territory and enemy territory. As long as a Muslim can live safely in a host country, he must follow the law of the land, in particular observe agreements and avoid causing damage.⁶⁹⁰ This is emphasised by the European Council for Fatwa and Research, founded in 1997 by prominent Muslims: Muslims living in non-Islamic countries have a duty (under the sharia) to treat the person, reputation and property of non-Muslims as inviolable. This duty is seen as corresponding to the permit of residence granted by the respective countries.⁶⁹¹ One instance quoted is that of the emigration of a group of Muslims during Muhammad's lifetime who left Mecca, before it even became a Muslim city, for Christian Ethiopia. This is described as an example of living in a non-Muslim but just environment.⁶⁹² Thus the rulers of the foreign country are described as useful and consequently deserving of respect. From the Muslim point of view it was, and remains, significant that the indispensable rules of Islam can still be observed. Thus Abu Yūsuf is quite alone in his opinion that the return of Muslims (including Muslim slaves) to non-Muslim territory could not even be part of an arbitration.⁶⁹³

687 Cf. Peters, *Jihad*, 6; regarding the discussion in India in detail cf. Hunter, *The Indian Musalmans*, esp. 106 ff.; Jain, *Muslim Political Identity*, 108 ff., 267 ff.; Verskin, *Oppressed*, 51 ff.

688 Cf. the references in Verskin, *Oppressed*, 11, 31 ff., 58 ff., 93 ff., 98 ff., 117 ff.

689 Cf. Ibn Baz/Uthaymeen, *Muslim Minorities*, esp. 71 ff.; Fiqh Council of the Islamic World League, 16th meeting in Mecca, Report in 'A message from Muslim scholars to Muslim Minorities in the West', Daawah no. 4 AH 1422/ Feb. 2002, 8, 11.

690 Cf. al-Shaybānī, *Al-siyar al-kabīr*, vol. 2, nos. 775 ff.; vol. 4, no. 2270; nos. 2416 f.; al-Qayrawānī, *Kitāb al-jihād*, 409 f.; al-Bahūtī, *Kashshaf al-qinā'*, vol. 3, 85; Abou El Fadl, *Islamic Law and Muslim Minorities*, 141 ff. with further references; Salem, *Islam*, 150 with further references.

691 *Al-majlis al-urubī lil-iftā' wa-l-buḥūth*, *Fatāwā*, vol. 1, Cairo n. d., 19 f.

692 *Op. cit.*, 27.

693 Cf. Romahi, *Diplomacy*, 253, 259.

If Muslims are generally permitted to stay beyond the borders of the *dār al-Islām* and must respect the law of their host country, the fundamental question arises of to what degree Muslims are still bound by Islamic rules in this case. The Hanafites occupied a very territorial position and went so far as to rule out the application of Islamic rules to Muslims in ‘foreign countries’ altogether,⁶⁹⁴ leading to most other jurists contradicting them firmly.⁶⁹⁵ To illustrate the debate we will look at the question of whether the Quranic punishment for theft should be applied even if the perpetrator as well as the victim are Muslims in the *dār al-ḥarb*.

As so often, the Hanafite position is in conflict with that of the other schools. Joseph Schacht links this to the extant hadith material of Syrian and Iraqi origin and the fact that the Medinans did not accept the practice set out in these.⁶⁹⁶ Due to their territorial concept of criminal law the Hanafites conclude that theft among Muslims in the *dār al-ḥarb* cannot be punished with a *ḥadd* penalty, as the *imām*’s authority (regarding the title cf. 8 above) ends at the borders of the *dār al-Islām*.⁶⁹⁷ For pragmatic reasons the scope of the ‘rights of God’ are linked to the extent of state authority. An ordinary army commander (*amīr*), lacking the qualification and competence of a judge, would not be able to exercise any judicial authority within the army camp. As his authority would end with the return to the *dār al-Islām*, retrospective punishment would also be out of the question. Circumstances would be different only in cases when the army, independent of its size, were led by the *imām* himself or by the governors of Egypt, Great Syria (Sha’m), Iraq or similar governors, according to Abu Yūsuf. Al-Sarakhsī, on the other hand, names only the governor of Iraq besides the *imām* – an indication of the varying political significance of individual regions at different times.

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The Hanafites obviously base their opinion on the idea that the *imām* and a few other bearers of state authority are able, by their mere presence and by erecting an army camp, to create an exclave ruled by Islamic law, but that beyond the limits of this camp their authority will end – again according to unanimous Hanafite opinion. Besides these general deliberations, traditions by Zayd ibn Thābit and ‘Umar are adduced according to which the *ḥudūd* should not be applied in the *dār al-ḥarb* because executing them would risk

694 Cf. al-Sarakhsī, Kitāb al-mabsūt, vol. 10, 96 (*li’annahum ghayr multazamīn aḥkām al-Islām fī dār al-ḥarb*).

695 Cf. Salem, Islam, 150 f.

696 Schacht, Origins, 209.

697 Abū Yūsuf, Kitāb al-kharāj, 348; al-Shaybānī, Al-siyar al-kabīr, vol. 103 f., 239 f.; al-Sarakhsī, Kitāb al-mabsūt, vol. 9, 181 f.

weakening the Muslim criminal so much that he might fall into the hands of the infidels. This is, of course, only a justification for postponing the execution of the punishment; the interpretation of these traditions does not abolish the fundamental validity of Quranic criminal law.

At the same time as discussing the situation in the *dār al-ḥarb*, Hanafite jurists deal with theft on a territory ruled by rebels (*ahl al-baghy*):⁶⁹⁸ the *imām* has no authority here, either. Consequently taking rebels' possessions would be lawful. On the other hand acts against loyal Muslims could not be subject to *ḥadd* punishment there, as the rebels for their part might believe, albeit erroneously, that it would be lawful to take their [the loyal Muslims'] possessions. Should, however, the rebels appoint a judge who is loyal to the Islamic authorities, his official duties would include applying the *ḥudūd*.

162 Malikites⁶⁹⁹ and Shafi'ites,⁷⁰⁰ on the other hand, rely on the personality principle alone; in their opinion the *ḥudūd* apply everywhere, without exception. The general wording of the relevant Quranic verse and the sunna as well as the consensus and rational insight all led them to the conviction that what is forbidden is forbidden on principle and independently of the place where it takes place. The exception made by the Hanafites is branded as being arbitrary. It is described as being as absurd as the claim – not asserted by anyone – that within the *dār al-Islām* Quranic criminal law should apply only in the cities but not in unsettled areas (*bādiya*), as there was no de facto government authority in the latter. It is furthermore pointed out that nobody would suggest that Islamic law ceases to apply if the governor of a city dies; of course his successor would be entitled to carry out a punishment. Malikites and Shafi'ites thus see it as undisputed that the rules of Quranic criminal law apply beyond the Islamic sphere of power and are binding for all Muslims independently of where they are. The traditions of 'Umar and Zayd ibn Thābit mentioned above are recognised only in that carrying out the *ḥadd* punishment may be postponed until the return onto Islamic territory. In addition, carrying out punishment in the *dār al-ḥarb* is only permitted to an authorised military leader; otherwise postponing the punishment is inevitable.

In conclusion it must be said that, while overall it is later authors who discuss every issue in the greatest detail, in this case the early jurists devote much space to discussing the subject. This may be due to the fact that the expansive politics of the early Islamic period provided sufficient cause to study issues of the scope

698 Al-Sarakhsī, Kitāb al-mabsūt, vol. 9, 181f.; vol. 10, 130.

699 Saḥnūn, Al-mudawwana, vol. 16, 91.

700 Al-Ṭabarī, Kitāb al-jihād, 61–67; al-Shīrāzī, Al-muhadhdhab, vol. 2, 241.

of Islamic law, while this aspect lost some of its practical relevance during the later period of consolidation.

10 Fiscal Law and Charitable Foundations (*awqāf*)

The giving of alms is postulated in the Quran as an important duty of all the faithful in the same context as the obligatory prayer (*ṣalāt*).⁷⁰¹ The exact meanings of the terms used to denote it, *ṣadaqa* and *zakāt*⁷⁰² are not as yet clearly distinguished.⁷⁰³ Classical law distinguishes between a rate set and enforced by the state (*zakāt*) and voluntary alms – which may, however, be a religious duty under certain circumstances – (*ṣadaqa*).⁷⁰⁴ Voluntary alms may be given as individual contributions, but another option frequently selected is to establish or support charitable foundations (*awqāf*, sg. *waqf*; in North Africa frequently also *hubs*⁷⁰⁵). This is the same term which is also used to denote family trusts set up in order to remove the family fortune from legal relations and ‘preserve it for eternity’, while the use and yields go to those family members who benefit under the arrangement.⁷⁰⁶ Due to their economic potential these trusts and their administrators (*wālī* or *mutawallī*) became a force to be reckoned with in the Islamic world, and in many places they still are.⁷⁰⁷ It is not surprising that the state should have attempted frequently to gain influence over the trusts.⁷⁰⁸ In the present this has become possible to a great extent by creating dedicated ministries to supervise trusts and foundations.

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Zakāt must be paid for certain specified possessions at a rate which is similarly clearly specified and amounts to between five and ten per cent of the yield. In the case of valuable goods such as precious metals it is calculated to the

701 Cf. suras 2:43, 110, 177, 277; 4:162; 5:12.

702 And also the corresponding verb forms.

703 Cf. e.g. suras 2:43, 110, 177, 277; 4:162; 5:12; 9:18, 60, 103 as well as further references listed in ‘Abd al-Bāqī, 331, under the heading ‘*zakāt*’.

704 Regarding this issue and its ties to the system of trusts cf. Wizārat al-awqāf, Al-mawsū‘a, vol. 45, 109 and ff. For modern approaches and implementations of *zakāt* systems cf. Farschid, *Zakāt in der Islamischen Ökonomik*, Beirut/Würzburg 2012.

705 Regarding the terminology cf. op. cit., 108 and ff.

706 Cf. e.g. the translation of an early foundation deed, transmitted in al-Shāfi‘ī’s *Kitāb al-umm*, in Hennigan, *The Birth*, 203 ff.

707 Monograph studies of the sources of the early period may be found in Hennigan, *The Birth*, 2004; of the later period in Bartels, *Das Waqfrecht*, 1967; Kemke, *Stiftungen im muslimischen Rechtsleben*, 1991; Kogelmann, *Islamische fromme Stiftungen*, 1999.

708 Cf. e.g. Kogelmann, *Islamische fromme Stiftungen*, 299 ff. and *passim*.

appropriate proportion of the material. There is, however, much disagreement when it comes to details.⁷⁰⁹ There is furthermore the land tax (*kharāj*) to be paid on certain lands.⁷¹⁰ At first this was only levied on the non-Muslim population in conquered regions while the Arab Muslim conquerors had to pay only the rather lower tithe (*ʿushr*) which was levied on all Arab lands.⁷¹¹ In the course of the mass conversions to Islam the *kharāj* evolved into a land tax tied to the land, independently of the owner's religious affiliation.⁷¹²

A certain outward orientation is shown by the fifth (*khums*)⁷¹³ due on spoils of war (according to Shi'ite law the *khums* is levied on all income subject to tax) and on the poll tax (*jizya*), levied on all non-Muslims living permanently on territory under Islamic rule (*dhimmīs*) instead of the (lower) *zakāt*. This tax is justified by a Quranic passage⁷¹⁴ as well as the exemption from⁷¹⁵ military service and the guarantee of (military) protection. Intricate difficulties arose in the wake of the mass conversions – for tax reasons – to Islam by those subject to poll tax.⁷¹⁶ Customs duties also had practical significance.

For the rest it seems that throughout the history of Islamic law the rulers' inventiveness when it came to thinking up taxes was considerable, too. The creation of military fiefs (*iqṭāʿ*) – a variant of tax farming – from the third/ninth century onwards (after the flow of spoils of war began to dry up) played a significant part.⁷¹⁷ Taxes of this kind, which were not legitimised by recognised sources of law (*mukūs*, sg. *maks*⁷¹⁸), were attacked frequently by scholars;

709 Regarding the discussion in al-Shaybānī cf. e.g. the description in Hatschek, *Der Mustafāmin*, 39 ff.

710 Fundamental texts are e.g. Abū Yūsuf, *Kitāb al-kharāj*; Yahyā ibn Ādam al-Qarashī's (d. 203/818–819), *Kitāb al-kharāj* and Abū l-Faraj 'Abd al-Rahmān ibn Ahmad ibn Rajab al-Ḥanbalī (d. 695/1295–1296), *Istikhrāj li-aḥkām al-kharāj*. An informative overview is found in the article 'Abgabe' in Khoury/Hagemann/Heine, *Islam-Lexikon*, 1991.

711 Cf. e.g. Ibn al-Humām, *Sharḥ*, vol. 6, 31: *arḍ al-ʿarab kulluhā arḍ al-ʿushr*; cf. also Løkkegaard, *Islamic Taxation*, 72 ff.

712 Cf. Johansen, *The Islamic Law*, 12; Wichard, *Zwischen Markt und Moschee*, 32 f. and now also, in some detail, Katbi, *Islamic Land Tax*.

713 Cf. sura 8:41.

714 Sura 9:29.

715 It was contentious whether non-Muslims would be allowed to do military service at all; it seems that in practice this was a not infrequent occurrence (cf. the references in Fattal, *Le statut*, 233 ff.).

716 On the differing development in different regions and regarding terminological shifts cf. Dennett's study, *Conversion*, 14 ff.

717 On their development and consequences cf. Duri, *Arabische Wirtschaftsgeschichte*, 107 ff.

718 Cf. only the reference in Tritton, *Caliphs*, 220 f.

without, however, any practical consequences. Concession fees which meant that brothels and sales of alcohol would be tolerated must have seemed particularly outrageous.⁷¹⁹ Resistance appears to have been futile: according to an account from 1720 the judge in the Ottoman subprovince of Bolu refused to collect taxes which were unlawful in his opinion;⁷²⁰ he was expelled immediately. Tellingly, the account describes him as a romantic.⁷²¹

Aigen reports from seventeenth-century Aleppo:⁷²² 'When a merchant or a nobleman departs in death, his property and effects are sequestered⁷²³ immediately. The sultan will take possession of the tenth part according to Ottoman custom; the pasha and the qadi claim what is theirs, and usually the surviving heirs are left with no more than half.' For – which seems to be surprising to Aigen with his European background – 'then the surviving offspring and wives each inherit a portion, and none may be left out.' According to Aigen's account it appears that the blood money due to the clan of a murdered person (regarding *diya* cf. 7.d above) is also diverted to the state: 'If there is a death in a street or an alley, be it by accident or through rage, then those who have their homes in this street must pay the blood money, and it is sometimes not possible to pay for it with four or five thousand reichstaler.'

719 Cf. the article 'Abgabe' in Khoury/Hagemann/Heine, *Islam-Lexikon*, 1991.

720 So-called *avanz* and *nüzül* tax.

721 Referend in Ergene, *On Ottoman Justice*, 52, 83. Cf. also the impressive list of 'arbitrary' taxes in Ottoman documents in v. Hammer, *Staatsverfassung*, vol. 1, 214 ff.

722 *Sieben Jahre in Aleppo*, 38 f.

723 I.e., given to the official administration.

PART 2

Modern Islamic Law



Further Development and Upheaval from the Thirteenth/Nineteenth Century Onwards

1 Introduction

During the thirteenth/nineteenth century many parts of the Islamic world began to experience more intensive contact and confrontation with European culture, some of their own accord such as in Muhammad Ali's Egypt, others of necessity due to colonial subjugation. While the field of law did not remain unaffected, it would be wrong to see this as a simple rejection of previously valid concepts. We occasionally encounter the belief that Islamic law did not evolve at all from the fourth/tenth century onwards and was then mainly replaced by Western laws; this, however, does not do justice to reality. On the one hand it suggests that internal development – albeit inspired by communication with non-Islamic cultures – is impossible. On the other it overlooks the centuries-old dynamics, e.g. in the Ottoman Empire or under the Mughals in India, which was certainly not 'guided from outside'. It is true that the thoughts of reformers such as Jamāl al-Dīn al-Afghānī or Muhammad 'Abduh would not have been possible without communication with the West, but they evolved out of Islam itself.

From a non-Muslim point of view it is futile to argue whether all this is a continuing development of existing ideas or a rejection of these. The question is difficult to answer, not least because there is very little information overall on whether classical legal texts correspond to the practice of the time.

The later period is more accessible thanks to collections of fatwas and contemporary accounts. Besides the Ottoman *qānūn-nāmehs*, the sources of the law *'urf* and *'āda* seem to be playing a significant part. In the Ottoman Empire in particular we can observe a tendency to unify divergent doctrines, by means of e.g. attempts at standardisation and collection in literary canons, as well as establishing institution such as the chief mufti (*ṣeyh ül-Islām*) and other 'official' mufti positions in larger and smaller towns and settlements.¹

1 Cf. Peters, What does it mean, 147 ff. with further references; Vikør, Between God and the Sultan, 212 ff.; in detail: Gerber, State, 79 ff.

168 With regard to the law relating to aliens, the gradual reversal of the political and military balance of power between East and West had an additional impact.

The need for modernisation within Islam has been expressed for a long time. Attempts at reform are based on the basic concept that Islam as it was practised during the Middle Ages, and frequently is even today, has moved away from its spiritual foundations and got entangled in rigid and superficial conventions.² The actual term 'reform' is, in fact, rejected by many, as it might be interpreted as a desire to replace God-given rules with man-made ones, or adopt unsuitable Western ideas. Instead, the support of an approach which has been employed since time immemorial is sought once more, namely that rules may and must be re-interpreted according to the circumstances prevailing in time and space. Terms such as 'renewal' (*tajdīd*), 'revival' (*iḥyā'*), or 'correction' (*iṣlāḥ*) are also used in this context.³ The effect is essentially that which legislators term 'reform', i.e. changing a previously existing rule or its interpretation.

The key to new approaches lies in activating the *ijtihād*, independent reasoning while consulting and interpreting the respective relevant sources. One of the great reformist thinkers of the twentieth century, Muhammad Iqbal,⁴ wrote the following: 'The closing of the door to *ijtihād* is pure fiction, suggested partly by the crystallization of legal thought in Islām and partly by that intellectual laziness which, especially in the period of spiritual decay, turns great thinkers into idols. If some of the later doctors have upheld this fiction, modern Islām is not bound by this voluntary surrender of intellectual independence.'⁵

Under the series heading 'The Islam we want' the Kuwaiti author Ismā'īl al-Shāṭī drafts the agenda in a high-circulation newspaper: 'We must lead Islam out of the straits of tradition.'⁶ Justification for his demand is provided by sura 21:25:⁷ The fact that many prophets were sent, one after the other, is evidence to him that God considered it necessary to protect the true revelation from the aberrations of tradition. Al-Shāṭī is also referring to the heyday of the Islamic world: due to the freedom of opinion and thought the Islamic community, he

2 Cf. e.g. Husain, *Interpreting the Tradition*, 1, 2.

3 Cf. T. Ramadan, *Radical Reform*, 11 ff.; regarding Tunisia cf. M. Charfi, *Islam and Liberty*, 90.

4 Cf. Kenneth Cragg, *Counsels in Contemporary Islam*, Edinburgh 1965, 48 ff.

5 M. Iqbal, *The Reconstruction*, 168; cf. also Iqbal, *Islamic Rationalism*, esp. 325 ff.

6 *Al-Islām alladhī nurid. 'Alaynā ikhrāj al-Islām min ma'ziq al-turāth*, al-Sharq al-Awsaṭ of 6 June 1998, 10.

7 'And We sent never a Messenger before you and did not reveal to him, saying, 'There is no god but I; so serve Me'

says, flourished beyond the disagreements among legal scholars and philosophers. Islam does not offer a fixed basis from which to solve problems by applying intellectual mathematics or pure insight. He sees intellectual debate as being part of Islamic culture, but not of Islam itself. This view helps to open the door to independent reasoning wide.

The well-known Dean of the Theological Faculty of Istanbul University Yaşar Nuri Öztürk reaches the same conclusion through even more precise argumentation. With regard to the Quran he first of all states that there is no reform in religion as it is a divine institution. A word requiring reform could not be divine. Religious practice and Islamic law, however, are a different matter, as they are human institutions. The Quran itself, he says, possesses such wondrous flexibility that it enables humans at all times to evaluate its timeless religious principles in such a way that it fulfils the practical religious needs of different eras and societies. This phenomenon – which Iqbal sees as the soul of the Quran and the basis of Islamic vitality – is *ijtihād* (Turk.: *içtihat*), independent judgment and research. Anyone who rejects this in fact denies the timeless nature of the Quran.⁸ 169

Similar views are also found in explicitly Islamist sources. The influential Sudanese Hasan al-Turābī for instance declares the traditional *fiqh* as obsolete and demands the implementation of universal *ijtihād* oriented towards the common good (*maşlahā ʿamma*). The interpretation of the sharia should be adapted – up to and including a new interpretation of the Quran – to present-day problems.⁹ Yūsuf al-Qaraḏāwī is afraid the Islamic movement favoured by him could be weakened if the liberal and creative thinkers should not be able to flourish.¹⁰ The leader of the Libyan revolution Muammar al-Gaddafi, finally, intended to commit the ‘yellowed tomes’ of ‘infidel jurists’ to oblivion in his accustomed dramatic style, and also declared a multitude of prophetic traditions to be falsified;¹¹ concluding that the equal esteem granted to Quran and sunna was blasphemous. In this way al-Gaddafi drew accusations of heresy and unbelief upon himself.¹²

Legal scholars of more traditional inclination do not go quite as far, but they do open considerable scope of interpretation. A much-quoted work by

8 Öztürk, 400 Fragen, 61, 206.

9 ‘Eine Theokratie wird es nicht geben’; interview in Der Spiegel 21/1998, 190, 194.

10 Al-Qaraḏāwī, Priorities, 133 f.

11 Thus in a talk of 19 Feb. 1978 on the occasion of the prophet’s birthday; reference in Reissner, in Ende, Werner/Steinbach, Udo (eds.), Der Islam in der Gegenwart, 329, 336.

12 References op. cit., 336.

Wahba al-Zuhaylī contains a chapter entitled ‘Changing rules in changing times’.¹³ According to this all those rules ought to be open to re-interpretation which are based on *qiyās* (cf. Part 1, 2.5 above) or on consideration of the common good. Overall, reformers are able in many instances to draw on the existing, and extremely varied, fund of scholars’ expert opinions to buttress their own ideas. Traditional and respected ‘dissenters’ such as Ibn Ḥazm or Ibn Taymiyya are consulted as well as the law school founder Abu Ḥanīfa, who was unconventional in many respects.

170 Ultimately there will be reforms simply because the increasingly global market of ideas does not leave any region untouched. We know from experience that new understanding and expectations of social roles influence the application of the law even if it remains unaltered in its form. Conversely, reformed law may influence those parts of the population in a progressive way who adhere to more traditional ways of life.

The Syrian legal scholar Ibrāhīm Salqīnī, who tends to base his arguments on classical categories, finds a starting point for similar deliberations in the diverging opinions expressed by legal scholars.¹⁴ He considers the differing opinions a necessity which guarantees the eternalisation of the sharia. They offer a uniquely wealthy fund of legal thought, diverse due to the fact that it originates with different characters, abilities, circumstances and customs as well as at specific times and places. Such differences, he says, are useful as they influence only individual assessments but not the agreed foundations of Islamic law. Yusuf al-Qaraḍāwī’s title ‘Divergent opinions in individual points (*furūʿ*) are necessity, grace and wealth’.¹⁵ He rejects obeying the exact letter of the law (*harfiyya*) in the interpretation and formalism (*ẓāhiriyya*) in the implementation of the law.¹⁶ This view opens a wide scope for further developments, also within a more regionalised framework.

There are even classical examples to which we can refer in this context. Muhammad ibn Idrīs al-Shāfiʿī, the great systematiser of the law in the third/ninth century, was at first active in Iraq, later in Egypt. There are many instances of him changing his opinion in answer to changed circumstances in his life. This kind of adaptation to one’s respective environment on the part of the forefathers is used as an argument in favour of reform even in the present-

13 *Taghyīr al-aḥkām bi-tajyīr al-azmān*, al-Zuhaylī, *Al-fiqh al-islāmī*, vol. 1, 139.

14 *Uṣūl al-fiqh al-islāmī*, 31 ff.

15 Al-Qaraḍāwī, *Al-ṣaḥwa*, 59.

16 Reference in unpublished notes in Roald, *The Wise Men*, 29, 36.

debate.¹⁷ On the other hand the desire to distance oneself from a simple adoption of western codes and concepts of order and system is clearly perceptible.¹⁸

As a result the development of the law in states which continue to follow Islamic law is so very varied, despite some very similar ways of life, that e.g. norms of family or inheritance law in one state are not recognised in another because they breach the basic legal principles prevailing in the latter, even though the roots of the respective regulations are the same.¹⁹ Tunisian courts, for instance, have on occasion rejected the prohibition of inter-religious marriages, inheriting between religions, the absence of divorce options for women or the husband's one-sided right of divorce.²⁰ On the other hands earlier court judgments in borderline cases in that country enforced the concepts of Islamic law against the positively regulated law, thus for instance the prohibition of interreligious marriage for Muslim women or the rejection of foreign provisions for the custody of children.²¹ This illustrates that besides the regional differences, the background and understanding of those applying the law has great bearing on the interpretation of norms.²²

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2 Surrounding Conditions, Motives of and Paths Taken by Reforms

From the nineteenth century onwards it has been possible to observe extensive attempts at adapting Islamic law to the requirements of the times. The thrust of reforming classical Islamic law is on aspects of organisation, power politics and content.

17 E.g. in Salqīnī, *Uṣūl al-fiqh*, 31, 34; Prof. E. Kosheri, President of the Université pour le Développement Africain in Alexandria, during a conference on 'Islamic Law and its Reception by the Courts in the West' from 22 to 24 Oct. 1998 in Osnabrück.

18 Cf. only Muslehuddin, *Islamic Jurisprudence*, 3: 'Dazzled by the glitter of Western Civilisation, they (sc.: the modernists) cannot visualise the intrinsic superiority of Islam, nor can they appraise the real value of its laws. They want to make Islamic Law conform to the human reason which is ever changing and also liable to err. (...)':

19 Cf. Ben Achour, *L'Articulation*, 101, 116 f. with further references.

20 References op. cit., 116 f.; Ben Jémia, *Management*, 563 ff.

21 References op. cit., 115. The superiority of one's own legal culture is emphasised. Regarding the non-uniform attitudes cf. Verhoeven, *Judicial Discretion*, 199, 218 ff. with further references.

22 Regarding Tunisia cf. Waletzki's extensive study, *Ehe und Ehescheidung in Tunesien*, 2001, which looks in depth at legal facts with regard to the position of women in society and the law.

The intention is to loosen the much-lamented rigidity of traditional law. Existing legal uncertainties will be lessened by codification and by extending the system of registries, which could at the same time establish the centralisation and concentration of the competencies of government authorities.²³ A great number of new provisions of commercial law have been, and are being, set in motion, mostly without controversy.²⁴ At the core of Islamic law reforms are aimed especially at the improvement of women's legal position, to a lesser degree also that of non-Muslims. A basic idea was that the multitude of provisions and interpretations of individual details which were considered binding for a long time were actually tied to their specific time and consequently could and should be adapted. One clear example is found in Art. 39 of the Ottoman Mecelle, the great book of laws of the nineteenth century (more in 2.1.a below): 'It cannot be denied that regulations change with the changing times'.

172 The motives of the reforms should be sought as much in the recognition of internal crises as in the confrontation with Western colonial criticism. Some of the innovations were instituted directly under the influence of the colonial powers. In fact the Muslims in charge were in a difficult position. The need for reforms was obvious in a comparison of the overall desolate situation of the Islamic world with Europe's economic, social and military position. At the same time the colonial powers conquered nearly the entire area, with the consequence that 'internal Islamic' development was possible only in a few semi-independent states such as the Ottoman Empire. Often Western colonial administrators would take the place of possible Islamic reformers; cooperating Muslims were discredited as 'collaborationists'.²⁵

More than a few legal reforms with the aim of 'modernising' took place in a context of despotism and corruption²⁶ with no democratic or constitutional support. Some contemporary Muslims deplore the fact that *ijtihad* as an instrument of Islamic law was employed too little during these measures.²⁷ Consequently the adoption of the achievements and knowledge of other cul-

23 On e.g. the development in twentieth-century Iran cf. Yassari, *Das iranische Familienrecht*, 59 ff.; on developments in the Ottoman Empire, Akgündüz, *Sharī'ah Courts*, 202 ff.; Paz, *Documenting Justice*, 81 ff., 112.

24 Regarding the UAE cf. Keimer, *Neuere Entwicklungen*, 149 ff.

25 As pointed out by Laroui, *Islamisme*, esp. 46; comparable Fatima Mernissi, *Die Angst vor der Moderne. Frauen und Männer zwischen Islam und Demokratie*, Munich 1996, 62.

26 Referred to by Karčić, *Applying the Sharī'a*, 207, 215.

27 Cf. e.g. *op. cit.* 207, 223.

tures could be branded and demonised as anti-Islamic westernisation, even if in actual fact it conformed entirely to Islam. Islamists foment this suspicion of reforms to this day, usually on a level that leaves much to be desired intellectually.²⁸

In this environment adhering to actual or imagined traditions acquired a political and cultural value of its own; it could express self-assertion in the face of domination by Western powers (regarding the Indian debate on the subject cf. Part 3, 2.2.c below).²⁹ As the Canadian Muslim scholar Anver Emon puts it: 'For Muslims contending with post-colonial controversies over political identity, the idea of changing or modernizing Islamic law in a way that does not adhere strictly to the textual tradition is perceived as surrendering to the cultural hegemony of the West and the values it enshrines.'³⁰ This is reflected in particular in 'preserving' the Muslim family and consequently also preserving the gender roles associated with it. While the basic concern may be understandable, in some cases it is pursued in positively obsessive fashion.³¹ It is unfortunate that there is widespread prejudice outside the borders of the Islamic world that only traditionalistic or Islamist attitudes represent Islam 'proper'. This provides unintentional support for the hardliners. Some crude opponents of Islam even broadcast this view, with no thought that in many countries of the Islamic world the reform of classical Islamic law has become common property.

Furthermore the development can by no means be described as a unified 'modernisation' in the sense of correcting flaws and improving the legal position of disadvantaged groups of the population, especially women.³² Still, the general tendency points in this direction. This is also true of the improvement of the position of non-Muslims, for instance with regard to equal treatment under tax law and in the area of civic rights and duties.

28 Cf. e.g. Muhammad Taqi Usmani, *Islam and Modernism*, esp. 61 ff.; also Abu Zaid, *Rethinking the Qur'an*, 35 f.; An-Na'im, *Towards an Islamic Reformation*, 7, 18 ff.

29 Cf. Laroui, *Islamisme*, 52 f., 164; al-Muzaffar, *Reformation*, 19, 21.

30 Emon, *Islamic Law*, 208.

31 Cf. Kreile, *Politische Herrschaft*, 230 with further references; Shehadeh, *The Idea of Women*, 2007 with numerous references; criticism of the biologicistic interpretation of the Quran in e.g. Wadud, *Qur'an and Woman*, 64 ff.; Hajjar, *Domestic Violence*, 231, 252 ff. and *passim* with further references. The fear – frequently with very sweeping justification – of 'infiltration' becomes clear in e.g. Bashier, *Muslim Women in the Midst of Change*, 9 and *passim*.

32 Cf. only the informative collection *Women, the Family and Divorce Laws in Islamic History*, published by Sonbol in 1996.

In concrete terms suggestions include allowing women to occupy public office, changes in family and inheritance law, and abolishing patriarchal restrictions e.g. in passport and travel laws.³³ Regulations of these issues are seen as tied to their specific time and consequently open to change. Ziba Mir Hosseini describes the intellectual basis of this kind of reform in the following way: 'Unlike earlier discourses, the new one sees the gender inequality embedded in fiqh rules not as a manifestation of divine justice, but as a construction by male jurists which goes contrary to the very essence of divine will as revealed in the sacred texts of Islam. (...) the new one sees women's sexuality as defined and regulated by familial and social circumstances, not by nature and divine will.'³⁴ The former³⁵ Iranian regulation of compensation in the case of a Muslim man deliberately killing a woman or a non-Muslim man is only one instance of inequality: as according to classical Shi'ite doctrine the wergeld for the perpetrator's social group is twice as high as that for either of the two victim groups, if the victim's heirs asked for retribution they would have to pay half the wergeld to the perpetrator's heirs. The Baha'i, who are not recognised as a protected religious community and frequently persecuted, are entirely without rights in this respect.³⁶

Within modern legislation on the basis of the sharia there is a considerable³⁷ extent of agreement as far as the objectives go: marriage of minors must be abolished,³⁸ women must be guaranteed the freedom to choose their marriage partner, polygamy should be limited,³⁹ the husband's one-sided right of divorce curtailed,⁴⁰ women should be granted the right to file for divorce⁴¹ and be placed in a better position regarding maintenance law and custody of children

33 Cf. 'Islamischer Feminismus durch eine Politikerin im Aufwind', *Süddeutsche Zeitung*, 4 March 1997, 9.

34 *The Construction of Gender*, 95, 111.

35 Until the reform of 2004, which was pushed through against the will of the Guardian Council.

36 Cf. Peters, *Crime*, 178, and para. 258 of the Iranian Criminal Code.

37 For opposing voices which defend the traditional institutions, and their argumentation cf. Ascha, *Marriage*, 103 ff. (polygamy), 189 ff. (one-sided right to divorce); Wafi, *Human Rights in Islam*, 121 ff., 180 ff.

38 Cf. e.g. Shaham, *Family*, 53 ff.; Cammack/Young/Heaton, *Legislating Social Change*, 45 and ff. with further references; Anderson, *Islamic Law*, 48 with further references, and also articles 4–7 of the Ottoman Code of Family Law of 1917.

39 Cf. Anderson, *Islamic Law*, 48 ff.; Tellenbach, *Änderungen*, 943, 945; Kamali, *Islamic Law in Malaysia*, 153, 139 ff.

40 Cf. Nasir, *Status*, 26 ff.

41 Cf. e.g. Shahbūn, *Al-shāfi*, vol. 1, 254 for Morocco.

of the marriage.⁴² There are furthermore attempts in the dispensation of justice to allow women the right to determine their own employment.⁴³ Equality of the sexes is also promoted within inheritance law, albeit on a smaller scale (regarding all this in more detail cf. 3.1 below).⁴⁴

One example of an area we must mention as being in particularly urgent need for reform is divorce law, which allows wives very few options while allowing the husband one-sided divorce which does not require any grounds or justification (cf. Part 1, 4.2.b.gg above). The Indian scholar Asaf Fyzee describes the imbalance between the divorce options as follows: 'The law of divorce, whatever its utility during the past, was so interpreted, at least in the Hanafi school, that it had become a one-sided engine of oppression in the hands of the husband. And almost everywhere, Muslims are making efforts to bring the law in accord with modern ideas of social justice.'⁴⁵ The reformer Muhammad Iqbal's accusation against traditional divorce law is only one of many comments on the situation which we could highlight. Iqbal pointed out that in the Punjab women would declare themselves apostates as this was the only possible way for them to be rid of unbearable husbands. Iqbal ties this to the question whether rules considered normative in the twelfth century could really be suitable to support the faith in that country?⁴⁶ Incidentally, Mawlana Ashraf Ali Thanawi of the traditionalist Deoband school reacted to these attempts at divorce by means of apostasy with a revised fatwa according to which in the specific circumstances apostasy would not dissolve the marriage.⁴⁷

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During the final years of the Ottoman Empire reforms were instituted for the reason that men from out of town who came looking for work in Istanbul would marry women living in the city and then leave them at the end of their employment without declaring the divorce. Even if they did not receive any

42 On the reforms by the Tunisian legislative authority cf. e.g. Forstner, *Veränderungen*, 1 ff.

43 Regarding Egypt cf. the references in Shaham, *Family*, 93 ff., as well as the verdict of the Egyptian constitutional court of 3 May 1997 (*El Sayed Mohamed Mustafa vs. the President of the Republic, the Speaker of the People's Assembly and others*), *Yearbook of Islamic and Arabic Law* 4 (1997), 250.

44 Concerning the controversial views of the Tunisian legislative authority and the prominent jurist Yūsuf al-Qaraḏāwī cf. id., *Al-ijtihād al-mu'āṣir*, 87 ff.

45 Fyzee, *Outlines*, 148.

46 M. Iqbal, *The Reconstruction*, 169 with reference to the discussion of the subject in Marghinānī's *Hidāya*; cf. Ph. Lewis, *Islamic Britain*, 132.

47 Cf. Zaman, *The Ulama*, 29 f.; Masud, *Apostasy*, 193, 195 f. Thanawi on the other hand wanted to grant the wives the less severe norms of Malikite divorce law.

alimony at all, until then these women had not had any way of obtaining a divorce and remarry.⁴⁸ The need for reform of the system was obvious.

Overall the regulations and social conditions influencing the matter are widely divergent in the different states of the Islamic world. This is not only the case in clearly different regions such as Southeast Asia, Central Asia, the Arabian Peninsula, Turkey or the Maghreb,⁴⁹ but also, as mentioned above, Tunisia and Morocco in the days before the great reform of family law. There is furthermore no one definable direction followed by the development. Thus in the past thirty years there have been perceptible changes for the worse in the legal situation of women in e.g. Egypt or Iran, which have then been corrected and improved rather cautiously in more recent years. Equality of the sexes and of different religions has still for the most part not been achieved.

In addition there have even been instances of backward development. Thus one consequence of the unification of Northern and Southern Yemen in 1990 was that the family law valid in the South since 1974, which had established (more or less) the same rights for both married partners in the matters of divorce, alimony and custody of children of the marriage, was abolished.⁵⁰ In Iran provisions under the law for the protection of the family of 1967 and 1975, under which the husband's right to divorce pertained only with sufficient grounds, a mother was allowed to be the guardian (*walī*) of a child, fell victim to the Islamic Revolution under Khomeini.⁵¹ The same is true of the appointment of female judges. In Iran women – with the same qualification – may be only assessors without authority to sign.⁵²

175 In many states with Islamic heritage patriarchal concepts are still dominant, and consequently influence legal practice.⁵³ Extremists and traditionalists try with all their might to cement the traditional understanding of gender roles.

48 El Alami/Hinchcliffe, *Islamic Marriage*, 29 f.

49 Regarding Algeria cf. e.g. Kuske, *Reislamisierung und Familienrecht*, 1996; regarding Tunisia, Waletzki, *Ehe und Ehescheidung in Tunesien*, 2001; regarding Morocco, Foblets/Carlier, *Le code marocain*, 2005; regarding Egypt, Baudouin Dupret, *Le jugement en action*, Geneva, 2006, as well as the collection *Women's Rights and Islamic Family Law* edited by Welchmann.

50 Regarding this and later developments cf. Würth, *aš-Šarī'a fī Bāb al-Yaman*, 76 and ff. with further references.

51 Cf. Yassari, *Das iranische Familienrecht*, 66 ff.

52 Cf. *op. cit.*, 73.

53 Cf. e.g. the judgments from Bangladesh collected by Taslima Monsoor (*Judiciary and Gender of Trial*), which also documents cases which diverge from the basic, patriarchal trend (*op. cit.*, 15 f.); cf. also ead., *From Patriarchy to Gender Equity*, 1999.

The amount of modern literature on the special role of woman in Islamic society is quite remarkable.⁵⁴ Frequently the subject matter deals with all the things the author believes a woman should not be allowed to do. Thus it is earnestly debated over and over again – and then answered in the affirmative – whether she would need her husband's agreement in order to change her hairstyle.

On the other hand there have been considerable reforms in recent years in some states such as Morocco, Algeria and Egypt, and in some areas also in Afghanistan and Iran. The concomitant debates, often heated, under the aspect of legal and social policy illustrate the central importance these issues in particular hold for the future of Muslim societies.

Most reforms crystallise around the central question of whether present-day Muslim jurists are bound by the conclusions of earlier scholars' finding of the law beyond the Quran and the sunna? I.e., do they have to apply *taqlīd* (see Part 1, 2.1 above), or are they free to employ *ijtihād* and arrive at new and independent decisions. Some recognise the – comparatively restrictive – sunna as being of lesser importance than the Quran or interpret it as merely an early type of consensus tied to its specific time, like the Indian scholar Sindhī.⁵⁵ The influential Pakistani Fazlur Rahman (d. 1988) named the traditional attitude towards the (conclusion by) consensus as a major cause of the lamentable stagnation and criticised it as being a mechanism of traditional authoritarianism.⁵⁶ The Malaysian lawyer Nik Noriani simply states: 'After the time of the Prophet (...), there can be no such thing as a human interpretation, single or collective, of the Qur'an, infallibly correct for all times and places until the Day of Judgment. The *ijma'* of the *ijtihād* of five hundred years ago is not necessarily identical in all respects with the *ijma'* of the *ijtihād* of today.'⁵⁷

One characteristic example of the freedom of interpretation which courts in the Islamic world allow themselves in particular is a judgment on appeal by the Bangladesh High Court in the matter of Hefzur Rahman v. Shamsun Nahar Begum et al. of 9 Jan 1995.⁵⁸ The point at issue was whether divorced wives may claim alimony from their husbands beyond the three-month period of waiting (*'idda*). One of the major works of classical legal literature, the Hanafite scholar

54 Cf. only Shehadeh's very readable compilation and analysis, *The Idea of Women*, 2007.

55 Cf. Zaman, *Consensus*, 153, 164 f.

56 Rahman, *Islam*, 201.

57 Nik Noriani Nik Badli Shah, *Marriage*, 2000, 152.

58 Civil Revisional Case No. 2067 of 1992, 47 DLR (1995), 54.

al-Marghinānī's (530/1135–539/1197) *Hidāya*, which has had a particular impact on the Indian subcontinent and to which the verdict refers,⁵⁹ is against this.

176 The conclusion is determined by the interpretation of sura 2:241 which says (in Arberry's translation): 'There shall be for divorced women provision honourable – an obligation on the godfearing.' The nub of the problem is the interpretation of the phrase 'appropriate goods' (*matā' bi-l-ma'rūf*): does this refer to household utensils and suchlike, or does it refer to continuing alimony for needy wives after the end of the marriage? In the end the court went with the opinion which translates the passage as 'maintenance on a reasonable scale' and consequently agrees to the continuing claim to alimony (up to a possible remarriage).

The court began by saying that in God's own words the Quran is easy to understand. Of course, it admitted, there are Muslims who insist that everyone must follow one of the interpretations by recognised scholars of the early period, and that the door to new interpretations is closed. This, however, would go against the constitution of Bangladesh, which states that God's commandments must be followed to the letter and without any deviation. The Quran requires continuous study in order for it to do justice to the dynamic, progressive and universal nature of Islam. There follows a quote from a judgment by the Lahore High Court in 1960: 'It is quite clear that reading and understanding the Qur'an is not the privilege or the right of one individual or two. It is revealed in easy and understandable language so that all Muslims if they try may be able to understand and act upon it. It is thus a privilege granted to every Muslim which cannot be taken away from him by anybody, however highly placed or learned he may be to read and interpret the Qur'an. In understanding the Qur'an one can derive valuable assistance from the commentaries written by different learned people of yore, but then that is all. Those commentaries cannot be said to be the last word on the subject. Reading and understanding the Qur'an implies the interpretation of it and the interpretation in its turn includes the application of it which must be in the light of the existing circumstance and the changing needs of the world (...). If the interpretation of the Holy Qur'an by the commentators who lived thirteen or twelve hundred years ago is considered as the last word on the subject, then the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the time. It will then cease to be a universal religion and will remain a religion confined to the time and place when and where it was revealed (...).'⁶⁰

59 Cf. *Hidāya*, vol. 2, 290.

60 *Mst. Rashida Begum vs. Shahan Din et al.*, PLD 1960, Lah 1142.

A civil court, they argued, is consequently authorised to follow Quranic law and disregard everything else, even if the latter was argued by early, much-respected jurists and observed for a long time. Consequently a conflicting judgment by the Privy Council formerly responsible for British India from 1897, which followed the traditional interpretation, should not be observed any more for the reasons named, and also because the non-Muslim judges were very careful not to decide against the views of established Muslim jurists in similar cases. Apart from everything else this illustrates that colonialism not infrequently led to the conservation of traditional views and the interruption of an older vitality in the application of the law.

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A publication by Muslims in Germany argues that finding the law by means of *ijtihād* – nowadays preferably by committees – enriches the sharia. Islamic legal norms, they say, are rational and not based on religion. Consequently non-Islamic legal norms do not automatically contradict the sharia (as long as they follow the same *ratio*). On the contrary, they might be integrated into Islamic law and become part of the sharia.⁶¹ These trains of thought correspond to those of modern comparative law. The starting point is a certain regulatory task, or tasks, with postulated solutions on a rational basis which will resemble one another in comparable issues. At the same time this argumentation softens the exaggerated opposition between allegedly ‘God-given’ Islamic law on the one hand and ‘un-Islamic’ Western law on the other (more at 3.b below).

Abu Sulaymān argues on a similar level when he calls for the consideration of actual circumstances when finding the law rather than restrict oneself to some theoretical and out-of-touch deliberations from the past; and to consider insights from the field of social sciences as well. On a concrete level this call is directed against *taqlīd* and the traditional concept of consensus.⁶²

The suggestion that the sources of the law, the Quran and the sunna as such, should be opened to re-evaluation, has not met with much agreement among sharia jurists. Similar approaches are, however, present – albeit without any more profound development – in the everyday practice of very many Muslims.⁶³ Among the aspects criticised is the traditional abrogation doctrine (*naskh*, the abrogation of earlier provisions on the same issue by later ones; cf. Part 1, 2.1, 2 above), which has led to more spiritual Meccan revelations being replaced by more concrete Medinan ones, which are likely to be tied to

61 M. Ibrahim, Missverständnisse über das islamische Recht, *Al-Islam* 1/2001, 17, 18, with reference to Khallaf, *Usul al fiqh*, Kuwait, 1986.

62 Abū Sulaimān, *Crisis in the Muslim Mind*, 39 ff.

63 Cf. Uçar, *Moderne Koranexegese*, (forthcoming), (MS p. 189 f. with further references).

178 their specific time.⁶⁴ This is seen as a rejection of the eternal validity of the Quranic message. Consequently the Turkish Islamic scholar and Prime Minister (1949/50) Şemseddin Günaltay tried to the Medinan provisions because they clearly refer to their specific time only.⁶⁵ Abdullahi al-Na'im also assumes that different groups were addressed by the Meccan and the Medinan verses; the latter were clearly aimed at an audience showing but little maturity; this should not, however, have abrogated the Meccan revelations, as that would ultimately render them meaningless, which would mean depriving the Muslims of the best part of their religion.⁶⁶

On the other hand the concept of abrogation can be employed in the context of a historical–critical evaluation of the content of legal sources.⁶⁷ Thus the recognised type of *naskh dūna l-tilāwa* ('abrogation of the rule while retaining the text') may serve to resolve seeming contradictions within the Quran.⁶⁸ This frees the path to extensive re-interpretation, if certain provisions for individual cases – which are recognised as being tied to their specific time – are replaced with more general, divergent provisions being declared binding.⁶⁹ A related approach re-evaluates the relation between verses of differing substance which had traditionally been interpreted to the effect that the later verse abrogated the earlier one (cf. Part 1, 2.2 above). Thus for instance sura 8:61, a verse aiming for peaceful agreement (cf. 3.3.e below) is not understood, as in the traditional interpretation, as having been abrogated by the sword verses in sura 9:29ff. Rather, the latter are interpreted as a specific regulation for one particular situation in history where defensive action was called for, which could not possibly abrogate the generic regulation; on the contrary, the generic regulation limits the specific one.⁷⁰

64 This distinction is already found in al-Shāṭibī, *Al-muwāfaqāt*, vol. 3, 262 f., who, however, assumes that the Medinan revelations are on the whole based on the Meccan ones.

65 Cf. Uçar, *Moderne Koranexegese*, (forthcoming), (MS p. 124) with further references.

66 Al-Na'im, *Toward an Islamic Reformation*, 53 ff.; also L. Müller, *Islam und Menschenrechte*, 243 ff.

67 Cf. Abu Khalil, *Against the Taboos*, 110, 116; al-Na'im, *Toward an Islamic Reformation*, 57 ff.

68 Al-Na'im, *Toward an Islamic Reformation*, 57 with further references; Souaiaia, *The Function*, 259 ff.; cf. also Part 1, 2.2 above.

69 Al-Na'im, *Toward an Islamic Reformation*, 59 f. with further references.

70 Concerning comparable Egyptian expert opinions on the conclusion of the peace with Israel in 1979 cf. Hadler, *Modernes politisches Iftā'*, 118, 121. In more detail see id., unpublished MA thesis 'Religiöse Legitimation staatlichen Handelns – Ägyptische Fatawa zu den (Friedens-)Verträgen der Jahre 1956 und 1979', Erlangen 2000, 72 ff., 81; cf. also Masud, *Rethinking Shari'a*, 366 f.

In this context some authors concentrate their argument on 'central statements' whose substance is timeless and which are superordinate to detailed provisions or historical details of interpretation. They do refer to historical sources which establish a connection with the scholarly tradition. Mohammad Hashim Kamali, who teaches in Malaysia, bases his doctrine of freedom, equality and justice on Islam.⁷¹ He interprets the Quranic description of the creation of humans in tribes and peoples (sura 49:13) as foundation for the commandment to treat all humans equal.⁷² He also refers to Ibn Kathīr's Quranic commentary which states that this verse applies not only to the Muslims but to all humanity.⁷³ Like some other contemporary scholars⁷⁴ Abdullahi al-Na'im⁷⁵ rejects the timeless applicability of the sharia norms on male dominance (*qawwāma*), Muslim hegemony (*dhimma*) and the violent-aggressive form of jihad: all these, he says, contradict Meccan revelations to the contrary and can be explained only within the historical situation, as a concession to the difficult circumstances under which the Islamic community was living in an extremely hostile environment.

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Abdelmajid Charfi criticises the eclectic approach of classical legal scholars to Quranic legal sources, such as e.g. with regard to the regulation of polygamy in sura 4:3: he declares that the precondition for polygamy – namely the fear of treating orphans unjustly – is simply ignored, against all rules of grammar and logic. The universal permission of polygamy, he adds, takes no account of the feelings of women who have to share their husband with others, of the possible age difference, the possible difference in social status which would be a punishment for the woman, or of the fate and education of children who have to grow up in an atmosphere heavy with quarrels between the co-wives. In fact, he concludes, the classical scholars ignored all the verses on marriage ethics which relate to mutual trust, affection, compassion, gentleness and fairness. Contrary to the spirit of the Quran these scholars only justified existing practices.⁷⁶ The Iranian scholars Mahmud Taleghani and his daughter

71 Kamali, Freedom, Equality and Justice, 1999.

72 Op. cit., 69 f.

73 Ibn Kathīr, Tafsīr, vol. 1, 521.

74 Cf. e.g. the contributions by Muhammad Khalid Masud (Gender Equality), Nasr Abu Zayd (The Status), Faqihuddin Abdul Kadir (Gender Equality), Hassan Yousefi Eshkeveri (Rethinking Men's Authority) and Mohsen Kadivar (Revisiting Women's Rights) in Ziba Mir-Hosseini et al. (eds.), Gender and Equality.

75 Islam and the Secular State, 283 f. and *passim*.

76 Charfi, L' Islam, 173 f.

support gender equality under inheritance law with reference to the spirit of the Quran which they say demands a re-interpretation to that effect for modern times.⁷⁷

Currently Turkish scholars in particular endeavour to find a fundamentally new approach to the sources.⁷⁸ They understand the Quran as a historical document, too, one that was addressed in specific wording to a specific audience and whose substance must consequently be re-read anew again and again. There is also an increasing number of other scholars with Arab, African or South Asian roots, many of whom live in Western states for reasons of personal safety, but many of whom still live in those areas.⁷⁹ Abdullah Saeed⁸⁰ for instance demands the abandonment of the legalistic–literal interpretation in favour of the contextual approach with emphasis on (the changing) socio-historical environment.⁸¹

The instruments of interpretation preferred by these scholars are a wide-ranging *ijtihad* which focusses on studying and then implementing the general principles of the Quran to the respective reality of daily life.⁸² The ‘classical’ authority referred to is Najm al-Dīn al-Ṭūfī (d. 716/1326), a not uncontroversial Hanbalite scholar. If there was a contradiction between a recognised textual source (*naṣṣ*) and the common good (*maṣlaḥa*) in the area of *mu‘amalāt*, he is said to have favoured the common good as he saw all relevant rules as aimed at precisely the common good.⁸³ Consequently comprehensive aims and purposes (*maqāṣid*, *ḥikma*) and factors of universal benefit (*maṣlaḥa*) gain in importance compared to traditional, individual interpretations. On this basis it is possible to interpret the draconian corporal punishments in the Quranic penal provisions as being entirely tied to their specific time.⁸⁴ Mohammad

77 Quoted in Amirpur, *Islamischer Feminismus*, 35 f.

78 Cf. Felix Körner’s excellent monograph, *Revisionist Koran Hermeneutics in Contemporary Turkish Theology*, 2005.

79 Cf. e.g. the helpful introductions in the collection *Modern Muslim Intellectuals* (ed. by Taĵi-Farouki), 2006, and in Saeed, *Interpreting the Qur‘ān*, 2006.

80 *Interpreting the Qur‘ān*, 1 f., 116 ff.

81 Similar opinions are expressed by Mehmet Paçacı and others; cf. Körner, *Revisionist Koran Hermeneutics*, esp. 68 f., 224 ff.

82 Cf. e.g. the definitive works by Ömer Özsoy, *Kuran ve Tarihsellik yazılar*, Ankara 2004; İlahmı Güler, *Sabit din dinamik şeriat*, Ankara 1999; also extensively Uçar, *Moderne Koranexegese*, (forthcoming), (MS p. 178 ff.); Körner, *Revisionist Koran Hermeneutics*; al-Jabri, *Democracy*, 201 ff. and *passim*.

83 Cf. Uçar, *Moderne Koranexegese*, (forthcoming), (MS p. 288 f.; on criticism, 293 f.) with further references.

84 Cf. Uçar, *Moderne Koranexegese*, (forthcoming), (MS p. 188, 284 ff., 302) with further

Hashim Kamali sees the revitalisation of the search for the *maqāṣid* as an essential key, albeit one in need of further development, for overcoming the interpretations which are tied to a particular time.⁸⁵ On this basis he is able to discover ways of e.g. treating women as the equals of men under inheritance law.⁸⁶ The same trend may be observed in the methods of Quranic interpretation described by the influential Mohamed Talbi as 'focussing on the meaning and the purpose' (*maqāṣidī*), 'historical' (*ta'rikhī*) or 'referring to people' (*anāsī*).⁸⁷

Similar principles apply to a dynamic reinterpretation of the sunna: those who apply it may for instance pursue the equality of the sexes, an aim recognised in the sunna, and consequently ignore those statements which contain restrictions necessary at their specific time, as this aim could not be comprehensively achieved in the seventh century.⁸⁸ Even traditions at the core of the faith can be adduced: Muhammad is said to have complained to his wife Aisha that her tribe did not erect the Kaaba on the Abrahamite foundations. He rejected her suggestion that he might do this now with the reason that while he would like to act on it, he feared the memory, fresh in her tribe's mind, of paganism and worried that they would reject him in case he took such action.⁸⁹

As for the legally binding character of prophetic traditions, the prominent Egyptian jurist Muhammad Sa'īd al-Ashmāwī distinguishes according to whether they are rooted in the prophetic mission or in Muhammad's political role. Only the former commands timeless validity.⁹⁰ Al-Ashmāwī himself can in his turn refer to prophetic traditions which make this very distinction.⁹¹

The Bangladeshi author Taj Jashmi demands that the background and opinions of those who transmit legal rules must be taken into consideration before

references. Thus the cutting off of a hand as punishment for theft can be interpreted as belonging to the old times in Arabia, where there were no prisons and the punishment was in keeping with already prevailing tradition.

85 Kamali, *Law and Ethics*, 23 ff.

86 *Op. cit.*, 43 f. (on the basis of the *istihsān* at least those women who do not receive financial support from relatives would have the same claim under inheritance law).

87 According to Nettler, Mohamed Talbi, 235.

88 Cf. Uçar, *Moderne Koranexegeese*, (forthcoming), (MS p. 265) with further references.

89 Quoted by al-Bukhārī, *Ṣaḥīḥ*, vol. 2, hadith no. 5403, and Muslim, *Ṣaḥīḥ*, vol. 1, hadith no. 3304; cf. Uçar, *Moderne Koranexegeese*, (forthcoming), (MS p. 386) with further references.

90 Al-'Ashmāwī, *Al-Islām al-siyāsī*, 32 f.; with reference to this Abu Khalil, *Against the Taboos*, 124 f.

91 Cf. the evidence from Muslim's *Ṣaḥīḥ* and Ibn Ḥanbal's *Musnad* in Abu Khalil, *Against the Taboos*, 125, n. 36.

their transmissions are applied. Thus for instance al-Bukhārī and Ibn Ḥanbal, (universally recognised) transmitters of prophetic traditions believed to be authentic, had a very low opinion of women. This ought to be taken in consideration in particular in connection with traditions which relate to women.⁹²

181 Amina Wadud, an author teaching in the USA, deduces from the general Quranic statements in suras 2:231 and 4:128 that the right to divorce ought to be granted to both sexes equally, and rejects the traditional opinion according to which it is only ever the husband who can declare the one-sided divorce.⁹³

Traditionalist criticism of such views is usually characterised by intellectual simplicity, but is likely to find wide recognition. Comparative considerations with reference to other legal systems, which might lead to determining new positions, are for instance dismissed with the argument that it is impossible to compare a God-given legal system with man-made laws.⁹⁴ In this way the centuries-old – and unquestionably man-made – tradition of interpreting Islamic law is simply ignored; those propounding this view ultimately claiming a semi-divine right to rule for themselves by formally accepting divine omnipotence.⁹⁵ On the other hand this illustrates that a universal redefinition of the essence of norms will be much more difficult to enforce than a reinterpretation within a theoretically more or less undisputed system of norms. To date it seems that the latter is the preferred path, and will remain so for the foreseeable future.⁹⁶

Turkish endeavours to establish an 'Islamic state religion' are a special case. This is not the same as the connection between state and religion embraced by the Islamists, but the definition by the state of a politically desirable national Islam. The considerations intend to lead to a 'modern, reformed, Turkish Islam'. Opportunities to exploit this in the cause of politics are illustrated by statements in a newspaper commentary in *Yeni Yüzyil*: 'Islam, which was stained with blood by the Arabs and with terror by the Iranians, will be carried into the twenty-first century with a friendlier face by the Turks.'⁹⁷

Not much study has been devoted to, finally, the power-politically motivated restriction of the diversity of opinions, the dissolution of pluralistic institutions, and centralisation tendencies against local customary law.

92 Hashmi, *Women and Islam*, 56.

93 Wadud, *Qur'an and Woman*, 79 f.

94 One example among many being 'Oudah, *Criminal Law*, vol. 1, 9 ff.

95 Cf. Rohe, *Islamismus und Shari'a*, 120, 132 ff.

96 Cf. only Pohl's study of Islamic international law (*Islam*, 151 ff.).

97 Cf. 'Wohldosierte Religion', *Die Zeit* no. 17/1998, 16 April 1998, 15.

Methods for Further Development and Examples of Practical Application

Since the eighteenth century broad currents of reform have emerged, predominating among them those approaches which aim at further developments inherent to the system.¹ Revolutionary changes resulting in the complete abolition of Islamic law, on the other hand, have been regionally limited (especially in Turkey, Albania and Bosnia as well as Central Asian states). In some cases there is continuing tension between them and established traditions of legal culture.²

1 Formalising the Law and Application of the Law under Government Parameters

a *Codification*

The codification of the law in the Islamic world began with the introduction of the Ottoman *qānūn-nāmehs*.³ The modern codification movement started with the Ottoman commercial code of 1850 and especially the civil code, the so-called Mecelle, which was developed in the period between 1869 and 1876.⁴ It was in force on the Balkans as far as the Arabian Peninsula until a few centuries ago, and parts of it still apply in the territory of the Palestinian National Authority.⁵ In the area of family law, for instance, towards the end of the nineteenth century the later Egyptian justice minister Muhammad Qadrī Pasha drafted a compilation based on Hanafite law which, while it was not enacted, was still able to set the standard for the application of the law within

1 Regarding Khayraddīn al-Tūnusi cf. e.g. Djait, *Denken*, 29, 34 f.

2 Cf. e.g. Central Asia and the Caucasus, in An-Naʿīm (ed.), *Islamic Family Law*, 31 ff.

3 Cf. only the article entitled 'Qānūn', EI II, vol. 4, 557 (Linant de Bellefonds).

4 Regarding this and the scope of application cf. the basic discussion in Krüger, *Zum Geltungsbereich*, 43 ff., esp. 44. An English translation of the Mecelle was completed by Tyser/Demetriades/Haqqi Effendi (*The Mejelle* [2001]). Onar, *The Majalla*, in Khadduri/Liebesny, *Law I*, 292 ff. has an overview over its origins and contents.

5 Cf. Krüger, *An Introduction*, 202 f. with further references.

and beyond Egypt.⁶ In 1917 the Ottoman family code was added, a predecessor of many marriage and family laws in the modern Islamic world.⁷

183 According to Islamic law the basis for the codification is provided by the ruler's so-called *siyāsa* authority (cf. Part 1, 1.3 above). Codification enables the respective ruler to ensure that in case of controversial points of law the interpretation he favours becomes binding. Codification can also serve as a tool to supplant customary law. At the same time the law can be positivised by means of the more or less targeted use of earlier doctrine as support for existing legal rules.⁸

The trend to codification continues unbroken.⁹ In Pakistan a retired judge attempted in 1980 – albeit in vain – to put a stop to the Islamisation legislation with the argument that all the necessary rules could be found in the immediately binding sources Quran and sunna and that consequently secular regulation of the matter would not be binding.¹⁰

In many regions codification is seen as an aid to unifying the laws and consequently guaranteeing legal certainty.¹¹ Two areas of application are to be distinguished. There are no, or hardly any, rules applying to large sections of constitutional, administrative and criminal law as well as many areas of civil law¹² in the uncontested sources of the law. It was consequently easy, indeed advisable, for the legislators to seek inspiration from other legal systems and to incorporate only precisely formulated rules from classical Islamic law.

Historically the codification movement coincided with the adoption of Western bodies of law in the colonised countries. Codified law may thus generally be suspected of Western inspiration or, worse, Western control, a suspicion that must be fended off within inner-Islamic discourse as well.

The most prominent instance of this is the Egyptian civil code of 15 October 1949¹³ with its monumental commentary by 'Abdarrazāq Sanhūrī.¹⁴ Unlike the

6 The translation by Hans-Georg Ebert (The Qadrī-Pāshā-Kodifikatīon) also includes a detailed appreciation.

7 Cf. El Alami/Hinchcliffe, *Islamic Marriage*, 37.

8 Cf. Lohlker, *Islamisches Familienrecht*, 117 ff., esp. 126, 132.

9 Cf. only Ebert, *Die Interdependenz*, 70 with further references.

10 E.g. Kai Kaus vs. The President of Pakistan, [1980] PLD SC 160; with reference to this Ann E. Mayer, *The Sharī'ah*, 188 f.

11 Cf. Cammack/Young/Heaton, *Legislating Social Change*, 45, 52 f. Concerning the argument surrounding the codification cf. Skovgaard-Petersen, *Defining Islam*, 200 ff.

12 Cf. Krüger, *Zum Geltungsbereich* 43 ff., esp. 47.

13 See Bälz, *Europäisches Privatrecht*, 51 ff.

14 Al-Sanhūrī, *Al-wasīṭ fi sharḥ al-qānūn al-madanī al-jadīd*, 8 vols., Cairo 1952–1964.

Mecelle it combines the French structure of codification with the insertion of specific institutions of Islamic law such as the *hawāla* (cf. Part 1, 4.4.a above) or the pre-emptive right (*shuf'a*). As regards details, here, too, the legislator referred to the continuation of the concepts of Islamic law.¹⁵ For instance an Egyptian regulation of debt transfer which is closely related to German substantive law was justified with the classical instruments of Islamic law: while the similarity to German law could not be denied, the origin of the regulation is indeed Islamic law only.¹⁶ Sanhūrī's concern becomes clear in his later work *Maṣādir al-ḥaqq fī l-fiqh al-Islāmī*¹⁷ as well, in which he attempts to restructure Islamic contract law according to modern concepts of systems theory such as rights and entitlements, and rights in rem.¹⁸

Referring to Sanhūrī, Mustafa Fadel, the former president of the high court of the United Arab Republic, classes this course of action as entirely in accordance with Islam. If individual suggestions inspired by Islam were not accepted, this, he states, is due only to the fact that they were based only on superficial investigations.¹⁹ This underlying attitude is shared by Amr Shalakany. He says that attempts at identifying Islamic and non-Islamic norms in quasi-mathematical fashion were based on the erroneous premise that static Islamic law exists beyond history. He also points out that Sanhūrī's own assessment of this issue sometimes wavered.²⁰ 184

On the other hand codification does meet with resistance, especially in those areas of the law in which plurality of opinion prevails and which are seen as particularly characteristic of Islam. Thus the Iraqi reform of family law in the 1950s was criticised by leading Shi'ites also because the courts would be bound permanently by definitive legislation. This, however, would be contrary to the comparatively open nature of matters of personal status in the eyes of science and the sharia. They claimed it would also close the door not only to *ijtihād* but also to referring to a certain – not codified – doctrine.²¹ It is not surprising that members of a minority in particular should oppose the codification, as the probability of the majority view being followed is great.

Cf. in detail Bechor, *The Sanhuri Code*, 2007. For his biography and work cf. Arabi, 'Abd al-Razzāq al-Sanhūrī, 491 ff.

15 Cf. Anderson, *Law Reform*, 92.

16 Cf. *ibid.*, with a reference to the explanation of laws in *Al-qānūn al-madani*, vol. 3, 136.

17 2 vols., Beirut 1953–1954.

18 Thus the appreciation by Bälz, *Europäisches Privatrecht*, 57 with further references.

19 Fadel, *Islamic Law*, 57.

20 Shalakany, *Between Identity*, 201, 203 and ff.

21 References in Mallat, *Shi'ism*, 71, 79 f.

In many states of the Islamic world the concentration of codification is much lower to this day than for instance in continental Europe. Consequently traditional Islamic law retains a certain importance thanks to the subsidiarity clauses included in many constitutions. There are furthermore frequent regulations on the sub-constitutional level within which Islamic law according to one particular school must be applied subsidiarily, e.g. with reference to the Hanafite school in the Jordanian (Art. 183) and Syrian (Art. 205) family codes, or with reference to the Malikite school in the Moroccan (Art. 400) and Kuwaiti (Art. 343) family codes.

b *Creating Institutions/The Organisation of the Courts*

Turning one's back on transmitted legal concepts can also be achieved by assigning certain areas of the law to courts whose tie with sharia norms is comparatively tenuous. Here a wide range of possible courses of action are open to the state, as the organisation of the courts is not defined by any high-ranking sources of the law (cf. Part 1, 1.4 above). The creation of secular courts relies on this circumstance as well. Historically the office of judge and the organisation of the courts were not set up immediately following sharia provisions, but on the basis of the caliph's authority.²² Thus in many of the states in the Islamic world which did not reject Islamic law, sharia courts were abolished (e.g. in Egypt in 1955, in Tunisia in 1956) or restricted to the areas of personal status, family and inheritance law, as for instance in the United Arab Emirates. Contrary to traditional practice, stages of appeal were established in most places.²³

Using the example of the highest judicial authority on the field of property law in the UAE, Hilmar Krüger has shown how a considerable number of judgments diverge from traditional sharia principles.²⁴ Even in very traditional Saudi Arabia litigation concerning commercial law is in many cases not decided by the sharia courts but rather by a state-controlled appeal court (*dīwān al-maẓālim*; cf. Part 1, 1.4 above), which is in line with international standards and consequently delivers judgments that are comparatively easy to predict. It is also responsible for declaring foreign arbitration judgments applicable – which is most important in practice.²⁵ Further reforms which included the introduction of specific stages of appeal took place in October 2007.²⁶

22 Cf. Coulson, *A History*, 172 f.

23 Cf. only *op. cit.*, 163.

24 Krüger, *Vermögensrechtliches Privatrecht*, 360, 362, 365 ff., 373, 386.

25 Cf. 'Saudi-Arabien will mehr ausländische Investoren locken', *Frankfurter Allgemeine Zeitung*, 28 Oct. 1998; in more detail Krüger, *Vermögensrechtliches Privatrecht*, 485 ff.

26 Cf. Mathieu, *Le nouveau système*, 47, 451 ff.

Consequently lawyer training was organised in secular teaching institutions in many Islamic states, or a two-part system was established, according to which only the traditional core subjects of personal status, family and inheritance law are taught at sharia faculties. Johansen notes a striking loss in importance for the great mosque–universities.²⁷ This may explain why the traditionalist branch usually puts up such an embittered fight for the survival of its influence. Overall future developments will depend to a significant degree on which direction teachers and students follow in the respective educational establishments. In some states such as Egypt there appear to be indications that traditionalist or Islamist trends are embraced on a large scale.

We can also observe a pronounced trend of putting scholars as well as the means accrued from alms tax and trust property under the control of the state.²⁸ One important facet of this development is the widespread establishment of positions of chief mufti dependent on the state. On the other hand scholars who are frequently of the more traditionalist persuasion endeavour to hold on to the domains left to them and try – often at the expense of reform processes – to influence legal policy through a variety of institutions. A ‘middle-ground’ solution is emerging on the field of commercial transactions: in some states ‘Sharia Boards’ have been established in a formalised fashion, and are consulted in order to assess the permissibility of the transactions (regulations are found for instance in the banking laws of Jordan and of Kuwait). In this way scholarly legal theory can acquire new importance, but only within a framework determined and influenced by the state.²⁹ Informal pronouncements remain, of course, possible as well and cover a wide range of subjects, especially in the form of expert opinion – which has recently been used excessively.

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The organisation of the legal situation of recognised non-Muslim religious communities in the Ottoman Empire by the Millet system (from Ar. *millat*, religious community) must also be seen as being part of the creation of institutions (cf. Part 1, 4.9.d.aa above).³⁰ The tendency to standardise is, however, apparent, with autonomy being granted as regards matters of personal status, but civil equality still absent (cf. also 3.3.d below).

c *Further Development of Substantive Law by Means of Formal and*

27 Johansen, Contingency, 289 with further references.

28 Cf. only Ebert, Die Interdependenz, 199 f. and *passim*.

29 Cf. Hardy, Shari’a Compliance, 199 ff.

30 Cf. Shalit, Nicht-Muslime, 11 ff.

Procedural Rules

A certain degree of legal certainty, especially as regards marriage and family, can be achieved by means of formal rules and the duty to provide information.

Article 7 (1) of the Pakistani Muslim Family Law Ordinance (1961) stipulates in this context that once he has pronounced the one-sided divorce the husband seeking the divorce must inform the court responsible in writing, attaching a copy of the document for the wife. Any breach is punishable by law. The Pakistani Federal Shariat Court attacked this rule as being un-Islamic (and consequently unconstitutional), as in its view these rules could not be deduced from the Quran. The court rejected this opinion: the rule is merely a procedural one (enacting which would be within the competence of the Pakistani legislative body).³¹

187 Indonesian Muslim marriage law intends to prohibit marriage of minors. It is met with the widely held view that only the rules of classical Islamic law are relevant, which allows such a marriage under certain circumstances. A 'frontal attack' against these opinions from the side of legal policy clearly promises only little success.³² Gentler pressure may be exerted by stipulating the official registration of marriages, and ruling out the registration of marriages involving minors. Such pressure may be felt when an entry in the register is required e.g. as evidence of the right to maintenance or the right to inherit.³³ In this way marriages recognised by classical law lose their legal enforceability. The same is true for the procedure in Egypt which minimises the number of the undesirable marriages involving minors by refusing judicial protection to those involved (*takhšīš al-qaḍā'*).³⁴

In many regions of the Islamic world the problem of unsuitable age for marriage arises in a different guise these days. The high value of the dower demanded from the future spouse is difficult to afford, especially in times of widespread under-employment. The result is that e.g. in Tunisia the average marital age has risen to 27 among men and 25 among women,³⁵ approaching the German comparative figure.³⁶ For the same reason it has been prohibited

31 Allah Rakha vs. Federation of Pakistan [2000] CLR 349, 399; cf. Menski, *Comparative Law*, 2000, 322 f.

32 Cf. Cammacl/Young/Heaton, *Legislating Social Change*, esp. 62 ff.

33 *Op. cit.*, 64 f., 67. These measures can only be successful if those keeping the registers are paid well enough for them to be able to 'afford' resisting the usual attempts at bribery.

34 Cf. an-Na'im, *Toward and Islamic Reformation*, 45; Rohe, *Eheschließung*, 95 f.

35 Data provided by the Tunisian health authorities, quoted in '*Tarāju' al-zawāj al-mubakkir*', *Al-Ṣabāḥ*, 5 Sept. 1998, 2.

36 According to the *Statistisches Jahrbuch* the average marital age in 1995 was 29.7 among

in the United Arab Emirates to celebrate weddings with expensive festivities.³⁷

Egyptian inheritance law of 1946, finally, decreed that legacies contested by the heirs must be enforced by the courts only if the legacies are in written form.³⁸ In this way the very formalistic law of witness evidence, which was open to all manner of abuse, was superseded.

2 Defining and Determining the Content within the Framework of the Administrative Authority (*siyāsa*)

The modern legislative authority has inherited the classical right of the ruler (cf. Part 1, 1.3 above) of enacting implementation rules within the scope of the *siyāsa* authority, and makes use of this right on a large scale. Rules of this sort are usually designated as sources of the law tied to their specific time and of a lower rank. They are often called *qānūn* ('administrative rule', from Gr. *kanon*) or *nizām* ('procedural regulation'). There will always be arguments concerning where the limits of mere implementation are exceeded.

Overall, extending the legal system by means of these kinds of regulations occupies considerable space. It is easily justified wherever there are no unambiguous sources of the law from Quran or sunna (*naṣṣ*, 'text'³⁹) contradicting them. One facet of the *siyāsa* authority is to select doctrines which diverge from undesirable opinions held by the prevalent school of law, and to use the former as a basis for legislation.⁴⁰ 188

3 Silence of the Legislative Authority within the Codification and Legal Practitioner's Silence

It is possible to include reforms in the codification by means of simply ignoring and silently passing over opinions held so far, possibly even majority opinions.⁴¹ In this context we must mention the harsh physical punishments of traditional criminal law (cf. Part 1, 4.7.b above), which are not found in the criminal codes of most countries in the Islamic world. In Egypt and the Ottoman

men and 27.3 among women.

37 AP notice in Frankfurter Allgemeine Zeitung, 7 Dec. 1998, 11.

38 Article 2 of Law no. 71 of 1946 concerning testation; cf. Anderson, Law Reform, 45.

39 Cf. Salqīnī, Uṣūl al-fiqh, 42, with reference to al-Shāfi'ī.

40 Esposito, Women in Muslim Family Law, 95.

41 Cf. Dilger, Das Schweigen, 81 ff.

Empire they were abolished during the nineteenth century partly by decree, and partly also because they were simply not applied.⁴²

The law can be developed also if the legal practitioner is silent. An example is found in the 1994 verdict of the Dubai court of cassation on the issue of which compensation payment (wergild, *diya*; cf. Part 1, 4.7.d above) should be due to the heirs of a young girl killed in a road accident.⁴³ The court decreed the payment of the full amount of *diya*. The objection that according to the sharia only half the amount of *diya* is payable for a woman was refuted by the court with reference to the relevant regulation, which stipulates the payment of *diya* independent of gender. During the entire argument the court – unlike in earlier divergent verdicts⁴⁴ – did not with a single word refer to the fact that according to classical law only half the amount would indeed have been payable and that it could have been possible for the legislator to have based his regulation of the amounts of *diya* on this silent assumption. In the same way the court decreed in 1997 that Islamic law protects the inviolability of the life of Muslims and non-Muslims in the same way.⁴⁵

189 We find a further example in a temporary Tunisian practice with regard to interreligious marriage. Prohibition of the marriage between a Muslim woman and a non-Muslim man⁴⁶ – which, while not part of codified law, was in keeping with traditional family law – could be circumvented if the couple wishing to get married were simply not asked which faith they professed.⁴⁷

4 Reform on the Basis of New or Rediscovered Methods of Finding and Interpreting Sources

a Selection (*takhayyur*) and Amalgamation (*talfiq*) of Doctrines

In the Sunni Islamic world the traditional division into schools has clearly lost its importance. While the differences between schools are retained to a great extent in the area of religious norms, especially in the context of rites, the situation is different in the case of legal norms. *Takhayyur* (adopting other schools'

42 Cf. Peters, *Crime*, 108 f.

43 Reference in Krüger, *Vermögensrechtliches Privatrecht*, 372 f.

44 Quoted in Ḥammādī, *Qaḍā*, 274 f.

45 Abu Dhabi Court of Cassation verdict no. 9/19 of 18 Oct. 1997, quoted in Price/Tamimi, *United Arab Emirates Court of Cassation Judgements 1998–2003*, Leiden etc. 2005, 383 f.

46 Cf. the evidence of legal practice as quoted in al-Ḥabīb al-Sharīf, *Majallat al-aḥwāl al-shakhṣiyya*, 29 f.

47 Cf. Krüger, *Zur Eheschließung*, 251 f.

doctrines)⁴⁸ and *talfiq* (amalgamating various doctrines to form a new one),⁴⁹ both of which have been in use for over a hundred years, have contributed to this development, as has the long-standing tendency to secularise in many parts of the region.

Consequently juristic 'patchwork' has been established for some time. This opens up an immense potential of material to be used in evidence, as it is now possible to draw on very different lines of argument and legal verdicts with regard to a great number of issues. Some take the matter even further, challenging the use of schools of law per se. Thus Yaşar Nuri Öztürk writes that the schools of law 'pursue their aims either to the right or to the left of the path of balance. And this is the reason why they have not contributed anything of use to Islamic societies, for they all took a path which more or less contradicts the Quran's main objective.'⁵⁰ Such harsh criticism has remained the exception among Islamic scholars, but it tends to emerge especially where the followers of particular schools of law insist on a particularly traditionalist concept and refuse to consider desirable reforms.

Increasing the number of 'recognised' schools of law is also discussed. Not only the four main Sunni schools, which had prevailed in the past (cf. Part 1, 1.3 above), but also minority opinions and Shi'ite views may be consulted in the process of decision making. It is once more Öztürk who proclaims a multitude of schools of law as being the only means against stagnation.⁵¹

One example of the *takhayyur* method is found in regulations which extend the preconditions for a divorce at the wife's request, which are very narrow under Hanafite doctrine. During the drafting of the Ottoman Family Code, and many successor codes in the Islamic world, Malikite doctrine was consulted. According to the latter, a marriage may also be dissolved if the husband suffers from an incurable disease, is absent over a long time, in prison or missing, if he does not fulfil his duties of providing support or if life with him is unacceptable due to his misconduct (cf. Part 1, 4.2.b.gg above). A circular from the highest Sharia Court in Sarajevo of 27 Jan. 1917 called upon the lower courts to apply Hanbalite divorce law in cases where the wife's maintenance was uncertain due to the husband's absence.⁵² As early as during the reforms of the 1920s the

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48 On the permissibility cf. already al-Māwardī, *Al-aḥkām*, 86 ff. (with regard to judges' activities); regarding the implementation cf. Anderson, *Law Reform*, 47 ff.

49 Cf. Anderson, *Law Reform*, 51 ff.; Skovgaard-Petersen, *Defining Islam*, 163; Krawietz, *Cut and paste*, 3 ff.

50 Öztürk, 400 *Fragen*, 187.

51 *Op. cit.*, 204.

52 Karčić, *Duštveno-pravni aspekt*, 209.

Egyptian legislator included opinions of the Malikite and Hanbalite schools as binding which, unlike Hanafite doctrine, make it easier for a wife to obtain a divorce (article 6 of the law of 1929) and make the one-sided divorce by *talāq* more difficult (article 1 of the law of 1929).⁵³

Jordan (1951) and Morocco (1958) enacted family laws which permitted – with reference to Hanbalite doctrine – to include a wife’s right to divorce in the marriage contract, to provide for the possibility of the husband entering into a second marriage later.⁵⁴ Iraqi inheritance law developed a combination of Sunni and Shi’ite rules, incorporating the Shi’ite principles of division into classes and representing predeceased claimants through their descendants, which ultimately works in favour of women and relatives in the direct line.⁵⁵

Not only the legislator but also the courts have made use of the *takhayyur* method, thus e.g. in nineteenth-century India in a prominent precedent (cf. Part 1, 4.1 above). It seems that these options are also employed by a Sharia Council in the UK, whose function is that of an unofficial arbitration body for Muslims in a wide range of issues (cf. also Part 3, 3.3.e below).⁵⁶

191 One example of *talfīq* may be found in article 6 of the Egyptian law no. 77 of 1943. This decrees that an Egyptian non-Muslim may make a will in favour of a non-Muslim not resident in Egypt, as long as the latter’s country of domicile does not rule out foreigners inheriting under its inheritance law. This is a conflation of Hanafite and Malikite law: the Hanafites allow members of different faiths to benefit under inheritance law as long as they are both resident in the same country. Malikites permit this with regard to persons living in different countries but not belonging to different religions. Both schools, however, reject the solution found in this particular law.⁵⁷

b Further Development of Substantive Law by Means of New Juristic Reasoning (fatḥ bāb al-ijtihād)

The principle, which continues to apply, that everything which is not explicitly forbidden is generally permitted (*ibāḥa aṣliyya*; cf. also Part 1, 2.1 above),⁵⁸ provides the foundation for ‘liberal’ legislation.⁵⁹ The 2004 reform of Moroccan

53 Cf. Pearl/Menski, *Muslim Family Law*, 9–26 ff.; Shaham, *Family*, 114 ff. and 140.

54 Esposito, *Women in Muslim Family Law*, 93.

55 Anderson, *Law Reform*, 150.

56 Cf. Poulter, *Muslims*, 195, 235.

57 Cf. Coulson, *Introduction*, 198.

58 Yaşar Nuri Öztürk, for instance, refers to this explicitly (400 Fragen, 54).

59 The same is fundamentally true of the interpretation of religious rules; thus with regard to the question of whether Muslim women must wear a headscarf the contemporary Turkish

family law is a striking instance in recent years.⁶⁰

It must, however, be said that Sunni Islamic law had suffered considerable stagnation from the fourth/tenth century onwards,⁶¹ one main reason being the widespread doctrine that independent juristic reasoning was on the whole ruled out by binding consensus decisions of earlier legal scholars ('closing the door to *ijtihād*', *insidād bāb al-ijtihād*). The prevailing view was that these decisions should be adopted without any criticism (*taqlīd*). There are traditionalist groups who adhere to this opinion to this day.⁶²

The doctrine of *taqlīd* was, however, never uncontroversial.⁶³ The famous Hanbalite Ibn Taymiyya (d. 728/1328) was and is cited as the principal witness for the continuing permissibility of *ijtihād*.⁶⁴ The Wahhabis of the eighteenth century as well as Indian Muslim scholars of the same time also advocated the permissibility of *ijtihād*.⁶⁵ The Shia had never renounced it anyway. It must also be borne in mind that as early as the late classical period there were a multitude of developments especially on the fields of interpretative legal practice, of 'administrative regulations' and of expert opinions, which have only just begun to be examined.⁶⁶

theologian Zekeriya Beyaz comes to the conclusion that this is merely a not universally mandatory Arab custom; cf. Berger, *Ein türkischer Reformtheologe*, 74, 97 f., and Beyaz's text *İslam ve Giyim-Kuşam. Başörtüsü sorununa dini çözüm*, Istanbul 2000, 259 ff. Others reached the same conclusion, thus a shaykh of the al-Azhar University in the 1830s and Muhammad Sa'īd al-'Ashmāwī; cf. Ben Abid, *The Sharī'a*, 17 with further references; Balić, *Islam für Europa*, 86.

60 Cf. M. Badran, *Feminism*, 133 and ff.; Nelle, *Marokko*, 276 ff.; Foblets, *Moroccan Women*, 1387 ff.; cf. also Gisela Wohlgenuth, *Das deutsche und marokkanische Familienrecht*, 2nd ed., Düsseldorf, 2006.

61 The former Jordanian justice minister and prominent jurist Jamal Nasir speaks of the 'Age of ... Jumud (Stagnation)'; (*Islamic Law*, 12).

62 Cf. Ph. Lewis, *Islamic Britain*, 133 with n. 37, regarding an example from England.

63 Regarding the Maghrebīn jurist al-Haskūrī, around the turn of the eighth/fourteenth century, cf. Powers, *Law*, 53 ff.

64 Cf. only an-Na'im, *Toward an Islamic Reformation*, 35 ff.; cf. also Melchert, *Formation*, 16 ff. with further references.

65 Cf. Cammack/Young/Heaton, *Legislating Social Change*, 49 with further references, on Muhammad ibn 'Abd al-Wahhāb and Shāh Walī Allāh.

66 Cf. only Johansen, *The Islamic Law*, 124 and *passim*; Krüger, *Fetwa und Siyar*.

With the fundamental writings of reformers such as Muhammad ‘Abduh, who became Mufti of Egypt and Member of the Legislative Council in 1899, the use of *ijtihād* was given wider scope once more.⁶⁷ In Egypt, the motherland of many contemporary laws in the Arab–Islamic world, in particular, a movement took shape from the second half of the nineteenth century onward which ensured that *ijtihād* had a wide scope of application.⁶⁸ From that time onwards this doctrine has been, as it were, the key to reforms. From a Muslim point of view the preferred statement is, as we have mentioned above, that these are not ‘reforms’ in the sense of a change of basic principles, but in the sense of applying these basic principles in accordance with the conditions defined by the time and place of a particular situation.

Legitimation of the permissibility of *ijtihād* is found, e.g., in sura 29:69.⁶⁹ However, there was some resistance against giving up the *taqlīd* as far as possible⁷⁰ even during the twentieth century, and it has not been silenced completely even to this day. It is concerned with questions of religious orthopraxy, though, not with legal matters.

Consequently a critical interpretation of law remains generally possible.⁷¹ Its particular subject are all those verses and other sources of the law whose exact meaning cannot be defined with absolute certainty.⁷² Many authors limit the sources excluded from *ijtihād* to the Quran and the sunna,⁷³ leaving everything else open to *ijtihād*; an opinion supported by classical Hanbalite doctrine. Others recognise older consensus decisions as being binding, but only if they are based on an unambiguous text (*naṣṣ*) and not on individual reasoning or on consideration of universal benefit.⁷⁴ Reasoning or considerations of benefit are subject to the changing course of time, and consequently themselves changeable. Here the legal concept of necessity (*ḍarūra*) comes into its

67 On his life and works cf. e.g. Peters, *Erneuerungsbewegungen*, 118 ff.; Botiveau, *Loi islamique*, 108 ff.

68 Cf. Skovgaard-Petersen's studies, *Defining Islam*, 65 ff.

69 Cf. Muslehuddin, *Islamic Jurisprudence*, 42.

70 Cf. Muneer Fareed, *Against Ijtihād*, 355 ff.

71 Cf. e.g. Ramadan, *Das islamische Recht*, 62 ff. as well as, more generally, Poya's lucid study, *Anerkennung des Ijtihād*, 2003.

72 Which are not so-called *aḥkām qaṭʿīyat al-thubūt wa-l-dalāla*; cf. e.g. the judgment of the Egyptian Constitutional Court of 15 Dec. 2002, printed in al-Bakrī, *Mawsūʿat al-fiqh wa-l-qaḍāʾ, al-aḥwāl al-shakhṣiyya*, vol. 4, 578, 581.

73 Cf. Muslehuddin, *Islamic Jurisprudence*, 42 with reference to sura 4:59; al-Khuḍarī, *Uṣūl*, esp. 373 ff.

74 Cf. Salqīnī, *Uṣūl al-fiqh*, 111.

own,⁷⁵ which is already found in article 21, and – its general sense at least – articles 17 f. of the Ottoman Mecelle. The former Jordanian minister for justice criticises that earlier Sunni jurists had turned their backs on the primary sources Quran and sunna, contrary to the view of the schools' founders, and concentrated on the founders' works to such a degree that in the end they mistakenly saw these as equal to the sharia.⁷⁶

Some scholars subject even Quran and sunna themselves to reinterpretation. A classic example of the changing norms according to changes in time and place (*taghayyur al-aḥkām bi-taghayyur al-azmina wa-l-amkina*) may be found in the works of the Malikite al-Qarāfi⁷⁷ (d. 684/1285). The former president of the Supreme Sharia Court of Pakistan, Justice Aftab Hussain, explains that *taqlid* has a place only in matters of worship practice and possibly inheritance law,⁷⁸ and that in all other issues decisions must be made according to one's own discretion (*istiḥsān*; cf. Part 1, 2.5 above) and universal benefit (*maṣlaḥa mursala*; cf. Part 1, 2.7 above).⁷⁹

The Supreme Constitutional Court of Egypt distinguished between rules not requiring interpretation and rules in need of interpretation in several judgments. In each case it had to be determined whether a particular rule of Egyptian statute law breached article 2 of the constitution, which names the sharia as having been the main source of legislation since the reform of 1980. Only statements 'that are definitive in certainty as to the source from which they derive and as to their meaning' can provide a norm. '(...) Contrary to the above are rules in respect of which divergent points of view have arisen, with regard to their certainty and/or their meaning. These are the only ones that are subject to discretionary interpretation and may alter with changes of time and place, in order to ensure their flexibility and vitality'.⁸⁰

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75 Cf. Muslehuddin, *Islamic Jurisprudence*, 60 ff.; Krawietz, *Darura*, 185 ff. with further references; Skovgaard-Petersen, *Defining Islam*, esp. 279 ff.; for concrete examples cf. al-'Aqqād, *Al-ijtihād*, 38 ff.

76 Jamal Nasir, *The Islamic Law*, 12.

77 Al-Qarāfi, *Al-iḥkām*, 112 ff.

78 Abdullah Saeed, *Interpreting the Qur'ān*, 120 ff., holds a different view.

79 Aftab Hussain, *Status*, 13.

80 Judgment of 26 March 1994 (Ali Mohammed Abdul Moneibo v. The Prime Minister, Minister of Justice and Badria Abou Zeid), *Yearbook of Islamic and Arabic Law* 3 (1994), 128 f. The judgment of 15 Dec. 2002 concerning the constitutionality of statutory divorce law by means of *khūl'* in accordance with article 20 of Reform Law no. 1 of 2000 (printed

The Constitutional Court clearly speaks out against the canonisation of earlier expert opinions. A verdict of 1996 states clearly ‘that the opinions of one canonist – concerning matters subject to difference in interpretation – are not sacred and may be amended or replaced, and that Islamic Shari’a is therefore not rigid but is subject to evolution in its basic fundamentals.’⁸¹ On this basis the Constitutional Court declared for instance that a provision requiring all female pupils to wear school uniforms was in accordance with the constitution. Parents or guardians have a say only in the matter of whether the girl should wear a headscarf, but only on the condition that it does not cover the face. The justification is that within the constitutional order the legislator has the right to decree regulations that advance the common good. Once more we see a reflection of the ruler’s classical *siyāsa* competence: neither Quran nor sunna offer any clear rules on what women’s clothing must look like. The aim of the regulations is to improve the position of women, not to stop them from learning, going out and communicating with the world around them. ‘It is not conceivable that – while life is going on around them – women should be ordered to be ghosts dressed in black.’⁸²

A further judgment of the Constitutional Court from 1997 states⁸³ that a woman does not lose her marital claim to maintenance if she continues professional employment against her husband’s request. The reasoning given is that the wife is the husband’s life partner. Forbidding her to follow a professional career is the kind of severity that could make her life more difficult. Employment – if it benefits society – on the other hand would open the door to constructive activity. Concerns that women might be led into temptations in such a situation are based on the erroneous idea that their religion would not protect them from such problems; these concerns do not take the equality of men and women into account (aside from their natural differences). The husband’s duties do not give him the right to subject his wife to his will and authority, as

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in al-Bakrī, *Mawsū‘at al-fiqh wa-l-qaḍā’, al-aḥwāl al-shakhṣiyya*, vol. 4, 578 ff.). A detailed account of this administration of justice may be found in Bernard-Maugiron, *La politique*, 349 ff.

81 Judgment of 18 May 1996 (Mahmoud Samir Wassel in his capacity as the natural guardian of his daughters Miriam and Haggar vs. the Minister of Education), *Yearbook of Islamic and Arabic Law* 3 (1996), 178, 179. Similarly the judgment of 15 Dec. 2002, printed in al-Bakrī, *Mawsū‘at al-fiqh wa-l-qaḍā’, al-aḥwāl al-shakhṣiyya*, vol. 4, 578, 581.

82 Judgment of 18 May 1996, 180.

83 Judgment of 3 May 1997 (El Sayed Mohamed Moustafa vs. The President of the Republic, the Speaker of the People’s Assembly and others), *Yearbook of Islamic and Arabic Law* 4 (1997), 250.

women as well as men are required to further the benefit of society. It has not been possible to find a source of law not requiring interpretation which defines the claim to maintenance of a professionally employed married woman; consequently the legislator has the right to determine the relevant rules. Egyptian courts had judged in the same way in the past, with reference to individual necessity (*ḍarūra*) and universal benefit (*al-ṣāliḥ al-‘āmm*). With reference to the professional work of a female teacher one judge even described her work as the fulfilling of a religious duty which could under no circumstances result in negative legal consequences.⁸⁴

A further example of a defining reinterpretation is Article 6a of the (by now amended) Egyptian Law no. 44 of 1979. Contrary to previously accepted doctrine a second marriage is generally seen as ‘damaging’ to the first wife and entitles her to seek a divorce even without a previous contract granting her the right to divorce her husband.⁸⁵ The prominent, but also controversial, European scholar Soheib Bencheikh goes further still, interpreting sura 4:2 f. to the effect that the permission of entering into second marriages was only granted in exceptional cases and limited to widows with children.⁸⁶ Should this view prevail we can predict that polygamy will essentially disappear.

The prohibition of *ribā* (‘usury’, cf. Part 1, 4.4.e.aa above) does not require interpretation only in principle. While the Quran sets out the contrast between permitted trade and the prohibition of *ribā*,⁸⁷ it does not define clearly what constitutes *ribā* and is consequently open to interpretation.⁸⁸ The comparatively generous options of judicial divorce at the request of the wife under the new Moroccan family law of 2004 (Art. 98 ff.) are interpreted similarly: As there is no clear evidence against these options, the path to *ijtihād* is clear. The new regulations, in fact, are in keeping with the kindly spirit of Islam (*rūḥ al-Islām al-samḥa*).⁸⁹

Yūsuf al-Qaraḍāwī, an influential person whom some consider to be on the Islamist spectrum has evolved a remarkable position with regard to the accusation of inadmissible innovation (‘heresy’, *bid‘a*) using the example of whether a ruler’s term of office may be limited (cf. Part 1, 2.4 above). He states that the accusation of heresy does not apply in this case at all. Inadmissible innovations that deserved this designation could only be found in the field of issues

84 Cf. the references in Shaham, *Family and the Courts*, 93 f.

85 Cf. Yehia, *Neue Aspekte*, 31, 35 ff.

86 Bencheikh, *Marianne et le Prophète*, 132.

87 Sura 2:275.

88 Cf. Muslehuddin, *Islamic Jurisprudence*, 40 f. with further references.

89 Shabbūn, *Al-shāfi*, vol. 1, 254.

195 relating purely to faith and worship. Areas such as laws, tradition, custom and administrative, social and political customs, all of which are subject to the vicissitudes of life, are separate. In his view they are ruled by the deciding principle of the universal benefit (*maṣlaḥa mursala*)⁹⁰ under which a consideration of the interests involved is necessary.

The area of reform through reinterpretation also includes the re-evaluation of the contents of comparatively abstract legal rules, which takes place not only within the confines of legislation but also in legal and social political debate. In a long article the leading Tunisian daily paper *al-Ṣabāḥ* discussed the attitude of children towards their working mothers. The consistently supportive trend is simply supported by an alleged hadith according to which a person who works is better than a person who does not work (running a household is apparently not taken into consideration).⁹¹

The possibilities of interpretation can furthermore be widened by a critical revision of the sunna. Öztürk points out that only very few traditions are actually traced back to the prophet's companions who embraced Islam from the very early days onwards. Besides these (and scholars have been in agreement on this point for centuries) there is a large number of falsified hadiths. Consequently those traditions which did not correspond with the principles of the Quran and the fundamental rules of reason have been rejected at all times. One must never, he adds, lose sight of the fact that the Quran is the true source.⁹² A very wide scope of application for contemporary reinterpretation is opened on this basis.

Yūsuf al-Qaradāwī rejects the uncritical adoption of every tradition as well. He thus opposes the trend to construe an enduring precedent out of every single of the prophet's and his companions' actions. In his view, the place, time and circumstances of the actions must always be taken into consideration. If these parameters change, the preconditions for adopting the tradition also change. He states that the truth of this opinion is evident from the actions of the four rightly guided caliphs who are particularly revered in the sunna. He refers to caliph 'Umar who maintained the universal benefit by diverging from the manner of distributing spoils of war practised by the prophet. If the caliph was not bound by the 'precedent' set by the prophet, he says, then how much less are later Muslims bound by examples from an earlier age.⁹³ As for

90 Al-Qaradawi, *Priorities*, 158f.

91 '*Al-insān alladhī ya'mal afḍal min alldahī la ya'mal*', quoted in '*Al-umm al-āmila min nazar al-abnā'*', *al-Ṣabāḥ*, 5 Sept. 1998, 4.

92 Öztürk, 400 Fragen, 119ff., esp. 120, 195f.

93 Al-Qaradawi, *Priorities*, 157f.

the information on statements, personality and actions of the prophet, it is important to distinguish between sunna and *sīra* (the prophet's biography). The latter only proves that what the prophet did was permitted, but it cannot lead to immediate conclusions as to the normative character of his actions. For instance, the circumstances of spreading the religion of Islam during the prophet's time are entirely different from those nowadays.⁹⁴

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c *Reinterpreting the Law with Regard to Its Origins (asbāb al-nuzūl and Historical-Critical Interpretation) and ratio legis (maṣlaḥa)*

Classical Islamic law already refers to the causes of the revelation (*asbāb al-nuzūl*) as the basis of interpretation (cf. Part 1, 2.2 above).⁹⁵ In keeping with this approach, the normative value of rules may be diminished if the causes of their revelation were specific to their time. From this point of view they are merely examples without binding legal force.

Similarly a 'dynamisation' of regulations with particular reference to their substance is possible. According to the opinion universally agreed among Muslims the provisions in the Quran concerning the rights of women represent a clear improvement compared to the situation prevalent until then (cf. Part 1, 4.2.a above). On this basis we can discern a contrast between 'progressive' Quran and the traditionalist jurisprudence of the classical period which was lagging far behind such progress.

Islamic feminists, but not only they, often base their arguments on this view.⁹⁶ Thus a well-known Iranian jurist interprets the fact that only male relatives may be guardians of minor children (*wilāya*) as showing a purely person-specific relationship and a concept which does not include any other 'protective measures' directed at children.⁹⁷ Thus – contrary to the prevalent view – the *wilāya* is stripped of its legal character with the consequence that a protective position may be held by other persons – including females – as well.

Arguments supportive of this approach may be found by referring to the meaning and purpose of regulations, which may change according to the changing times (*maqāsid*). These admit that unlike the religious rules, which

94 Op. cit., 159 ff.

95 On modern times cf. Salqīnī, *Uṣūl al-fiqh*, 47; also Khoury, *Islamische Minderheiten*, 14 f.

96 Cf. Poulter, *Muslims*, 195, 213; Muslehuddin, *Islamic Jurisprudence*, 21 f. on the contrast with pre-Islamic law; Abu Zayd, *Frauenfrage*, 193, 204 and *passim*; Engineer, *The Rights of Women*, 20 ff., 62 ff. and *passim*.

97 Seyyed Mostafa Mohaghegh-Damad on the occasion of a conference of German and Iranian jurists at the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg on 4 July 2003.

are often considered to be unchanging, legal provisions are meant to serve the universal benefit (*maṣlaḥa*) as the highest purpose, which is indeed accessible to human reason and understanding. Classical references adduced are frequently Ibn Qayyim al-Jawziyya (691/1292–751/1350), al-Shāṭibī⁹⁸ (d. 790/1388) and some other prominent scholars.⁹⁹ Some authors apply this inspection even to those norms described as *naṣṣ* (cf. Part 1, 2.3 above) and, in case of collision, give precedence to analysing their purpose.¹⁰⁰ The rudiments of this approach are already present in the works of the eminent scholar al-Ghazālī¹⁰¹ (d. 505/1111). They continue to exert their influence to this day. Another, modern author takes up his pithy statement according to which the *maqāṣid* are in fact the scholar's (*mujtahid*) direction of prayer (*qibla*; directing ritual prayer towards Mecca).¹⁰² Al-Shāṭibī's model is also the basis for the important Lebanese jurist Ṣubḥī Maḥmaṣānī (1909–1986). Ultimately he comes to the conclusion that the fundamental rules of Islamic law correspond to what the Greek philosophers developed as their doctrine of Natural law. In this way he finds a common foundation of Western and Islamic law, refuting the occasionally postulated fundamental opposition.¹⁰³

An extensive reinterpretation of Islamic law can find support in the fact that the revelation of the Quran and the life of the prophet Muhammad took place during the seventh century AD and allow for its particular circumstances.¹⁰⁴ Only very few exegetes with a law background would, however, go so far as to subject the Quran as such to a historical-critical interpretation. Attempts along these lines could start with separating Meccan and Medinan revelations (cf. Part 1, 2.2 above). Similar approaches were attempted by the Sudanese Mahmud Muhammad Ṭāhā¹⁰⁵ and, even earlier, the Egyptian 'Alī 'Abd al-Rāziq (1888–1966), both of whom met with sometimes embittered opposition. Ṭāhā had to

98 Al-Shāṭibī, *Al-muwāfaqāt*, vol. 2, 7 ff.; Cf. Masud, *Shatibi's Philosophy*; al-Raysuni, *Imam al-Shatibi's Theory*.

99 Kamali, *Principles*, 395 ff., esp. 400 ff.; cf. also Johnston, *Maqāṣid al-Sharī'a*, 157 ff.; Opwis, *Concept*, 74 ff.; Hallaq, *Sharī'a*, 504 ff. with instructive case studies.

100 Cf. Poya, *Iḡtihād*, 238 ff. with further references.

101 Cf. al-Ghazālī, *Al-mustaṣfā*, vol. 1, 345 ff.; vol. 2, 393.

102 'Abdū, *Maqāṣid*, 101, 109 ff. with further references.

103 Cf. Opwis, *Concept*, 74 f. with further references.

104 On the issue of dress regulations cf. Zekeriya Beyaz, *İslam ve Giyim-Kuşam. Başörtüsü sorununa dini çözüm*, Istanbul 2000, 259 ff.

105 Concerning him and his movement cf. Annette Oevermann, *Die 'republikanischen Brüder' im Sudan. Eine islamische Reformbewegung des 20. Jahrhunderts*, Frankfurt/M. 1993; ead., *EI II*, vol. 10, art. 'Ṭāhā, Maḥmūd Muḥammad', 96 f.

pay for his opinions with his life,¹⁰⁶ al-Rāziq lost his position as sharia judge. Nowadays, however, similar opinions are becoming more prevalent among intellectuals. One instance are the teachings of Mohamed Talbi, who demands that the Quran should be read with a focus on the meaning and the purpose and bearing in mind the historical and human aspects (i.e. recognising human limitations) (*qirā'a maqāṣidiyya, ta'rikhiyya, anāsiyya*).¹⁰⁷

Frequently, scholars call for a straightforward separation between Quranic content 'proper', which must be re-examined, and transmitted writings and elements of popular belief which cannot be substantiated.¹⁰⁸ Thus in the area of divorce law Hüseyin Atay refers to suras 4:35 and 65:2 and comes to the conclusion that after an unsuccessful attempt at mediation, a judicial divorce could take place in front of two witnesses. He does not recognise any further requirements, either for husbands or for wives seeking a divorce, assigning them to the outdated patriarchal understanding of legal scholars of the past which misinterprets the gender equality inherent in the Quran.¹⁰⁹ The Pakistani jurist Shaheen Sardar Ali is thinking along the same lines when she adds the apt subtitle 'Equal before Allah, Unequal before Man?' to her book on women's right in Islam.¹¹⁰ A comparative approach reinterprets statements which classical jurists did not interpret as legally but merely as 'morally' significant, such as statements on the equality of the sexes.¹¹¹ If these statements are now interpreted as legally binding, they supersede older decisions which were based on divergent statements.¹¹² This approach is used in particular by female Muslim authors who distinguish between Islam and the effects of the patriarchal system dominating in many regions.¹¹³ However, even authors with a clearly traditional orientation such as Ahmad al-Kubaysī – who has considerable presence in the media – admit that traditionally women did not take

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106 Cf. Johansen, *Contingency*, 303 with further references, on written congratulations as well as protests from Islamic organisations and Muslim professors.

107 Cf. the overview presented in Nettler, Mohamed Talbi, esp. 235; for concrete instances see Talbi, *Plaidoyer*, 57 ff.

108 Cf. Taştan, Hüseyin Atay's approach, 241, esp. 252 ff.

109 Conversation with Atay quoted in Taştan, Hüseyin Atay's approach, 252 f.

110 *Gender and Human Rights in Islam in International Law*, 2000.

111 Cf. Kamali, *Divorce*, 85 ff.

112 Cf. Mir-Hosseini, *Stretching the Limits*, 285 ff., esp. 315.

113 Cf. Karmi, *Women*, 69 ff.; Engineer, *The Rights of Women*, 11 and *passim*; Wadud, *Inside the Gender Jihad*, esp. 187 ff.; Kreile, *Politische Herrschaft*, esp. 320 ff.; Barlas, 'Believing Women' in, *Islam 2002*; al-Mughni, *Women in Kuwait*, 184; cf. also Pinn/Wehner, *Euro-Phantasien*, 145, 148; Osman, *The Children of Adam*, 20.

part in the interpretation of Islamic rules. Consequently the men concerned with this activity would often – albeit not with evil intentions – come up with provisions in family matters and issues of gender relations which ultimately benefited men.¹¹⁴

199 These approaches are currently being evolved mainly around the geographical periphery of the Islamic world, namely in Turkey and Southeast Asia, but also in Tunisia and Morocco as well as in Iran; they meet with vehement resistance in the Arab world in particular, but also from the current Iranian regime. Some progressive thinkers have fled to the West in the face of threats and sanctions by now. Their opponents are not only among the Islamists but also among large groups of traditionalist mainstream scholars. While they generally offer no resistance against reforms enacted *de facto* only, they put up vehement opposition against fundamental reinterpretations. To quote the former Pakistani minister for justice, Brohi: ‘In the Islamic world, research on the field of the law must assert itself against the intolerance of the so-called *ulama* (...) as well, who see themselves as the guardians of the faith. They will also, and this is worse, note the smallest possible deviation in writings by academically trained authors on the subject of law and institutions of the law, and then brand the writers responsible as heretics. As a result there are hardly any contributions worth mentioning from the pen of thinkers in Muslim countries on the literature of Islam; only in non-Muslim countries do we find a few attempts at supporting a re-establishment of Islamic thought, law and institutions of the law.’¹¹⁵

Below the threshold of general reinterpretation we find the reinterpretation specific to a point in time of a multitude of individual issues. One instance is *sura* 2:282 where a woman’s testimony is valued less than a man’s (the testimony of two women is equal to that of one man). This provision is set in the context of the evidence needed for documenting certain financial transactions. The modern view is able to argue that the provision assumes women to be less experienced in these matters; if, however, women are just as well-versed as men, their testimony would be of equal value to men’s.¹¹⁶

The abovementioned separation between eternally valid spiritual aspects of Islam and changeable legal and political ones is indeed widely supported.

114 His views, broadcasted in 2000, quoted in Roald, *The Wise Men*, 29, 46; even more explicitly: Engineer, *Islam of the Eve*, 9, 13 ff., esp. 16.

115 Brohi, *Introduction to Ramadan*, *Das Islamische Recht*, 18 f.

116 Cf. E. Rahman, *Themes*, 48 f.; Balić, *Ruf vom Minarett*, 90 f. with further references; J. Badawi, *Gender Equity*, 35 ff.; Engineer, *Status of Women*, 63 f.; Al-Alwani, *Issues*, 161 ff.

Modifying the title of a series of articles in a high-circulation Arabic publication an Egyptian author describes 'an Islam we do not want': what they do not want is an Islam whose aim is merely to fill an ideological void and which is then used as a means to achieving certain political objectives.¹¹⁷

Choosing to embrace these new approaches might help solve, in particular, the pressing difficulties in the context of the equality of faiths, philosophies, and genders. Problems of the kind have recently acquired notoriety in, for instance, the Rushdie affair.¹¹⁸ Another appalling case was reported from Saudi-Arabia, where a member of the religious police cut his daughter's tongue off after in a discussion with him she professed herself to be a Christian.¹¹⁹ According to a widely-held view the crime of *ridda*, apostasy from Islam, is punishable, possibly even a capital offence (cf. Part 1, 4.7.b.gg above). Sura 2:193 is adduced as the Quranic basis of this view;¹²⁰ however, it clearly refers to the previously 'heathen' Meccans, enemies at the time of the prophet. This is made clear by the reference in the preceding verse 191 to the later *ḥaram al-sharīf* (sanctuary precinct) in Mecca as being a zone where fighting is forbidden. An interpretation which takes the causes of the revelation into account could explain that once Mecca had become Muslim, the purpose of this revelation became irrelevant. The Islamic community's being traumatised by the great number of people who apostatised from Islam after the prophet's death could be seen as a historical phenomenon and then laid to rest. Thus the Sudanese Islamist Hasan al-Turābī rejected the fatwa against Salman Rushdie on the grounds that this and similar problems could be solved only in the way of peaceful dialogue.¹²¹

Unequal treatment of the sexes under the law is based on several verses in the Quran, which refer to the woman's position under family or inheritance law, or her suitability for giving evidence in court. A central statement in this context (in the tradition of other religious texts)¹²² is found in sura 4:34:

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117 Muhammad Sa'īd Ahmad, '*Al-Islām alladhī nurīduhu*', al-Sharq al-Awsaṭ of 9 June 1998, 10.

118 Cf. e.g. Malise Ruthven, *A satanic affair*, London 1991; Swantje Barrett, *Islam, Blasphemie und freie Meinungsäußerung*, Hildesheim 1994.

119 'Saudi man kills daughter for converting to Christianity', viewed on 13 Aug. 2008 at <http://archive.gulfnews.com/articles/08/08/12/10236558.html>.

120 'Fight them until no-one will attempt to persuade (Muslims to renounce their faith), and until only God is worshipped! (...)'

121 'Eine Theokratie wird es nicht geben', interview in *Der Spiegel* 21/1998, 190, 196; for his biography and work cf. Layish, Ḥasan al-Turābī, 513 ff.

122 Cf. also Genesis 3:16: 'Unto the woman he said (...) thy desire shall be to thy husband, and

'Men are the managers of the affairs of women because God has preferred in bounty one of them over the other, and because they have expended of their property'.¹²³

This is one of the Medinan suras and can be interpreted from a historical point of view. The reason given for men's superior role on the one hand is the maintenance they have to provide, in the broadest sense. This is linked to functional, not intrinsic 'superiority'.¹²⁴ If, however, as in the present-day Islamic world, the circumstances are or may be inverted, the basis of this superior role becomes non-existent.¹²⁵ 'Preference in bounty', the second reason, is a very vague expression. It is interpreted as referring to the man's role as a protector, due to his superior physical strength.¹²⁶ The basis for this role is also becoming non-existent. In Balić's words, this Quranic passage resembles 'a sociological statement characterising the status quo of a patriarchal society. It does not contain a rule of conduct.'¹²⁷ On the other hand the German legal system also takes into consideration instances in which there is clear inequality, such as excluding women from the obligatory military or fire service. Natural differences such as women's childbearing ability can, and indeed must, be treated differently under the rule of equality.

Overall the chances for equal treatment of the sexes in the future are not unfavourable, although there is still considerable cause for concern today. A very significant legal basis is women's right to private property (cf. Part 1, 4.2.b. ff above), which is by no means a matter of course in the world history of law. Single, successful women are increasingly accepted in many regions,¹²⁸ even

he shall rule over thee', and Ephesians 5:22 f.: 'Wives, submit yourselves unto your own husbands, as unto the Lord. For the husband is the head of the wife, even as Christ is the head of the church (...)'.

123 After Arberry's translation of the Quran, <https://archive.org/stream/QuranAJArberry/Quran-A%20J%20Arberry#page/n59/mode/2up>, viewed on 28 August 2014.

124 Rahman, Themes, 49; Balić (Islam für Europa, 85 f.) calls it an indicative statement reflecting the social reality of the time, but without normative character.

125 Abou El Fadl, Speaking in God's Name, 210 and ff.

126 Cf. the translation 'Men are the protectors And maintainers of women, Because God has given The one more (strength) Than the other, and because They support them From their means.' The Holy Qur'an, Text, Translation and Commentary by Abdullah Yusuf Ali, Dar Al Arabia edition, Beirut 1968, 190. Cf. also Hussain, Status of Women, 15 f.

127 Balić, Ruf vom Minarett, 88, 90; concerning new interpretations arriving at comparable results cf. Murad Hofmann, Der Islam im 3. Jahrtausend, Kreuzlingen 2000, 140 f.; cf. also Karni, Women, 69 ff., esp. 80.

128 Cf. Rashad/Osman/Roudi-Fahimi, Marriage, 4 f.

though it is likely that the traditional concept of gender roles continues to prevail widely. Even in Saudi-Arabia, a comparatively traditional country, women gain influence by means of considerable financial resources (partly from legacies); 40 % of private property is said to be controlled by women, including 50 % of the landed property in Jeddah and 25 % in Riyadh.¹²⁹ All the same it is clear that the road to equality is still a very long one. Women still require a male sponsor for business,¹³⁰ to say nothing of the continuing multitude of social restrictions and exclusion. However, while it is true that there is still widespread inequality under the law, the image of the generally suppressed oriental woman which is sometimes spread is incorrect.¹³¹

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A reinterpretation of the Quran taking place in various countries in the Islamic world may also be the basis for equal rights. The editor of the Iranian journal *Zanan* states simply that it is untenable to claim that the Quran allows men to beat their wives. She adds that there are other questions which are by no means decided, either, just because men had answered them to the disadvantage of women. Changes would have to be initiated within the framework of Islam and under consideration of the time in which we live: the modern woman is different from the woman of the pre-Islamic period.¹³²

The former member of the Iranian parliament Fa'izeh Hashemi declared that it is not the Quran which prevents the complete legal equality of men and women, but the patriarchal system dominating Iranian society.¹³³ The Muslim Women Organisation Musawat published a study on common ground between (modern) interpretations of Islamic Law and the CEDAW, which is still highly contested in many Islamic states.¹³⁴ Norani Othman, member of the Malaysian 'Sisters in Islam', points out the necessity of distinguishing between the cultural heritage of Middle Eastern Muslim societies and the true essence of Islam.¹³⁵

129 Cf. 'Von der Frau des Propheten lernen. Emanzipation durch wirtschaftliche Macht', *Süddeutsche Zeitung*, 7 April 1995, 11.

130 Cf. 'Saudiische Frauen ersetzen Chauffeure', *Frankfurter Allgemeine Zeitung*, 4 Nov. 1998, 3.

131 Cf. the relevant statements in BGH NJW 1999, 135; life in a 'typical Muslim marriage' does not allow the immediate conclusion that the woman's freedom of decision is restricted (in the context of accepting an obligation to pay).

132 'Chatami macht uns Hoffnung. Lage der Frauen im Iran', *Süddeutsche Zeitung*, 2/3 Aug. 1997, 10.

133 Daughter of the former president of the state Rafsanjani; cf. 'Islamischer Feminismus durch eine Politikerin im Aufwind', *Süddeutsche Zeitung*, 4 March 1997, 9.

134 Musawat, CEDAW and Muslim Family Laws. In Search of Common Ground, Petaling Jaya 2011.

135 'Blame Men, Not Allah, Islamic Feminists Say', *New York Times*, 10 Oct. 1996, A4.

This necessity can emerge especially in a multireligious country with its own cultural tradition. At the same time it becomes clear that the examination of Islamic law should not be limited to the Middle East.

On the other hand extreme patriarchal cultural traditions may be perpetuated, or even re-instituted, with the support of traditionalist sharia scholars. In her impressive study on women and Islam in Bangladesh the Bangladeshi scientist Taj Hashmi examined among other things the activities of rural arbitration courts ('salish courts'). She says that the myth of the connection between the judgments of rural mullahs, 'self-styled guardians of Islam', and sharia law must be destroyed. She describes even non-practising and non-believing men insisting on so-called sharia law being applied in order to deprive their relations, usually sisters, of an inheritance to which the latter have an equal claim. The mullah (supporting this) should be seen as nothing more than the assistant and collaborator of powerful village elders, but due to his position as interpreter of the sharia he has great influence with the populace.¹³⁶ 'The bulk of the peasant and non-peasant population favour patriarchy and both 'islamists' and 'secular' Bangladeshi Muslims ardently legitimize the subjection and deprivation of women in the name of Islam (...) In sum, (...) patriarchy has been the main stumbling-block towards the empowerment of Bangladeshi women. The marriage of convenience between patriarchy and popular Islam has further aggravated the situation.'¹³⁷

The social scientist Mounira Charrad has also shown the extent to which post-colonial family law is dependent on the process of a country's organisation and on the weight of communities with kinship-based solidarity.¹³⁸ She considers Moroccan family law to be an instrument of upholding the political and social status quo (before the reform of 2004), Algerian family law a hostage in case of political separation, and later subject to political calculations; Tunisian family law, on the other hand is a force for change. In all three states family law was a political and strategic means employed 'from above' by the elite of power. The closer the connection between victorious national leadership and kin groupings were, the smaller the chance of reform of family law became.¹³⁹ This is a further illustration that explanations of concrete legal form which refer to 'Islam' or 'Islamic law' tend to be rather too one-dimensional. A sociological study of Muslims in the UK, on the other hand, shows that the patriarchal allocation of roles is widespread and rests firmly on a mix of cultural and

136 Hashmi, *Women and Islam*, 96 ff. (quoted from p. 98); cf. also 61 ff.

137 *Op. cit.*, 209.

138 Charrad, *States and Women's Rights*, 2001.

139 *Op. cit.*, 233 and *passim*.

legal-religious grounds.¹⁴⁰ In this respect it may be said that while 'Islam' does not necessarily endorse patriarchy, in its traditional interpretation it frequently supports it.

5 Further Developments 'from the Bottom up' and Opposing Trends

Private initiative in interpreting the law is another way of making the legal corset fit changed circumstances. There are reports from Tunisia that educated couples in particular feel the need to find out whether the partners are indeed suited to each other. Immediate marriage and consumption of the marriage might lead to the husband possibly having to institute costly divorce proceedings. In order to avoid this, people enter into marriage in several steps. To begin with, a marriage contract is drawn up according to all formal requirements. The marriage is not consummated immediately afterwards, but living together is practised for some time. If the partners come to the conclusion that they are not suited to each other, the court is informed that the existing engagement (not: a consummated marriage!) has been dissolved and that there is no need for the compensatory payment that would otherwise have been due. It appears that the Tunisian courts sanction this procedure.¹⁴¹ In Egypt the so-called *'urfi* marriage between partners who are of age fulfils a similar function of socially acceptable cohabitation, as this form of marriage only has limited legal effect.¹⁴² Such a legally informal relationship is also attractive for people who would lose their claim to maintenance (e.g. widow's pension) or the custody of children in the case of a legally valid marriage.¹⁴³ There are, however, reports that it is also used to legalise prostitution in cases where the male partner in such a 'marriage' is a wealthy Gulf Arab. There are furthermore cases in which young girls are being in fact 'sold' into such relationships. Other accounts claim that in some places they have been used to 'legitimise' even abductions and rape at the hand of religious fanatics. Overall the legal position of women in these relationships is particularly parlous.

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On the other hand it has always been possible to see that in many regions of the Islamic world rights – which genuinely existed according to the traditional view – could not be enforced due to social circumstances. This is true in

140 Siraj, 'Because I'm the man!', 195 ff., evaluating 25 structured interviews with Sunni Muslim married couples in Glasgow.

141 Reported in Rosen, *The Justice*, 94 f.

142 Cf. also Rashad/Osman/Roudi-Fahimi, *Marriage*, 6 f.

143 Cf. Sonneveld, *Rethinking the Difference*, 77, 83 ff. with further references.

particular of women being denied their inheritance (cf. also Part 1, 2.9 above). The factors responsible are, firstly, repressive social structures, together with lack of education and information in the deprived persons. In many countries the rate of literacy and the level of education of girls and women is still lagging behind that of boys and men. Of course this is also a means of cementing power structures, as illustrated more than clearly by the ongoing situation in Afghanistan, where the criminal terrorist militias of the Taliban and related extremists deliberately destroy girls' schools and kill the teachers.

Expert legal opinions (*fatāwā*), while not a source of the law still remain an important instrument of finding the law on a religious basis. One instance is furnished by the opinion on the permission to accept voluntarily paid 'shares of benefit' relating to one's savings.¹⁴⁴ There is also a multitude of opinions regarding religious issues, such as the consumption of Pepsi-Cola and Coca-Cola in 1951,¹⁴⁵ the use of microphones and loudspeakers during divine service,¹⁴⁶ on the permission of having dental crowns and fillings made,¹⁴⁷ and even concerning suicide, euthanasia, organ transplants and blood transfusion, artificial insemination,¹⁴⁸ and family planning.

204 6 'Revolutionary' Changes

In two countries with an Islamic majority – Turkey and Albania – Islamic law was abolished and European codes adopted in its stead.¹⁴⁹ In 1997 a Turkish author put it simply: 'Islamic law, influenced as it was by feudal and patriarchal inequalities, was abolished completely in 1926.'¹⁵⁰ According to the current status the implementation of provisions of Islamic law, which (formally)

144 Fatwa of the supreme Iranian expert (*Marja'-e taqlid*) Husayn Burujirdī, text and translation in Benzing, *Rechtsgutachten*, 6 f.

145 Reference in Nallino, Maria, *Fetwà del 'Mufti' d'Egitto circa l'uso del 'Pepsi-Cola' e del 'Coca-Cola'*, *Oriente Moderno* 31 (1951), 213 f.

146 Reference in Nallino, Maria, *Fetwà di el-Azhar sull'uso di microfono e altoparlanti nei servizi religiosi*, *Oriente Moderno* 32 (1954), 137.

147 Expert legal opinion issued in Kayseri (Turkey) in 1960; cf. the references in Benzing, *Rechtsgutachten*, 8.

148 Cf. Krawietz's studies, *Hurma*, 91 ff.

149 A valuable up-to-date overview over publications on the subject in German may be found in Laciner, Hediye/Laciner, Vedat, *Türkisches Recht in deutscher Sprache. Eine Auswahlbibliographie*, Frankfurt/M. etc. 2005.

150 Serozan, *Das türkische Erbrecht*, 473.

discriminate against women, in cases crossing national boundaries is entirely incompatible with the Turkish *ordre public*.¹⁵¹ As a consequence even provisions which would be considered appropriate under private international law will not be applied.

It seems that there was resistance against reforms such as these. According to Rona Serozan the new civil code was nicknamed 'son-in-laws' law', as it allowed daughters and sons an equal right to inherit.¹⁵² This is an illustration of the ancient patriarchal concept that sons – and their property – remain within the family, while daughters move away to another family group: the advantage is not perceived as being in the daughter's favour, but only her husband's. Attempts at circumventing the new law by transferring property onto sons during one's lifetime were foiled. A pretend business transaction (purchase) was declared void, as was the disguised gift, ineffective due to formal deficiencies or violation of morality.

The abolition of Islamic law in Turkey has found widespread but not, apparently, universal recognition. This is proved not only by the vociferous attacks by extremists in Germany on the allegedly un-Islamic secular Turkish law.¹⁵³ In Turkey itself we also find a number of people who reject the new legal system especially in areas previously imbued with classical Islamic law, such as family law and inheritance law.¹⁵⁴ Thus we have expert opinions by the mufti department in Istanbul, dating from the most recent past, which demand a re-inclusion of elements of Islamic law into current inheritance law, with reference to the freedom of religion.¹⁵⁵ A similar trend can be observed in fatwas (Turk. *fetwa*), usually in cautious but still clear terms, in Turkish journals.¹⁵⁶ They present a fairly simple world view, which contrasts an idealised Islamic system with the – perceived – Western moral decay. In logically consistent fashion these fatwas adhere to the preserved form of statements made by the

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151 Tekinalp, *Milletlerarası Özel Hukuk Bağlama Kuralları*, Istanbul 1992, 212 f.; quoted in Serozan, 473, 474, n. 2.

152 Serozan, *Das türkische Erbrecht*, 473, 474.

153 Cf. Rohe, *Islamismus und Shari'a*, 132 ff.; on Turkish publications on the subject cf. the references in Mumcu, *Siebzig Jahre*, 48 f.

154 Regarding acceptance cf. Öztan, *Türkisches Familienrecht*, 85 ff.; Mumcu, *Siebzig Jahre*, 17 ff., esp. 48 ff.

155 Cf. Uçar, *Recht*, 276 with further references.

156 In the context of this issue cf. the examination of fatwas from 1981 in Esther Debus, *Die islamisch-rechtlichen Auskünfte der Milli Gazete im Rahmen des 'Fetwa-Wesens' der Türkischen Republik*, Berlin 1984.

Hanafite school of law, not showing any development along the lines of adaptation to changed circumstances. This is not at all in keeping with Islamic legal tradition.

Conversely, introducing secular marriage does not guarantee the desired secularisation without further difficulty. It seems that the rule for the mandatory civil marriage of the Western type does not fit in with custom everywhere. Even the mufti department in Istanbul appears to be dwelling on traditional Islamic provisions of marriage law, as is illustrated by expert opinions dating from even the most recent past.¹⁵⁷ In the eastern regions of Turkey in particular the marriage concluded before the imam is seen by some as valid and practicable to this day.¹⁵⁸ As a result there are large numbers of relationships which are not legally marriages, with all the consequences for the children's status. This is an untenable state of affairs in a society which still largely rejects cohabitation (between unmarried partners). Consequently the Turkish legislator is regularly forced to issue amnesties legalising imam marriages, in order to avoid stigmatising large numbers of children as being born in relationships not legally recognised as marriages.¹⁵⁹ It appears that agreeing a dower (*mehir*) in connection with a marriage is also still a frequent occurrence, even though the civil code has only general regulations on gifts.¹⁶⁰

Overall, however, the law of the land appears to be widely accepted. However, as research into how those applying the law view and understand it is so far in Turkey a marginal topic at best;¹⁶¹ we can venture only few empirically sound statements. Still, according to a representative poll from 2007 only 12% of those interviewed wished for the sharia as the basis of legislation, while the percentage rejecting it has increased from 68% (1999) to 83% (2006). Only 1% wants to return to the structures of traditional Islamic law, including

157 Cf. Uçar's excellent study, *Recht*, 271ff. with further references, including some regarding divergent views.

158 Cf. OLG Zweibrücken NJW-RR 1997, 1227 with further references.

159 Cf. law no. 3716 of 8 May 1991, in: StAZ 1992, 87 f.; OLG Zweibrücken NJW-RR 1997, 1227 with further references; AG Freiburg FamRZ 1991, 1304 f.

160 Cf. OLG Köln NJW-RR 1994, 200 with further references, OLG Düsseldorf FamRZ 1998, 623 w. n.; Öztan, *ibid.*

161 Cf. Mumcu, *Siebzig Jahre*, 40f. with references especially regarding the history of how the age of reforms (*Tanzimât* period) in the Ottoman Empire was perceived by those applying the law; Seufert, *Grenzen des Zivilrechts*, 145 ff.; Çivi, *Türkisches Familienrecht*, 191ff.

gender inequality, polygamy, and corporeal punishment.¹⁶² In view of decreasing numbers Günter Seufert sees the advocates of these opinions as fighting a rearguard battle.¹⁶³

In Lebanon, finally, an attempt – which failed in the end – at introducing an optional civil marriage was promoted by parliament in 1998.¹⁶⁴ There were no clear fronts discernible here. The Maronite Christian leadership rejected the proposition, as did leaders of Sunnis and Druze, while the Shi'ite leadership agreed with it. This is remarkable in that one of the consequences of civil marriage is that it would be impossible to enforce the absolute prohibition of a marriage between a Muslim woman and a non-Muslim man. Even more important might be the general loss of power and influence if the authority in matters of personal status is transferred to the state.¹⁶⁵ Maybe the negative attitude was made easier by the fact that civil marriage was already possible 'by the back door', in that marriages entered into in nearby Cyprus were recognised in Lebanon by simple registration. However, according to Lebanese conflict law the effects of marriage and a possible divorce are subject to the law of the place in which the marriage was contracted.¹⁶⁶ In the course of the 'Arab Spring' in 2011, the youth protest movement put the issue of introducing an optional civil marriage code on the political agenda again, based on polls from 2007 indicating that a majority of the population supports this move.¹⁶⁷

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Overall it can be said that the legislators in the Islamic world are generally, and depending on the political situation, cautious when instituting reforms. The greater the ruler's legitimation – and this includes religious acceptance, and the further the secularisation process has progressed, the sooner we will

162 Report on Hakan Yilmaz' study in 'Oberschicht gegen Mittelschicht', *Frankfurter Allgemeine Zeitung*, 16 April 2008, 10.

163 Seufert, *Grenzen des Zivilrechts*, 145 ff., esp. 150 f. with further references.

164 Cf. Kahlmeyer, *Zivilehe*, 41 ff., esp. 54 ff.; 'Zivilehen im Libanon bleiben verboten', *Süddeutsche Zeitung*, 18/19 April 1998, 6. The reason for the failure appears to have been the fact that civil marriage would have entailed the not (yet) acceptable abolition of political denominationalism.

165 This recalls the *Kulturkampf* in nineteenth-century Germany. Cf. also di Ricco, *Reclaiming Changes*, 31, 32 ff. with further references.

166 Information received by Dr Thomas Scheffler, Research associate at the Beirut Orient-Institut of the DMG during a lecture entitled 'Libanon – der globale Staat' in Erlangen on 25 February, 1999.

167 Cf. "al-qānūn al-madani li l-ahwāl al-shakhsiyya: al-ān waqtuhu", *al-Ḥayāt*, 14 February 2011, 18.

find fundamental reforms. Morocco (especially 2004) and Tunisia (1956/7) provide instances of this connection. In many countries change takes place only in selected areas and without any open debate with the representatives of traditionalism, who often continue to wield influence. Consequently these changes remain fragile and without any systematic foundation in legal theory. As a result those working towards reform may find it difficult to find broad acceptance for their interpretations. Sometimes new types of training and further education as well as new judicial structures are established at the same time as reforms are instituted, in order to guarantee the practical implementation of the reforms.

Core Areas of Modern Islamic Law

The different depth of comprehensive scholarly analysis of points of law during the classical period is reflected in the discussion concerning legal politics which still continues in the Islamic world. Personal status law, family law and inheritance law remain the preserve of much debate within the confines of Islamic law; changes in these areas meet with the most adamant resistance. In other areas of the law such as civil law and commercial law specific Islamic aspects are rather more marginal. We do, however, see a certain re-emergence of Islamic commercial law, which raises questions especially concerning the charging of interest, speculative transactions and, more generally, contract and investment models compatible with Islam.

Over the last few decades Quranic penal law has become a political issue in some states where it had been mostly abolished. Issues of constitutional law are addressed under the aspect of Islamic law, mainly by supporters of political Islam (Islamists). As political freedom is restricted nearly everywhere, debates on these subjects on a larger scale are impossible. An exception may be seen in recent developments in Turkey where a synthesis of Islam and secular political system is being discussed intensively, as well as in parts of Southeast Asia. Innovative thinkers are also found not least in Western states where, unlike in most Islamic states, a free and open discussion is possible. Issues of the law regarding foreigners and international law, finally, are addressed only rudimentarily.

1 Personal Status Law, Family Law and Inheritance Law

a *Introduction*

In most countries with Islamic heritage, Islamic personal status law, family law and inheritance law still dominate. The same is true for significant Muslim minorities such as for instance in India (cf. Part 3, 2. below). Discussions of classical Islamic law are thus relevant to the current legal situation to a great extent. Some developments of classical doctrine were simply cast into legal form, for instance provisions regarding the dower.¹ In most countries

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¹ Cf. Ebert, *Das Personalstatut*, 91 ff. with further references.

the laws in question are generally based on the doctrines of one particular school of law. Past homogeneity within a certain school, however, was in some areas abandoned when certain rules from other schools of law were adopted (cf. the examples on the subject in 2.4 above). In response to changed economic and social circumstances some traditional provisions were added to, e.g. with rules on allowing for inflation in cases of (deferred) dowers,² or the allocation of the marital home after a divorce. Further reforms were instituted in some important areas, which we shall look at in the following. Compared to classical doctrine the variety has, if anything, increased. In practical cases it is indispensable to refer to the respective legal provisions of individual states.³

In most recent times reforms have taken place in North Africa in particular. In February 2005 Algeria renewed its family law to a large degree, after several years of debates concerning the necessity to reform the family code of 1984.⁴ Supporters were especially aiming to improve women's legal position, which included guaranteeing autonomy when entering into a marriage. They are following a trend in legal politics which can be observed throughout the Maghreb states. Tunisia having instituted reforms of the area as early as 1956, and again in 2003,⁵ Morocco also reformed its family law thoroughly in

2 Concerning Iranian law cf. Yassari, *Die Brautgabe*, 200 f.

3 Helpful overviews may be found in e.g. Ebert, *Das Personalstatut arabischer Länder*, 1996; id., *Das Erbrecht arabischer Länder*, 2004; An-Na'im (ed.), *Islamic Family Law*, 2002; El Alami/Hinchcliffe, *Islamic Marriage*, 1996, as well as in the (in some cases outdated) loose-leaf booklets by Bergmann/Ferid, *Internationales Ehe- und Kindschaftsrecht*, and Ferid/Firsching, *Internationales Erbrecht*. For up-to-date information databases may be helpful, such as e.g. the ISLAW database (<http://www.islamkatalog.uni-leipzig.de/islawinhalt.html>) and that of Emory Law School (<http://www.law.emory.edu/ifl/index2.html>).

4 Concerning demands by, in particular, Algerian women cf. the declaration 'Droits des femmes algériennes: jusqu'à quand la hogra?' of 10 Nov. 2001, viewed on 2 Aug. 2005 at http://famalgeriennes.free.fr/declarations/APEL_decl_101101.html; 'Algérie, le code de la famille, vingt ans barakat!' of Nov. 2003, viewed on 2 Aug. 2005 at http://famalgeriennes.free.fr/declarations/APEL_decl_111203.html; regarding the early legal situation see Forstner, *Das neue algerische Ehe- und Kindschaftsrecht* 1987, 197 ff. and 237 ff.; Mitchell, *Family Law*, 194 ff.; for fundamental information on the development cf. Kuske, *Reislamisierung und Familienrecht*, 1996; Dennerlein, *Islamisches Recht*, esp. 208 ff., 263 ff. (where surprisingly Kuske's study which was published by the same publisher in 1996 is not taken into account); regarding the difficult surrounding legal-political conditions cf. e.g. Daoud, *Feminisme*, 129 ff. (regarding Algeria); Charnay, *La vie musulmane en Algérie*, esp. 369 ff., 385 ff.

5 Cf. Nelle's concise overview in *Neue familienrechtliche Entwicklungen*, 253, 254 with further references; cf. also Forstner, *Veränderungen*, 1 ff.

2004,⁶ referring on a large scale to the arguments of earlier scholars and diverse schools of law, in order to establish it on a broad basis of legitimacy.⁷ In keeping with the trend towards gender equality, reforms of citizenship law took place at the same time.

In nearly all the Muslim states which have not explicitly dissociated themselves from Islamic Law, the traditional division of gender roles generally remains in force.⁸ In some countries, however, there is a cautious move towards adjustment in some areas of the law such as maintenance law, and in Tunisia and Morocco we see very clear departures from traditional law in favour of women. The trend to softening traditional provisions which disadvantage women without fully abolishing such provisions is more common. The impression conveyed is that some legislators would wish to abolish such laws but are unable to prevail in the face of powerful traditionalist opposition. The Indonesian government, for instance, submitted a draft reform in 1973, which envisaged a unified marriage law independent of religion and greatly divergent from traditional Shafite Islamic law, which resulted in disturbances so vehement as to force the government to agree to negotiations as a consequence of which everything 'un-Islamic' would have to be removed from the draft.⁹ Further attempts at fundamental reforms at the beginning of the twenty-first century were unable to win recognition.¹⁰

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To what extent the reforms instituted are actually implemented depends essentially on the courts and consequently on the type and substance of the legal training as well as the inherent understanding of those involved. In this context some scepticism arises towards the Moroccan reforms of family law. Still, new courts are to be established, new judges will be appointed and current judges receive further training in order to eliminate the existing resistance.¹¹

On the other hand it is clear that irrespective of what the law states, the status of the people involved dictates the application of the law to a significant degree. Consequently especially women from a poorer background or those who do not want to adhere to the traditional gender roles are often clearly at a

6 Cf. Nelle, Marokko, 276 ff.; id., Neue familienrechtliche Entwicklungen, 253, 255 with further references; Foblets, Moroccan women, 1387 ff.

7 Cf. El Hajjami, The Religious Arguments, 81 ff.

8 Cf. Ebert, Das Personalstatut, 43 ff.; regarding Shiite law, cf. the overview in Mohaqeq Damad, Legal and Civil Aspects, 57 ff. and Yassari, Das iranische Familienrecht, 62 and ff.

9 Cf. Cammack/Donovan/Heaton, Islamic Divorce Law, 99 f.

10 Cf. Mulia, Toward a Just Marriage Law, 142 ff.

11 Information in M. Badran, Feminism, 136 f.

disadvantage, even though protective measures are occasionally effective.¹² In addition there are time and again reforms which actually restrict the legal position of women and religious minorities in the interest of an 'Islamisation' with traditionalist thrust. Examples are Iran after 1979, Egypt after 1980¹³ (cf. i.bb below) and Pakistan in the 1980s and '90s.¹⁴

b *System of Personal Laws*

In the areas of personal status, family and inheritance law most Islamic countries retain the system of personal laws, according to which non-Muslims have legal autonomy as long no Muslims are involved. There are, however, other forms as well: Libya, for instance, enacted uniform laws on an Islamic basis which apply to all its citizens regardless of religious affiliation.¹⁵ In Egypt Islamic law is applied in cases involving different non-Muslim religions.¹⁶

As a rule Muslims receive preferential treatment in interreligious legal matters. Thus in Iran inheritance is 'one-sided' under article 881: Muslims may inherit from non-Muslims, but the other way around is not permitted. In Egypt, where article 6 of law no. 77 of 1943 specifies a universal prohibition of inheritance between Muslims and non-Muslims, the Supreme Court awarded a Christian who had converted to Islam the right to inherit his aunt's heritable property in 1970. He had submitted that his aunt had also converted to Islam shortly before her death. In accordance with classical procedural law – not mandatory Egyptian law – Muslim witnesses were allowed during the proceedings, but non-Muslim witnesses were not.¹⁷ More recent judgments also illustrate that in similar cases Islam is seen as the 'better' religion, irrespective of the letter of the applicable law, with the obvious consequences, e.g. as regards the custody of children.¹⁸ Interreligious marriages between Muslim women and non-Muslim men are still prohibited nearly everywhere,¹⁹ the only exception being Tunisia,

12 Cf. Würth's extensive and instructive study, *Aš-Šarī'a fi Bāb al-Yaman*, esp. 153 ff., 189 ff., 216 ff.; Bernard-Maugiron/Dupret, *Breaking Up*, esp. 63 ff.

13 Cf. Egypt, in an-Na'im (ed.), *Islamic Family Law*, 170; Gallala, *Religionsfreiheit*, 499 ff., 510 ff.

14 Regarding the husband's one-sided right to divorce and the right of the first wife to institute proceedings for divorce in case the husband enters into a second marriage cf. Otto, *Islamisierung*, 30 f. with further references; Monshipouri, *Islamism*, 147 ff.

15 Cf. Ebert, *Das Personalstatut*, 16 f.

16 Cf. Wähler, *Internationales Privatrecht*, 163 f. with further references; Gallala-Armdt, "Inconvenient Loves", 573, 579 ff.

17 Reported in Edge, *Comparative Approach*, 31, 51.

18 Cf. the detailed case description in Tadros, *The Non-Muslim 'Other'*, 111, 120 ff.

19 Cf. Ebert, *Das Personalstatut*, 103 with further references.

where we can observe an – admittedly inconsistent – development of recognising such marriages in some international cases.²⁰ The minority faith of the Bahā'ī²¹ suffers severe discrimination under the law; it is widely regarded as a group who renounced Islam, even though it is not threatened with criminal prosecution anymore.

On the whole religious minorities are still a long way from equality.²² In this context Abbas Poya²³ speaks of the paradox that on the one hand there is general approval of the principle of freedom of opinion and freedom of religion with its Islamic foundation in the passage 'no compulsion in religion' (sura 2:256), but that on the other hand this freedom is de facto restricted to the confines of the sharia, and non-Muslims enjoy freedom of religion within these limits only.

c *Minimum Marital Age*

In order to safeguard everyone's self-determination, the minimum marital age has been raised nearly everywhere and fixed at ages usually somewhere between 15 and 20 years,²⁴ with the minimum marital age for women often slightly lower than for men.²⁵ There are regular exemptions involving parents and/or the courts.

In Iran, where girls as young as nine were treated as marriageable until 2002, the reforms of 2002/03 succeeded in raising the regular minimum age to 13 for girls and 15 for boys. In the case of younger children the guardian as well as the courts must agree to a marriage. Parliament's attempts at more far-reaching reforms, raising the minimum age to 18 for both sexes, were blocked by the Guardian Council.²⁶ A well-known Iranian scholar considers the current law to be still in violation of the UN declaration of human rights and is convinced that it is possible to find justification in keeping with Islam for raising the age to 18.²⁷ An Iranian judge, on the other hand, reports that in practice the

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20 References from in part unpublished judgments of Tunisian courts in Bejemia/Ben Achour/Bellamine, *Ordre public*, 216 ff.

21 Cf. only the references regarding Egypt in Pink, *Neue Religionsgemeinschaften*, 117 ff.

22 E.g. M. Charfi, *Islam and Liberty*, 45 ff., expresses a critical opinion.

23 Poya, *Iğtihād*, 226.

24 Years are often calculated according to the lunar year which is ca. 10 days shorter than the solar year.

25 Cf. Ebert, *Das Personalstatut*, 94 f. with further references; concerning present-day North Africa cf. Nelle, *Neue familienrechtliche Entwicklungen*, 258 f.

26 Cf. Hamidian, *Jurisdiction*, 83 f.; Yassari, *Das iranische Familienrecht*, 67 f., 70 f.

27 Seyyed Mostafa Mohaqeq Damad on the occasion of a conference on Iranian family and

average marital age has by now reached between 25 and 30 years of age, not least because of economic circumstances.²⁸ It does, however, appear that the discrepancies between town and country are considerable, and that consequently raising the minimum age could have practical significance especially in rural areas.²⁹ Overall the marital age seems to have increased – due to economic and social developments rather than as a consequence of law reforms. While in the mid-1970s in the UAE, Libya and Kuwait 57, or 40%, of women were between 15 and 19 years old when they married, the corresponding figures for the mid-1990s show a decrease to 8,5, or 1%.³⁰

d *Informal Marriages and Betrothal*

In recent year the problem of so-called *ʿurfi* marriages has appeared repeatedly. This type of marriage, which conforms to certain established customs, is increasingly restricted by national legislation. One instance is provided by Egypt: article 17 paragraphs 1 and 2 of the family code (reform) law no. 1 of 2000 lay down that actions brought based on marriage contracts are not admissible if the wife is under sixteen at the time the action is brought, or the husband under eighteen (both solar years according to the Christian calendar). Furthermore, in case of dispute complaints arising from these marriage contracts are not admissible, either, unless their existence is substantiated by an official document (*wathīqa rasmiyya*),³¹ or with regard to a divorce or dissolution being sought.

The legislator's desire was obviously to establish the disadvantage of a lack of legal safeguards in order to deter people from marriages among minors. The remaining option of simplified divorce or dissolution is a response to cases where young girls were married to rich Gulf Arabs, who leave their 'wives' after a while without seeking a divorce.³²

inheritance law and its application by German courts in Hamburg in 2003 (cf. Haars, Summary of the Discussion, in: Basedow/Yassari (eds.), *Iranian Family and Succession Laws*, 98.).

28 Cf. Hamidian, *Jurisdiction*, 84.

29 Cf. Yassari, *Das iranische Familienrecht*, 71 with further references.

30 Cf. Rashad/Osman/Roudi-Fahimi, *Marriage*, 2 with further references.

31 It must be issued by the official responsible. In the case of Egyptians living abroad this may be the consul.

32 Cf. Elwan, *Die Form*, 157 f.

As regards the international application of the law the question arises whether, and if so under what preconditions, such marriages would be considered legally valid in Germany. The answer could be in the affirmative only if they were also valid according to Egyptian law. The Egyptian legislator, however, has avoided using the term validity or invalidity, according to the *ʿurfi* marriages the status of a unique imperfect obligation. The aim was obviously to avoid classifying them as invalid in order to safeguard children from such marriages from being declared 'illegitimate', and in order not to treat the married partners as simply living together illegitimately.³³ Apart from this, however, legal validity is precisely what is not desired. Consequently marriages of this kind cannot be seen as valid within a functional comparative analysis in Germany, unless the preconditions of article 17 are fulfilled.

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The author is aware of courts in Hurghada and Luxor which recognised (confirmed) such marriages at the insistence of the parties involved, while other courts refuse to do this – in any case the final judgment fulfils the condition of the official document required under article 17. Apparently the *ʿurfi* marriage is a path also chosen by couples of different nationality, possibly in order to avoid the comparatively involved official procedure for concluding a marriage according to article 5 paragraph 2 of the law no. 68 of 1974 (as amended by law no. 103 of 1976); later they can try to achieve recognition in the form of a judicial action for a declaratory judgment. Egyptian court rulings on the subject will have to be taken into account, unless it becomes clear that they were arrived at in a manner which collides with the principles of judicial independence and neutrality.

What remains problematic is the aspect of the possible retroactive effect these documents would have regarding the time at which the marriage took place. In view of the classification of article 17 it seems that it would be necessary to distinguish between issues of status in the narrower sense and legal positions derived from them. Thus as regards their status, the couple would be married from the time that the contract came into force, but they are not able to legally assert any rights arising from this circumstance. The fact that article 17 does not refer the actionability of claims to the date of the marriage but to the age of the claimant at the time of the action, also indicates retroactive effect (to the date on which the marriage contract came into

33 According to an unpublished judgment of the Cairo court of appeal of 24 May 2006 the paternity of a man was ascertained who had denied this as well as the existence of a non-official marriage.

force),³⁴ at least as regards status. It seems that as long as the claimant is above the legal minimum age, the additional circumstances of the marriage have no further relevance.

Another aspect which has recently been the subject of legal debate is the betrothal (*khitba*) which has no legally binding effect under current legal provisions.³⁵ It is possible that in the case of the betrothal being broken off at the request of one partner, the other partner may demand the return of gifts given with a view to a future marriage.³⁶ All of which makes it possible to counter-act widespread practices of customary law, according to which a betrothal by reciting the first sura in early childhood, i.e. with the partners involved unable to make a free decision, had to lead to a legally binding marriage in the end.³⁷ The practical effectiveness of these safeguards remain to be seen.

e *The Voluntary Nature of Marriage*

Everywhere in the Islamic world we can see reforms which intend to guarantee that the decision to enter into a marriage is voluntary. The option, permissible under classical law in certain cases, of the marriage guardian (*wilāyat al-ijbār*; l cf. Part 1, 4.2.b.cc above) forcing a ward to marry was abolished nearly everywhere, most recently in Morocco in 1993.³⁸ It appears that it is now permissible only in the Malay federal state of Kelantan.³⁹ The phenomenon of forced marriages, on the other hand, has by no means been eradicated.⁴⁰ On the Indian subcontinent and in Afghanistan in particular these marriages continue to be frequent. Due to migration processes they have now found their way into Europe as well.⁴¹ All of this does not refer to the majority custom of marriages arranged by members of the family, but to marriages which are not based on

34 Cf. also Kissner, Peter, Eheschließung einer Deutschen mit einem ägyptischen Staatsangehörigen in Ägypten, StAZ 2005, 299 f.

35 Cf. Ebert, Das Personalstatut, 89.

36 For examples concerning the reformed UAE laws of 2005 cf. Krüger, Grundzüge, 123 f.

37 Cf. Kuske, Reislamisierung und Familienrecht, 52 ff.; Nelle, Neue familienrechtliche Entwicklungen, 258 with further references.

38 Cf. Tellenbach, Änderungen, 943, 944.

39 Cf. Nik Noriani Nik Badli Shah, Marriage, 2000, 7.

40 Concerning a notorious case in present-day Yemen cf. 'Zwangsehe einer Achtjährigen', Süddeutsche Zeitung, 17 April, 2008, 7.

41 Case descriptions may be found in e.g. Badawi, Muslim Justice, 73, 75 f. and 79; cf. also Bundestag record 15/5951 of 11 Aug. 2005 (draft of the law to combat forced marriage) incl. explanatory statement, 6 ff., as well as the collection, produced by Heiner Bielefeldt on behalf of the Bundesministerium für Familie, Senioren, Frauen und Jugend, Zwangsverheiratung in Deutschland, Baden-Baden 2007.

voluntary individual decision, even if no externally perceivable force is being used.⁴²

In many states the involvement of a marriage guardian (*wali*; cf. Part 1, 4.2.b.cc above) continues to be obligatory if a marriage is contracted; for women this applies beyond marriageable age in some places. The *wali* is not entitled to forbid a marriage to a ward of marriageable age wishing to marry; controversial cases usually require a judicial ruling. Supporters consider the part played by the marriage guardian to be protection for an inexperienced bride, while opponents see it as disenfranchisement. Tunisia abolished this institution as early as 1956, while Morocco retained it formally but redefined the substance: under articles 24 f. of the family code marriage guardianship is now a 'woman's right' carried out on behalf of an adult in accordance with her choice and wishes. A bride of marriageable age may conclude a marriage contract herself, or entrust a close relative to do it on her behalf.⁴³ While the Algerian reform of 2005 retains the involvement of a guardian, the group of people has been widened⁴⁴ and thus been granted mainly ceremonial significance. The new family code of the UAE, which was enacted at the same time, retained the traditional provisions.⁴⁵

f *Formal Requirements and Their Significance*

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It is generally the case that the effectiveness of a marriage concluded in accordance with classical Islamic law does not depend on any form of registration. This was introduced in the modern era on a large scale, mainly in order to create legal security and to curtail arbitrary application of the law.

Where these kinds of formal requirements have been introduced, they are usually only declaratory. Non-observance does not lead to the marriage becoming invalidated. Observing them, on the other hand, may be a condition for claiming certain rights, and disregarding them may lead to consequences in accordance with penal or administrative law.⁴⁶ On occasion judicial permis-

42 Regarding this distinction cf. Filiz Sütçü's Ph.D. *Zwangsheirat und Zwangsehe*, Frankfurt/M. 2009, supervised by the author; Rohe, *Islam – Multikulturalität*, 67 ff.

43 German version reproduced in Nelle, *Marokko*, 277 f.

44 Article 11 of the family code states (English after the author's translation of the original): 'Women who are of age enter into a marriage in the presence of their *wali*. This is their father, or one of their relations, or any other person of their choice.'

45 Cf. Krüger, *Grundzüge*, 124 f.

46 Cf. e.g. Fritz Sturm, *Eheschließungen im Ausland. Nachweis, Wirksamkeit und Folgen von Rechtsverletzungen*, StAZ 2005, 1, 10 regarding Pakistan with further references.

sion is required as well, for instance in some countries in case of a very large age difference between the couple to be married.⁴⁷

Apart from this, the presence of two suitable witnesses is sufficient when the marriage contract is concluded; not even this, however, appears to be binding.⁴⁸ If doubt arises as to whether a marriage has been concluded effectively according to the law of the Islamic home country of one of the parties' involved, the validity of the marriage is generally to be presumed. This is due to the fact that 'unlawful' circumstances – and their, in part, drastic legal and social consequences – are to be avoided if at all possible. This applies once the marriage has been consummated, and is even more important when there are children of the marriage.

Also new but not constitutive of a valid marriage are the regulations on premarital medical examinations as contained in article 7 paragraph 2 of the Algerian family code in its reformed version of 2005.⁴⁹ Modern technology poses additional challenges: Indian scholars have explored the validity of marriage contracts concluded by telephone, video conferencing or internet.⁵⁰ Their concern has been to ensure reliability of the declarations. Thus, they declared such a marriage valid provided two witnesses were present as well as an attorney known to the witnesses or by his ID details. However, they remained silent on the consequences of a marriage which does not meet the latter requirement (presence of an attorney).

g *Specification of Marital Rights and Duties*

The traditional allocation of gender roles (cf. Part 1, 4.2.a above) is still reflected in most family laws in the Islamic world.⁵¹ Some explicitly set out the wife's traditional 'duty of obedience' (cf. Part 1, 4.2.b.ff above). A breach of obedience takes place if e.g. the wife leaves the marital home without her husband's

47 Cf. Ebert, *Das Personalstatut*, 98 with further references on the law of Syria, Jordan and the UAE.

48 Cf. Elwan, *Die Form*, 155 f. with further references.

49 (English after the author's translation of the original): 'The two parties wishing to enter into a marriage must provide a medical certificate no older than three months in order to prove that they are not afflicted with any disease or other risk factor which would be an obstacle to matrimony.'

Before drawing up the marriage contract the notary or official of the civil administration must determine that both parties have undergone medical examinations and must be informed of possible results regarding diseases or other risk factors which would be an obstacle to matrimony. This will be duly noted in the marriage contract.'

50 Islamic Fiqh Academy (India), *Juristic Decisions* (2009), 96.

51 Cf. Ebert, *Das Personalstatut*, 105 with further references.

approval, or if she refuses sexual intercourse; in these cases she will lose her right to maintenance.⁵² There are, however, many provisions to widen wives' scope of activity on a secure legal basis. These provisions include in particular those which allow a wife to finish professional training, pursue professional employment and maintain family ties through visits. One instance is the most recent new regulation of the issue in the Algerian reform of family law in 2005. The re-formulated article 36 of the family code (marital duties) now includes the following points:

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- Both spouses have a duty to (...)
2. live together with decorum, in mutual respect, affection and forbearance (...)
 4. discuss together how to carry out family affairs and how to space births of children.
 5. treat the respective parents-in-law well and with respect, also other relatives of the spouse, including visits (...)
 7. Either spouse is entitled to visit parents and relations as well as to invite them in the customary fashion.⁵³

h *Polygamy*

According to estimates the number of polygamous marriages in the Arab world is between 2 and 12%.⁵⁴ The reasons for these marriages are found on three levels: in some cases an unfulfilled desire to have children (especially with regard to male offspring). The fact that the child's gender is determined by the father's genetic material is not yet widely known. Another reason may be the archaic circumstances based on family subsistence economy in which women require material support. The wealth phenomenon, finally, is particularly common on the Arab peninsula, i.e. due to destitution, families de facto 'sell' very young women into these kinds of relationships. There are also reports from Egypt of cases where women enter into a marriage of this kind in order to gain some measure of independence in the public space (employment, freedom of movement) which would be denied them if they remained single.⁵⁵

52 Cf. op. cit., 107 with further references; Krüger, Grundzüge, 130 with further references; Wizārat al-awqāf, Al-mawsū'a, vol. 41, 38f.

53 The French translation shows that the main aim is to establish the right of the respective spouse (in actual fact especially the wife) to stay in contact with parents and relations. In this respect the provision replaces the former article 38.

54 Cf. Ebert, Das Personalstatut, 98 with further references.

55 Cf. Sonneveld, Rethinking the Difference, 77, 88 ff.

Overall polygamy meets with increasing disapproval, but Tunisia is the only country with a legal system based on Islamic law which has forbidden polygamy, in the family code of 1956.⁵⁶ The justification employs lines of argument inherent to the system, which were evolved by the Egyptian jurist and reform thinker Qāsim Amīn around the turn of the twentieth century.⁵⁷ It links the propositions of two Quranic verses: one the one hand polygamy could only be permissible if the husband treats his wives equally and fairly;⁵⁸ on the other
 216 the husband, despite wishing to with all his heart, would never be able to be entirely fair to all his wives.⁵⁹ In the current situation, equal treatment is thus impossible and polygamy consequently prohibited.⁶⁰ In spite of all this, traditionalists judged the conclusion to be unjustifiable, which is why this reform remained one of a kind.

Many other states tie the permission of polygamous marriages to formalities which are at least restrictive. In Morocco, for instance, they are possible only before and with the approval of a court, in the presence of the first wife and with the future wife being informed of the existing marriage.⁶¹ In any case the first wife can be granted a divorce. Other countries also introduced preconditions such as the agreement of the first wife and the completion of registration formalities.⁶² The most recent re-formulation by the Algerian reform of family law of 2005 (article 8 of the family code) states the following:

The husband must inform the existing and the future wife (sc.: of the intended additional marriage) and must submit an application for the permission to enter into a (further) marriage to the president of the court in the place of the marital residence.

The president of the court can permit the additional marriage if he has established the agreement of the two parties and the (future) husband has

56 Cf. article 18 of the family code; cf. also Anderson, *Islamic Law*, 49. Very impressive among criticism of polygamy is the argumentation of the Tunisian reformer al-Ṭāhir al-Ḥaddād, in Husni/Newman, *Muslim Women*, 63 ff.; cf. also Ben Abid, *The Shari'a*, 15.

57 Cf. Peters, *Erneuerungsbewegungen*, 108 f.

58 Sura 4:129.

59 Sura 4:3. Cf. also Weeramantry/Hadiyatullah, *Islamic Jurisprudence*, 69.

60 Cf. Coulson, *A History*, 210; Poulter, *Muslims*, 195, 231.

61 Cf. M. Badran, *Feminism*, 134; wording of the relevant articles 40 ff. (civil code) in Nelle, *Marokko*, 278.

62 Cf. Nelle, *Neue familienrechtliche Entwicklungen*, 260; Ebert, *Das Personalstatut*, 98 ff. with further references; on the very subtly differentiating Indonesian system see Otto, *Islam*, 79 f.

presented a valid reason and proved his ability to show fairness⁶³ and provide the necessary prerequisites for marital life.

The Supreme Court of Bangladesh declared in 1997 that the official permission required in that country had to be denied on a regular basis because humans are far too imperfect to be able to fulfil the Quranic postulate of fair and equal treatment.⁶⁴

In Gabon, on the other hand, steps were to be taken to facilitate polygamy, which was already permitted. Until then the couple getting married had to state during their marriage whether they intended to live a monogamous or polygamous life. A later change was possible only with the agreement of both partners. Against the protest of many women and also some men, the latter condition was to be abolished.⁶⁵

i *For Instance: Divorce Reform*

aa The Husband's One-Sided Right to Divorce

In many countries, the husband's effectively exercising his one-sided right to divorce (*ṭalāq*) is now tied to formalities, such as registration duties or involving the courts, e.g. under Iranian⁶⁶ and Indonesian⁶⁷ law. If the formalities are not observed, the *ṭalāq* does not have any consequences under Egyptian property and inheritance law for a wife who was not informed of her husband's intention.⁶⁸ In addition provisions are enacted which only recognise a definite and deliberate declaration of divorce as having legal effect.⁶⁹ Furthermore thoughtless exercising of the divorce right can be contained if a revocable divorce can be declared only with the wife's agreement.⁷⁰ There are also provisions for formalised attempts at reconciliation (cf. sura 4:35) under judicial supervision, or at least involvement. A certain social pressure may also prevent a rash declaration of *ṭalāq*, if the couple are closely related – which is frequently the

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63 This refers to the Quranic provision in sura 4:3.

64 Jesmin Sultana v. Mohammad Elias, 17 BLD (1997) 4, 6; References in Otto, Islamisierung, 34 with n. 40.

65 'Protest gegen Polygamie-Gesetz', Süddeutsche Zeitung, 19 June 1995, 9.

66 Cf. Safa'i, Le Mariage, 69, 76.

67 Cammack/Donovan/Heaton, Islamic Divorce Law, 103 ff.; it is remarkable that only around half of all divorces appear to comply with this law, op. cit., 119 ff.

68 Article 5 f. of the Egyptian law decree no. 25 of 10 March 1929 as amended on 3 July 1985; translated text quoted in Bergmann/Ferid, Internationales Ehe- und Kindschaftsrecht, Länderbericht Ägypten, Loseblattsammlung, date of last edit 31 Dec. 1993, 76.

69 Cf. the references in Ebert, Das Personalstatut, 109.

70 Thus the outcome in article 124 together with articles 94 ff. of the Moroccan family code reform of 2004.

case – and *ṭalāq* would consequently put a strain on important familial relationships.

Classical as well as modern legal scholars point out that while divorce is permitted by Islam, it is in fact generally frowned upon (*makrūh*).⁷¹ Financial consequences such as the agreed duty to pay a deferred dower or some other compensation may also lessen the inclination to repudiate one's wife. All the same, the overall number of divorces is high.⁷² There are figures for the time around the turn of the twentieth century, according to which of all marriages in Egypt 50–85% were divorced. Divorce was easy particularly in those regions where Hanafite law predominated, which was extremely favourable to *ṭalāq*. According to this view, a divorce could be valid even if it was declared in a state of unconsciousness, under duress, and even if it included all possible future wives.⁷³ As a result the Egyptian legislator was forced to explicitly declare these kinds of divorces as invalid (article 1 of the law decree no. 25 of 10 March 1929). The explanatory memorandum explicitly referred to the arbitrary way in which Egyptian men handled the *ṭalāq* as being contrary to the spirit of Islam.⁷⁴ In Pakistan, on the other hand, the comparatively pro-women provision of the Muslim Family Law Ordinance of 1961 (according to which the one-sided divorce by the husband only becomes effective once it has been registered with the respective authority) now seems to be treated as a breach of sharia law and consequently as invalid.⁷⁵

The classical distinction between revocable and irrevocable divorce (cf. Part 1, 4.2.b.gg above) remains. Of course the husband can still declare the divorce after failed attempts at reconciliation and in his wife's absence.⁷⁶ It should not be necessary to give reasons, in order to protect family secrets and the wife's honour (!), as well as because of the difficulty of providing evidence.⁷⁷

71 Cf. only al-Qasir, *Al-mar'at al-muslima*, 54 ff., 59 with further references.

72 Cf. Shaham, *Family*, 103 f. with further references.

73 Cf. Dimitroff, *Die Stellung der Frauen*, 14 f.; Anderson, *Islamic Law*, 53.

74 Reference in Shaham, *Family*, 102.

75 Cf. Otto, *Islamisierung*, 30 with further references. The relevant key decision of the supreme court, which was in this concrete case in favour of a divorced and remarried woman, appears to be adopted by the lower courts without restriction to special cases.

76 Cf. the references in Ebert, *Das Personalstatut*, 108 ff.; El Alami/Hinchcliffe, *Islamic Marriage*, 22.

77 Thus *Wizārat al-awqāf, Al-mawsū'a*, vol. 29, section headed *ṭalāq*, marginal note 11.

Classical as well as modern authors defend the fact that only the husband should be granted such extensive rights with men's alleged greater detachment from and, compared to women, lower dependence on emotions.⁷⁸ In addition, men are thought to have greater interest in the marriage continuing, as in case of divorce the husband would suffer great financial disadvantages, as for instance when he has to pay the deferred portion of the dower.⁷⁹ What the authors fail to mention is that as a rule divorced women suffer even graver legal and social disadvantages.

Legal consequences for wives are grave indeed. In particular, most countries only grant them post-marital alimony for a short time; they also do not usually have a share in the property acquired by the husband during the years of marriage and thus have to forfeit the economic value of their own contributions during the marriage.

An Iranian reform law of 1975 which restricted *ṭalāq* was abolished by the Islamic regime under Khomeini and not reinstated in the reform of 2002, either;⁸⁰ and neither was it possible to enact a draft reform of 1945 by the Egyptian department of social affairs intending to make the one-sided right to divorce dependent on judicial approval.⁸¹

In individual countries, e.g. Tunisia and Algeria, only judicial divorce is permissible nowadays. Here as well as in many other countries such as Egypt, Yemen, Kuwait and the UAE,⁸² the arbitrary divorce against the wife's wishes is made more difficult by provisions which may obligate the husband to pay living expenses and damages which could be rather more comprehensive than the universal, small claim to post-marital maintenance.⁸³

Ultimately, wives will remain in a state of permanent legal uncertainty under the rule of *ṭalāq*, which also includes significant potential for blackmail.

New challenges, finally, arise with modern technology: in several countries the question became relevant whether one-sided divorce could be declared with legal effect by text message. It seems to be permissible in the UAE, while

78 Zuḥaylī, *Al-fiqh al-islāmī*, vol. 7, 461; El-Bahnassawi, *Die Stellung der Frau*, 195; Wafī, *Human Rights in Islam*, 126 ff.

79 Cf. only al-Qasīr, *Al-mar'at al-muslima*, 54 ff.; Wānī, *Al-rajul*, 319.

80 Cf. Safa'i, *Le Mariage*, 77.

81 Cf. Shaham, *Family*, 102 with further references.

82 References in Ebert, *Das Personalstatut*, 111.

83 If the wife has given no grounds for the divorce, under Egyptian law she must receive a payment to the amount of alimony payments over at least two years; cf. also Dilger, *Tendenzen der Rechtsentwicklung*, in: Ende, Werner/Steinbach, Udo (eds.), *Der Islam in der Gegenwart*, 4th ed. (Munich 1996), 193 f.; Nasir, *Islamic Law*, 135 ff.

in Malaysia it was prohibited, even though the mufti of Kuala Lumpur had at first declared it to be in accordance with the law.⁸⁴

219 bb The Wife's Statutory Divorce Rights

Under classical law a wife had overall rather restricted options when it came to divorce (cf. Part 1, 4.2.b.gg above); they are perpetuated in modern regulations. In addition many countries have introduced more extended statutory divorce rights. In Iran, for instance, since the reform of 2002 a wife can obtain a divorce through the courts in case of distress (*'osr ve ḥaraj*). This applies e.g. if the husband is violent, surrounds himself with undesirable persons, marries again, is addicted to alcohol or drugs, is in prison for a long time or does not provide maintenance.⁸⁵ Comparable provisions are by now found in many Islamic states.⁸⁶ They are based on reforms going back as far as the early days of the twentieth century. These facilitations of divorce which benefit the wife were enacted by the Egyptian legislator over several reforms beginning in 1920 and finally in 2000.⁸⁷ As these reforms provide a clear example of the substance and justification of new provisions within the limits of Islamic law, they will be discussed in more detail below:

The reform laws of 1920 and 1929 grant the wife the right to divorce in certain cases which have been retained in the amended law of 1985. Under articles 4 ff. of the law of 1920 the wife can obtain a divorce if the husband does not provide the maintenance due; even if he can prove insolvency he will be given respite of one month maximum (article 4). Another cause for divorce is, under article 9, if the husband suffers from a serious incurable or chronic disease which might make intercourse harmful to the wife. The condition in this case is that the wife was not informed of the existing illness, or refused intercourse once she had been informed.

Similar provisions apply in cases of the husband's being absent without arranging for maintenance (article 5). Under article 6 of the law of 1929 as amended in 1985 the wife is able to file for judicial divorce with the claim that her husband committed such misdeeds against her as to make it impossible for her to take part in social activities among persons of her status. The divorce will be pronounced immediately only if the misconduct can be proved, and if

84 Report in Frankfurter Allgemeine Zeitung, 14 July 2001, 9.

85 Cf. Hamidian, Jurisdiction, 85 f.; Safa'i, Le Mariage, 78.

86 Cf. Ebert, Das Personalstatut, 114 ff. with further references; Morocco has a similar provision under article 99 of the family code of 2004.

87 *Qānūn raqm 1 li-sanat 2000 bi-iṣḍār qānūn tanzīm ba'd awḍā' wa-ijrā'āt al-taqāḍi fi masā'il al-aḥwāl al-shakhṣiyya, al-jarīdat al-rasmīya* 29 Jan. 2000 (23 Shawwāl 1420).

the judge's attempts at reconciling the couple were in vain. It seems that the courts tend to treat wives comparatively severely.⁸⁸ If the wife fails to produce evidence, under article 6 the marriage may be divorced only in a second lawsuit and after a further failed reconciliation attempt. 220

In these cases either party's fault in such misconduct will be investigated; if the wife is found to be at fault, she will have to make proportionate payments (article 10). In this case patriarchal principles become precarious when the husband claims provocation on the part of the wife in order to justify physical abuse, as was indeed the case according to Egyptian court records (cf. sura 4:34⁸⁹).

Further grounds for divorce are e.g. absence of more than a year for no reason and imprisonment for a similar time (articles 12 ff.), marrying another woman if this results in the existing wife suffering material or moral damage to a degree which makes further life together as husband and wife impossible, and if a subsequent attempt at reconciliation failed (article 1, para. 2); this is a statutory extension of possible provisions under a marriage contract. The new wife has the same right, if she was not informed of the existing marriage.

The change of social circumstances would be taken into account in particular in the reform of 1979, which was promoted significantly by Jihan al-Sadat, the wife of (later assassinated) President Anwar al-Sadat.⁹⁰ Article 6a of law no. 44 of 17 June 1979 states the husband's duty to provide a written declaration of his marital status to the registrar. Before a second marriage the registrar had to inform the existing and the future wife of the intention to marry again/ the existing marriage. If the second wife had not been informed, she had a right to divorce the husband; the first wife had this right anyway.⁹¹ The actual aim was to control polygamy.

Islamist groups, on the other hand, mobilised vehemently against this reform. Implementing the sharia in what they claimed was its 'authentic' form

88 Thus Nassar's statements in *Legal Plurality*, 198 ff.

89 Concerning article 6 of law no. 25 of 1925 cf. Shaham, *Family*, 122 f. with further references. Heated debate continues regarding the interpretation of the 'right to chastise'; cf. e.g. Jamal Elias, *Islam*, (Freiburg/Br. 2000), 171; it is true that an interpretation close to the precise wording must not be dismissed from the outset; cf. also Sa'īd 'Abdu 'Abd al-Hamīd, *Muta'alliqāt*, 107 f. in the context of article 6 of law no. 25 of 1929. A remarkable interpretation of 'limitation' rather than 'granting' of rights is found in al-Sha'ār, *Usus*, 68 ff. Cf. also Part 3, 3.3.a.mm below.

90 Cf. Flores, *Die Stellung des Islams*, 478.

91 Cf. Yehia, *Neue Aspekte*, 35 ff.; regarding social background cf. the vivid description in Tove Stang Dahl, *The Muslim Family*, (Oslo etc. 1997) 76.

became a major political issue.⁹² It is possible that the *conditio humana* played a part in this individual case as well. According to a well-known Egyptian jurist one of the causes of the parliamentary debate on the 'Islamisation' of the civil code was that the most important protagonist wanted to become as famous as Sanhūrī, the author of the civil code of 1948.⁹³

The champions of Islamising the law were able to achieve a success in legal politics due mainly to the constitutional change forced by the referendum of 22 May 1980.⁹⁴ Now article 2 para. 2 named the principles of the sharia as 'the' main source of legislation, while previously they had been 'one' of the main sources.⁹⁵ When the prominent campaigner for women's rights Nawāl al-Sa'dāwī demanded the abolition of this article of the constitution, some legal scholars called for her to be put to death.⁹⁶

On the basis of the amended article 2 it is possible to put forward the legal argument that laws contradicting Islamic law are unconstitutional and must consequently not be obeyed.⁹⁷ This may include provisions which forbid something allowed under Islamic law, e.g. the prohibition of polygamy.⁹⁸ Since that time parliamentary attacks against law no. 44 of 17 June 1979 have multiplied; it was finally abolished by the Constitutional Court for reasons of procedural law in a judgment published on 16 May 1985.⁹⁹ It was replaced by law no. 100 of 16 May 1985 which, while retaining important components of the preceding law, in fact took a step back compared to the development of the 1970s. It did, however, retain the protection by means of formal requirements. Under article 5a

92 Cf. N. 'Abd al-Fattah, *The Anarchy*, 159, esp. 168 ff.

93 Prof. El Kosheri, President of the Université pour le Développement Africain in Alexandria, on the occasion of a conference on 'Islamic Law and its Reception by the Courts in the West' from 22–14 Oct. 1998 in Osnabrück.

94 Cf. Brown, *Islamic Constitutionalism*, 493 ff. On the constitutional history of the republic cf. Baumann/Weber (eds.), *Die Verfassungen*, 46 ff.

95 Cf. the printed text in Baumann/Weber, 57 ff.

96 Cf. 'Bewegung in Ägypten', *Frankfurter Allgemeine Zeitung*, 1 March 2005, 7 (R. Hermann).

97 On the relevant judgments of the constitutional court cf. Murray/El-Molla, *Islamic Shari'a*, 511 ff.; Bälz, *The Secular Reconstruction*, 229 ff.; on the debate cf. also Flores, *Die Stellung des Islams*, 478 ff.; Abu-Sahlieh, *Les mouvements islamistes*, 21.

98 Cf. the statement to that effect by Ibrahim Ahmad al-Waqī'i, Academic councillor for Islamic Law at the al-Azhar University and member of a parliamentary commission on the formulation of sharia law, *Tilka ḥudūd Allāh*, Cairo 1979, 274 f., quoted in Muranyi, *Die Stellung des Islams*, 351. Concerning the development in Egypt cf. Skovgaard-Petersen, *Defining Islam*, 199 f. (in some detail).

99 Cf. El Alami/Hinchcliffe, *Islamic Marriage*, 51; the reason for its being abolished was the lack of participation on the part of parliament.

of law no. 100 of 1985 the husband must register the one-sided divorce within 30 days with the proper authority. The wife must be informed of this and of the legal consequences and must receive the relevant documents. Failing this the divorce will not have any consequences under property and inheritance law. Article 21 of law no. 1 of 2000 adds some more formal requirements.

Advocates of reform suffered a severe setback with the forced divorce of the scientist Naṣr Ḥāmid Abu Zayd and his wife.¹⁰⁰ Due to his liberal writings he was accused of apostasy (cf. Part 1, 4.7.b.gg above) and subsequently divorced from his wife against her wishes in a forced divorce. This course of action was sanctioned through all stages of appeal. It is remarkable that the presiding judge of the court of cassation which confirmed the forced divorce was said to have acquired his extreme position (*tashaddud*) during a stay in the Gulf States.¹⁰¹ The couple subsequently went to live in the Netherlands. It is true that the Egyptian legislator endeavoured to prevent a repetition of such cases by abolishing the legal institution employed in the case of Abu Zayd, the *ḥisba* lawsuit for individuals – i.e. an action without personal involvement with the aim of establishing Islamic order – by means of article 1 of law no. 3 of 29 Jan. 1996.¹⁰²

We do, however, see opposing trends as well. The extreme Islamist Shaykh Yūsuf al-Badrī, who was responsible for, among other things, the proceedings to reinstitute female genital mutilation¹⁰³ and Naṣr Ḥāmid Abu Zayd's forced divorce, brought an action against the liberal journal *Rose al-Yussuf* for payment of around 25,000 Euros, because it had called him an extremist. The court, however, awarded the journal ca. 4,000 Euros in damages because of al-Badrī's continuous libelling of it. As the judge put it, the cause of the rampant 'epidemic of religious extremism' are 'a few psychopathic persons whose illness suggests to them that God granted them personally the power to punish and reward others'.¹⁰⁴

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100 Cf. Bälz, Eheauflösung, 353; fundamental information is provided by Thielmann's monograph, Naṣr Ḥāmid Abū Zaid 2003.

101 Cf. Thielmann, Naṣr Ḥāmid Abū Zaid, 219 f.

102 Cf. *Qānūn raqm 3/1996 tanzīm ijrā'āt mubāsharāt dā'wā al-ḥisba fī mas'āl al-aḥwāl al-shakhsīyya*.

103 Cf. 'Beschnidung bei Mädchen erlaubt', Frankfurter Allgemeine Zeitung, 25 June 1997, 9; 'Die Prominenz begehrt gegen die Islamisten auf', Süddeutsche Zeitung, 5/6 July 1997, 14. The non-Islamic origins of this atrocity can be clearly seen in the fact that the majority of Coptic Christian Egyptian women were mutilated in this way; cf. 'Ägypten verbietet weibliche Beschnidung', Süddeutsche Zeitung, 20/21 July 1996, 12.

104 Cf. 'Die Prominenz begehrt gegen die Islamisten auf', Süddeutsche Zeitung, 5/6 July 1997, 14.

This climate, characterised by opposing extremes in legal politics, provides the backdrop for the most recent reform of family law in 2000. It provides new regulations of the legal relations between spouses in some important issues, in particular with regard to dissolving a marriage; it caused a considerable stir in parliamentary as well as extra-parliamentary debate. Some people clearly thought the twilight of the Orient would be imminent if these ideas were put into practice.¹⁰⁵ Others saw it as a necessary step to adapt the family code to the existing social situation. Innovations were in particular the significantly expanded options a wife had to file for divorce.

The fierceness of the argument in the run-up to the reform may seem surprising at first. After all the issue was not to amend laws adopted from or inspired by the West to conform with the sharia, as Islamists had demanded loudly for decades. In Egypt, as in most other Islamic countries, family law has always remained the preserve of traditional Islamic law. The frontlines are thus not Western import against authentic religious and legal legacy, but traditionalists against advocates of reform in a discourse within the limits of Islamic law.

The need for reforms was obvious. According to reports in the Egyptian press around 1.5 million women were waiting for judicial divorce. According to information from the department of justice passing the decree of a divorce might take up to 15 years.¹⁰⁶ The considerable number of women wishing for a divorce may be due to the fact that many people enter into marriage at a very early age, and that marriages were often arranged by parents. Very young women from poor families are often married to wealthy older men. Furthermore, marriage is usually the only way in which a woman can start another existence outside her parents' house. All these are reasons why people
 223 may enter into marriages without sustainable foundations. In addition the wife's position becomes more and more insecure with increasing age: prospects of remarriage decrease and financial risks increase with age, unless the wife has considerable property of her own. At the same time the wife becomes more susceptible to blackmail by the husband who, after all, can pronounce a *ṭalāq* at any time.

At the core of the reform is article 20, stating the following:¹⁰⁷

105 Cf. the unusually mediocre and extremely anti-Western comments by Mahmud Zāhir, 'Al-majlis al-qawmi li-l-mar'a wa-l-khul' wa-l-ijhād wa-ḥaqq al-'idda', al-Gha'b, 29 Feb. 2000 (viewed on 10 Aug. 2000 at <http://www.elshaab.com/29-2-2000/4.htm>).

106 Quoted in 'Ägyptens Pascha hat ausgeherrscht', Süddeutsche Zeitung, 22/23 Jan. 2000, 16.

107 The text of the following norms is based on the author's translation from the Arabic.

The spouses can agree a *khul'*. If they have not agreed one, the court will pronounce the divorce if the wife brings a suit for *khul'* and separates from her husband in return for payment by forgoing all her legal claims to property and returning the dower paid by him.

A divorce because of *khul'* is only pronounced after an attempt at reconciliation between the spouses, which is the task of two mediators with the reconciliation endeavours lasting for three months maximum (...), and after the wife has declared explicitly that she finds life with her husband so repulsive that any continuation of marital relations between them is impossible and that she is afraid that due to this revulsion she would not be able to observe the limits set by God. The compensation for *khul'* must not be the surrender of the actual care for minor children (*ḥaḍāna*), of their maintenance or of any of their rightful claims.

Legal consequences of *khul'* are those of the irrevocable divorce (*ṭalāq bā'in*). Under no circumstances can the judgment be contested by legal remedy or legal redress.

The provisions of articles 18 and 19 here referred to are the following:

Article 18, para. 2: In divorce cases the court will rule only once a judicial attempt at reconciliation has remained unsuccessful; if the spouses have a (minor) child, the court must offer a proposal for reconciliation at least twice, at least 30, and not more than 60, days apart.

Article 19: In divorce actions (actions for *taṭlīq*¹⁰⁸), for which the law prescribes the appointment of two mediators, the court must oblige both spouses to appoint a mediator, each from their own family (*min ahlihi*), if possible during the subsequent session. If either of the spouses fails to appoint a mediator or does not attend this session, the court will appoint a mediator for him or her.

Both mediators must attend the subsequent session of the court in order to announce what they have agreed, and if they disagree, or if one of them contradicts (the other) or does not attend the session, the court will hear them both, or hear the one present, after they have been sworn in. The court may then decide either that which the two mediators have agreed on, that which either of them has announced, or else that which can be found in the case files.

108 I.e. an action for divorce brought by the wife; cf. Part 1, 4.2.b.gg above.

224 The most significant change of article 20 compared to the previously prevailing legal norms¹⁰⁹ is that the wife can file for divorce of a broken marriage without provable grounds which belong exclusively to the husband's environment, and against the husband's wishes; without a particular agreement and without having to pay compensation beyond the dower. It is true that she will lose the value of the contributions she has made to the marriage while it lasted, unless the husband has transferred the corresponding assets as part of his duty to provide maintenance for her. Repaying the dower is, of course, in any case a loss of security in case of financial straits and in old age.

It is remarkable that the substance of the regulation is based very closely on a prophetic tradition. The historical model of *khul'* is found in the case of Thābit ibn Qays' wife¹¹⁰ who complained to Muhammad of her husband's ugliness and requested the marriage to be dissolved, although she was not able to reproach him for failings in his character or piety. She did, however, abhor the idea of unfaithfulness. This last statement was probably intended to express that she feared to commit the crime, named in the Quran, of having extra-marital sexual relations (*zinā*, cf. Part 1, 4.7.b.cc above).

According to this prophetic tradition Muhammad asked the wife if she would be willing to return her dower, an orchard of date palms. When she answered in the affirmative, Muhammad asked Thābit ibn Qays to take back the dower and pronounce the divorce.¹¹¹ Here we have the model of the rule according to which the wife has to return the dower if the desire for divorce is on her side only.

The legislative procedure expressed the criticism that according to unanimous opinion of the four Sunni schools of law, *khul'* presupposes the agreement of both parties. While the wife could bring a suit for divorce on the grounds of the husband causing harm or damage, she could not bring a suit for *khul'* without an agreement to that effect. The critic also pointed out that the already permissible divorce on the grounds of harm or damage was comparatively easy to achieve.¹¹² The statistical information quoted above, however, contradicts this. Advocates of women's extended right to divorce could refer to the prophet's

109 For a detailed overview cf. Sayyid Muhammad, *Al-khul'*, 1424/2002; in German see Denker, *Die Wiedereinführung*, 125 ff.

110 Transmitted in e.g. Ibn al-Athīr al-Shazarī, *Jāmi' al-uṣūl*, vol. 4, 2090 ff.

111 Quoted in El-Nimr, *Women*, 87, 99.

112 Cf. Kamāl Ḥabīb's report in *al-Gha'b*, 22 Feb. 2000, 3 (viewed on 18 Aug. 2000 at <http://www.elshaab.com/22-02-2000/3.htm>) regarding Muhammad Khātir Muhammad al-Shaykh's comments.

as well as caliph ‘Umar’s practice.¹¹³ Remarkably, even Sayyid Qutb, one of the most important leading thinkers of Islamism in Egypt, approved of *khul‘* under the conditions set out in the reform law, although in his opinion the wife should have to return all or some of the maintenance payments made to her during the marriage. This may be a reference to the contractually agreed *khul‘* with attendant obligation to pay.¹¹⁴

In the end what we see reflected is the conflict between the advocates of *taqlid* and those who want to allow wider scope to *ijtihad* in order to free the law from the constraints of the outdated regulations of individual details. In the meantime the Egyptian constitutional court has confirmed the constitutionality of the amendment.¹¹⁵ It referred to a considerable degree to the fact that there were no binding rules not open to interpretation contradicting the amendment, and that due to the diverse scholarly opinions the legislator has the authority to determine a statutory provision. Ruling out legal means as a recourse for the husband is justified on the grounds that they would exacerbate the hardship.

The Egyptian campaigner for women’s rights Nawāl al-Sa’dāwī calls the reform a ‘small victory over deep injustice’.¹¹⁶ Thus Egyptian women justly point out that the financial consequences of a divorce where the action was brought by the wife (loss of dower and alimony) are beyond the financial capacity of poorer women. The work they have done in the household, possibly over many years, is not taken into account at all.¹¹⁷ This shows clearly that the changed social circumstances make a fundamental reform of the entire family law including maintenance and inheritance law necessary.¹¹⁸ Abdullahi al-Na‘im presents this reform in a wider context: it illustrates, he says, the mistake of attempting a legislative realisation of sharia norms instead of simply making good laws. Consequently every legislation should be based on ‘civic reason’

113 Thus El-Nimr, *Women*, 99.

114 Sayyid Qutb, *Fī zilāl al-qur‘ān*, vol. 1, 7th ed. (Beirut 1971), 362; al-Qaṣīr, *Al-mar‘at al-muslima*, 56, follows him.

115 Judgment of 15 Dec. 2002, printed in al-Bakrī, *Mawsū‘at al-fiqh wa-l-qaḍā’*, al-aḥwāl al-shakhṣiyya, vol. 4, 579.

116 Quoted in ‘Der abgelegte Mann’, *Süddeutsche Zeitung*, 31 March 2000, 3. Regarding the practical problems of implementation cf. Bernard-Maugiron/Dupret, *Breaking Up*, esp. 63 ff.

117 Quoted in ‘Ägyptens Pascha hat ausgeherrscht’, *Süddeutsche Zeitung*, 22/23 Jan. 2000, 16.

118 The argumentation of the Tunisian reformer al-Ṭāhir al-Ḥaddād goes in the same direction, in Husni/Newman, *Muslim Women*, 46 f.; cf. also Farzana Hassan-Shahid, *A Forward-looking Ijtihad in the Modern Era*, 14 Dec. 2006, viewed on 28 August 2014 at <http://farzanahassan.com/Articals/FH0002.htm>.

supported by a free and open public discussion, at the same time always safeguarding the constitutional and human rights of everyone, including minorities.¹¹⁹

Still, the reform had a parliamentary majority, despite all the opposition. The reform law of 1979 had not made that hurdle: due to parliamentary opposition President Sadat had enacted it by presidential decree,¹²⁰ which ultimately resulted in its being abolished by the constitutional court.

The opposition, rooted as it is in profoundly patriarchal understanding,¹²¹ has not been dispelled by a long way, as illustrated by the comments made by the member of parliament Badr Maḥrūs Muhammad Sulaymān Sha'rawī¹²² on the subject of *khul'* and the wife's free choice of residency. He vehemently opposed the legal regulation of *khul'*, as he claimed that due to the economic and social developments in the country this would result in an increase of crime (!) and that a wife could use this right in order to destroy the family. At the same time the MP did explicitly not intend to contradict the well-known legal authorities supporting the law on the side of the government, or the Shaykh al-Azhar Muhammad Sayyid al-Ṭanṭāwī, on the sharia level, but from the social point of view. As for the reform of the right to travel debated at the same time, he asked the rhetorical question whether this right would mean that one day a husband might wake up without his wife by his side because she had decided to go travelling. Sha'rawī found his most important counter-argument in sura 4:59, usually referred to as basis for the doctrine of constitutional law (cf. Part 1, 4.8 above): those 'whose duty it is to give the orders (*ūlī l-amr*)' and to whom obedience is therefore due are – in a family context – the husbands. How, then, could people even consider instigating wives to disobedience against their husbands? An Egyptian lawyer was quoted as having said: 'Soon every woman will leave her husband as soon as she sees a richer or prettier man'.¹²³ This privilege of choice had indeed been a male prerogative until then.

Ṭanṭāwī's remark in the parliamentary debate, on the other hand, is noteworthy: only a man devoid of dignity would force his wife to stay with him against her wishes. He emphasised that men and women have the same worth under Islam (it is not the case that men are made from gold and women from silver, or vice versa) and are subject to the same legal and religious duties; the

119 An-Na'im, *Islam and the Secular State*, 29 f.

120 Cf. Flores, *Die Stellung des Islams*, 478.

121 Cf. Karmi, *Women*, 69 ff.

122 Remarks taken from the record of the consultation meeting on 17 Jan. 2000, quoted in Sāmiḥ Sayyid Muhammad, *Al-khul'*, 453, 464–467.

123 Quoted in 'Der abgelegte Mann', *Süddeutsche Zeitung*, 31 March 2000, 3.

laws under discussion intended to establish equal rights for both sexes, and consequently justice.¹²⁴ If the bearer of the highest authority in Sunni Islam speaks out in this way, he confirms the understanding of many modern Muslim authors – male and, in particular, female – according to which it is not Islam but the patriarchal ideas dominating in many Islamic countries which prevent gender equality.¹²⁵

This reform meant that Egypt took a step forward, but it was by no means a trailblazer.¹²⁶ Immediately after independence Tunisia introduced the exclusive judicial divorce with equal right to apply for both spouses in the personal status law of 13 Aug. 1956 (articles 29–31). If needed, the wife has a claim to post-marital alimony payments until her death (article 31 p. 3). The legal situation in Egypt and other Islamic countries still lags far behind this. Morocco is the only other state to have introduced, in 2004, regulations of divorce beyond the possibilities opened by *khul'*.¹²⁷

It is not yet possible to gauge the effects of the fact that the new generation of jurists and lawyers in Egypt (and not only there) received its training in a climate of opinions dominated to a significant degree by Islamists.¹²⁸

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j *Marriage Contracts*

Marriage contracts were and are a key element to improving the position of women. They can include provisions enabling women to end an unbearable marriage or *de facto* complicate the one-sided repudiation by the husband. They can also lay down the first wife's unrestricted right to a divorce in case the husband later enters into a second, polygamous marriage.¹²⁹

Classical law already allows the additional option to set down in the marriage contract the possibility of an easier divorce by means of *khul'* and similar forms; always, however, with the abovementioned adverse consequences for

124 Remarks taken from the record of the consultation meeting on 17 Jan. 2000, quoted in Sāmiḥ Sayyid Muhammad, *Al-khul'*, 453, 464–467.

125 Cf. Karmi, *Women*, 69 ff.; cf. also Pinn/Wehner, *EuroPhantasien*, 145, 148 with n. 25; Rohe, *Der Islam*, ch. 2.2, 3.d.

126 For the practical implementation of the reform and its factual hurdles cf. Al-Sharmani, *Legal reform*, 85 ff. with further references.

127 Cf. Nelle, *Neue familienrechtliche Entwicklungen*, 263 f.; Foblets/Carrier, *Le code*, 63 ff.; for the implementation of the reform and its factual hurdles cf. Newcomb, *Justice*, 105, 111 ff. with further references.

128 As pointed out by N. 'Abd al-Fattah (*The Anarchy*, 170); cf. also Sherif, *The Origins*, 13, 35 f. on the situation in the Bar Council.

129 Cf. El Alami, *The Marriage Contract*, 130 ff.; El Alami/Hinchcliffe, *Islamic Marriage*, 10.

the wife (cf. i above). In Egypt, it does not appear to have been socially acceptable until recently.¹³⁰

Finally it must be pointed out that *khul'* may also be abused by the husband, if he behaves in such a way that the wife sees herself forced to take recourse to *khul'*. In this case she will have to pay damages, which the husband can then use in his turn to finance the dowry for a new wife. According to Anderson¹³¹ this is said to have been widespread usage in some countries. The Moroccan legislator reacted to this in article 117 of the family code, creating a provision under which a wife can claim back the assets she gave her husband if she can prove that she declared *khul'* under threat from her husband. The option to have a contractual agreement is thus by no means a substitute for the legal solution created in Egypt, as explained above.

Iran recognises the community of property acquired during the marriage agreed in marriage contracts. Under this the wife has a claim to half the property acquired (by the husband) during the marriage.¹³² Comparable rules were created in the course of family law reforms in Morocco (article 49 family code 2004) and Algeria (article 37 family code 2005). However, these courses of action are presumably open to educated women only, who are able to assert their interests in this way.

228 k *Property Law and Personal Custody Law*

The classical allocation of gender roles with the man dominating is also retained in principle in property law and personal custody law. Some countries, however, have instituted reforms which strengthen the mother's position and allow individual decisions according to the best interest and welfare of the child.¹³³ In some individual laws, for instance in Libya, Tunisia and Morocco, personal custody is furthermore defined as a duty to be shared by both parents, rather than allocating it according to the age of the child either to the mother or the father, or the nearest responsible relatives. In Bangladesh the regulations based on the child's age are merely used as refutable presumptions in relation to the best interest and welfare of the child.¹³⁴

In Iran the mother's personal custody right for male children was increased from 2 to 7 years, equal to custody for daughters.¹³⁵ In Egypt law no. 100 of

130 Cf. Nassar, *Legal Plurality*, 197.

131 Anderson, *Islamic Law*, 52 f.; id., *Islamic Law in Africa*, 320.

132 Cf. Hamidian, *Jurisdiction*, 84, 92.

133 Cf. the references in Ebert, *Das Personalstatut*, 124 ff.

134 Cf. Otto, *Islamisierung*, 35 with further references.

135 Cf. Hamidian, *Jurisdiction*, 93.

1985 created the opportunity for the mother's personal custody to be extended (for boys until the age of 15, for girls until their marriage) upon request, if it is in the best interest of the child. The further reform of 2005 (law no. 4) increased the mother's personal custody of boys until they completed their fifteenth year, with the option of extending it upon request until they come of age (at 21) if this is in the child's best interest. The regulation that the mother loses personal custody of her children if she remarries continues to apply widely, adding a strain to the mother's situation. Evidence of remarried mothers retaining personal custody is rare and only found in exceptional cases, such as the Egyptian judgment referring to the unusual circumstance that the father in this case was a foreigner.¹³⁶

According to the Moroccan family code in the reformed version of 2004 (article 175) the mother's remarriage does not lead to her losing personal custody of children under 7 years of age or if the separation from their mother would be detrimental to their well-being, also if the child is suffering from an illness or disability which would rule out childcare by another person, or if the new husband is related to the child in a degree which rules out marriage, or if he is already the child's legal guardian.

As an example of recent reforms the following paragraphs quote the norms of the Algerian family code in the amended version of 2005:¹³⁷

Article 64:

The person with the primary right of personal custody for children (*ḥaḍāna*) is the mother, then the father, then the maternal grandmother, then the paternal grandmother, then the maternal aunt, then the paternal aunt, then relatives of the next degree, always considering the best interest and welfare of the child. When the judge allocates personal custody he has to decide the visiting rights at the same time.

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Article 67 p. 3, second sentence:

The wife's professional employment by no means results in her losing her right to undertake the personal custody (of the child).

¹³⁶ Court of first Instance Iskandariyya (Alexandria), judgment of 17 Feb. 1985, quoted in al-Bakrī, *Mawsū'at al-fiqh wa-l-qaḍā'*, al-aḥwāl al-shakhṣiyya, vol. 3, 86.

¹³⁷ The English text is after the author's translation from the original.

Article 72:

In the case of divorce brought about by the husband (ṭalāq), the father (sc. the former husband) must provide the person entrusted with personal custody with accommodation suitable for carrying out the personal custody or, of this is not possible, he must pay the rent for such accommodation.

The mother entrusted with personal custody will live in the marital home until the father (sc. the former husband) has put into practice the court's decree regarding the accommodation.

Article 87:

If the father is absent or another impediment exists on his part, the mother takes his place with respect to putting into effect urgent measures regarding the children.

In the case of divorce brought about by the husband (ṭalāq)¹³⁸ the judge apportions guardianship to the party who is entitled to carry out personal custody of the children.

1 *Maintenance Law*

The generally prevailing concept is that the husband alone is responsible for the financial upkeep of the family. Consequently failure to comply with his duty to provide maintenance is among generally agreed grounds for divorce in favour of the wife. The continuing traditional distribution of gender roles is reflected in the different period postulated for the maintenance of children: while for instance under Egyptian maintenance law sons have a claim to maintenance only until they have completed their fifteenth year, or suitable training, a daughter's claim to maintenance ends only with her marriage or her entering into professional employment (which she is not obliged to do).¹³⁹

Compared to classical law we see changes in two ways especially. On the one hand some countries modified the traditional allocation of gender roles according to which only the husband is responsible for the upkeep of the family: under Moroccan, Tunisian, Libyan and UAE law a wealthy wife must contribute to the financial upkeep.¹⁴⁰

138 Cf. articles 48 ff.

139 Cf. article 18b law no. 25 of 1920 as amended in law no. 100 of 1985; further references in Ebert, *Das Personalstatut*, 122 f.

140 Cf. Ebert, *Das Personalstatut*, 106 with further references.

On the other hand partial reforms of post-marital maintenance in favour of divorced wives (who were not the guilty party) were implemented. After all, according to classical doctrine the claim to maintenance ends only a short time after the end of the marriage (cf. Part 1, 4.2.b.ii above). Tunisia is the only country where a needy, divorced and not remarried wife has a claim to continued alimony in keeping with the marital standard of living (article 31 personal status law).¹⁴¹ Other countries stipulate certain compensation payments for contributions to the marriage (*mut'a*; cf. Part 1, 4.2.b.gg above). Article 18a of the Egyptian law no. 100 of 1985 stipulates alimony payments for a wife who was not the guilty party and divorced against her wishes for two years beyond the traditionally granted payments during the period of waiting.¹⁴² In Algeria the amended article 52 of the family code of 2005 stipulates that the court can order a husband who has used his right to declare divorce gratuitously to pay compensation to the wife; the same applies under article 53 to a husband whose wife divorces him with justifiable grounds. In Iran one-sided divorce was tied to the husband handing over to the wife the remaining dower, alimony and providing her with suitable items needed for everyday life.¹⁴³ A wife who does not wish the divorce and who is not guilty of any breach of marital duty has a right to claim financial compensation from the husband wishing to divorce her, for housework and other tasks which she was not obliged to carry out (*ojrat ol-mesl*).¹⁴⁴ In very few countries the enforcement of these claims is facilitated by state guarantee funds from which needy women receive payments at first, which are later recovered from the debtors.¹⁴⁵

In some countries additional modifications are enacted with regard to the claims to maintenance of further relatives.¹⁴⁶

m *Parentage*

With only few exceptions there have not been any essential changes to the law of parentage (regarding the classical legal position cf. Part 1, 4.2.b.hh above). In cases of illegitimate parentage the father is generally ignored. Classical

141 Cf. Martin Forstner, Neuerliche Änderungen im tunesischen Personenstandsgesetz, StAZ 1982, 17.

142 Cf. Denker, Die Wiedereinführung, 165.

143 Cf. Hamidian, Jurisdiction, 84; Shid, Selected Aspects, 149 f.

144 Cf. Yassari, Das iranische Familienrecht, 69 with further references.

145 Cf. Nelle, Neue familienrechtliche Entwicklungen, 264 with further references; Forstner, Veränderungen, 4 ff, and the comprehensive study by Yassari, Die Brautgabe, 211 ff.

146 Cf. Ebert, Das Personalstatut, 123 f.

means of mitigating this view, such as acknowledgement of paternity, still exist. Overall the continuing tendency is to regard legally contestable marriages as valid when it comes to the parentage of children (cf. Part 1, 4.2.b.hh above).¹⁴⁷ According to a judgment of the Egyptian court of cassation in 1986¹⁴⁸ it is even possible to determine the parentage of the child of a marriage between a Muslim woman and a non-Muslim man (regarding the prohibition of this see Part 1, 4.2.b.bb above). On the other hand some laws have shortened the maximum pregnancy period to 9 months, unlike the generous classical interpretation (cf. Part 1, 4.2.b.bb above).¹⁴⁹

Only few countries have instituted substantive reforms. In 1998/2003 Tunisia facilitated legal relations between the father (not married to the mother) and his child in a rather indirect fashion. The mother can sue to have the paternity ascertained, as a result of which the child will be given the father's name and consequently has claims to maintenance and inheritance.¹⁵⁰ Under the reformed Moroccan family code of 2004 it is now possible to institute proceedings to ascertain the paternity of a child born to an engaged couple if the man in question denies paternity (article 156 family code).

n *Inheritance Law*

In the area of inheritance law most parts of the Islamic world continue to observe more or less unchanged traditional regulations (cf. Part 1, 4.3 above).¹⁵¹ This persistence is due not only to the patriarchal society structures reflected in Islamic inheritance law but also to the fact that the regulations are set down in the Quran, the highest-ranking source of the law.¹⁵² Before this background even some jurists who advocate reform consider inheritance law to be among the immutable rules of Islam.

147 Regarding this area cf. the references in Ebert, *Das Personalstatut*, 118 ff.

148 Judgment of 27 May 1986 File no. 100, 55th year.

149 References in Ebert, *Das Personalstatut*, 118 f.

150 Cf. Nelle, *Neue familienrechtliche Entwicklungen*, 265; the relevant law no. 51 of 7 July 2003 may be viewed at www.juristetunisie.com/tunisie/codes/csp/L2003-0051.htm.

151 The best overview which is still up to date is in Ebert, *Das Erbrecht arabischer Länder*, 2004; as for Egypt, Tunisia and Morocco cf. the detailed description in Pattar, *Islamisch inspiriertes Erbrecht*, 281 ff.

152 A contemporary text states laconically: 'The law of Inheritance in Islam is an integral part of the Islamic Law and it is a component of the comprehensive religion (...) The application of Inheritance Law is mandatory for every Muslim (...). This cannot be separated from any Islamic practices since it is a part of the religion.' (Kavakci, *Islamic Inheritance Law*, xi).

Thus attempts at reform in Iraq, which aimed at gender equality under inheritance law, failed after only a short time.¹⁵³ New regulations had been developed in 1959 which stipulated equal right of use to state-owned land, i.e. contradicting the double consideration of males entitled to inherit under classical inheritance law. In addition it allowed, also contrary to classical – and still prevailing – doctrine,¹⁵⁴ wills in favour of legal heirs in order to even out the unequal portions allocated under classical law. Some authors branded this a near-overthrow of Islamic inheritance norms,¹⁵⁵ although those in favour were also able to find supporting passages in the Quran (2:180). After a vehement storm of protest the regulations were abolished as soon as 1963.¹⁵⁶ In Somalia some people advocating such reforms were even killed.¹⁵⁷

Traditional reasons given for unequal treatment of the sexes due to their different roles within the family (cf. Part 1, 4.2.a above) are still put forward. What they do not take into account is that according to some modern codes women are actually required to provide maintenance,¹⁵⁸ and that they in fact often contribute a considerable proportion.¹⁵⁹ Furthermore, this view entirely disregards the task of running a household which is usually done by women.

On the other hand the husband's 'leading' role is not infrequently a heavy burden,¹⁶⁰ such as in cases of unemployment through no fault of his own,¹⁶¹ and consequently the sweeping allocation of gender roles does not do justice to either partner. Calls suggesting the fundamental change of considering socio-cultural developments when interpreting the law¹⁶² have not found much support so far. In the 1990s in Indonesia judges of the supreme court as well as a minister for religious affairs were unsuccessful in their attempt to base gender equality under inheritance law on the Quran and with reference to socio-cultural changes. It does, however, seem that in spite of the traditional

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153 Cf. Ebert, *Rechtsfortbildung*, 109, 126 with further references.

154 *Shahbūn, Al-shāfi*, vol. 2, 133 ff. concerning article 280 of the Moroccan family code (*Mudawwana al-usra*) of 2004, which declares this practice to be without legal effect.

155 Muhammad Abu Zahra, quoted after *Shahbūn, Al-shāfi*, vol. 2, 136.

156 Cf. the references in *Mallat, Shi'ism*, 71, 78.

157 Cf. Anderson, *Law Reform*, 192 ff.

158 Cf. Nelle, *Neue familienrechtliche Entwicklungen*, 253, 262.

159 Cf. e.g. the cases Würth reports from the Yemen (*Al-Sharī'a fī Bāb al-Yaman*, 173 ff.).

160 Aldeeb/Bonomi (eds.) also point this out in *Le droit musulman*, 309 f.

161 Cf. Rohe, *The Application*, 19, 29.

162 Cf. Saeed, *Interpreting the Qur'ān*, 120 ff.

interpretations being retained, many Indonesians ensure that sons and daughters receive equal shares of the inheritance.¹⁶³

Even so, some countries have implemented substantive reforms in the field of inheritance law. In Sudan (1945) and Egypt (1946) wills in favour of legal heirs leaving them the disposable third part of the property were declared legal. Some hidden hints were made referring to the corresponding Twelver Shiite doctrine.¹⁶⁴ The principle of representation, which has been codified in several countries and favours offspring after the first one, goes even further. According to classical Sunni inheritance law closer descendants generally exclude more distant relations (namely those of subsequent generations, e.g. to the disadvantage of orphaned grandchildren). Some legislators – the first was Egypt in 1946 – responded to this by instituting ‘legally obligatory wills’ which provide for the descendants who had been left out as well as for the surviving members of the previous generation instead of deceased descendants entitled to inherit. They were, however, restricted to the disposable third part of the property, and sometimes limited to male descendants.¹⁶⁵ The Bangladeshi supreme court, finally, granted entire freedom to dispose of one’s entire property in 1997: restricting this to a third, they stated, was based on incorrect translation and interpretation of the Quranic passages dealing with the issue.¹⁶⁶

233 A testator is still able to employ legal stratagems (cf. Part 1, 4.4.e. above), as long as they are recognised. Thus inheritance laws which are considered to be inappropriate may be circumvented by the owner giving gifts (while he is still alive) to those who would not be provided for sufficiently under the inheritance law in force. The irrevocably binding effect of the gift can be ensured by means of a gift – of lower value – in return. Any disadvantage the testator might incur from the untimely loss of property thus given may be neutralised by agreements recognised by Sunnis and Shi’ites alike, under which he may retain the right to use the items in question (similar to ‘Nießbrauch’ (usufruct) in German law).¹⁶⁷ Many states furthermore recognise the establishment of family trusts (cf. Part 1, 4.10 above).

Rules regulating the relations among relatives are very complex in their detail, and still owe much to the family group structure. The position of children, for instance, is much weaker compared to grandparents than it is in

163 Cf. Otto, *Islam*, 82 f. with further references.

164 Coulson, *A History*, 219.

165 *Op. cit.*, 204 ff.; in more detail Ebert, *Das Erbrecht*, 145 ff.

166 Otto, *Islamisierung*, 35 with reference (*Khodeja Banu Chowdhury v. Amin Ahmed Chowdhury*, BLD 1997 (HCD) 57, 59 ff.).

167 In detail on the subject: Carroll, *Life Interests*, 245 ff.

contemporary European inheritance law systems. However, we do see some tendency to reform, such as when 'legally obligatory wills' or the principle of representation are introduced which favour grandchildren at the expense of uncles and aunts otherwise¹⁶⁸ legally entitled to inherit. This takes into account the development towards the 'nuclear family' observable in the Islamic world as well. For the rest, the prevailing concept of society does not allow even a debate on the subject of illegitimate children having a share in their father's estate, or of the right to inherit among same-sex partners in the Western mould.

In individual cases we can observe clear differences from the traditional ideas. Thus the Egyptian court of cassation¹⁶⁹ declared the testament of an apostate, or in favour of an apostate, to be legally valid. In this context we can find remarkable comments¹⁷⁰ on the relation between Islamic and non-Islamic states whose inhabitants were not permitted to inherit from one another in the past. Nowadays, it is maintained, a new order of human society has developed and Islamic states have good and understanding relations with other countries, while still retaining their Islamic identity. The secular rules of the sharia ought to adapt to this new situation.

In some countries the traditional autonomy rights (of minorities) were abolished and non-Muslims included in the jurisdiction of inheritance law based on the Islamic system.¹⁷¹ Some interreligious prohibitions to inherit were abolished but on the whole they continue in force.¹⁷² After a failed parliamentary initiative to reform the law, the traditional provisions remain in force in Iran, with a one-sided prohibition to inherit to the disadvantage of non-Muslims.¹⁷³ The most problematic aspect in this context is that one Muslim heir will bar all non-Muslim descendants from inheriting, independently of the degree of kinship. Consequently there are frequent reports of conversions to Islam which were clearly motivated by financial motives. The relations who have lost out are not always able to furnish evidence of the kind reported in one case: even after his conversion the alleged convert had been singing in the church

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168 Cf. e.g. Anderson, *Law Reform*, 54, 54, 151; Coulson, *The Islamic Legal System*, 7, 28 f.; Ebert, *Erbrecht*, esp. 121 f., 145 f.; Khan, *Inheritance*, 152 ff. with further references.

169 Judgment of 25 July 1989, file no. 149, 150, reprinted in Ibrāhīm Bek/Ibrāhīm, *Al-Tarika*, 875; concerning the different opinions cf. Ebert, *Das Erbrecht*, 90 f.

170 Ibrāhīm Bek/Ibrāhīm, *Al-Tarika*, 871.

171 Cf. Ebert, *Das Erbrecht*, 74 f.

172 Cf. Ebert, *Das Erbrecht*, 130 f.

173 Cf. Thoms, *Nichtmuslimische Minderheiten*, 81 ff.; Valavioun, *Succession Laws*, 119 ff.

choir for all to hear, which convinced the court that he had not actually converted in earnest. Catholic inheritance law was applied as a consequence.¹⁷⁴ On the other hand, conversion within Islam might lead to flexible solutions: The author was informed in 2012 about a Lebanese Sunni father who converted to Shi'ite Islam in order to ensure his daughters would inherit his entire estate, excluding cognates according to Shi'ite inheritance law. Such cases demonstrate the necessity of re-thinking traditionalist doctrines.

2 Contract Law and Commercial Law

a Introduction

Essential parts of the civil code are only mentioned in passing in the classical law books. Detailed descriptions, some of them extreme in their casuistry, are found in particular in passages dealing with individual types of contract such as purchase contracts. Important issues of legal transactions doctrine are frequently discussed as well, but not systematised (concerning the entire issue cf. Part 1, 4.4 above). Consequently modern legislators had a free hand and could adapt foreign codes without much opposition.¹⁷⁵ After all, this is not necessarily contrary to the principles of Islamic law, as this allows further development in all those areas where the Quran or the sunna do not offer definitive rules which rule out reinterpretation.

By now e.g. regulations concerning employment law have been developed, or protective laws for intellectual property, a concept which does not exist in classical Islamic law, but without which economic interaction would be significantly restricted. The same is true of the recent introduction of bodies corporate, and time limits on the possibility of enforcing a claim (corresponding to (the statute of) limitation).¹⁷⁶ In particular the concept of freedom of contract has become widely accepted: based in part on the classical authorities Ibn Taymiyya and Ibn Qayyim al-Jawziyya the idea was evolved that the types of contract developed in the classical period relied on the general principles of freedom of contract.¹⁷⁷

¹⁷⁴ Account in Thoms, *Nichtmuslimische Minderheiten*, 82 with n. 21.

¹⁷⁵ Regarding Tunisia cf. e.g. Charfeddine, *Esquisse*, 421, esp. 428 ff.

¹⁷⁶ Cf. only Krüger, *Vermögensrechtliches Privatrecht*, 377 ff.; concerning early, functionally comparable reforms in the Ottoman Empire cf. id., *Fetwa*, 48 with further references.

¹⁷⁷ Cf. Krüger, *Vermögensrechtliches Privatrecht*, 366 ff. with further references; Chehata, *Essai*, 105 ff.; *Fatwa of Al Baraka Investment & Development Co. Islamic Banking & Finance*, viewed on 6 Dec. 1998 at <http://www.albaraka.com/Islamicinfo/FAQs/Fat11.html>.

Since the 1970s we can see, on the other hand, a trend towards reintroducing classical institutions of commercial law. This trend affects especially banks and credit institutes. Regulations which restrict freedom of contract are mainly aimed at the preservation of the classical prohibitions of *ribā* and *gharar* (cf. Part 1, 4.4.e above). One instance is the prohibition of release of covenant, which is not legally effective without the debtor's agreement.¹⁷⁸

Overall it must be pointed out that Islamic contract law and commercial law as they were described in the classical legal texts (cf. Part 1, 4.4 above) are not in force anymore in the greater part of the Islamic world.¹⁷⁹ Some countries such as Turkey or Albania have replaced them with codes based on Western models. Most other countries have enacted laws that are a combination of classical provisions and modern rules.

The Egyptian civil code, for instance, parent legal system of many other civil codes in Arab states as well as Afghanistan,¹⁸⁰ follows the French Code civil¹⁸¹ as regards its structure as well as some important areas such as contract law and law of tort, but is expanded to include some traditional institutions of Islamic law such as the pre-emptive right (especially benefiting neighbours, *shuf'a*, articles 935 ff. civil code¹⁸²).

Under article 1 para. 1 civil code customary law (*'urf*) shall apply if there are no statutory provisions; if there is no customary law, either, the principles of the Islamic sharia shall apply. Attacks on institutions seen traditionally as un-Islamic such as interest (article 226 civil code: statutory interest rate in case of delayed payment 4%, in commercial transactions 5%) and insurance contracts (articles 747 ff. civil code) were to no avail.¹⁸³ The same is true of the attempted introduction of a codification oriented more strongly towards traditional ideas.¹⁸⁴ Thus in the UAE commercial transactions are distinguished from private credit agreements: while in the latter case interest on credit is prohibited, the commercial code of 1993 stipulates a legal interest rate of 12%

178 Cf. Krüger, Vermögensrechtliches Privatrecht, 369 with further references; id., Grundzüge, 111 ff. with further references.

179 Cf. only Bälz, Islamische Bankgeschäfte, 379 ff.

180 Krüger, An Introduction, 207 ff.

181 Cf. Bälz, Europäisches Privatrecht, 51 ff.; esp. 62 f. on the subject of law of tort.

182 Cf. op. cit., 68 f.

183 Cf. Elwan, Der Scheck, 82 f. with further references; Jung, Holger, Ägyptisches internationales Vertragsrecht, in: Kronke et al. (eds.), 58 f. with further references.

184 The draft (*mashrū' al-qānūn al-madani tibqan li-ahkām al-sharī'a al-islāmīyya*) of 1982 did not become law, cf. Botiveau, Loi islamique, 31, 282 ff.; Bälz, Die 'Islamisierung', 437, 447 ff.

for the former, which may even be exceeded for default interest.¹⁸⁵ Commercial codes based on French law have also established themselves in many Arab states, beginning with Lebanon and Syria.¹⁸⁶

236 Today civil and economic legislation in the Islamic world presents a motley picture. To begin with, someone applying the law will in general have to consult the relevant national laws, insofar as they exist. Even so, despite the many differences in details, they will have some essential points in common, which are based on classical Islamic contract law. Furthermore the constitutions of most Islamic countries allow the sharia at the very least the function of filling in gaps or aiding interpretation. Wherever it is raised to the foundation of legislation, laws contradicting it may be attacked, the result always depending on the respective understanding, background and interpretation of the courts in charge.

b *Issues of Contract and Commercial Law with Specific Relevance to Islamic Law*

Since the twentieth century many Islamic countries have enacted regulations which diverge from classical doctrine. One point of friction is the broadly interpreted prohibition of *ribā*, understood to include any form of interest, which is clearly contrary to the requirements of modern business transactions with their emphasis on capital. On the other hand, classical doctrine on the prohibition of speculative transactions (*gharar*) prevents a great number of banking and hedging transactions as well the conclusion of complex types of contracts customary in international trade and commerce. Consequently we can find a variety of strategies by means of which legislator and legal practitioners attempt to adapt to the realities of commerce. Two main strategies are pursued: the relevant norms are either re-interpreted in light of their ethical values and modern economic knowledge, or a strictly formal approach (partly by *hiyal*) adhering closely to the wording of traditional interpretations.

In some cases the provisions enacted simply contradict classical doctrine, such as the regulations on statutory interest mentioned above. The legislator is able to refer to his authority to interpret the concept of *ribā*. After all the interpretation was not entirely uniform even in the classical period, and furthermore it may be carried out anew on the basis of *ijtihad*.

185 Cf. Krüger, Vermögensrechtliches Privatrecht, 382.

186 Cf. Krüger, Rechtliche Aspekte im Geschäftsverkehr mit Partnern im Nahen und Mittleren Osten, *bfaI Recht & Steuern international* March 2001, 47, 50.

Legal regulations of default interest are found in many countries. Claims are often regarded as lump-sum damages and not as additional payment without an actual material substrate. Such regulations are found even in countries whose constitutions include a sharia clause.¹⁸⁷ In addition interest shares which only cover the loss in value of the capital, caused by inflation or administrative charges, are not to be considered prohibited *ribā* in the view of some authors.¹⁸⁸

The most extensive argumentation is required with regard to genuine return on capital. Modern scholars interpret the prohibition of *ribā* according to its recognisable meaning (similar to the prohibition of usury in section 138 of the German civil code) and take the time value of the capital into account.¹⁸⁹ In this way, instead of hasty and across-the-board condemnation, the economic principles of exchange transactions are reflected and outer limits of the enforceability of contracts are drawn on a *concrete* level. The intention is to achieve universal benefit by supporting types of transaction which are generally beneficial and abused only in a few individual cases. After all, in actual fact the prohibition of interest only results in particularly high rates of interest – as additional charges are added due to uncertainty – independently of the guise in which they appear.

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The then mufti of Egypt al-Ṭanṭāwī followed a similar line in an expert legal opinion he composed in 1989 according to which interest-bearing government bonds are not contrary to the prohibition of *ribā*. However, there was some vehement protest against al-Ṭanṭāwī's opinion.¹⁹⁰ According to a press report from 1994 an Egyptian Islamist terrorist organisation called all customers of banks to cancel their interest-bearing accounts, because of Islam's prohibiting any interest.¹⁹¹

According to the broad classical interpretation the prohibition of *gharar* prevents types of contract which do not specify the services to be performed. This affects a multitude of banking transactions (futures transactions etc.) as

187 Cf. Dubai Court of Cassation judgment no. 321/99 of 19 Dec. 1999, reported in Al Sharif Advocates & Legal Consultants Legal Bulletin No. 17 (4/2000), 3; Krüger, Vermögensrechtliches Privatrecht, 360, esp. 381 ff.

188 Balić, Ruf vom Minarett, 67.

189 Cf. M. Charfi, Islam and Liberty, 82 ff.

190 Cf. Skovgaard-Petersen, Defining Islam, 295 ff.

191 Cf. 'Neue Drohung ägyptischer Fundamentalisten', Frankfurter Allgemeine Zeitung, 22 Feb. 1994, 6. In order to emphasise its demands the 'Jama'a Islamiya' in question planted bombs outside banks.

well as complex contracts with the performance not specified in detail, which are also customary in international trade and commerce (franchise agreements, contracts concerning major construction projects etc.). Multiple-stage marketing of goods and services can also be restricted, as selling an item before one has taken possession of it is considered to be inadmissible as a rule. Under a strict interpretation, doubts are also cast on insurance contracts.¹⁹² Genuine factoring is also regarded as inadmissible.¹⁹³

There are modern attempts at reinterpretation by means of *ijtihad* in this area as well.¹⁹⁴ According to these the prohibition of *gharar* is limited to contractual relationships within which the uncertainty regarding a service or performance really is comparable to a gamble due to its aleatory character. Excluded are investment or risk protection transactions taking into account the fair value of capital or the economic background of risk spreading. Under new Kuwaiti law, for instance,¹⁹⁵ futures trading is permissible. In the UAE there is remarkable divergence between the legislation of the more traditionally inclined Abu Dhabi (negative) and the economically prospering and more open Dubai (positive).¹⁹⁶

238 Not the least of the institutions in collision with the broadly interpreted prohibition of aleatory contract is the insurance contract. The speculative aspect of an insurance contract is, in fact, perceptible only within the framework of a narrow scrutiny of individual contracts between insurer and policy holder – the occurrence of the loss insured is indeed uncertain. The assessment changes, however, if the entirety of the policy holders is taken into account. Looking at the network of all insurance contracts, the occurrence of loss may be presumed with some degree of certainty. The speculative element of individual contracts thus does not apply anymore; insurance cover must be considered a genuine and equivalent consideration.¹⁹⁷ In legal terms the community of policy holders thus moves closer to the type of company, permissible under Islamic law, known as *muḍārabā* (cf. Part 1, 4.5 above). The term used

192 Cf. Bälz, *Versicherungsvertragsrecht*, esp. 9 ff., 20 ff.

193 Cf. Wegen/Wichard, *Islamische Bankgeschäfte*, 829.

194 Cf. only the remarks on the subject in Binladin, *Negotiability*, 289 ff. and *passim*.

195 Cf. 'Kuwait Introduces Futures Trading', *Al Sharif Advocates & Legal Consultants, Legal Bulletin* 3/1998 (Dubai), 8.

196 References in Krüger, *Vermögensrechtliches Privatrecht*, 383 ff.

197 Thus the argument of Dr El-Fatih Hamid, General Counsel & Director of the Legal Department of the Islamic Development Bank, Jeddah/Saudi Arabia, on the occasion of a conference on 'Islamic Law and its Reception by the Courts in the West' from 22–24 Oct. 1998 in Osnabrück; cf. also Muhammad N. Siddiqi, *Insurance*, esp. 27 ff.

to denote insurance, *takāful* 'mutual liability', also attempts to take this into account.¹⁹⁸

Thus the insurance contract is increasingly recognised. It is true, too, that it is becoming more necessary in oriental societies, where for a long time informal 'safety nets' survived within large family groups or village communities. The Egyptian scholar Naṣr Ḥāmid Abu Zayd, for instance, describes in his autobiography how in the past the village community would help a farmer when one of his animals had been injured: all inhabitants would buy the meat of the animal that had to be slaughtered from the owner.¹⁹⁹ Where systems such as this are in force, contractual risk protection was indeed superfluous.

Ultimately even types of penalty clauses may be evolved on the basis of classical theory, as long as they observe the *gharar* prohibition. The purpose of agreeing penalty clauses is to discourage breach of contract and thus increase the certainty of the contract being honoured ('giving hostages'). Positive consequences are the encouragement to observe contracts and thus ensure the best possible protection of private autonomous exchange (presumption of ideal allocation of resources), the prevention of disruption in market confidence (correct implementation of follow-up contracts); furthermore facilitating the enforcement of compensation claims which are difficult to prove (the function of lump-sum compensation) and avoiding additional charges (expensive hedging transactions with regard to follow-up contracts). On the other hand the problem of gagging or extortion arises: to the author's best knowledge creditors will time and again and against better judgement claim forfeit of a contractual penalty in order to acquire additional payments in this way.

According to a collection of expert legal opinions (*fatāwā*) by 'Al Baraka Investment & Development Co. Islamic Banking & Finance' accessible online²⁰⁰ it is permitted to agree penalty clauses in order to prevent contractual obligations being neglected. A prerequisite for the legal effectiveness is, however, that the penalty will be used for 'works of charity and general welfare'. This creates a system of incentives with little risk of abuse: the deterrent effect exists independently of the way in which the penalty payable will be employed, because the defaulting debtor will be liable in any case. If the penalty is to be used to benefit a third party, the creditor, on the other hand, has no interest in enforcing the penalty clause for motives of greed if it should not actually have

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198 On the entire issue in detail: Skovgaard-Petersen, *Defining Islam*, 335 ff.; Gassner/Wackerbeck, *Islamic Finance*, esp. 181 ff.

199 Abu Zaid, *Ein Leben mit dem Islam*, 2001, 10.

200 Viewed on 11 June 1998 at <http://www.albaraka.com/Islamicinfo/FAQs/Fat12-4.html>.

expired. The fatwa clearly found a solution by means of which the defects in the system of punitive damages of US legislation could be overcome.²⁰¹

The second condition for admissible penalty clauses must also be mentioned: they are to be used only to deter those who are solvent. The fatwa ought to be understood to mean that a penalty clause may always be agreed within the limits described, but must not be enforced in case of insolvency. According to this view, protection on the substantive level is achieved, similar to that granted in Germany under stay of execution (cf. sections 811, 850 ff. ZPO [Code of civil procedure]).

The second strategy used is still the legal instrument of legal stratagems (*hiyal*; cf. Part 1, 4.4.e. above). Major sections of 'Islamic Banking' – which formally does not allow interest – rest on these: instead of interest, 'fees' (*Ar. ḍarā'ib*) are raised, which have the same economic effect. Purists, of course, do not approve of this procedure; it has always been controversial outside the Hanafite school of law. This may be why some mock Islamic Banking as 'Islamic whisky'. Generally, fees are not seen as objectionable only if they are calculated independently of the volume of the respective transaction and at the very least cover a plausible expenditure.²⁰² Consequently bank guarantees, opening a credit account or currency transactions are generally unproblematic.²⁰³

240 Finally, economic models which were already recognised according to classical doctrine are developed further, with fluid boundaries to the use of legal stratagems. One widely used type is the contract for financing purposes based on the classical model of 'purchase with transparent calculation of the purchase price from the cost price' (*murābaḥa*; cf. Part 1, 4.5 above). The bank providing the funds takes on the function of interim purchaser of the goods, its profit margin formally resulting from a – permitted – sales transaction and not from a – prohibited – interest-bearing credit. By means of skilful contract design the risks arising from the position – never desired by the bank – as purchaser or seller can be minimised in such a way that in actual fact simply a funded transaction results. This may be achieved, for instance, by the bank as the first purchaser shifting the risk of non-delivery by the seller onto the ultimate purchaser.²⁰⁴ If the amount of the agreed profit margin or the agreed

201 In fact there is a growing tendency to make payments from punitive damages available to the public purse, cf. Merkt, Abwehr der Zustellung von 'punitive damages'-Klagen, 83 ff.

202 Concerning letters of guarantee cf. the fatwa on the subject by Al Baraka Investment & Development Co., Formulation of a letter of guarantee and how much may be charged, viewed on 4 May 1999 and <http://www.albaraka.com/Islamicinfo/FAQs/Fat8-2.html>.

203 Cf. Wegen/Wichard, Islamische Bankgeschäfte, 829.

204 Concerning a relevant case decided by the English High Court on 13 Feb. 2002 (applying

lump-sum compensation for delay are calculated with reference to interest rates such as LIBOR, the resulting transactions are even more similar to credit transactions.²⁰⁵ In Germany there would, however, be legal difficulties arising from the applicability of section 475 BGB (no waiver of warranty for defects) and the regulations of general terms and conditions monitoring (esp. section 309 no. 8b BGB), which would render this type of transaction unattractive to the financier.

The *murābaha* was also able to establish itself as a type of export funding, with the export good sold to the bank as an intermediary who then sells it on to the (Muslim) importer with an additional charge. The fact that this is a credit transaction is illustrated by the purchase price given in the first contract being payable instantly, while that given in the second contract – including the additional charge – is deferred until receipt of the goods or later.²⁰⁶ Negative consequences arising from the prohibition of selling items before one has taken possession of them may be minimised by interposing only one ‘virtual second’ between the two ‘purchase contracts’ (i.e. defining the duration of the contracts in such a way that the second one comes into force only one second after the first one expires). Thus the importer is hardly able to reject the goods; furthermore he may be subject to a corresponding fine. Overall this construction is very close to the letter of credit.

Widely used types of leasing transactions (including financial leasing) can be based on the *ijāra* (‘rent’) type of contract, which is permissible under Islamic law.²⁰⁷ However, as there are comparatively few alternatives of risk control, there has to be considerably more intensive selection and supervision with regard to the debtor.²⁰⁸ Factoring transactions (sale of debts in order to acquire capital quickly, for a fee/against a reduction in value) are also justified, sometimes with reference to classical instruments such as the *hawāla* (cf. Part 1, 4.4.a above).²⁰⁹

Other transactions can be managed on the basis of company law. The underlying idea is the parallelisation of the chance of making a profit and the risk of making a loss: the investment may make a profit, or it may be lost. Mod-

English law as chosen by the parties involved) cf. Bälz, *Islamische Bankgeschäfte*; id., *Das islamische Recht als Vertragsstatut?*, 44.

205 As rightly pointed out by Bälz, *ibid.*

206 See Bälz, *Das internationale Vertragsrecht*, 2444 f.

207 Cf. Wegen/Wichard, *Islamische Bankgeschäfte*, 828.

208 Cf. only Kuran, *Islam and Mammon*, 56.

209 Thus the Azhar scholar ‘Abd al-Rāziq Muḥammad, ‘Aqd shirā’ fawātīr al-duyūn, 421 ff.

ern Islamic investment offers or project financing²¹⁰ are based on similar types of cooperation. Thus interest accruing from investments can for instance be replaced by types of profit-sharing. Investment guarantees or profit guarantees
 241 are not permissible.²¹¹ Non risk-based minimum profits or profit-sharing which diverge from the share in the investment (e.g. minimum profits for banks up to a certain sum) are also problematic.²¹² Percentage deductions from the profit for reasons of company expenditure, on the other hand, are considered permissible.²¹³

No problems are, of course, caused by interest-free sight or savings deposits, but then these are not particularly marketable. In this field we also find combined types with agreements on profit-sharing.²¹⁴ Overall there is a wide spectrum of opinions when it comes to details. Consequently attempts are constantly being made to establish possibly generally binding standards, in order to guarantee sufficient legal security. One such attempt may be seen, for instance, in the Sharia Standard of the Accounting Organisation for Islamic Financial Institutions (AAOIFI) based in Bahrain.²¹⁵

On the other hand banks are also able to be active in the lending business. There is even a possibility that Islamic hedge funds might be set up.²¹⁶ Open credit transactions, on the other hand, are treated with some suspicion, as the economic risk of loss remains exclusively with the borrower, at least in case of assured repayment of credit.

c *Religious Aspects of Economic Activity*

Modern commercial law exhibits not only overlaps but also separation between the legal and the religious substance of rules. Thus when Islamic investment funds are examined, a severe attitude towards interest generally prevails.

210 Cf. Klarman, Islamic Project Finance; Bälz, A Murābaha Transaction, 117 ff.

211 Cf. Wegen/Wichard, Islamische Bankgeschäfte, 827.

212 Cf. *ibid.*

213 *Ibid.* Cf. e.g. the sales brochure of UBS (Lux) Islamic Fund of February 2001, according to which the fund pays an all-in fee to the management company, the administrative authority, the depository bank, the Sharia Board, the Portfolio Manager and the distribution agency to the amount of 2.04 % p.a. of the net asset value of the respective sub-fund.

214 Cf. Wegen/Wichard, Islamische Bankgeschäfte, 827.

215 See Bälz, Das islamische Recht als Vertragsstatut?, 46. Further information may be found at <http://www.aaofi.com>.

216 Cf. 'A leap of faith for the Muslim world's investors', Financial Times 7 May 2003, 8; Gassner, Islamic hedge funds: Recipes, merits and critics, viewed on 15 Sep. 2005 at http://bankerme.com/bme/2005/sep/islamic_hedge_funds.asp.

In view of the fact that interest is customary nearly all over the world this would narrow the range of businesses in which it would be permissible to participate extremely, if acquiring shares in companies were ruled out simply because they are involved in interest-bearing transactions (even if they are otherwise entirely in accordance with Islamic provisions). In the opinion of many contemporary scholars a separation between the religious and the legal aspect may help in such cases:

There is no doubt that the shareholder is connected legally to the corporation. However, in the customary situation he, as a minority, does not usually have any influence on individual business decisions, even if he speaks out against certain practices in the shareholders' general meeting. Consequently no personal (religious) responsibility attaches to him.²¹⁷ Transactions conducted by the corporation are not, however, legally void but, according to this view, are the personal (religious) responsibility only of the person who is in charge of having them carried out.

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Religious prohibitions do, however, influence the form of investment transactions. Items forbidden for religious reasons are alcohol and pork, as well as games of chance.²¹⁸ Trading in tobacco or arms is rejected, as is investment in prostitution or other 'impure' actions and items such as e.g. pornographic films. The investment principles of Islamic investment funds often rule out such participation explicitly. Sometimes subtle questions have to be resolved, such as whether it is permissible to invest in real estate which is then rented to companies which sell alcohol products.²¹⁹ Under the new rules of the board of the Dow Jones Islamic Index, for instance, it is prohibited to hold shares in corporations which are in debt to the amount of more than 33% of their own capital resources, which draw more than 5% of their profits from non-operating interest revenue or whose receivables amount to more than 45% of their own capital resources.²²⁰

Even from the point of view of Islamic law, a large part of the religious considerations cannot be enforced under the law. Good or bad intentions are rewarded or punished mainly in the next world. This is, in fact, a point at which cultures meet. Let it suffice to point out that in Germany and other countries,

217 Cf. Usmani, *An Introduction to Islamic Finance*, 93 ff.

218 Cf. 'Islamischer Aktienfonds in Deutschland', *Freitagsblatt* 2/2 February 2003, 13; Venardos, *Islamic Banking*, 70 with further references.

219 Cf. 'Muslimische Anleger in der City bleiben gelassen', *Frankfurter Allgemeine Zeitung*, 22 July 2005, 21.

220 Cf. Venardos, *Islamic Banking*, 70 f.

the phenomenon of conduct motivated by religious or ethical beliefs which influences civil law is not unknown; one need only think of 'Eco-Banking'.

Besides religious aspects, the following problems render economic activity more difficult in the Islamic world: excessive national economy; lack of political stability and uncertain legal frameworks, the absence of democratic structure and widespread corruption. This context in particular is where different concepts, at home in several cultures all the same, may clash. Thus the Saudi-Arabian Council meeting (*majlis al-shūrā*) debated the question of whether bribes should be tax deductible. According to a newspaper report the general secretary of the chamber of commerce, Riyadh Usāma al-Kurdī, supported it, while a scholar referred to as a 'religious forefather' asked why such a tax privilege should be established when the person in question ought really to be sent to jail.²²¹ In this instance the sympathies of a Western jurist are with the 'forefather' rather than with the modernist, and for entirely modern reasons.

243 3 Constitutional Law and Administrative Law

a Introduction

As in the past, constitutional and administrative law takes up only a comparatively narrow space in the contemporary legal literature. This is not in any way surprising in a region in which democratic approaches and freedom of opinion are overall in short supply. It is not, however, necessarily tied to the application (which is limited in any case) of Islamic law, but has a multitude of causes.²²²

It will not be possible to discuss the constitutional and administrative law applying in Islamic countries in all its aspects. Only those aspects will be chosen which are regulated in specifically Islamic fashion or which are being discussed under a specifically Islamic point of view.²²³

In many parts of the Islamic world mistrust of the state and its representatives is noticeable, and frequently justified. It is true that there are discernible attempts at developing democratic and constitutional structures, e.g. in some of the smaller Gulf states, in Malaysia, Jordan or Morocco. However, there is frequently a lack of functioning administrative and justice systems. Corruption and nepotism are entrenched in many countries, and the level of pay received by public servants appears to expect some additional income from the outset.

²²¹ 'Keine Befehlsempfänger', Frankfurter Allgemeine Zeitung, 3 May 2002, 7.

²²² Cf. Arkoun, Religion, 138, 143 f.

²²³ Gudrun Krämer has examined this discussion in her excellent study Gottes Staat als Republik, 1999.

Investment for the future is sometimes prevented by the state appropriating acquired property without warning or justification. Thus there is no broad financial basis by means of which social cohesion and, ultimately, trust in the state could be created. The legacy of borders drawn by colonial powers means that some states in the region furthermore do not have any historically grown identity to facilitate a greater degree of cohesion and willingness to reciprocal waiving of claims. Consequently 'oriental' traditions of government survive to this day, often complete with structures inherited from tribal societies and life in large family groups.

Participation takes the form of individual, not necessarily elected representatives at the national level, including a 'palaver system' and corresponding distribution of privileges. Consequently the concept of delegating power to elected representatives from among the people who may be trusted to be willing to assume responsibility in a (largely) impartial fashion is not widely recognised. In addition, the democratic culture of civil debate is probably often regarded as unacceptable party bickering contrary to oriental consensus culture. This is where the desire for a strong and just ruler is likely to be particularly strong.

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Since the twentieth century the debate concerning constitutional law has been dominated by two issues in particular. In the eyes of the Sunna the most important issue is the ruler's legitimation and his exercise of power after the abolition of the caliphate.²²⁴ The forms of government supported or tolerated range from kingdoms as in Saudi-Arabia, Jordan or Morocco to party and military dictatorships to republics with a system of (merely) formally parliamentary democracy.

The second issue is a fundamental one, but is rarely debated in depth: Who is the legislator? According to traditional understanding the law is given by God and his prophet Muhammad, who have set down immutable norms in the Quran and the sunna. Some states, such as Saudi-Arabia and Iran since the time of Khomeini adhere to this concept, with the norms established by government limited to the theoretically inferior level of administrative provisions or government decrees.²²⁵ Even on this level there is a wide scope of action in many areas, namely those which are not regulated by specific provisions in those two highest-ranking sources of the law. The Ottoman *qānūn-nāmehs* already rested on a comparable basis of legal theory. In other states sharia rules are restricted

224 Cf. al-Mawdūdī, *Tadwīn*, 46 with n. 1; regarding the disparate situation cf. Foda's slightly ironic remarks in *Die vergessene Tatsache*, 167, 175 ff.

225 Cf. only Ebert, *Die Interdependenz*, 71 f.

at the level of the constitution, with the entire sharia or possibly merely its principles being considered as merely 'one' or 'the' (main) source of legislation, or as a subsidiary source in the absence of clear legislative norms (regarding the constitutional reform along those lines in Egypt and its effect on legislation cf. 1.i.bb above).

b *The Organisation of the State and the Rule of Law*

Despite numerous differences in many areas, the constitutions of most Islamic states have some shared elements: Islam is usually anchored in the constitution as the state religion. The sharia, as mentioned above, is established with varying firmness as a source of legislation. Consequently the head of state must be a Muslim. In many areas Muslims enjoy a more privileged position than members of other religions. The state supports Islam and, in cooperation with a large number of scholars, usually supervises its implementation.²²⁶

245 In this way the traditional idea of the predominance of Islam is perpetuated within the structure of the state. It is supported by classical texts and by present-day traditionalist literature, but is by no means compulsory. A contemporary author remarks simply that there is no rule in the sharia which defines the form of government.²²⁷ Thus Muslim society may itself determine at any time who should be granted the right to exercise just rule. Interestingly, he discusses the matter in his book on 'The powers of those in authority' (a reference to sura 4:59; cf. Part 1, 4.8.b above) in one footnote only. It must furthermore be said that supporters of political Islam do not necessarily demand the restoration of the government by caliphate. Their leading thinker al-Mawdūdī regards elected members of parliament as present-day *ahl al-ḥall wa-l-'aqd*, who would appoint the caliph under classical law (cf. Part 1, 4.8.b above).²²⁸ However, according to al-Mawdūdī only men who are sufficiently versed in the interpretation of the divine commandments would be suitable.²²⁹ The well-known Muslim activist Rashid Shaz even goes so far as to demand the re-establishment of the caliphate,²³⁰ as do some extremist groups such as *ḥizb al-taḥrīr* or *Khilafet Devleti* (caliphate state).

226 Ebert's studies on the subject, *Die Interdependenz*, 97 ff., 204 f., continue to be of topical significance.

227 Al-Marzūqī, *Sulṭat walī al-'amr*, 24, n. 3.

228 Al-Mawdūdī, *Tadwīn*, 32 f.; regarding his political theory cf. Afsaruddin, *Mawdūdī's 'Theocracy'*, 301 ff.

229 *Op. cit.*, 34.

230 'Khilafat is the only solution', interview in *The Milli Gazette*, viewed on 29 August 2014 at <http://www.milligazette.com/Archives/01-7-2000/Art15.htm>.

While traditionalist texts discuss – with no recognisable relevance to the present day – the old topics of the person of the caliph, the requirements for his appointment, how to do homage to him and his successor designate, other authors do seek a connection with the present.²³¹ This is just as true of the champions of political Islam as of the supporters of democratic-constitutional government structures.

The idea of God as the sole sovereign (*ḥākimiyyat Allāh*²³²) as evolved by leading Islamist thinkers such as al-Mawdūdī²³³ is diametrically opposed to any established democratic idea. The traditional gender role distribution assigns women a place in the house and the family; when it comes to politics and administration, their role is at best subordinate. In state theories of this kind non-Muslims are citizens on sufferance, which has really nothing in common with civic equality. The reason given by al-Mawdūdī is that the Islamic state is based on the ideology of Islam and that consequently no-one who does not profess this religion could be permitted to occupy a position where they might influence the running of the state.²³⁴

Yūsuf al-Qaraḍāwī argues along different lines, although his conclusions are rather similar. He points out that Islam and democracy should by no means be equated. In his view Islam cannot be assigned to one specific system or principle of government. However, in the past Islam was able to flourish only in freedom and in democracy, while it suffered in dictatorships and totalitarian systems. Only in political freedom and in a democracy can the power of parliament reach its full potential, where members of parliament are able to withdraw their confidence in the government. Only in this environment would the power of a free press, a free parliament, an opposition and the ‘masses’ become tangible.

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231 Cf. e.g. El-Awa, *On the Political System*, 117 ff. and *passim*; Ar. original: *Fī l-nizām al-siyāsī li-l-dawlat al-islāmiyya*, Cairo etc. 1975.

232 Cf. only Krämer, *Gottes Stat*, 88 ff. with further references; critical is e.g. Öztürk, *Der verfälschte Islam*, 76 ff.

233 ‘No person, class or group, not even the entire population of the state as a whole, can lay claim to sovereignty. God alone is the real sovereign (...) God is the real law-giver and the authority of absolute legislation vests in him. The believers cannot resort to totally independent legislation nor can they modify any law which God has laid down, even if the desire to effect such legislation or change in Divine laws is unanimous (...)’ Excerpt from his work, *Islam: Its Meaning and Message*, reprinted in Donohue/Esposito (eds.), *Islam in Transition*, 262, 263 f. This most readable volume contains a multitude of differing Muslim position on the organisation of the state, points of law and on fundamental issues of social coexistence.

234 Maududi, *The Islamic Law*, 295 and ff.

Al-Qaradāwī argues against the Islamists' reservations that this concept is aimed at a population with a Muslim majority, who would certainly not pass laws which contradict Islam. It is, he says, the right of the Muslim community to enact its own rules applying to everyday life in accordance with its constantly changing circumstances. This does in no way question God's position as the sole giver of laws. In fact, there is always the option of dispelling concerns by means of a statutory rule under which no law can be effective if it contradicts Islam. There are, however, only very few normative and unambiguous text passages in the sharia, and consequently considerable scope remains for legislative activity.²³⁵ The limits of this understanding of democracy become clear when we look at the positioning of non-Muslim minorities. In this matter al-Qaradāwī, applying the principle of majority rule in a very one-dimensional fashion, refuses to exceed the limits of the status of second-class citizen with some degree of autonomy in matters of religion and family affairs.²³⁶ This, of course, while historically significant is not acceptable any more in the present day.

Some moderate Islamists such as Rachid Ghannouchi, a Tunisian who has had a considerable impact – are more conciliatory but pursue the same basic objectives.²³⁷ He has developed suggestions how – and especially with what degree of compromise – Muslims may participate in 'non-Muslim' governments. Still, his aim remains the establishment of a 'genuine' Islamic state structure. Ghannouchi summarises as follows: 'Can any Muslim community afford to hesitate in participating in the establishment of a secular democratic system if it is unable to establish an Islamic democratic one? The answer is no. It is the religious duty of the Muslims, as individuals and as communities, to contribute to the efforts to establish such a system.'²³⁸ On the other hand he calls upon Muslim minorities to cooperate with secular democratic groups in establishing a secular democratic government which will respect human rights and guarantee personal safety as well as freedom of religion and opinion.²³⁹ All these, he says, are basic requirements of humanity, and Islam has come to guarantee them all.

²⁴⁷ In science and politics these suggestions are interpreted differently. Some see them as an orientation towards pragmatism and a gradual adoption of the democratic system, with the recognition or establishment of an Islamic

²³⁵ Al-Qaradawi, *Priorities*, 186 ff.

²³⁶ *Op. cit.*, 192 ff.

²³⁷ Cf. Lamchichi, *L'islamisme politique*, esp. 151 ff.

²³⁸ Ghannouchi, *The Participation*, 271, 273.

²³⁹ *Op. cit.*, 276.

state being a merely formal one. Others understand it as representing temporary pragmatism only, with the aim of hollowing out the existing institutions in order to achieve a more politicised Islamic state. The latter interpretation is supported by other statements from Ghannouchi's political allies.²⁴⁰ It will certainly not be possible to rely on these and similar theories when supporting the democratic rule of law as long as the, albeit theoretical, prerequisite remains that it is in fact an Islamic state that should be established. On the other hand, there were interesting new approaches in Egypt and elsewhere to define a 'civil state' (*dawla madaniyya*) by keeping the sharia as the basis of legislation, but concretely defining the legal-political contents of the sharia as demanding democracy, the rule of law, the separation of powers, etc. By this, the term 'secular' is avoided, but its basic principles are nevertheless met.²⁴¹

Within the Twelver Shi'a, the doctrine of *welāyat-e faqih*,²⁴² which is controversial indeed, has been evolved over the last few decades. This is the rule of the legal scholars on behalf of the occulted imam, the Mahdi, which is intended to continue until his return. According to this doctrine it is necessary to establish an Islamic government and consequently to appoint a leader who will be its head.²⁴³ It must be said that there are also some Shi'ites who would consider a republican constitution with some parliamentary components to be suitable, as long as it is 'Islamic'. By postulating divine rule (*ḥākimiyyat Allāh*),²⁴⁴ however, this constitution will turn out to be the pseudo-republican rule of a class of scholars not legitimised by the people, such as we see in the current system in Iran. Khomeini on his part castigated the separation between religion and state/politics as the 'invention of the colonial powers and their political henchmen'.²⁴⁵

Within the Shi'a the debate of whether one should engage in political activity at all until the return of the Mahdi has by no means been settled. Some are

240 Cf. the references in Abu-Salieh, *Les mouvements islamistes*, 62 ff.

241 Cf. Rohe/Skovgaard-Petersen, *The Ambivalent Embrace*; Rohe, *Verfassungsrechtliche Entwicklungen*; cf. also Brown, *When Victory*, 59 ff., 126 ff.

242 Cf. (one among many) Amirpur, *A Doctrine in the Making?*, 218 ff.; al-Khalkhālī, *Al-ḥākimiyya fi l-Islām*, esp. 329 ff.; Jahanbakhsh, *Islam*, 130 ff. Regarding the Iranian constitution see Tellenbach, *Untersuchungen*, esp. 126 ff. (cf. esp. article 5, 107 of the constitution). Concerning internal Shi'ite criticism cf. Amirpur, *Die Entpolitisierung*, 67 ff. with further references.

243 Cf. Khomeini, *Wilāyat Faqih*, 51 ff., 89 ff.; al-Khalkhālī, *Al-ḥākimiyya fi l-Islām*, 333 ff., 344.

244 Cf. e.g. al-Khalkhālī, *Al-ḥākimiyya fi l-Islām*, 110, 127 ff.

245 Chomeini, *Der islamische Staat*, 29.

of the opinion that the classical doctrine of al-Ṭūsī (fourth/eleventh century) still holds, according to which no legitimate government is possible during the imam's absence.²⁴⁶ Others adhere to the, likewise classical, idea that proximity to power corrupts and that one is most likely to exert influence precisely by being detached from involvement in matters of state. Some of those who support political activity find the basis of democratic pluralism within Islam itself. The endeavour to found parties is buttressed by the maxim that 'God wants pluralism'.²⁴⁷ The rationale, as cogent as it is simple, is that God created different people with different opinions.

248 The power struggle between the different representatives of Islam in Iran is, of course, not over, and the current situation cannot be described other than as precarious. Some cautious optimism may be permitted, however, due to the fact that formerly extremist occupiers of the US embassy in Tehran now concur with more secularly inclined powers in calling for reforms.²⁴⁸ Some of the most interesting initiatives endorsing the secular democratic rule of law may be found in the works of contemporary Iranian scholars such as 'Abdolkarīm Sorūsh,²⁴⁹ Mohammed Shabestari²⁵⁰ or Mohsen Kadivar.²⁵¹

Of course, the fact that religious scholars should have the competency of the final decision is diametrically opposed to the democratic model. This is in no way altered by the democratic election of these scholars – to say nothing of the more than dubious circumstances of the candidate selection process. In the end it is restricted to the appointment of a selection of decision-makers, the

246 Cf. Navid Kermani, 'Die religiöse Macht und die Wahrheit', *Frankfurter Allgemeine Zeitung*, 7 Nov. 1998, 111; according to which the overwhelming majority of the Iranian Grand ayatollahs adhere to this quietist position.

247 Cf. 'Gott will Pluralismus. Parteiengründungen im Iran', *Süddeutsche Zeitung*, 28 May 1998, 11; concerning pluralism as the subject of discussions on reform cf. Smail Balić, *Die innerislamische Diskussion zu Säkularismus, Demokratie und Menschenrechten*, in: Ende, Werner/Steinbach, Udo, *Der Islam in der Gegenwart*, fourth ed. Munich 1996, 590, esp. 594; Haddad, *Islamists*, esp. 7 ff.

248 Sejjed Morteza Mardīha, *Wir sind die Revisionisten der islamischen Revolution*, in German translation (Susanne Baghestani) printed in *Frankfurter Allgemeine Zeitung*, 31 Aug. 1999, 31.

249 Regarding him and the impact he has had cf. Amirpur, *Die Entpolitisierung des Islam*, 2003; Jahanbakhsh, *Islam*, 140 ff.

250 Regarding him cf. Amirpur, *Die Entpolitisierung*, 179 ff.; a text by Shabestari on the subject of democracy is available in German at <http://www.islam.de/2387.php>.

251 Regarding him cf. Jahanbakhsh, *Islam*, 181 ff.; on his theory of legal politics, see his essay *Political Rights*, 107 ff.

substance of whose decisions is essentially limited by the authority of religious persons or bodies, which in turn become the de facto legislative authority and ruler.

Abdelwahhab Al-Affendi, on the other hand, points out that such a system cannot be justified from an Islamic point of view, either, as it would allow the allegedly ignorant populace to elect those who then decide policies. He even goes so far as to say that the caliph or legal scholar (*faqīh*) who claims absolute authority in fact arrogates divine authority to himself and thus violates the prohibition of polytheism, the fundamental rule absolute of Islam.²⁵² Muqtedar Khan remarks that talk of divine sovereignty leads to absolving those who rule on this basis of the responsibility they have to the population they rule.²⁵³

Since the twentieth century the idea of establishing a secular, democratic rule of law has found followers throughout the entire Islamic world even among scholars. It has wide support from the population in any case, insofar as it is at all possible to discuss ideas of the kind.

The most important, and highly controversial, fundamental text on the subject was the Shaykh al-Azhar Ali 'Abd al-Rāziq's *Al-Islām wa uṣūl al-ḥukm* of 1925.²⁵⁴ He expanded on the idea that Islam is only a religion and the prophet Muhammad's mission was of a purely spiritual kind. That Muhammad was also the head of state should not lead to the conclusion that Islam demands the establishment of a state and the propagation of the teachings of Islam in this way; neither the Quran nor the sunna, he points out, demanded a caliphate.²⁵⁵ Muhammad's political activities should be understood as being tied to his time and have nothing to do with the essence of Islam.²⁵⁶ Abdou Filaly-Ansary reports of a poll among Arab writers according to which nearly all those interviewed named this book as the one that has informed our time the most.²⁵⁷ At the time, however, 'Abd al-Rāziq lost his position as judge in a storm of protest against his theses. He was rehabilitated later and became minister of endowments for a short time (1948/49).²⁵⁸ Since then reformers have often preferred to search for 'silent' solutions and to avoid frontal attacks on the

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252 El-Affendi, *Democracy*, 27, 244 f.

253 Khan, M., *The Politics*, 149, 156.

254 *Al-Islām wa uṣūl al-ḥukm*, Cairo 1925; (= 'Abderraziq, *L'islam et les fondements du pouvoir*, transl. by Abdouh Filali-Ansary, Paris 1994).

255 *Al-Islām wa uṣūl al-ḥukm*, 37 ff.

256 Cf. Peters, *Erneuerungsbewegungen*, 127.

257 Filali-Ansary, Preface to 'Abderraziq, *L'islam et les fondements*, 7 and ff.; concerning its meaning cf. Ebert/Hefny, *Der Islam*, 11 ff.

258 Cf. Ebert/Hefny, *Der Islam*, 10.

strong traditionalists. Consequently the indigenous intellectual underpinning of democratic government models has remained comparatively rare.

The legitimization of democracy under Islamic law is found in the Quranic rule of shura ('consultation', Ar. *shūrā* /*mashwara*, Turk. *şura* /*meşveret*; cf. Part 1, 4.8.b. above).²⁵⁹ It is disputed whether the shura is only recommended or in fact – for instance in the case of majority recommendations – binding.²⁶⁰ The latter opinion is very close to the democratic system. Thus Öztürk, the dean of the Theological faculty (*İlâhiyat Fakültesi*) of Istanbul University, defines *şura* and *meşveret* with modern terms as the system of republic and democracy.²⁶¹

The Egyptian reformist thinker Rashīd Riḍā had already developed a concept of reaching a consensus in connection with institutions which, however, did not go beyond the merely consultative involvement of an elected body.²⁶² Muhammad Iqbal intended to breathe new life into the idea of consensus by no longer allocating *ijtihād* to individual scholars but to an elected legislative body.²⁶³ What remains unclear, though, is also which part the '*ulamā*' should play at the side of the legislative body. Still, even among modern theologians and scholars of other affiliations we find many – mainly in Turkey, but also in Iran and, not least, the West – who are of the opinion that in the present day the model of democratic government is the only one in accordance with Islam.

We can see that the shura is understood as a genuine parliament as well as – in the traditional interpretation – an entirely undemocratic council of notables, such as we find e.g. in Saudi-Arabia. Consequently the model of shura remains extremely vague. Basically it only describes a process of decision-making but does not define the legitimization of those making the decisions.²⁶⁴ Thus Islamists are able to come to the conclusion that shura denotes the opposite of democracy.²⁶⁵

Muslim reformers are not agreed on whether democracy and human rights should 'in addition' be supported by re-interpreting religious sources. Some sec-

259 In great detail: Badry, *Die zeitgenössische Diskussion* 1998, cf. also Krämer, *Gottes Staat*, 121 ff.

260 Cf. e.g. El-Awa, *On the Political System*, 92 ff. with further references; L. Müller, *Islam und Menschenrechte*, 127 ff. with further references.

261 Öztürk, 400 *Fragen*, 63, 200; cf. also Eith, *Koranexegese*, 329 with further references.

262 Cf. Zaman, *Consensus*, 153, 158 f.

263 Cf. Iqbal, *The Reconstruction*, 165 ff.; Zaman, *Consensus*, 153, 159 ff.

264 Cf. also Al-Affendi, *Democracy*, 232 ff. with further references.

265 Cf. Hayder Ibrahim Ali, *Civil Society and Democratization in Arab Countries with Special Reference to the Sudan*, Islamic Area Working Paper Series No. 12, Tokyo 1999, 2 f. with further references.

ular Muslims reject this argumentation based on sources of religious law: the Quran, they say, does not contain information on the political system, which ought to be determined according to its own inherent laws. Those who attempt to derive the democratic system from religion would then open a platform for discussion to the religiously motivated opponents of this concept, too.²⁶⁶ On the other hand, there are numerous supporters of internal Islamic new approaches who would like to pave the way for a liberal democracy bound by human rights.²⁶⁷ Naşr Hāmid Abu Zayd, for instance, considered human rights to be self-evident international standard these days, but advocated translating them into a comprehensible concept with cultural reference points.²⁶⁸ Amina Wadud refuses to leave the interpretation of Islam to neo-conservative extremists.²⁶⁹ 250

There are also more than a few voices pointing out that the substance of religion would be devalued if, as in the Islamist maxim 'Islam is religion and state', it is equated with the state.²⁷⁰ It is also often said that the Quran is not principally a law but a religious guideline; with emphasis on the fact that a clear distinction must be made between God the 'law-giver' on the one hand and those who arrogate to themselves the authority to determine how God's word should be interpreted on the other.²⁷¹ In the words of Muhammad Sa'īd al-'Ashmāwī, former member of the Egyptian Council of State and chairman of the State Security Court: 'God intends Islam to be religion, but men want

266 To this effect: Ghaleb Bencheikh during a conference of the Konrad-Adenauer-Stiftung, the Heinrich-Böll-Stiftung and the Bundeszentrale für Politische Bildung on the subject 'Muslime als Staatsbürger' ('Muslims as citizens') on 9 Feb. 2007 in Berlin; cf. also the discussion recorded in Wadud (Inside the Gender Jihad, 191).

267 Cf. e.g. the excellent examination presented by Bielefeldt, *Muslims im säkularen Rechtsstaat*, esp. 59 ff., the overview presented in Abou El Fadl, *The Great Theft*, 182 ff.; Charfi, *Islam and Liberty*, esp. 38 ff.; Muhammad Shabestari, *The Secular Nature of Law in Islam: A Basis for Democracy*, in: *Dialogue and Cooperation* 1/2006 (viewable at www.worlddialogue.org/content.php?id=297), 27 ff., and the texts on modern Turkish Quranic hermeneutics collected in Felix Körner, *Alter Text – Neuer Kontext: Koranhermeneutik in der Türkei heute*, Freiburg etc. 2006, esp. Öztürk's remarks 223 ff. The lucid overview in Andreas Jacobs, *Reformislam, Arbeitspapier Konrad-Adenauer-Stiftung No. 155/2006*, is also very readable.

268 Abu Zaid, *Ein Leben mit dem Islam*, 68.

269 Wadud, *Inside the Gender Jihad*, 191.

270 Cf. Laroui, *Islamisme*, 188 f.

271 Cf. esp. Zakariya, *Laïcité*, 112 ff.; An-Na'im, *Toward an Islamic Reformation*, 185 ff.; Abou El Fadl, *Speaking in God's Name*, 132 and *passim*.

to turn it into politics.²⁷² The abovementioned dean of the Theological faculty of Istanbul University Öztürk declared that the Quran should be interpreted from within itself and that no-one must put himself as an exegete in God's stead and claim absolute doctrinal authority.²⁷³ The jurist Abdullahi al-Na'im stated that it is not possible to turn the sharia into laws, but that rather it is a system of norms with religious sanction: the state enforcing it would be as good as denying its religious binding force. The sharia, independently of how one understands it, will, he explains, always remain human interpretation, determined by history, of the Quran and the prophetic tradition.²⁷⁴ How it is interpreted and applied consequently depends to a great degree on the people interpreting it. On the other hand any attempt at enforcing the sharia by government action will lead not to an exercise of Islamic authority but rather of secular force. The idea of an Islamic state, he adds, is a post-colonial one based on European polity models with a totalitarian concept of law and public order.²⁷⁵ Muhammad Khalid Masud²⁷⁶ views as similarly problematic the transfer of a religious legal system, which is understood as God-given and with a focus on personal affiliation (status), onto a territorial idea: while traditional *fiqh* rejects discrimination on the basis of ethnic background or social status, it allows it with regard to gender, religion and freedom.

Overall, champions as well as opponents of structures relying on the democratic rule of law base their opinions on arguments from Islam's highly complex web of norms and interpretation rules. Texts with a traditionalist or extremist slant provide a sharp contrast, as they like to rely – frequently in the simplest of trains of thought – on 'unambiguous' religious norms and tenets, which must be adhered to 'without doubt'.

While secular approaches based on the democratic rule of law appear to be attractive to Muslims living in the West, they are not the mainstream among scholars in the Islamic world. It is true that there, too, many people hunger for a democratically secured rule of law. However, despite all regional differences we will find that, with the exception of very few states such as Turkey, the traditionalist majority of Islamic scholars have come to terms with the respective

272 Al-Ashmawy, *L'islamisme contre l'islam*, 11. Concerning him and his work cf. Fluehr-Lubban, *Against Islamic Extremism*, 1998, which includes excerpts in English translation.

273 'Der etwas weiß, soll sprechen', *Frankfurter Allgemeine Zeitung*, 23 June 2000, 53; similarly the rector of the Grand Mosque of Paris Dalil Boubakeur, *Les Défis*, 22 f.

274 An-Na'im, *Shari'a*, 29 (n. 1), 36 f.

275 An-Na'im, *Islam and the Secular State*, 7.

276 *Teaching of Islamic Law and Shari'ah*, 165, 179.

government structures. While they may even demand more democracy against (genuine) oppression, like the Islamist Muslim brotherhood in Egypt, they will not relinquish the theoretical rule of the sharia and its (self-styled) authentic exegetes.

This illustrates as well that the democratic process may also be attractive to Islamists who aspire to political power and that therefore we must add a further point to the democracy debate: to what extent is the democratic legislative authority bound by constitutional parameters that must not be altered? Two misconceptions widely held among Muslims become significant at this point.²⁷⁷ On the one hand democracy is seen as isolated and as a mechanism for enforcing arbitrary human decisions; a God-given and just system would be superior to it.²⁷⁸ Aside from the fact that existing deficiencies in the administration of justice are denounced most vehemently in many Islamic states in particular, this belief ignores the essential truth that it is always humans who must interpret and apply the God-given norms. It furthermore overlooks that the legislative authority is by no means able to change the constitutional foundations and characteristics of a just system at will. On the other hand the Western model of secular democracy is misunderstood as being non-religious or even anti-religious, and thus the extensive individual as well as institutional freedom of religion²⁷⁹ which is able to flourish here in particular is ignored.²⁸⁰

The reasoning behind the rule of law demanded by many Muslims, in particular the protection of individual human rights in the modern sense of the word,

277 As a typical instance cf. the quite polemical remarks by the Islamist Abid Ullah Jan, who was educated in London, *Compatibility: Neither Required nor an Issue*, in: Donohue/Esposito (eds.), *Islam in Transition*, 319 ff.

278 One example among many is provided by the article 'Democratic Norms' in Arif Ali Khan/Tuqir Mohammad Khan et al. (eds.), *Encyclopedia of Islamic Law*, vol. 10, New Delhi 2006, 275, 277: 'In Western democracy, the people are sovereign, in Islam sovereignty is vested in God and the people are his Caliphs or representatives. In the former the people make their own laws; in the latter they have to follow and obey the laws (Shariah) given by God through His Prophet (...). In brief, Western democracy is a kind of absolute authority which exercises its powers in a free and uncontrolled manner whereas Islamic democracy is subservient to the Divine law and exercises its authority in accordance with the injunctions of God and within the limits prescribed by Him.' A comparable view from within the Shi'ite spectrum: e.g. al-Khalkhālī, *Al-ḥākimiyya*, esp. 129 ff.

279 Cf. only Rohe, *Der Islam*, 81 ff., 133 ff.

280 Conversely, Murad Hofmann (*Democracy or Shuracracy*, in: Donohue/Esposito (eds.), *Islam in Transition*, 296, 297 f.) names states such as the UK, Germany or Italy as non-secular.

is even more elaborate than that behind the establishment of democratic structures.²⁸¹ Basis of the former is once again the postulate of justice, frequently with reference to the Quranic verse according to which one must pronounce just judgment (*wa-in taḥkumūna, fa-uḥkumū bi-l-'adl*).²⁸² The concept of justice, of course, is in dire need of detailed definition, dependent on societal ideas and understanding as well as legal basic decisions. It is thus debatable whether the legislative authority and those who apply the law are even permitted to develop and implement new ideas. This might well collide with the traditional concept, currently championed by Islamists in particular, of God as the only law-giver.

We also find the differing idea of God having delegated sovereignty to humans. Its earliest origins maybe date from the debate of the second/eighth century in which the caliph was described as God's representative on his earth. It is, however, also expressed in the constitution of e.g. Iran (article 56).²⁸³ The constitutions of some Arab states simply state that the authority of the state is created and sustained by the consent of its people (e.g. article 24 of the Jordanian constitution). The abovementioned Sudanese jurist Abdullahi al-Na'im expresses himself pointedly in this context: 'Like all aspects of the legal system of each country, family law is really based on the political will of the state, and not on the will of God. After all, there is no way of discovering and attempting to live by the will of God except through the agency of human beings. Since that is the case, those responsible for the enactment and application of family law must be politically and legally accountable for their actions, instead of being allowed to hide behind claims of divine command.'²⁸⁴

One example of the possible conflict between traditional interpretations of Islamic law and approaches focussing on human rights was played out in the drafting of the Afghan constitution of 2004.²⁸⁵ One much-debated issue in the run-up to the enactment was, unsurprisingly, the status of Islam and Islamic Law. The Afghan president Karzai praised the constitution as a progressive

281 Cf., from among the by now extensive corpus of literature, Krämer, *Gottes Staat*, 147 ff.; Bielefeldt, *Philosophie der Menschenrechte*, esp. 115 ff.; Aldeeb, *Les musulmans*, 1994.

282 Sura 4:58. This verse is inscribed, in gigantic letters, on the building of the Jordanian ministry of justice in Amman among other places.

283 Tellenbach, *Zwischen religiösem und säkularem Recht*, 125, 128; concerning this concept cf. also Kadivar, *Political Rights*, 114 ff.

284 An-Na'im, *Shari'a*, 20.

285 The text of the constitution in Dari and English translation may be found in Yassari (ed.), *The Shari'a*, 270 ff. On the development of the constitution in Afghanistan cf. Saboory, *The Progress*, 5 ff.

document which, while based on Islam at the same time granted the same basic rights to men and women; Afghanistan, he said, is a deeply religious country but also a country that chose democracy and pluralism as its path into the future.²⁸⁶ This is a reference to the formulaic compromise laid down in the constitution, which embraces currently incompatible positions in undefined proportion, and presumably perpetuates the discernible internal plurality of the law.

The position of Islamic law is not clearly regulated, which is not uncommon in Afghan constitutional tradition.²⁸⁷ Its champions, however, can refer to the prominently placed articles 1, 2 p. 1 and 3. Article 1 defines Afghanistan as an Islamic republic.²⁸⁸ Article 2 p. 1 declares Islam the state religion. Under article 3 no law may contradict the principles of faith (*mu'taqadāt*) and rules (*aḥkām*) of 'the sacred religion of Islam'. On the other hand this article avoids using the words sharia or indeed *fiqh*, naming Islamic rules generally as being those which must not be contradicted by the laws. Still, the passage in article 3 contained in the draft constitution,²⁸⁹ as well as the constitutions of 1964,²⁹⁰ 1987 and 1990, under which 'no law can be contrary to the sacred religion of Islam and the values of this Constitution',²⁹¹ was not in the end adopted. The most concrete rules are found in articles 130 and 131. Under article 130 the courts must apply the constitution as well as the other laws (*shā'ir qawānīn*); this refers to written statute law (cf. also article 94 of the 2004 constitution). P. 2 regulates the case in which such norms are lacking: a decision must be made within the limits drawn by the constitution in accordance with the rules of the Hanafite school²⁹² and by searching for the most just solution (*keh 'adālat rā beh behtarīn wajh ta'mīn nemāyad*), the latter being independent reasoning (*ijtihād*).²⁹³ The general formulaic compromise is in

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286 In a talk he gave during a conference on the subject 'Islam in a Pluralistic World' in Vienna on 15 Nov. 2005.

287 Cf. Saboory, *The Progress*, 10 ff.: the hierarchy between statute law and sharia norms is ultimately unclear even in the constitutions of 1964 and 1978.

288 Regarding the discussion of this constitutional norm cf. Kamali, *Islam and its Shari'a*, 24 ff.

289 Draft constitution of 2003, English version viewed on 19 Sept. 2014 at <http://www.cmi.no/afghanistan/background/docs/DraftConstitution.pdf>.

290 The text of the constitution in Dari and English translation may be found in Yassari (ed.), *The Shari'a*, 209 ff.

291 Cf. also Saboory, *The Progress*, 20.

292 The privileged position of this school is already evident in the constitutions of 1931 (article 1) and 1964 (article 69); cf. Saboory, *The Progress*, 8 ff.

293 Cf. Kamali, *Islam and its Shari'a*, 30 f.

fact repeated in this passage.²⁹⁴ The norm essentially corresponds to the predecessor regulation in article 102 of the 1964 constitution; the term sharia is not, however, used explicitly. Article 131, finally, decrees the application of Shi'ite personal status law with reference to the Shi'ite part of the population, with unclear consequences in further cases of specific statute laws being lacking.²⁹⁵

Supporters of legal concepts based on human rights may also refer to e.g. article 7 p. 1 of the constitution, which obliges the state to uphold the UN Charter, international treaties and agreements signed by Afghanistan, and the Universal Declaration of Human Rights. The agreements include e.g. the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW²⁹⁶), ratified unconditionally by Afghanistan with effect from 4 April 2003. Article 22 p. 1 of the constitution explicitly forbids every kind of discrimination against or granting of privileges to any citizens of Afghanistan. p. 2 emphasises their equal rights and duties independently of which gender they are; this emphasis was
 254 added only in the final phase of the consultation in the Loya Jirga at the suggestion of a considerable number of female members.²⁹⁷

Article 34 provides extensive freedom of opinion and of the press, Article 54 p. 2 obligates the state to take the measures necessary to ensure physical and mental well-being of families, especially mother and child, and to eliminate traditions which are contrary to the principles of Islam. Besides the reference to Islam the preamble to the constitution emphasises the obligations of the UN Charter at no. 1. and the Universal Declaration of Human Rights at no. 5.; at no. 6. it refers to the will of the people and democracy as being the foundation of government. No. 8 sets down the establishment of a civil society without oppression, attacks, discrimination and violence, based on the rule of law, social justice, the protection of human rights and the safeguarding of fundamental rights and freedoms of the people.

It cannot be overlooked that some areas of conflict remain all the same. This is particularly true of the collision between human rights and traditional rules of Islamic law such as draconian physical punishment, the unequal treatment

294 Regarding the dichotomy between traditional Islamic law and statutory law in Afghanistan cf. Yassari, *Legal Pluralism*, 45, 47 ff.

295 Cf. Kamali, *Islam and its Shari'a*, 32 ff.

296 Convention on the Elimination of all Forms of Discrimination against Women of 18 Dec. 1979 (Resolution 34/180 of the General Assembly of the UNO); ratified by Afghanistan on 5 Mar. 2003.

297 Cf. Kamali, *Islam and its Shari'a*, 38.

of men and women,²⁹⁸ and of members of different religions,²⁹⁹ under the law, as well as freedom of opinion in religious matters.³⁰⁰ Consequently the future will depend significantly on the attitude of those persons in whose hands the enforcement of law will rest.³⁰¹

This disparate starting position illustrates at the same time that norms and documents which include a universal sharia clause are on the whole worthless from the point of view of human rights. They may have their uses in cases where people do not have even those rights to which they would be entitled under the traditional regulations of Islamic law. In all other circumstances, however, their main purpose would seem to be to legitimise the restriction of human rights standards; consequently from an international human rights perspective they are counterproductive if anything.³⁰² This is particularly true of the much-debated Cairo declaration of human rights in Islam by the OIC in 1990,³⁰³ which contains such universal clauses and is clearly intended as an 'Islamic response' to the UN Charter of Human Rights.³⁰⁴ The spectrum of possible sharia interpretations allows traditionalism, which still dominates in many areas, to retain regulations contrary to human rights in areas such as women's rights, minority rights and freedoms (such as freedom of opinion or freedom of religion).

The Iranian scholar Abdolkarim Soroush,³⁰⁵ on the other hand, expands the democratic model by adding the separation of powers, compulsory comprehensive educational institutions, freedom of opinion and of the press, and

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298 On the current, traditionalist family law (Civil Code of 1977) cf. Kamali, *Islam and its Shari'a*, 39 ff.; Yassari, *Legal Pluralism*, 54 ff. A critical view on this aspect of the current constitutional situation may also be found in Niaz A. Shah, *The Constitution*, 239 ff. Cf. also Lauryn Oates/Isabelle Solon Helal, *At the Cross-Roads of Conflict and Democracy: Women and Afghanistan's Constitutional Loya Jirga*, International Centre for Human Rights and Democratic Development Montreal 2004, 37 ff.

299 Cf. e.g. Müller, *Islam und Menschenrechte*, 1996; A. Mayer, *Islam and Human Rights*, 1999; Mousalli, *The Islamic Quest for Democracy, Pluralism and Human Rights*, 2001; Rohe, *On the Foundations*, 67 ff.; Gallala, *Religionsfreiheit*, 499 ff.

300 Cf. only the contributions on the subject in the collection by Frick/Müller (eds.), *Islam and International Law*, 2013.

301 For more detail on the political and social environment cf. Rohe, *Islamisches Recht im islamischen Staat*, esp. 348 ff.; Röder, *Human Rights Standards*, 329 ff.

302 Cf. only Bielefeldt, *Menschenrechtskonzeptionen*, 99, 112 ff.

303 The English translation may be viewed at www.unm.edu/humanrts/instreet/cairodeclaration.html (last accessed 2 June 2014).

304 Cf. Rohe, *On the Foundations*, 67 ff.

305 Soroush, *Tolerance*, 311, 314 f.

the system of checks and balances in the formation of opinions and decision-making, and thus brings it very close to the Western model. The scholar and former Iranian president Khatami declared in 1997 that the legitimization of the 'Islamic order' applied only if it were supported by the majority of the population. He linked this statement to demands for freedom of thought and protection of those with divergent opinions as well as freedom of the press.³⁰⁶

That said, there is by no means an insuperable gulf between democratic legislation by the people and Islam which acknowledges only God as 'law-giver': all rules which according to Islamic understanding are given by God are also open to, and in need of, interpretation to a considerable extent, certainly with regard to the perpetual issue of their applicability to time and place (cf. also Part 1, 2.2 above). On the other hand the people and their elected representatives do not have any right to infringe fundamental constitutional values which are ultimately derived from an Occidental-religious concept, or purely from a rational concept of natural law. The absolute will of the majority is not known in Western democracy, either. Minorities in particular are protected by the universally applicable human rights safeguarded by constitutional law. Axiomatic norms such as the so-called 'eternity clause' in article 79 para. 3 of the German constitution safeguard the foundations of the democratic rule of law even against a 100 per cent majority. Thus a liberal³⁰⁷ democratic constitutional system is by no means in natural opposition to the fundamental principles of Islam. Muslims, too, will be able to contribute their religious guiding principles to the democratic discourse and adapt their everyday life in accordance with them, as long as no secular claim to sovereignty for these ideas with associated coercive measures to enforce them is raised. Abdulaziz Sachedina has found the apposite terminological solution of using 'guidance' (in an individual context) instead of 'governance'.³⁰⁸ Heiner Bielefeldt, UN Rapporteur for Freedom of Religion or Belief, who teaches at the University of Erlangen-Nürnberg, has shown conclusively that it would in fact be possible in all unresolved concept-related issues to mediate between human rights and specific religious, belief or cultural concepts to achieve an 'overlapping consensus'. Consequently the

306 Cf. 'Langer Marsch durch den Gottesstaat', *Süddeutsche Zeitung*, 2/3 Aug. 1997, 10; cf. also Kermani, 'Die religiöse Macht und die Wahrheit', *Frankfurter Allgemeine Zeitung*, 7 Nov. 1998, III.

307 On the link between democracy and the idea of freedom as early as the Athenian democracy cf. Tuttu Tarkainen, *Die athenische Demokratie*, Munich 1972, 284 ff.

308 Sachedina, *The Role of Islam*, in: Khan, 173 ff.

entrenchment of both Western and Islamic approaches, complete with the respective claim to exclusivity, must be discouraged in the firmest possible fashion.³⁰⁹

c *Women in Public and Administrative Offices*

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A further issue is whether men and women have the same rights and duties in the public sphere, especially whether women can be qualified to assume public and administrative offices including the judiciary.³¹⁰ Practice has shown that in some Islamic countries at least it is possible for women to hold such offices (Tansu Çiller, Turkey; Benazir Bhutto, Pakistan; Khalida Zia, Bangladesh at the same time in the 1990s). Many constitutions set down the equality of all citizens, and thus equal access to public office and political participation for everyone.³¹¹ Of course tensions may arise between these regulations and constitutional sharia clauses, if the latter are laid out with the traditional gender role distribution in mind (cf. Part 1, 4.2.a above). In addition, social reality often diverges to a great extent from such constitutional postulates.

Still, it seems that in many countries an increasing number of women succeeds in entering the public sphere. Even in Iran, under the rule of an emphatically Islamic constitution, there are female members of parliament and female ministers.³¹² In line with Shi'ite as well as Sunni classical law the Iranian constitution does, however, stipulate that the *faqih* as the highest constitutional institution and supervisory authority of all other bodies must be a Muslim of legitimate parentage who is male, of age, and just.³¹³ Furthermore, female members of the judiciary may have the same remit but are able only to participate as 'assessors'.³¹⁴

The participation of both sexes in public life is an important issue of legal politics in other parts of the Islamic world as well. Thus for instance in Qatar women have had the right to vote and be elected on the communal level (*majlis*

309 Most recently Bielefeldt, *Menschenrechtskonzeptionen*, 99 ff. with further references. Cf. also the other contributions in the collection *Islam und Menschenrechte* edited by Elliesie 2010, and March, *Islam and Liberal Citizenship. The Search for an Overlapping Consensus*, 2009 with numerous references.

310 Cf. e.g. Kamali, *Freedom*, 89 ff.; Walther, *Die Situation von Frauen*, 653 ff.

311 Cf. only Forstner, *Die Stellung der Frau*, 324.

312 Cf. 'Islamischer Feminismus durch eine Politikerin im Aufwind', *Süddeutsche Zeitung*, 4 Mar. 1997, 9.

313 Cf. Dilger, *Die 'Gewalt des Rechtsgelehrten' (walāyat-i faqīh)*, 39, 50 with further references.

314 Cf. Yassari, *Das iranische Familienrecht*, 73.

baladī) since 1990, against traditionalist opposition.³¹⁵ Opponents were met by the emir with the remark that in this matter Islam does not distinguish between men and women.³¹⁶

At a conference of the alliance of Arab women in May 1998 many Islamic countries such as Morocco, Tunisia, Sudan, Yemen,³¹⁷ Jordan, Syria and Lebanon were represented by female judges.³¹⁸ In Egypt the appointment of a female judge led to controversies in 2007.³¹⁹ The same is true of women assuming political office. Some voices draw the limit around the position of the head of state, quoting a prophetic tradition according to which a people cannot flourish when led by women to support their opposition to women assuming this office.³²⁰ Others counter this view by pointing out that there is no such regulation anywhere in the Quran, while female rulers such as the Queen of Sheba were presented positively: the hadith to the contrary is thus false, or at best unreliable.³²¹

Overall the participation of women in public life depends to a great extent on the background and understanding of those who have the power to support or prevent it. Indeed, even among the followers of political Islam we find a faction intending to clear the path for women to participate, albeit not with wholly equal rights. On the other hand the strongly traditionalist mainstream continues to cultivate its specific concept of the gender relations at the expense of all concerned, especially the women.

d *The Position of Religious Minorities*

Most Islamic countries are still a long way from equality under the law.³²² It is true that in the tradition of *tanzīmāt* legislation religious minorities theo-

315 Cf. 'Ein erster Schritt auf dem Weg zu einer Parlamentswahl', Frankfurter Allgemeine Zeitung, 10 Mar. 1999, 10. Despite the high turnout of female voters, the few female candidates were not successful.

316 Cf. 'Volksvertretung nach westlichem Vorbild', Frankfurter Allgemeine Zeitung, 24 Nov. 1998, 10. Along the same lines and drastic: Öztürk, *Der verfälschte Islam*, 110.

317 Cf. Shamiry, *The Rule of Law in Yemen*, 114.

318 'Frauen urteilen zu emotional', Frankfurter Allgemeine Zeitung, 14 July 1998, 12; El Sayed, *Female Judges in Egypt*, *Yearbook of Islamic and Middle Eastern Law* 13 (2006–2007), 135–149.

319 Cf. only the references at <http://weekly.ahram.org.eg/2008/890/eg4.htm>; <http://www.weekly.ahram.org.eg/2010/990/eg3.htm>.

320 Thus al-Tirmidhī, *Sunan*, vol. 2, ch. 75, hadith no. 2431.

321 Engineer, *The Rights of Women*, 76 ff. with further references on the discussion surrounding Benazir Bhuttos' accession to office in Pakistan.

322 Cf. e.g. M. Berger, *Public Policy*, 88 ff.

retically have equal rights,³²³ and many constitutions set down the equality of all citizens of the state. As with gender relations, however, so in this area there is a clash with traditional interpretations of sharia rules some of which may enjoy constitutional rank in their own right, and with specific laws which clearly order unequal treatment (regarding consequences in civil law cf. 1. above, regarding issues of criminal law 4. below). In cases where Muslims are involved, Islamic law is applied. Converting to Islam is rewarded under the law, while renouncing it leads to 'civil death', to say nothing of the fact that it may endanger one's life in real terms. Even in our time some extremists, such as al-Zarqāwī, a Jordanian terrorist active in Iraq until his death in 2006, justified their crimes with the claim – which is rejected by the overwhelming majority of Muslims – that Islam does not distinguish between soldiers and civilians but only between Muslims and 'unbelievers' (*kuffār*). This means that the life of a Muslim is inviolable anywhere and during any activity, while 'unbelievers' are fair game anywhere and during any activity, unless they are protected by a (peace) treaty (*'ahd*) or a residence permit (*amān*).³²⁴

Even where classical criminal law is not in force anymore we can find remains of the prohibition of apostasy which are clearly contrary to human rights. In practice, compulsory Islamic school also applies to the children of converts. Similarly, a woman who has converted to Islam is not permitted to marry a non-Muslim.³²⁵ Under article 10 para. 8 of the Libyan citizenship law (law no. 18 of 1980) an apostate loses his Arab citizenship when he renounces Islam, and consequently Libyan citizenship as well.³²⁶ Some contemporary scholars, however, recognise that the traditional status of *dhimmī* contravenes international human rights standards.³²⁷ As long as most countries in the Islamic world derive their constitutional legitimation at least in part from Islam (Islam as the state religion, sharia as foundation of legislation etc.), equality will not be achieved.

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In modern literature on Islamic law we furthermore find approaches among Islamists and traditionalists which revert to the classical toleration of religious minorities, simply ignoring the reforms that have taken place since the

323 Cf. Krämer, *Gottes Staat*, 165.

324 Cf. '*Al-Zawāhirī yad'ūhu ilā waqf nasf al-masājid wa'l-Zarqāwī yufī bi-qatl al-Madaniyyīn al-kuffār*', al-Ḥayāt, 8 Oct. 2005, 1, 6.

325 Cf. 'Ägypten – Verhaftung eines koptischen Priesters', *Gewissen und Freiheit* 44 (1995), 102.

326 There are other reasons such as being recruited into foreign military forces, committing acts of high treason or smuggling money out of the country.

327 Thus Ali Ahmad (Head of Department of Public and International Law, Bayero University Kano/Nigeria), *Extension of Shari'ah*, 133, 140.

nineteenth century.³²⁸ Modern Islamist thinkers such as the Pakistani al-Mawdūdī have drafted ‘Islamic’ constitutions under which non-Muslims can have only subordinate status. Al-Mawdūdī’s justification is that the Islamic state is based on Islamic ideology and that consequently anyone who does not profess this ideology must be prohibited from occupying a position of importance in public events.³²⁹

Of course there are also attempts at deriving equal rights from Islamic principles. With regard to the participation of minorities the Indian scholar ‘Ubayd Allāh Sindhī (d. 1944) who was educated in Deoband developed a far-reaching proposal.³³⁰ He drafted a new view of consensus building which focuses on essential issues of common human interest and includes non-Muslims. According to Muhammad Qasim Aman this view can be traced back via the Indian reformer Shah Wali Allah (d. 1762)³³¹ to the medieval mystic Ibn ‘Arabī (d. 1240) and his core concept of the unity of creation (*waḥdat al-wujūd*).³³² According to this concept, members of different religions are able – always on the basis of their own respective religion – to find corresponding substance in the spirit of a consensus. It is remarkable that Sindhī published his ideas within the environment of the Indian independence movement and was intending to enable Indian Hindus and Muslims as well as other groups to arrive at a common identity; this consensus thus extends rather further than the recognised ‘people of the book’.

259 The Egyptian Fathi Osman also counters Islamist ideas like those of al-Mawdūdī and al-Qaraḍāwī with the opinion that non-Muslims should not merely be treated in a friendly manner but be given equal rights. The status of being merely protected (*dhimmī*), he says, is a historical development and not immutable law. In a modern (Islamic) state institutions govern on the basis of fixed laws. In his view non-Muslims are a fully entitled part of this system.³³³ Fahmī Huwaydī, member of the (moderate) Islamist spectrum argues along similar lines when he gives one of his books the unambiguous title *‘Muwāṭinūn, lā dhimmiyyūn’* (Fellow citizens, not protected people).³³⁴ In this

328 Cf. Krämer, *Gottes Staat*, 165.

329 Maududi, *The Islamic Law and Constitution*, 295 and ff.

330 Regarding him and his work cf. Zaman, *Consensus*, 153, 162 ff.; id., *Modern Islamic Thought*, 47 ff., also concerning criticism of Sindhī.

331 Regarding him cf. Ghazi, *Islamic Renaissance*, 75 ff.

332 Zaman, *Consensus*, 153, 167.

333 Osman, *Islam and Human Rights*, 42 f., 48 f.

334 Huwaydī, *Muwāṭinūn lā dhimmiyyūn*, third ed., Cairo 1999; on the subject also L. Müller, *Islam und Menschenrechte*, 163 and ff. In this respect An-Na‘im, *Religious Freedom*, 465 ff.,

book he explains for instance that the poll tax (*jizya*; cf. Part 1, 4.9.d.aa above) is not a specifically Islamic institution but was levied already in the Persian Empire.³³⁵ Its only justification was that those subject to it did not contribute to the defence of the realm in those days. Nowadays, he stresses, this is different. In addition, all citizens pay the same taxes to the state and consequently should be supported according to their needs.

According to a declaration to the erstwhile Palestinian president Arafat the future government would grant Christians, as an 'irrevocable part of Palestinian tradition', the same rights as Muslims.³³⁶ On the occasion of the local government elections in Beirut in 1998 the mufti of the Republic of Lebanon Muhammad Rashīd Qabbānī and other religious dignitaries issued a call to respect the variety of religions in the elections and not delete non-Muslim candidates from the electoral list: the local government should be pluralistic and not only of one 'colour' (*min lawn wāhid*). The right to vote in local elections must not discriminate according to religious affiliation. The aim of political activity at the local level should be only to serve, and to serve every member of the community.³³⁷ The Iranian scholar Ayatollah Zanjani, finally, also regards the *dhimmi* concept as by now meaningless and contrasts it with the regulatory mechanism of the (exemplary) treaty of Medina which facilitated the establishment of a concept of national unity. Subsequently the independent Muslim peoples would have ratified new constitutions under which civil societies could have taken the place of religious ones.³³⁸

The life of non-Muslim minorities in Islamic countries is situated at the centre of the tension between such diverging opinions. Oppressive measures are often due to ethnic or political reasons, rather than religious ones. Thus in (allegedly) secular Turkey, non-Muslim minorities find themselves under pressure and are widely treated as 'not belonging'. Remarkably, the ruling AKP party, which has grown out of the Islamist spectrum, is willing to grant religious minorities more rights, while many supporters of the allegedly secular

489 ff. esp. 508 ff., is comparable. Regarding the contemporary public discussion cf. also Brunner, Kein Zwang, 1 ff. with further references.

335 Huwaydī, Muwāṭinūn lā dhimmiyyūn, 128 ff.

336 Cf. 'Palästina – Gleiche Rechte für Christen und Muslime', *Gewissen und Freiheit* 44 (1995), 105.

337 'Da'wa li-l-nākhībīn fi Bayrūt li-murā'a al-tawāzun al-ṭā'ifi', *al-Sharq al-Awsat*, 6 June 1998, 1 and 5.

338 Zanjani, *Die Wahrung*, 9, 11 f.

260 Kemalists – frequently on the basis of a hypernationalistic view combined with Sunni ‘state Islam’ – hold minorities universally suspicious and persecute them.³³⁹

e *International Legal Relations*

Since the twentieth century the countries of the Islamic world have been part of the international network of states thanks to a wealth of international, multilateral and bilateral agreements. They have ratified a multitude of agreements with bearing on legislation; legal obligations, however, are frequently accepted only with a so-called sharia-clause attached. If this is employed to enforce traditional views on gender relations, religions and physical punishment, a fundamental conflict with the modern understanding of human rights – the latter being, of course, shared by many Muslims – arises.

Classical doctrine of the two fundamentally opposed camps (cf. Part 1, 4.9.c above), which even in the past was implemented only in a very restricted fashion, is nowadays found only in the ideological positions of Muslim extremists – including some in the West – and some traditionalists.³⁴⁰ The classical distinction between the house of Islam and house of war is overall regarded as doctrine with merely historical relevance, not based on Quran or sunna but man-made and consequently non-binding and outdated.³⁴¹ Nowadays, we are

339 Cf. Rohe, *Die Türkei und die EU*, 259 ff.

340 In Maududi’s work ‘Towards Understanding Islam’, 2003, we read for instance: ‘And in Jihad he (i.e. the Muslim believer) sacrifices money, material and all he has – even his own life. (...) In Jihad a man takes away life and gives it away solely in the cause of Allah’, op. cit. 137. The meaning of jihad is defined as (p. 124) ‘a war that is waged solely in the name of Allah against those who practice oppression as enemies of Islam’, which according to classical understanding as followed by Maududi cannot be interpreted as a purely defensive reaction to attacks. Jamilah Kolocotronis, a convert, writes in her book ‘Islamic Jihad: An Historical Perspective’ (Indianapolis 1990, p. 124f.), which is based to a great extent on Maududi and other extremists, that the foundations of jihad have not changed, but that military and expansive jihad is dangerous nowadays and that progress in information and communication technology have opened other means of waging jihad.

341 E.g. Zakaria, *Is Islam Secular?*, 54; Oubrou, *Die ‘Minderheits-Scharia’*, 193, 197; Graz Declaration of the conference ‘Leiter islamischer Zentren und Imame in Europa’ [‘Leaders of Islamic Centres and Imams in Europe’] of 15 June 2003, printed in *Islamische Glaubensgemeinschaft in Österreich, Islam in Europe*, Vienna 2006, 49. ‘The medieval division of the world into the opposition of Dar al-Islam = House of Islam and Dar al-harb = House of war is to be rejected. It has a basis neither in the Quran nor in the sunna

informed, everyone shares one common house, the *dār wāḥida*, which rests on international agreements and embraces the whole world; a 'house of agreement'.³⁴² Some traditionalist Muslims living in the diaspora still use classical doctrine to justify their existence in a non-Muslim state and under its rules, and to deduce some relief of religious practice in this environment (cf. Part 3, 3.4 below).

Overall there are very few discussions of points of international law. No even remotely tangible system of modern Islamic international law is discernible. On the contrary, authors on the whole remain within the limits of general international debates.³⁴³ Following the terrorist attacks of the late twentieth and early twenty-first centuries as well as armed conflict in various parts of the Islamic world, the issue debated most vehemently is that of legitimate and illegitimate use of force. The classical key term in this discussion is jihad.

To begin with we must bear in mind in this context that all great Muslim organisations in Germany and all over the world have explicitly condemned attacks of the sort, pointing out that the perpetrators would not be able to justify their actions with recourse to Islam.³⁴⁴ Quranic passages denouncing acts of violence are adduced in evidence, especially frequently suras 5:32 and 2:190 as well as, more generally, 2:256. Of course there are statements in the Quran (and the Bible)³⁴⁵ which, when considered out of context and regarded purely result-oriented, may be employed as justification by extremists, such as sura 9:29 or 9:36 ('And fight the unbelievers totally even as they fight you totally'). Interestingly, in a television interview after the attacks Osama Bin Laden referred to sura 9:36, but left out the meaningful second clause 'even as they fight you totally' (i.e. defence). The verses calling for a fight against the

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and, being a historical and long outdated phenomenon, has no relevance to the present day.' Cf. also the references in Shadid/van Koningsveld, *Religious Freedom*, 3.2.

342 On the occasion of the ISESCO conference in Frankfurt/M. on 29/30 Sept. 2003 on the 'Dialogue among Civilizations: Diversity within complementarity' all Muslim participants from Islamic countries as well as Europe were agreed on this concept. Cf. also Peters, *Jihad*, 112, as well as the report of the 2010 Mardin-conference on the subject by Said, *Die Konferenz*, esp. 106 ff.

343 Cf. only the contributions in the instructive collection *Islam and International Law*, 2013, by Frick/Müller (eds.).

344 As regards Germany cf. the collection under the heading 'Muslimische Stimmen zu den Anschlägen in den USA' on the homepage of the ZMD, viewed on 11 Oct. 2001 at http://www.islam.de/print.php?site=forum/forum-aktuell&di=anschlag_meinungen; cf. also the subsequent collection regarding later events at www.islam.de/17354, viewed on 29 Aug. 2014.

345 Cf. 1 Kings 18:40; Matthew 10:34 ('I came not to send peace, but a sword').

'unbelievers' or 'idolaters' until they convert to Islam are generally interpreted as referring only to the pagan Meccans in Muhammad's own time.³⁴⁶

One clear example of the new view is the remark by the Syrian grand mufti Ahmad Badr al-Dīn Ḥassūn before the European Parliament in January 2008: There are no holy wars, only peace is holy. Humans should never abuse religion in order to kill other humans.³⁴⁷ Nearly all modern authors have distanced themselves from the classical interpretation and its focus on power (cf. Part 1, 4.9.c above). In this they can also refer to defensive positions developed by scholars of the early Islamic period.³⁴⁸ With the exception of some lone confused voices nobody demands the expansion by force of the territory under Muslim rule. In a statement of 2001 the highest commission of legal scholars of the Azhar University in Cairo, arguably the most respected university in Sunni Islam, defined jihad as 'defence of the homeland' (*difā' an al-waṭan*); a definition which also met with the approval of a prominent representative of the Egyptian Muslim Brotherhood.³⁴⁹ Contemporary followers of definitely conservative Islam such as Fethullah Gülen understand the call to physical
262 fighting as relating to a concrete historical situation (from the early years of Islam), a time in which wars of annihilation were waged on the Muslims who had to defend themselves.³⁵⁰

Overall the dominant view is of restricting jihad to defensive action in order to repel military attack or oppression.³⁵¹ This view is supported by e.g. sura 2:190: 'And fight in the way of God with those who fight with you, but aggress not: God loves not the aggressors.' And sura 8:61 says: 'And if they incline to peace, incline to peace yourself too.'³⁵² The sword verse in sura 9:29 is embedded historically³⁵³ and thus interpreted very narrowly with the argumentation that it could not be referring to converting others to Islam but only to

346 Mustafa Fadel (former president of the Supreme Court of the United Arab Republic), *Islamic Law*, 90.

347 'Syriens Großmufti in Straßburg', *Frankfurter Allgemeine Zeitung*, 16 Jan. 2008, 5.

348 Cf. Afsaruddin, *The Siyar Laws*, 45 ff.

349 '*Al ikhwān yaqbalūna ta'rif al-azhar li-l-jihād wa-yushaddidūna 'alā istiqlāliyyat al-mu'assasāt al-dīniyya*', *al-Ḥayāt*, 9 Nov. 2001.

350 Fethullah Gülen, *Islam = Sicherheit und Vertrauen*, fontäne, October–December 2001, 8, 9.

351 Cf. only Peters, *Jihad*, 125 and *passim*; Balić, *Ruf vom Minarett*, 73; Seidensticker, *Das Verhältnis*, 128 ff.

352 Cf. e.g. Hadler, *Modernes politisches Iftā'*, 118, 121, on Egyptian fatwas on the peace with Israel which reject the view that this verse was abrogated.

353 Cf. e.g. Huwaydī, *Al-Islām*, 35 f.

repelling oppression, as proved by the fact that the point at which fighting was stopped was (political) submission, not the conversion (of the opponents).³⁵⁴ The Sudanese Islamist Ḥasan al-Turābī also puts forward the view that the one united Islamic state comprising the entire world is only a dream without any religious foundation. Islam, he says, is linked to ‘the believers’ hearts and souls, not their passports or national flags’.³⁵⁵ He explicitly emphasises the maxim *lā ikrāh fī l-dīn* – no compulsion in religion. The influential jurist Mohammad Hashim Kamali, who teaches in Malaysia, expresses the even wider interpretation that this passage contains a fundamental principle which guarantees universal freedom of religion. Later attempts at restricting it by means of abrogation are, in his view, fundamentally mistaken.³⁵⁶

There are, of course, more iridescent opinions as well.³⁵⁷ Thus Ramadan al-Bouti, while agreeing that military jihad must only be a means to defending positions already established,³⁵⁸ he does include those who attempt to destabilise Islamic states. This statement is highly susceptible to interpretation. At least he adheres to the opinion that jihad must not be employed in order to conquer positions not yet under Muslim rule.³⁵⁹ Islamists, however, do include missionary activity and enforcing the sharia as the only system of norms in the concept of jihad.³⁶⁰ Others still expand the concept in entirely new directions, such as to include ‘educational jihad’ against underdevelopment.³⁶¹

With reference to present-day Germany let me quote a publication by the Islamisches Zentrum Hamburg from 1984 as an example: The equation of jihad and ‘holy war’, it states, is an error. Jihad must be understood entirely differently. There is, on the one hand, the greater jihad which is a struggle against the bad qualities innate in a human being; on the other hand, the lesser jihad meaning a defensive war against aggressors. However, the defence must on no account turn into aggression itself.³⁶² It would be advisable not to counter these statements with the reflex reference to earlier interpretations which

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354 Peters, Jihad, 125.

355 ‘Eine Theokratie wird es nicht geben’, interview in Der Spiegel 21/1998, 190, 194.

356 Kamali, Freedom, 105.

357 On the admissibility of describing a preacher who calls for children to be groomed for jihad in this manner as ‘Hasspriester’ (‘hate preacher’) see OLG Köln NJW 2005, 2554.

358 Al-Bouti, Le jihad, 243 f.

359 Op. cit., 245 and *passim*.

360 Peters, Jihad, 128 ff. with further references.

361 Cf. op. cit. 116 f. with further references.

362 Islamisches Zentrum Hamburg, ‘Jihad’ – nicht ‘Heiliger Krieg’, 3 ff., 12; cf. also Balić, Ruf vom Minarett, 73 f.; M. W. Khan, The True Jihad, esp. 17 f., 26 ff.

included military ones. Christians, too, would reject an argumentation that misunderstands earlier tenets of Christian faith as enjoining the systematic murder of all Jews on them, even though in past times the justification given for the persecution of Jews was indeed based in Christian theology. From the point of view of secular states under the rule of law, no fault can be found with the plain statement that Islam should be spread all over the world. In principle this is nothing more than the self-image of a world religion, shared by e.g. Christianity. The means of spreading the faith are what is significant. Peaceful promotion is permissible, but the use of non-peaceful means is prohibited.

Essentially, the problem arising in the discussion surrounding jihad is one that unites all monotheistic religions with missionary aspirations. Outward-looking monotheism must understand itself as absolute. It is necessary to make a clear distinction between this self-image and the question of how this claim to validity should be enforced in practice. The aggressive version is found in Islam, but not only there. Christianity,³⁶³ the religion of charity, also has passages such as the following in its Holy Scripture:

But there were false prophets also among the people, even as there shall be false teachers among you, who privily shall bring in damnable heresies, even denying the Lord that bought them, and bring upon themselves swift destruction. And many shall follow their pernicious ways; by reason of whom the way of truth shall be evil spoken of. (...) But these, as natural brute beasts, made to be taken and destroyed, speak evil of the things that they understand not; and shall utterly perish in their own corruption; and shall receive the reward of unrighteousness.³⁶⁴

In the war in Yugoslavia in the early 1990 the Metropolitan of Montenegro, Amfilohije, went so far as to say that 'Our holy war continues.'³⁶⁵ Here, as everywhere, we can see that the determining factor for peaceful coexistence in any religion lies with the members of the respective religions and their fundamental attitude.

363 Cf. Arnold Angenendt, *Toleranz und Gewalt. Das Christentum zwischen Bibel und Schwert*, 4th ed., Münster 2008.

364 2 Peter 2:1–2, 12–13.

365 Quoted after Anne Herbst, *Nationalismus und Menschenrechte in Mittel- und Osteuropa nach der Wende*, *Gewissen und Freiheit* 48, (1997), 45, 55.

4 Penal Law

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a *The Basics*

Since the days of colonialism, the penal laws in force in most countries of the Islamic world have been quite different from traditional doctrine.³⁶⁶ *Hadd* punishments in particular (cf. Part 1, 4.7.b above) are applied in only a few states, such as Saudi Arabia, Iran,³⁶⁷ Somalia, in parts of Nigeria and in Pakistan.³⁶⁸ In the much broader and overall vaguer area of classical *ta'zīr* (cf. Part 1, 4.7.c above) definitions and reforms could easily be based on the ruler's *siyāsa* authority (cf. Part 2, 2.3 above). Saudi Arabia and other religious dictatorships use *ta'zīr* for the brutal oppression of human rights activists who are in search of 'liberal' interpretations of Islam and its normative system.³⁶⁹

The reintroduction of the *ḥadd* crimes that has taken place in some countries over the past decades must be seen as a political issue above all.³⁷⁰ In this way, those in power wish to prove their exceptional conformity with Islam. This development was in part due to pressure from home-grown traditionalists³⁷¹ or Islamists who believe traditional penal law to be an integral part of the faith and champion it accordingly, and in part to support from other Islamic countries where this belief prevails, such as Saudi Arabia. The political aspect becomes particularly conspicuous in countries where large parts of the population are not Muslim, e.g. former Sudan and Nigeria, where this

366 Cf. only Peters, *Crime*, 103 ff. with numerous references; Ebert, *Tendenzen*, 211 f.

367 Cf. Tellenbach, *Zur Strafrechtspflege*, 45 ff.

368 Cf. Peters, *Crime*, 148 ff. with further references. Concerning the restrictive application by the Yemeni Supreme Court cf. the references in Shamiry, *The Rule of Law in Yemen*, 118 ff.

369 Cf. e.g. the extremely brutal punishment of Raif Badawi, who was sentenced to seven, later even to ten years in prison and 600, later 1,000 lashes for 'insulting Islam' and setting up a liberal internet forum (cf. the reports 'Saudi Arabian social website editor sentenced to seven years behind bars and 600 lashes', *nydailynews* 30 July 2013, available at <http://www.nydailynews.com/news/world/saudi-arabian-social-website-editor-sentenced-years-behind-bars-600-lashes-article-1.1412811>, and 'Saudi blogger Raif Badawi gets 10 year jail sentence', *BBC news Middle East* 8 May 2014, available at <http://www.bbc.com/news/world-middle-east-27318400>, last accessed 2 June 2014).

370 The development in Sudan since 1983 is a stark example; cf. Köndgen, *Das islamisierte Strafrecht des Sudan*, 1992. See (e.g. 55 ff.) in particular the examples proving how the authorities were riding roughshod over the form as well as the substance of existing laws.

371 E.g. in Egypt in 1982 a draft penal code drawn up by Azhar scholars and other influential jurists and legal scholars on the basis of classical law was presented to parliament; cf. Abu-Sahlieh, *Les musulmans*, 70 f. with further references.

kind of show of force will inevitably lead to conflicts.³⁷² Under the Islamist regime in Sudan, for instance, the most brutal of punishments were meted out: in 1994 in Wad Medani two men were executed and crucified who had converted from Islam to Catholicism more than 20 years earlier, and who had refused, despite being called to repent and being flogged, to revert to Islam.³⁷³

There is evidence that in many cases *ḥadd* penalties were applied for their effect on the general public, against prevailing traditional doctrine and practice. The judge Ṭaha al-Kabbāshī, one of the persons with prime responsibility for the introduction of the penal *ḥudūd* laws in Sudan under al-Numayri in 1983,³⁷⁴ categorised cases as *ḥadd* crimes in which state employees paid wages to imaginary recipients which ultimately ended up in their own pockets, i.e. typical fraud and embezzlement activities.³⁷⁵ Strangely, he himself described these cases as *ikhhtilās*, thus counting them among a type of case which was clearly distinct from *ḥadd* crimes in classical doctrine (cf. Part 1, 4.7.b. ff above).
 265 Objections to the verdicts imposed he attempted to refute by pointing out that in the opinion of some jurists a fraudster/embezzler (*mukhtalis*) is to be punished by law, that some jurists (not, however, members of the four great Sunni schools of law!) considered breach of custody legally superfluous (in these cases clearly no breach of custody had taken place) and thus punished a thief of state property as well.³⁷⁶ The intention to present a justification of the anticipated outcome is only too obvious in this case. The leading Sudanese Islamist and later president of the parliament Hasan al-Turabi³⁷⁷ commented: 'These punishments are outdated. Fifteen years ago the then dictator al-Numayri brought them back from the brink of oblivion, using the most dubious of means in order to present himself as an Islamic ruler.'³⁷⁸

Another instance of the politicisation of *ḥadd* crimes is their reintroduction in Pakistan through several decrees in 1979.³⁷⁹ After a court had rejected stoning

372 Cf. Peters' study, *Islamic Criminal Law*, esp. 13 ff.

373 Cf. 'Christen hingerichtet', *Gewissen und Freiheit* 44 (1995), 107.

374 For the legal politics of Islamisation under his rule cf. Layish/Warburg, *The Reinstatement*, esp. 30 ff.

375 Al-Kabbāshī, *Taṭbīq*, 75–77.

376 Op. cit., 79–85.

377 Graduate of law in Khartoum and London, PhD at the Sorbonne; after years in prison chairman of the National Islamic Front (the de facto 'state party') and president of parliament.

378 'Eine Theokratie wird es nicht geben', interview in *Der Spiegel* 21/1998, 190.

379 Cf. Peters, *Crime*, 155 and ff.

adulterers (cf. Part 1, 4.7.b.cc above) in 1984 with reference to sura 24:2³⁸⁰ and imposed 'only' flogging, the displeased dictator Zia ul-Haq had the judges deposed and arranged for a change in the constitution in favour of a revision of the case. The new court before which the case was brought delivered a judgment in accordance with his wishes.³⁸¹

Wider support for the reintroduction of draconian punishments was found in places where a desperate population suffered under unlimited crimes and failing or non-existent public institutions, such as Somalia where the so-called sharia-courts were able to establish themselves for a time as the only agencies of public order.³⁸² In Libya and Pakistan, on the other hand, the *ḥadd* crimes were reintroduced formally, but the punishments were only rarely, or indeed never, carried out.³⁸³ Of course, a high degree of uncertainty remains.³⁸⁴ Currently there is a debate on a wider scale in Pakistan pushing for the abolition of such laws, not least because of their devastating consequences for women who have been raped (cf. Part 1, 4.7.b.dd above).

As a rule the penal codes are very similar to those of Western states in large parts.³⁸⁵ However, they are often influenced by excessive state protection norms, on which corresponding arbitrary measures can be based. Rules concerning *qisās* and corresponding civil arbitration (cf. Part 1, 4.7.d above) apply in many countries.³⁸⁶

Without any major debate around the legal politics, *ḥadd* crimes were simply not included in the laws in force (regarding this very characteristic strategy of implementing reforms cf. 2.3 above). There are also individual authors who speak out explicitly against the continued applicability of *ḥadd* punishments. They refer, for instance, to the traditional doctrine according to which punishment depends on the cooperation of the victim and, especially, the perpetrator (the option of active repentance which can result in exemption from

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380 Comparable also Diakho, *La Lapidation*, 148 and *passim*, who understands stoning as a punishment at first adopted from the Jews (cf. Lev. 20:10 and ff.) but later abrogated.

381 Reference in Peters, *Crime*, 159. It appears that there were no stonings in actual fact after all. Concerning comparable arbitrary interference in Sudan under Numayri cf. Köndgen, *Das islamisierte Strafrecht*, 52 f.

382 Cf. 'Islamisten siegen in Mogadischu', *Frankfurter Allgemeine Zeitung*, 6 June 2006, 6; 'Letzter Versuch der OAU in Somalia', *Süddeutsche Zeitung*, 27 Jan. 1995, 9; regarding Nigeria cf. Peters, *Islamic Criminal Law*, 14.

383 Peters, *Islamic Criminal Law*, 44; in more detail id., *Crime*, 153 ff.

384 Cf. Peters, *Crime*, 155, on a first case of amputation carried out on highway robbers.

385 Concerning the current situation cf. Peters, *Crime*, 142 ff. with further references.

386 On the reintroduction in Pakistan cf. Lau, *The Role*, 132 ff. with further references.

punishment; often the only proof furnished is a confession; justifiable doubts which might lead to exemption from punishment but can be manipulated; cf. Part 1, 4.7.b. above) and draw the conclusion of its being altogether impracticable in this world.³⁸⁷ In addition, they point out, the option of repentance with subsequent exemption from punishment is an indication of the focus on God and the next world, the purpose of inner purification and reconciliation.

Thus El Baradie sees the interpretation of the rights of God as the protection of the community in this world (cf. Part 1, 4.7.b.aa above) as a misinterpretation of rules which were in truth meant to be transcendent only.³⁸⁸ The deterrent effect claimed does not carry any conviction, not least because other crimes against possessions and property do not entail *ḥadd* punishment. It is true that the widely recognised traditional doctrine according to which it may be well-nigh impossible to execute a punishment against the perpetrator's wishes does not sit well with the concept of deterrent.

Other authors try to adhere to the basic claim to validity of traditional Islamic penal law as well, but declare its implementation to be unsuited to existing societies considered to be 'un-Islamic'. This may well be an expression of the strategy of postponing the implementation of unloved norms indefinitely. On the other hand the problem remains that despite being – in some cases, severely – contrary to human rights, these rules are seen as part of an ideal order which people should aspire to establish.³⁸⁹ The frequent reference to the fact that a hungry thief's hand would not be cut off does not answer the question of how one should deal with a well-off thief. It is true that 'deferral' is sometimes interpreted so generously that the execution of *ḥadd* punishments is postponed to a time when the people have sufficient livelihood and a just social order has been established everywhere.³⁹⁰

Another approach to reform, finally, is by reflecting on the aims of penal statutes. This explains that Islamic penal law is merely the last resort in maintaining necessary minimum standards in social interaction. The fact that usury, gambling and similar offences are 'only' punished in the other world is cited in support. Islamic law, it is added, relies on persuasion and admonition rather than enforcement.³⁹¹

387 Farūq, From here we start, 126.

388 El Baradie, Gottes-Recht, 181, 185 f.

389 Thus explicitly El-Awa, Punishment, 138. He tellingly names Saudi-Arabia as a shining example (op. cit., 137).

390 Cf. Bassiouni, Sources, 5; Farūq, From here we start, 126.

391 Muslehuddin, Islamic Jurisprudence, 17.

A considerable number of those modern authors who devote their time to, overall rather unloved, Islamic penal law do, however, follow traditional doctrines.³⁹² Thus they describe the individual elements of the offences and requirements for court proceedings according to their own school of law or according to the opinions of several schools. Not infrequently there is a palpable aggressive rejection of criticism from the West,³⁹³ the decadence of which is emphasised as well as high crime rates. Unlike the mild Western punishments, which betray sympathy for the perpetrator rather than the victim, the *ḥudūd* are praised as being effective penalties for all times and places.³⁹⁴ Centuries of comparative effectiveness are proof of this, as well as the low crime rate in e.g. Saudi-Arabia to this day.³⁹⁵ Not to apply the *ḥudūd* might even be called an invitation to crime and to renouncing God.³⁹⁶ Khalil al-Ghazzālī introduces his description of objections to *ḥadd* punishment with the pithy words *qāla al shayṭān wa-junduhu* ('the devil and his comrades-in-arms said').³⁹⁷

Yūsuf al-Qaraḏāwī's remarks are in a similarly extreme anti-Western tone. Thus, with reference to the Islamist thinker Mawḏūdī, he defends the punishment for illegal intercourse (*zinā*) as being necessary for the protection of society.³⁹⁸ The animalistic nature of human beings, he says, makes mere monetary penalties ineffective, and consequently harsh punishments are needed. 'Western heathens' only protect individual rights while ignoring the rights and needs for protection of society as a whole.³⁹⁹ This criticism also pervades the 2001 work of comparative legal studies⁴⁰⁰ by the co-founder of an Islamic centre⁴⁰¹ in Berlin who emphasises his thirteen years' experience of life in Germany. The author's severely anti-Western position is expressed in the wording

392 Cf. e.g. Bahnasī, 26, 59 f., 102–109, 123–128, 179 f., 197–201; al-Shadhli, *Āthār*, 43–61.

393 Cf. Menon, *Islamic Criminal Jurisprudence*, 232 f.; Siddiqi, *Concept*, 191; see also Peters, *Crime*, 182 and ff.

394 Menon, *Islamic Criminal Jurisprudence*, 234; Hiba, *Mujāz*, 175–177; cf. also the remarks made by Hasan al-Turabi in an interview, 'A Few Hands', *Horn of Africa*, vol. 8/1, 35.

395 Cf. Adler, *Nations*, 88; Menon, *Islamic Criminal Jurisprudence*, 237.

396 Al-Ghazzālī, *Āthār*, 161–163, 165 f.

397 *Op. cit.*, 169, 171.

398 He confines himself to punishing unmarried offenders with 100 lashes, not mentioning the punishment for married offenders at all.

399 *Legislation and Law*, 7 ff.

400 Sālim ibn 'Abd al-Ghanī al-Rāfi', *Aḥkām al-aḥwāl al-shakhṣiyya li-lmuslimīn fī l-gharb*, Riyadh 2001.

401 This obviously refers to the al-Nur mosque in Berlin-Neukölln; he was imam there and later moved to Lebanon where he is said to have taken up work as a judge.

as well as the contents: non-Muslims are called ‘unbelievers’ (*kuffār*) throughout, German legal norms and court judgments ‘judgments of unbelief’ (*aḥkām al-kufr*).⁴⁰² The author condemns Western society as believing only in material things, power and the lusts of the flesh, and calls upon Muslims living in Germany always to adhere to the norms of family law as set down in the (traditionally interpreted) sharia.⁴⁰³ With firm consistence he supports the physical punishment of illegal (under Islamic law) sexual relationships, e.g. for Muslim women who marry non-Muslims, even if they are not aware of the ‘criminal nature’ of their actions.⁴⁰⁴

268 A more general accusation against reformers in contemporary traditionalist and Islamist literature is that they align themselves with Western, ‘man-made’ law, thus dismissing the divine, perfect and immutable nature of Islamic law.⁴⁰⁵ Any intellectual debate on the content level and using arguments is thus simply pushed to the side.

Besides the presumed preventative effect the alleged fairness of *ḥadd* punishments is also pointed out, which is considered to be in an appropriate proportion to the gravity of the offence and the perpetrator’s responsibility,⁴⁰⁶ and which is said to have a deterrent effect despite being used only rarely.⁴⁰⁷ Ali Maṣṣūr even points out the especially benign nature of Islam, which may be seen in its love for animals (the author can look back on years of observing the situation in Islamic countries and his impression has not always been the same as Ali Maṣṣūr’s); how much better must it treat humans.⁴⁰⁸

Besides the intent of protecting society, according to these authors the *ḥadd* punishment should also lead to the perpetrator’s reconciliation with God. It might even be seen as an act of individual grace in the case of potential perpetrators, as the deterrent effect could transform their possible criminal energy into commitment to improve society.⁴⁰⁹ The abovementioned Ṭaha al-Kabbāshī justifies the execution of the *ḥadd* punishment for theft with the claim that the perpetrators are felons, and rejects the argument that in times

402 Op. cit., 618.

403 Op. cit., 146.

404 Op. cit., 394.

405 E.g. ‘Oudah, Criminal Law, vol. 1, 9 ff.

406 Cf. Abu Zahra, *Falsafat*, vol. 2, 6 f., 11; Jamāl al-Dīn, *Fī l-shar‘iyya al-jinā‘iyya*, 418; Hiba, *Mujāz*, 171–173; al-Kabbāshī, *Ṭaṭbīq*, 59; Maṣṣūr, *Ḥudūd Crimes*, 195; Siddiqi, *Concept*, 203.

407 Cf. Adler, *Nations*, 88.

408 Maṣṣūr, *Ḥudūd Crimes*, 196.

409 Cf. Hiba, *Mujāz*, 161–167; Maṣṣūr, *Ḥudūd Crimes*, 196, as well as the references in Dilger, *Das islamische Strafrecht*, 1328 f.

of universal poverty the preconditions for applying the law in the manner of the caliph 'Umar did not apply. He interprets 'Umar's action to the effect that there was nothing that could have been stolen at the time which would have warranted the cutting off of someone's hand. In addition, he says, current cases in Sudan did not arise out of need.⁴¹⁰

Looking at the champions of traditional concepts overall we see the same dilemma which the classical jurists faced as well: on the one hand trying to present an effective deterrent, while on the other avoiding the execution of the *ḥadd* punishment where possible. Wherever traditional penal law is still in force, the discriminating regulations of evidence at the expense of non-Muslim witnesses are also still in force.⁴¹¹

b *An Example: The Attitude towards Apostasy*

One particular set of issues discussed at some length is apostasy from Islam (*ridda*; cf. Part 1, 4.7.b.gg above). In most Islamic states this is not a punishable offence, even though it usually results in the apostate being socially ostracised. Many modern authors point out that the persecution of apostates is to be restricted to the specific historical situation of the early Islamic community in their armed conflicts with the pagan Meccans and after Muhammad's death. At that time many of those who had converted to Islam renounced it, and the young polity found itself in great danger. Thus in a secular sense the accusation is interpreted as desertion or high treason.⁴¹² El-Awa refers to Hanafite doctrine⁴¹³ according to which female apostates will not be subject to capital punishment, as women were not seen as being able to fight against the Islamic state.⁴¹⁴

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The approach of the erstwhile rector of the Azhar University, Mahmud Shalṭūṭ, follows similar lines. He explains that the tradition on which capital punishment (i.e. the threat of punishment) is based does not carry sufficient weight for this sanction (*sunnat al-aḥād*, a tradition transmitted by only a few authorities, cf. Part 1, 2.3 above). Not unbelief is the cause of punishment but only fighting the faithful, attacking them and attempting to divert them from

410 Al-Kabbāshī, *Taṭbīq*, 59 f.

411 Cf. the judgment of the Supreme Court of the UAE of 17 Nov. 1993 (as far as printed in Ḥammādī, *Qaḍā'*, 377), which does, however, allow such evidence in case of necessity (if there are no other witnesses).

412 Cf. e.g. Rahman, *Punishment*, 87 ff.; El-Awa, *Punishment*, 63 f.; Kamali, *Freedom of Expression*, esp. 247 ff.; Öztürk, *Der verfälschte Islam*, 93 ff.

413 Cf. al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 10, 109 ff.

414 El-Awa, *Punishment*, 63.

the faith.⁴¹⁵ Thus the element of the crime is – as it is also understood by other authors – a threat to the state. As such it does not apply at all beyond the borders of the territory under Islamic rule.

The Quranic passages on which some classical authors base their remarks are interpreted in a more specific way nowadays and restricted to the historical situation during Muhammad's lifetime, and consequently no punishment in this world would be justified based on the Quran.⁴¹⁶ S. A. Rahman summarises the classical Quranic commentaries on the subject regarding sura 5:54 ('O believers, if one of you turns from his religion and becomes an unbeliever, this is of no account') with the words: 'The main inference from the verse is that there is not punishment for apostasy to be enforced in this world, for such human aberrations cannot frustrate God's purposes.'⁴¹⁷ It is also pointed out that in his own lifetime Muhammad did not impose capital punishment even in clear cases of apostasy.⁴¹⁸

Many authors, furthermore, see renouncing Islam as an act which regards only the relationship between human and God and can consequently entail only punishment in the afterlife.⁴¹⁹ The Sudanese jurist Abdullahi al-Na'im explains his rejection of the punishment in this world by pointing out that tolerating unorthodox and divergent opinions performs a vital function, both spiritual and intellectual, for Islam.⁴²⁰ In his book 'Renewal of religious thought – an invitation to employing one's intelligence'⁴²¹ the Kuwaiti author Ahmad al-Baghdādī recognises the prosecution of *ridda* as a misinterpretation pure and simple, which he sees as contrary to the freedom of religion set down in the Quran. Sura 2:256 in particular (*lā ikrāh fi l-dīn*, 'there is no compulsion in religion') is seen as evidence. Here, this rule is interpreted as being universally and eternally valid, unlike earlier, more restrictive interpretations.⁴²²

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415 Shaltūt, *Al-Islām 'aqīda wa-sharī'a*, 280f. In this context the problem can arise that if this is interpreted broadly, even promoting another faith by describing it in a positive light might fall under this rule.

416 Cf. e.g. S. A. Rahman, *Punishment*, 9ff., 31ff. with further references, 138; El Baradie, *Gottes-Recht*, 123; El-Awa, *Punishment*, 53 ('nothing in the Qur'anic verses cited can be taken as a justification for the death penalty as a hadd punishment for apostasy').

417 S. A. Rahman, *Punishment*, 46.

418 El-Awa, *Punishment*, 54 with further references.

419 Cf. El Baradie, *Gottes-Recht*, 241 and *passim*.

420 An-Na'im, *Toward an Islamic Reformation*, 184.

421 Al-Baghdādī, *Tajdīd*, 123ff., esp. 132f.

422 Cf. Rahman, *Punishment*, 17ff. with further references; M. Charfi, *Islam and Liberty*, 55 and *passim*.

The Central Council of Muslims in Germany, finally, set down explicitly after some controversial debate in article 11 of its Islamic Charter of 20 February 2002⁴²³ that the Muslims represented by the Central Council respect everybody's right to change their faith, to hold a different faith or to live without faith. Evidence is provided by the abovementioned verse prohibiting compulsion in religion.

Extremists, of course, continue to adhere to traditional doctrine; indeed, they extend it. Thus in internal Islamic disagreements, *takfir* (declaring someone an unbeliever) is employed as a weapon against those holding dissenting views.

In 1985 the reform theologian Mahmud Muhammad Tāhā was found guilty of apostasy among other things, condemned to death and executed in Sudan, after a clearly political trial and with existing law being violated.⁴²⁴ He and his group, the republican brotherhood, had spoken out against the controversial introduction of the sharia and had upheld an interpretation of the Quran which assumes the Meccan suras as the basis of a reformed sharia.⁴²⁵ The judgment against him was later officially branded a miscarriage of justice.⁴²⁶ However, the Mecca-based Muslim World League and the Azhar University are said to have congratulated the president on executing the judgment.⁴²⁷

On the occasion of an academic conference in Germany in 2000 the author himself led a discussion of comparative law debating the possibility of interpreting the rules of Islamic family and inheritance law according to their meaning and purpose and rather than the wording alone. During the course of the debate an Egyptian university lecturer said to the interested Muslims participating in the discussion that whoever followed the author's theoretical approach would be seen as an apostate and would be subject to the designated punishment. It is not surprising that views of this kind and their threatening potential suppress the discussion of reinterpretations of commandments, as can be observed over wide areas in the Islamic world. This is even truer in places like Pakistan where vague regulations impose death or long prison sentences

423 Viewable at <http://www.zentralrat.de/3035.php>.

424 Cf. the references in Köndgen, *Das islamisierte Strafrecht*, 55 ff.; critical views in M. Charfi, *Islam and Liberty*, 52 f.

425 Cf. his work 'The Second Message of Islam', New York 1987; regarding Abdullahi an-Na'im's interpretation and further development of the text cf. L. Müller, *Islam und Menschenrechte*, 243 ff.

426 Cf. the references in Köndgen, *Das islamisierte Strafrecht*, 57 f.

427 M. Charfi, *Islam and Liberty*, 52 with further references.

on the crime of ‘blasphemy’, regulations under which Ahmadis and Christians suffer particularly.⁴²⁸ The murder of critics and Islamist terror in 2010 and 2011 cast a glaring light on these developments.⁴²⁹

271 Further development will depend considerably on the weight and scope for action open to the representatives of the respective trends. The debate in Afghanistan provides a striking example. The former president of the Supreme Court Shinwari told the author⁴³⁰ that the legal system enacted in the Kingdom of Afghanistan would be recognised ‘within the limits of the sharia’. This attitude gives rise to the assumption that a number of traditional regulations are to be expected, and some decisions of recent years confirm this. In keeping with this development one candidate for the presidency was accused of apostasy by the Court during the elections of 2004 because he had demanded equal rights for women in divorce regulations.⁴³¹

A similar case is that of the journalist and Islamic scholar Ali Muhaqqiq Nasab, who was imprisoned on 1 October 2005, after the journal he edited, *Huqūq-e zan*, expressed the opinion that renouncing Islam was not a crime punishable by death, that flogging was to be rejected as a punishment for extra-marital intercourse and that men and women ought to be treated equally under Islamic law. The legal justification given was article 31 of the media laws of 2004, which penalises the publication of articles which are ‘contrary to the principles of Islam’. After the public prosecutor had demanded the death penalty for apostasy in a clearly very questionable trial, the journalist was condemned to two years imprisonment, against the declared opinion of the minister for information and culture Rahim and the commission of inquiry required under media law.⁴³²

As regards the *ḥudūd*, the shift away from the excesses of the Taliban – which were, after all, denounced in most of the Islamic world as well – has been

428 Cf. Lau, *The Role*, 193 ff.; Monshipouri, *Islamism*, 155 ff.; Stahmann, *Islamische Menschenrechtskonzepte*, 235 ff.

429 Cf. ‘Innenpolitische Erdbeben in Pakistan’, *Frankfurter Allgemeine Zeitung*, 3 Mar. 2011, 6.

430 As discussed during a conversation in his office on 10 May 2003.

431 Cf. Amnesty International, ‘Amnesty Report Afghanistan, Women’s Rights only on Paper’, *qantara.de*, 25 May 2005 (Ali Matar), viewed on 29 August 2014 at <http://www.qantara.de/content/amnesty-report-afghanistan-womens-rights-only-on-paper>.

432 Cf. ‘Afghan Court Gives Editor 2-Year Term for Blasphemy’, *New York Times*, 24 Oct. 2005 (Abdul Waheed and Carlotta Galli); ‘Afghan editor arrested on blasphemy charge’, *Straight Goods*, 27 Oct. 2005 (Golnaz Esfandiari), viewed on 27 Oct. 2005 at <http://www.straightgoods.ca/ViewFeature5.cfm?REF=485>.

greeted favourably.⁴³³ After all, these penalties had not been imposed during more recent Afghan history before the Taliban regime.⁴³⁴ Still, here once again important representatives rejected a full abolition.⁴³⁵ The commandments under discussion, they said, are not open to interpretation but eternally binding (*qatʿī*).⁴³⁶ The strict evidence rules of the sharia⁴³⁷ should, however, be applied consistently; these often lead to the *hadd* penalty being ruled out. In this context, however, the pressing problem remains that women who have been raped and find the courage to report the rapist then run the risk of being punished for wrongful accusation of illegal intercourse if there are no eye witnesses willing to testify, or indeed of being punished for illegal intercourse.

While some jurists make it quite clear privately that the intention is to ultimately prevent the implementation of these penal norms, it remains to be seen whether this intention can endure beyond the boundaries of Kabul. A report on the stoning of an alleged adulteress in the province of Badakhshan in April 2005 is sobering; it is hardly worth mentioning that under article 129 p. 2 of the constitution of 2004 capital punishment may only be carried out after confirmation by the president – which of course was not given in this case.⁴³⁸ A comparable current case concerns the student and journalist Sayid Pervez Kambaksh who had published an article on women's rights and because of this was accused of apostasy and condemned to death by a non-competent board of scholars in 2008 in the province of Balkh. The Upper House at first confirmed his execution but retracted the confirmation in response to international protests; he was later condemned to 20 years imprisonment, then received a pardon and was released from custody.⁴³⁹ It has been assumed that the intention behind

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433 Cf. e.g. 'Taliban bedrohen Konvertiten mit Todesstrafe', *Frankfurter Allgemeine Zeitung*, 9 Jan. 2001, 8; 'Todesstrafe für Ehebruch. Die Justiz der Taliban in Afghanistan; Anwälte sind nicht vorgesehen', *Frankfurter Allgemeine Zeitung*, 9 May 2001, 3.

434 Cf. Kamali, *Islam and its Shari'a*, 23, 25 and ff.

435 Thus the abovementioned supreme judge Shinwari and the chairman of the Judicial Reform Commission Prof. Baha in conversation with the author in May 2003. The Judicial Reform Commission was created by presidential decree no. 153 of 2 November 2002 (11. 8. 1381) on the basis of the Petersberg agreement.

436 This unlike many other regulations which are open to interpretation (*zannī*) including as regards their applicability as to time and place.

437 Cf. Anwarullah, *Principles of Evidence in Islam*, Kuala Lumpur 1999.

438 Cf. Amnesty International, *Afghanistan. Women still under attack – a systematic failure to protect*, May 2005 (AI Index: ASA 11/007/2005), 36 with further references.

439 '20 Jahre statt Todesstrafe', *Süddeutsche Zeitung*, 22 Oct. 2008, 8; 'Journalist begnadigt', *Süddeutsche Zeitung*, 8 Sept. 2009, 8.

the action was to hurt his brother, a journalist who had already made public many instances of corruption and violations of human rights.⁴⁴⁰

On the other hand the current situation does not look favourable to fundamental reforms along the lines of an explicit abolition of *ḥadd* crimes. It would be more feasible to take the path of de facto non-implementation by the traditional means of the narrowest possible interpretation and a correspondingly designed law of evidence, which would be suitable to provide help at least for persons directly involved.⁴⁴¹ Still, the cases cited also show the extent to which even the possibility of such penalties being imposed can be oppressive.

c *'Honour Crimes'*

Legal issues of a more general kind arise beyond the scope of the *ḥadd* punishments. They concern the function of penal law as an instrument for establishing indispensable minimum standards for successful coexistence. A problem in this context is the minor punishment we often see imposed on perpetrators who kill or injure girls and women for reasons of 'family honour'.⁴⁴² It is, however, possible to discern opposing movements which demand full protection for women by implementing penalties that are equally strict for everyone.⁴⁴³

The attitude displayed in these crimes should be seen as a 'cultural' rather than a specifically legal-religious one. It unifies e.g. Christians and Muslims in Egypt or Albania.⁴⁴⁴ The highest Shi'ite cleric of the Lebanon, Sayyed Muhammad Hussein Fadlullah published a fatwa in August 2007 in which he severely condemned such crimes.⁴⁴⁵ Religion, he says, forbids and condemns such actions, as they are the result of a male tribal mentality which has nothing to do with a sense of honour or dignity.

440 Cf. the report by Ranjit Hoskoté/Ilija Trojanow, 'Den Islam beleidigt', *Süddeutsche Zeitung*, 16/17 Feb. 2008, 13.

441 The evaluation in Peters, *Crime*, 184f. is comparable.

442 Similar 'privileges' are found in many legal systems resting on patriarchal foundations, such as e.g. the French Code Pénal of 1810 in article 324.

443 Cf. 'Jordanische Frauen gehen auf die Straße', *Frankfurter Allgemeine Zeitung*, 28 Nov. 1998, 10; 'Junge Ägypterin wegen Entehrung der Familie getötet', *Frankfurter Allgemeine Zeitung*, 30 Nov. 1998, 14.

444 Cf. 'Junge Ägypterin wegen Entehrung der Familie getötet', *Frankfurter Allgemeine Zeitung*, 30 Nov. 1998, 14; 'Dieser Junge soll töten', *Süddeutsche Zeitung Magazin* no. 20/2007, 8 Mar. 2007 (Lars Reichardt/Dominik Wichmann) (Catholics); cf. also 'Brutaler Streit um die Familienehre', *Süddeutsche Zeitung*, 25 Feb. 2008, 42 (Turkish Armenian Orthodox Christians).

445 Viewed on 27 Mar. 2008 at <http://bayynat.english.org.lb?news%5C01082007.htm>.

However, it is possible that gender concepts based on religion as they are broadcast frequently in classical (cf. Part 1, 4.2.a above), but also in some modern texts, can lower the inhibition threshold for such crimes by providing seeming justification, or by exerting social pressure on those who adhere to different concepts. In this context we must see the statement by a Jordanian judge who clearly supports retaining the controversial mitigation clause in article 340 of the penal code: God, he says, demands that Muslims defend their honour. Adulterous women, he adds, are a greater threat to society than the men involved, as the former are the cause of these actions. If there were no women for men to commit adultery with, the men would automatically act in the correct way. The President of the Jordan Society for Human Rights interprets such remarks to the effect that Islam is being called upon in order to defend the status quo in society.⁴⁴⁶ The extent of the idea of 'honour' displayed there is illustrated by horrifying crimes committed not only in Germany.

446 Cf. the references in Wehler-Schöck, *Ehrenmorde*, 81.

PART 3

Paths Taken by Islamic Law in the Diaspora



Introduction

Outside the territory under Islamic rule, the norms of Islamic law can only be applied insofar as this is permitted by the law in force in the respective country.

An early example of the willingness to apply foreign religious law is provided by the reign of Frederick II of Hohenstaufen (b. 1194, r. 1215–1250). In the Constitutions of Melfi (1231)¹ he guaranteed the Jews as well as the ‘Saracens’ special status and granted them general legal protection.² This concession resulted in Frederick being mocked as the ‘Sultan of Lucera’.³ Later, in the nineteenth century under Habsburg rule, Muslims in Bosnia-Herzegovina and other Balkan states with Muslim minorities were granted their separate legal status after their independence from the Ottoman Empire.⁴ These, however, are all exceptions and concern populations with a long history of residence in the respective areas.

In the following we will present as examples the legal situation in India, Canada and Germany (with some reference also to other European countries) in some detail. They represent typical types of development of Islam in the diaspora.⁵ The example of India is interesting not only because of the change from the Muslims’ past political and legal dominance to their present status of a largely deprived minority and the ways in which they continue to interpret and apply Islamic law in this situation. In view of the fact that many Muslims of the Indian subcontinent maintain close family ties to Great Britain, beliefs and conflicts appear to surface here as well. It is no coincidence that there is no other country in Europe where the introduction of a Muslim personal status law is demanded with similar vehemence. Many mosques and organisations in Great Britain appear to be dominated by the Deoband school. Consequently a closer look at the situation in India is worthwhile, especially as there have so far not been any detailed studies of the issue.

Canada, on the other hand, is interesting as an instance of a typical immigration country, especially because during the last decades hardly any immigrants

1 Excerpts in Klaus J. Heinisch (ed.), *Kaiser Friedrich II. in Briefen und Berichten seiner Zeit*, Darmstadt, 1968, 225 ff.

2 Cf. Eberhard Horst, *Der Sultan*, 132.

3 Cf. *op. cit.*

4 Cf. Fikret Karčić, *Šerijatski Sudovi*, 21 ff; Heine/Lohlker/Potz, *Muslime*, 47 ff.

5 For the term ‘diaspora’ in this context cf. Rohe, *Sharia and the Muslim Diaspora*, 261 ff.

278 have arrived there from Europe but chiefly people from Asia and Africa. The number of Muslims in Canada is rising rapidly, and the debate concerning the introduction of Islamic arbitration authorities in Ontario, which has been conducted with some heat during the first decade of the 21st century, may be seen as a paradigm of the discussions of the issue in immigration countries in general.

Germany, finally, is one of the 'late' immigration countries where the debate of legal politics has reacted only for a comparatively brief time to the fact that irreversible immigration has already taken place. However, as yet there have been only few attempts at sounding significant issues with regard to a possible collision of norms. This chapter will deal with two relevant aspects: The ways in which secular state laws define the scope and limits of the application of Islamic law under the auspices of balancing unity and diversity, and the (pluralistic) attitude of Muslims towards such application. Historical and social aspects are of major, if not crucial importance in this context.⁶

6 For recent publications regarding other jurisdictions cf. e.g. Nielsen/Christoffersen (eds.), *Shari'a As Discourse*, 2010; Fournier, *Muslim Marriage in Western Courts*, 2010; Büchler, *Islamic Law in Europe?*, 2011; Mehdi/Menski/Nielsen (eds.), *Interpreting Divorce Laws in Islam*, 2012; Dupret (ed.), *La charia aujourd'hui*, 2012; Bowen, *Blaming Islam*, 2012; Rohe, *Reasons*, 25 ff.; id., *Sharia and the Muslim Diaspora*, 261 ff. For Europe-wide actual reports cf. Nielsen, Jørgen et al. (eds.), *Yearbook of Muslims in Europe*, vol. 1 (2009–).

India: An Example of a Territory Previously under Muslim Rule

1 Introduction

Muslims in India constitute a large minority; their number reached around 140 million people (census of 2001) and may well have increased to around 170–180 million in 2014.¹ As everywhere in the world, they were and still are highly diverse in terms of social status, religious affiliation and individual conviction.² There are significant regional and denominational differences, making them a marginal group in both economic and social terms.³ Their position in Indian

1 According to the census of 2001 there were 138,188,000 persons, 13.433% of the entire population of 1,027,015,422 persons; cf. A. P. Joshi/M. D. Srinivas/J. K. Bajaj, *Religious Demography of India. 2001 revision*, Chennai 2005, 10, table 1.4. According to the census of 2011 the total amounted to 1,210,193,422 and is estimated to reach around 1.27 billion in 2014. Interestingly, the figures in the census of 2011 which concerned religious affiliation were not published until May 2014. Reports explain this with the probability of a new Hindu–Muslim ratio in favour of the latter; cf. ‘Why is Census 2011 silent on religious data?’, *Niticentral* 3 May 2013 (Priyadarshi Dutta). This corresponds to a report in the *Times of India* of 30 Oct. 2013 (‘Muslim population myths’, T. K. Arun) dealing with propaganda figures used by Hindu extremists, who claim that an absolute Muslim majority will be reached in 2035 due to ‘conversion, threatening, rioting, slaughtering, terrorism, intrusion, polygamy, no birth control’.

2 Cf. only Mohammad Mujeeb, *The Indian Muslims*, New Delhi 2003.

3 This is proven by the extensive data in the ‘Sachar report’ (Prime Minister’s High Level Committee, Cabinet Secretariat, Government of India, *Social, Economic and Educational Status of the Muslim Community of India*, n. p., Nov. 2006), and the relevant summary 237 ff. A wealth of new data contained in the *India Social Development Report 2012* by the Council for Social Development (pp. 175 ff.) confirm these findings. Cf. also Omar Khalidi, *Muslims in Indian Economy*, Gurgaon 2006, summarised 224 ff.; Abusaleh Shariff/Mehtabul Azam, *Economic Empowerment of Muslims in India*, New Delhi 2004, with extensive statistical information, and the contributions by Amir Afaque Ahmad Faizi (*Prospects of Economic and Financial Inclusion of Muslims in India*, 347 ff.) and Malik Rashid Faisal (*Employment Opportunities for Muslims*, 367 ff.) in Ahmad (ed.), *Economic Conditions. Regarding discrimination experienced by Muslims* cf. e.g. Nadwi, *Muslims in India*, 126 ff., who deplores discrimination in the areas of mission, education (syllabuses, materials), language (Urdu) and working environment. Abu Saleh Shariff, former Member-Secretary of the Sachar Committee, complained in 2014 that the government reacted only half-heartedly to the report, and that Muslim initia-

society is under a strain for historical reasons.⁴ Still, coexistence has been overall peaceful since the political partition of the Indian subcontinent in 1947, albeit interrupted repeatedly by violent unrest and attacks.⁵ The origin of the nationhood of the political antagonist Pakistan was due precisely to the Islamic faith, even though reality often diverges from this ideal, and the unsolved conflict over Kashmir has led to persistent tension.⁶ The Hindu majority society – which itself includes ‘separatist’ groups – saw the self-image of many (but by no means all) Muslims as an independent nation, an idea which developed before as well as after partition, as a possible threat to the unity of the state. The Muslim desire for partition emerged because they did not consider their interests in protection and participation to be protected sufficiently.⁷ It is not possible in this place to go into the frequently discussed, and so far unresolved, question

tive was required in educational progress in particular (cf. ‘Muslims and their problems get no weightage in the country’s development model: Shariff’, *Milli Gazette* 1–15 Feb. 2014, 4).

- 4 Regarding the fundamental conflict between the widely held majority opinion which focusses on the unity of the country under a democratic government, and the widespread concern among Muslims of losing their identity simply by being overruled by the majority vote cf. Jain, *Muslim Political Identity*, esp. 124 ff. and the summary 274, 284, which contains a wealth of references. Having provided plausible evidence for the Muslim leadership’s desire for (especially in the period before partition in 1947) autonomy, Jain goes on to criticise it by pointing out that the majority of Indian nationalists and supporters of unity had accepted diversity of language, ethnicity and religion. Remarkably Jain employs the democracy argument only and does not raise the issue of substantively effective minority protection. Rather, he sees the Muslims as a group who see themselves as past rulers and insist on their prerogatives; a view for which there is ample evidence from the time of the British Raj with regards to the Muslim upper class, but which does not reflect the current situation realistically.
- 5 Cf. e.g. Iqbal A. Ansari (ed.), *Communal Riots, The State and Law in India*, New Delhi, 1997; Rafiq Zakaria, *Communal Rage in Secular India*, Mumbai 2002; Ashutosh Varshney, *Ethnic Conflict and Civic Life. Hindus and Muslims in India*, 2nd ed., New Haven etc. 2002; Jackie Assayag, *At the Confluence of Two Rivers, Muslims and Hindus in South India*, New Delhi 2004; Dwivedi, *Introduction*, 1ff. and the subsequent lucid contributions in Dwivedi (ed.), *The Other India*, 2012.
- 6 Cf. e.g. Miridu Rai, *Hindu Rulers, Muslim Subjects. Islam, Rights, and the History of Kashmir*, Delhi 2004.
- 7 Cf. Noorani, *Muslim Identity*, 121 and ff.; Shaikh, *Community*, esp. 76 ff., 103, 233f. and *passim*; regarding the dedicated support for state unity from the Muslim side see Maulana Hussain Ahmad Madani, *Composite Nationalism and Islam*, New Delhi 2005 (transl. by Hussain/Imam). Concerning the minorities’ participation – not very well known in India – in the freedom movement cf. Shan Muhammad, *Muslims and India’s Freedom Movement*, New Delhi 2002, and the collection *They Too Fought for India’s Freedom. The Role of Minorities, Gurgaon 2006*, ed. by Asghar Ali Engineer.

of who was responsible for the bloody partition of the country and the subsequent conflicts. Suffice it to state that significant groups within Indian society have differing fundamental ideas of the relative weighting of unity and pluralism.⁸ This has an immediate effect on Muslims' decision of whether to strive for minority protection or rather participation in society as a whole and its institutions.^{9,10}

This illustrates the fundamental conflict which grows virulent when majority and minority (or minorities) cherish their comparatively homogeneous self-image, clearly distancing themselves from the other groups: the 'argument for democracy' propounded by the majority can be used to overrule the minorities by majority vote, while minority status often becomes an end in itself.

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Economic, social and also religious issues are entwined in the debate concerning Muslims in Indian society. Unlike Dalits (casteless) or Adivasis (members of tribal groups) they do not enjoy group specific protection by means of legal measures (e.g. state support payments, grants, reserved places in educational establishments or the civil service including parliament) or the activities of cross-religious NGOs.¹¹ Especially in states where the government is drawn from the explicitly Hindu nationalist faction, Muslims and other minorities

8 Within these groups pluralism of opinion has of course always prevailed; this is no more than a tendentious statement. This chapter is based on research carried out in Delhi, Lucknow, Aligarh, Jaipur, Mumbai and Hyderabad between April and June 2006, in March 2008 as well as in April and May 2014. I am deeply grateful to the Thyssen Foundation which generously supported this research in 2006 and 2014.

9 The lack of presence in the law enforcement services is frequently lamented; cf. e.g. Omar Khalidi, *Khaki and the Ethnic Violence in India*, New Delhi 2003.

10 Prominent champions of the idea of participation moving to Pakistan led to the remaining leaders ceasing to pursue this line – participation rather than only protection – after partition; cf. Noorani, *Muslim Identity*, 121, 132.

11 On the measures for protection of Scheduled Castes and Scheduled Tribes cf. articles 330–342 of the Indian constitution. Muslims also demand the establishment of a comparable quota system, cf. 'Muslims demand quota', *Hindustan Times*, Mumbai, 12 June 2006, 3; concerning the problems attendant on such measures cf. Jenkins, *Identity*, 111f. In the course of the electoral campaign in spring 2014, the Congress party has put forward the idea of reserving a 4.5% quota for backward Muslims and Christians under the heading of already protected 'Other Backward Castes' (OBC). The Hindu-nationalist BJP strongly rejected the proposal, arguing that there was no caste-based discrimination within these religions; cf. 'Mid-poll pitch: Cong sub-manifesto promises OBC quota for Muslims', *Times of India* 25 April 2014, 1, 17.

such as Christians are put under additional pressure.¹² On the other hand Hindus see a provocation in Muslims slaughtering cows¹³ (which is forbidden by law in some places¹⁴) or consuming non-vegetarian food.¹⁵ Terrorist attacks like those in Mumbai in 2008 conducted partially by Pakistani extremists¹⁶ have created further tension and fear. The Hindus' aversion to other religions' offensively expressed, and occasionally just as offensively enforced, claim to exclusive truth, may be even more deeply felt.¹⁷ The clashes during and after the destruction of the Babri Mosque in Ayodhya, a place of great symbolic weight, in 1992 have not been forgotten,¹⁸ and neither have the repeated attacks by Muslim extremists resulting in many dead and injured as well as similar attacks

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- 12 Cf. the protest by Christian bishops against the faith legislation (Freedom of Religion Bill with the alleged aim of preventing forced conversions) in Rajasthan in early April 2006, 'Church leaders express concern. Reported move on the BJP to curtail the Fundamental Rights of Minorities', *The Hindu*, 29 April 2006, 5, and 'Arjun Singh's help sought to stop Freedom of Religion Bill', *The Hindu*, 5 May 2006, 5. This was strongly confirmed and corroborated with numerous examples by Indian Christian scholars in conversations with the author in April 2014. Cf. also the report 'Gujarat churches not happy with Modi', *Hindustan Times*, 29 April 2014, 12, which stresses the negative impact of the above-mentioned law and the politics of preventing international donations for maintaining Christian institutions. One instance of anti-Muslim Hindu nationalist pamphlets worth mentioning is: *Islam. A Concept of Political World Invasion by Muslims*, Mumbai 2003, by R. V. Bhasin, a lawyer with the Supreme Court. The author criticises e.g. that the Muslims of India never developed Indian nationalist sentiment, even though they were all descended from converted Hindus, and Hindu blood consequently flows in their veins (op. cit., 126). Regarding these developments cf. also Baber, *Secularism*, esp. 45 ff.; Chatan Bhatt, *Hindu Nationalism – Origins, Ideologies and Modern Myths*, Oxford etc. 2001.
- 13 Cf. only the report 'Demonstration to save the cow', *Sunday Hindustan Times*, 30 April 2006: interestingly it was a Muslim, Mawlana Masood Madani, who organised the protest movement working against such practices.
- 14 Cf. *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 SCC 534; regarding the constitutional basis (no protection of Muslims allegedly slaughtering cows for a sacrifice on Bakrid Day in Bengal) cf. also Pandey, *Constitutional Law*, 304 f. with further references.
- 15 Cf. the report '8-yr-old made to sit separately in class for being "non-vegetarian"', *Hindustan Times/Mumbai* 2 May 2014, 13 regarding a Muslim schoolgirl who was humiliated in her classroom after mentioning that her family celebrates Eid.
- 16 Cf. only the BBC-report 'Surviving Mumbai gunman convicted over attacks', of 3 May 2010, available at http://news.bbc.co.uk/2/hi/south_asia/8657642.stm (last accessed 1 May 2014).
- 17 Cf. Menski, *Comparative Law*, 2006, 199.
- 18 Cf. A. G. Noorani (ed.), *The Babri Masjid Question, 1528–2003*, 2 vols., New Delhi 2004.

on Muslims in Gujarat in 2002.¹⁹ More recently, communal riots have taken place in Muzaffarnagar district in the state of Uttar Pradesh in the autumn of 2013 for unclear reasons, resulting in dozens of dead and tens of thousands of refugees.²⁰ Violent clashes in Jammu and Kashmir are part of everyday life.²¹ An atmosphere of considerable tension was obvious during the presidential and parliamentary electoral campaign in 2013 and 2014, since the favourite candidate and winner Narendra Modi was a prominent long-term representative of communalist political Hinduism (*Hindutva*), and Prime Minister of Gujarat at the time of the 2002 riots. Giriraj Singh, a senior leader of his party (BJP) was very frank in saying that those who are against Modi should go to Pakistan, since there was no place for them in India.²² But it should also be mentioned that two Hindu religious leaders severely criticised the abuse of religious slogans for political gain, and opposed Mr Modi for his role in the 2002 Gujarat riots.²³ Thus, no religious group can be taken to be homogeneous regarding politics and inter-religious relations.

The fierce debate revealed that the communal factor can be used by all sides either to promote the interests of the groups supporting the respective party and candidates, or to stress the necessity of equal treatment (which would protect the minorities), blaming others for communalising the political

19 Cf. Shailaja Menon, *The Lost Victims of Gujarat 2002*, *Indian Journal of Human Rights*, vol. 8 (2004), 57 ff. Concerning the development cf. Manoj Joshi's overview, 'Challenge and response. The bigger picture: India's Islam needs to vigorously protect its future', *Hindustan Times*, 3 May 2006, 8.

20 Cf. 'Communal violence in India: An old curse returns', *The Economist*, 21 Sept. 2013, 12.

21 Engineer (*Communalism*, 169 ff.; 221 ff.) describes and analyses a number of communal riots and terrorist acts.

22 'Those against Modi should go to Pak', *Sunday Times of India*, 20 April 2014, 7. Cf. the critical comment on such attempts of religious polarisation by Neera Chowdhury, 'BJP's Cocktail for 2014', *Times of India*, 23 April 2014, 16. Mr Modi has expressed his disapproval of such remarks, cf. 'Avoid "petty statements", Modi tells saffron leaders', *Times of India*, 23 April 2014, 1. In this climate, a minor traffic accident in Vadodara/Gujarat could make people threaten a Muslim with the words 'Wait till May 16 (sc.: the day of the announcement of the election results) and you will see what we can do to people like you'; 'In polarised city, ghettoised Muslims lack poll choices', *Hindustan Times*, 29 April 2014, 11.

23 Cf. the report '2 Shankaracharyas oppose Modi, say he is not fit to be PM', *Hindustan Times/Mumbai*, 1 May 2014, 1, 8. Similar criticism regarding his 'divisiveness' was expressed by the head of the Kabir Chaura Mutt in Varanasi, Mr Modi's constituency in the 2014 elections; cf. 'Modi does not reflect our culture', *Asian Age*, 3 May 2014, 6.

process.²⁴ After all this, a coexistence which is overall comparatively agreeable is put under strain by exclusion policy, disrespect and violence. Not infrequently easily inflamed religious sentiments are abused to push through tangible economic interests, by removing disliked competitors or when poor labourers take the opportunity to loot in order to improve their fate.²⁵ It seems that resentment does not stop at anything: even prominent Muslim film stars from Mumbai have lamented the fact that they are not allowed to acquire property in upmarket areas of the city.²⁶ Muslim businessmen are occasionally denied to rent premises in business areas, which leads to phenomena of ghettoisation, not least in states like Gujarat.²⁷

The assessment of Mawlana Q. M. Kamunpuri, the head of the Shi'ite Madinatul-Uloom College in Aligarh, is typical:²⁸ In general the coexistence in the area is peaceful, but there remains a latent feeling of uncertainty, which would certainly affect the issue of 'self-determination' or the balance between national unity and religious diversity.²⁹ This is the only possible explanation of how the destruction for reasons of city planning³⁰ of a shrine revered by Muslims

24 Cf. only the reports published in the Times of India on 5 April 2014, 6 and 8, 'MSY boycott by AMU teachers irks SP'; 'Imran leaked video himself'; "'Har har tarakki" chants at Sonia rally'; 'Cong: Modi communal, not Sonia' a few days before the start of the elections. The secretary of the Aligarh Muslim University Teachers Association Aftab Alam is cited in defence of the criticism directed against the ruling party in Uttar Pradesh in 'What we are doing is based on facts. Muzaffarnagar (riots) is for everyone to see. (...). It is our duty to create awareness' (report 'MSY boycott ...', as above).

25 Statement by Parween Abdi, General Secretary of the All India Muslim Women's Personal Law Board on the occasion of a conversation with the author in Mumbai on 11 June 2006.

26 'What's common to these celebs? Name, fame and a common religious identity that is now coming in the way of their buying a dream house in posh suburb', Mumbai Mirror, 13 June 2006, 1, 3; estate agents confirm the report. Cf. also Kirmani, Questioning, 103 with further references. Seven years later, advertisements in Mumbai were offering 'Flats for sale but not for Muslims', cf. 'Minorities Commission for drastic action against "no flats for Muslims" ads', Milli Gazette 1–15 Dec. 2013, 15.

27 Information given by the lawyer Yusuf Hatim Muchhala during a conversation with the author on 30 April 2014 in Mumbai.

28 In conversation with the author on 3 May 2006 in Aligarh.

29 This was confirmed, if not entirely unanimously, during many conversations the author conducted with representatives of Muslim organisations and institutions as well as scientists in northern India.

30 Regarding the possibility of intervention and its being guaranteed under constitutional law cf. Pandey, Constitutional Law, 298f. with further references.

but also by some Hindus can be the cause of bloody riots.³¹ The same shrine had already been the target of previous attacks, and the destruction was implemented in spite of ongoing negotiations and by means of a compromise solution; all of which took place in a state where a high police official was appointed director of state police, despite being known to have taken hardly any steps on the occasion of the massacre of Muslims in Ahmedabad in 2002.³² The situation in this state ruled by Hindu nationalists is described with most cities divided and ghettoised, while the civil society is split into 'them' and 'us'.³³ On the other hand there are encouraging instances, such as joint peace prayers by Hindus and Muslims in the city of Vadodara after it was shaken by riots which appear to have been provoked by the state authorities³⁴ and similar events after the terrorist attacks on a Hindu temple in Varanasi and the bomb attacks on the country's main mosque in Delhi.³⁵ There are furthermore some Muslims who also believe the complaints of discrimination to be at times exaggerated or politically motivated. While they do observe the marginal status of many Muslims, they attribute it to a lack of education and a weak economic position rather than their religious affiliation.³⁶

31 A newspaper report headed 'There's a Taliban in Gujarat' (Hindustan Times, 7 May 2006, 10) pays tribute to the Hindu nationalist prime minister of Rajasthan. Cf. also Harsh Mander, 'Democracy wall: Vadadora clearly showed a state waging war against its own people', Hindustan Times, 8 May 2006, 8.

32 Cf. the report by Sitaram Yechury, 'Back to 2002? The Vadodara violence signals a repeat of the politics of polarisation', Hindustan Times, 4 May 2006, 8. According to another report ('Go to Pak for help', Times of India, 4 May 2006, 9), when inhabitants of the part of town where a Muslim driver was burnt alive in his car by the mob made emergency telephone calls to the police they were answered with the suggestion that they should call for help from Pakistan. One commentary states ('Stoking communal flames', The Hindu, 5 May 2006, 10) that since the Hindu nationalist BJP government came to power in Gujarat, Muslims there live in a state of insecurity and fear.

33 Cf. Teesta Setalvad 'Murder of Sufi Soul', Times of India, 6 May 2006, 26. This was strongly confirmed by several Muslim and Christian minority conversation partners in Delhi and Mumbai in April and May 2014.

34 Cf. 'All calm, time for answers now', Hindustan Times, 7 May 2006, 8.

35 Cf. 'Tackling Terrorism: Varanasi, Jama Masjid show the way', Milli Gazette, 1–15 May 2006, 7 (Ram Puniyani).

36 Thus Prof. Tahir Mahmood explicitly in conversation with the author in New Delhi on 9 May 2006. The poor educational standard of Indian Muslims at large is documented in the contributions by Fazal/Kumar, Muslims, in: India, Council for Social Development, Social Development Report 2012, 179 ff., and by Alam, Education, 196 ff.

Nevertheless, many everyday problems with which Muslims in India have to contend are barely covered by the activity of their organisations. Thus it has been criticised that the issues of poverty and violence are approached only in a normative fashion, or even regarded as a consequence of people straying from the right way, while empirical studies or cooperation with non-Muslim institutions dedicated to such matters are dispensed with.³⁷

In addition, there are internal problems such as the marginalisation of women³⁸ – which is a common issue in Indian society as a whole irrespective of religious affiliation³⁹ – and of religious minority groups within the Muslim faith. Dalits who have converted to Islam apparently continue to be seen as not belonging to any caste⁴⁰ (despite ‘untouchability’ having been abolished by article 17 of the Indian constitution).⁴¹ However, like converts to other

37 Cf. Kaleem Kawaja, ‘Should clerics dominate the nation’s Muslim politics?’, *Milli Gazette*, 16–30 April 2006, p. 2; there are also institutions which make a significant contribution, such as the Unity College in Lucknow under the leadership of its most dedicated president, Dr Kalbe Sadiq, or the Association for the Protection of Civil Rights in a number of states (information provided by the president, lawyer Yusuf Hatim Muchhala in a conversation in Mumbai on 30 April 2014).

38 Cf. e.g. the studies in Satya Pal Ruhela’s collection *Empowerment of the Indian Muslim Women*, New Delhi 1998; Shahida Lateef, *Muslim Women in India. Political and Private Realities: 1890s–1980s*, London etc. 1990.

39 Cf. only the report ‘Personal laws: A reality check’, *Frontline*, 21 Aug. 2013 (Rohit De), last accessed 2 May 2014 (<http://www.frontline.in/cover-story/personal-laws-a-reality-check/article5037670.ece>) and the thorough studies in Hasan and Menon (eds.), *Unequal Citizens*, 2004.

40 Cf. Yoginder Sikand, *Islam, Caste and Dalit–Muslim Relations in India*, New Delhi 2004; cf. also Monirul Husain, *Caste Among Non-Hindu Indians: An Exploratory Study of Assamese Muslims*, and Amir Hasan, *Elements of Caste Among the Hindu Converts to Islam: A Case Study of Muslim Gujars of Uttar Pradesh*, both in: Nadeem Hasnain (ed.), *Islam and Muslims Communities in South Asia*, New Delhi 2006, 26–28 and 29–63. Regarding the adoption by Muslims of Indian customs, which is viewed sometimes positively, sometimes negatively, cf. e.g. Nadwi, *Ethnic Conflict*, 74 ff. He praises the creation of Urdu, a tasteful lifestyle among the better off, the ability to preserve one’s own culture, depth of thought and mysticism, but criticises e.g. the strict separation of the sexes (*purdah*), the adoption of the concept of caste, immoral treatment of servants and excessive spending on festivities.

41 To report but one example, a case from Uttar Pradesh which took place during the period of field work there. A young Dalit had dared to attend a religious ceremony and was subsequently beaten to death; cf. ‘Dalit is killed for attending a kirtan’, *Asian Age*, 15 June 2006, 4. Even among the Dalits an extremely hierarchical ‘caste system’ appears to have developed, with even Dalit activists avoiding contact with the lowest groups; cf. ‘Whom

religions⁴² they lose their legal status as members of Scheduled Castes.⁴³ This ultimately puts the question of the legal aspect of Indian Muslims identity in a different light. Which family law, which norms of intra-religious relations, for instance, are part of the core which shapes their identity? To what extent are Islamic identities influenced, or even displaced, by cultural peculiarities, as seems to be the case in the matter of caste?⁴⁴

There are furthermore significant differences between the different denominations, which are intensified by regional characteristics. Sunnis and Shi'ites keep considerable distance from one another, even though there are various organisations and educational institutions where representatives of both groups work under the same roof.⁴⁵ According to many reports, comparatively well-educated and wealthy Muslims of southern India, who follow the Shafi'ite Sunni school, have hardly any contact with the overall very poor and poorly educated Hanafite Sunni Muslims of the north. They are described bluntly as being so different as to be 'two different worlds'.⁴⁶ More than a few Muslims, especially those who benefit from better education and better social position, reject the in some respects extremely traditionalist views of, in

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Dalits don't touch', Times of India, 7 May 2006, 12. The living conditions of these lowest groups have to be seen to be believed.

- 42 The caste structure appears to exist among Christians as well. In a conversation on 9 May 2006 Tahir Mahmood described a Catholic church in Sikkim in which a separate area was set out for Dalits.
- 43 Cf. Tahir Mahmood, *US-Report on religious freedom in India 2005 – a critique*, The Amity Law Watch 9 (March 2006), 5, 6.
- 44 The great majority of Muslims in India is descended from converted Hindus; cf. e.g. the statistical information in Jain, *Muslim Political Identity*, 9 ff.
- 45 E.g. in the Department of Theology of the Aligarh Muslim University; Sunnis and Shi'ites each have their own sub-departments but use the same mosque (information from a conversation with M. Saud Qasmi, Director of the Department of Sunni Theology of Aligarh Muslim University, on 2 May 2006 in Aligarh); the Shi'ite Madinatul Uloom College nearby also admits Sunnis, although they must live outside the campus (information from a conversation with the head of the English Language Department, Firdaus Rahman, on 3 May 2006 in Aligarh).
- 46 Statement made by Muhammad Yasin Mazhar Siddiqi, Department of Islamic Sciences of Aligarh Muslim University, in conversation on 2 May 2006 in Aligarh. Cf. also Bimal Prasad's preface to the new edition of Hunter, *The Indian Musalmans*, xiv ff.; based on data, Prasad criticises the theory often deduced from Hunter's book, namely that Muslims were overall discriminated against and impoverished even under British rule, while Hunter himself points out that his description referred to Bengal (and not the whole of India), *op. cit.* 149.

particular, the Deobandi school prevalent in northern India.⁴⁷ The same is true of the numerous followers of the more mystically inclined Barelvi school.⁴⁸ Both these schools have a tendency to dispute that the other one is part of Islam.

This diversity is also visible in the fragmentation of Muslim organisations. Thus in 2005 the All India Shia Personal Law Board separated⁴⁹ from the All India Muslim Personal Law Board (AIMPLB) which was founded in Bombay⁵⁰ in 1972 and dominated by the Deoband school.⁵¹ The All India Shia Personal Law Board is in turn regarded by other Shi'ite leaders⁵² and many liberal Muslims as focussing on power politics rather than substance. Among the Shi'ites

47 So called after the important Hanafite educational establishment Dar-ul-uloom in Deoband, founded in 1866; cf. e.g. Alam, *Understanding Deoband*, 175, 176 ff.; Sikand, *The Indian Madāris*, 269, 271 ff.; concerning its public impact see Reetz, *Dār al-'Ulūm Deoband*, 209 ff.

48 So called after the city of Bareilly east of Delhi in Uttar Pradesh.

49 During a conversation with the chairman Mirza Mohammed Athar on 28 April 2006 in Lucknow he stressed most explicitly that there were no problems with Sunni fellow Muslims. The main areas of activity he listed are educational and social support, also issues of personal status law. There is, however, no intention to offer an opinion on every single trivial matter; even less to publish fatwas concerning them (here we see a clear delimitation against Sunni traditionalists who never leave a raised question unanswered, e.g. on issues such as media consumption, football, photography etc., to which the reactions in the public debate range from amused to uncomprehending and even annoyed, and which certainly does nothing to improve the Muslims' standing). During the first national meeting in Delhi in November 2005 one of the topics raised was, however, that it would be necessary to delimit oneself from the existing AIMPLB because of the latter's Wahhabi tendency, their neglect of the Shi'a and because of significant differences which the board had not recognised so far (information by Yoginder Sikand, Delhi).

50 Cf. the report on the foundation in Noorani (ed.), *The Muslims of India*, 157 ff.

51 Shi'ites and representatives of other Sunni groups are also members of the board; as regards legal issues, only Hanafite doctrine is applied, according to the statement of Tahir Mahmood during a conversation on 25 April 2006 in New Delhi. This is confirmed by the 'Compendium of Islamic Laws' (second edition New Delhi, Nov. 2001) published by the AIMPLB. The author's (Tahir Mahmood's) passage according to which other positions besides the Hanafite one should also be considered was omitted from the English version without the author's knowledge or consent; information received from Tahir Mahmood.

52 Overall there are a few leaders among the Shi'ite Ja'fari Muslims in India who have the authority to interpret sources independently (*ijtihād*). None of them has achieved the highest rank of a scholar whose opinions ought to be accepted without restrictions (*marja'-e taqlid*). According to several similar statements the Indian Ja'faris have elected Ayatullah Sistani, who lives in Iraq, *marja'-e taqlid*. Interestingly, Shi'ite educational establishments in India are co-financed out of the *khums* (cf. Part 1, 4.10 above) in the hands of

we can see a clear division between the mainstream Twelver Shi'a on the one hand and the Shi'ite Ismaili ('Sevener Shi'a') Nizaris (called Khojas in India), most of whom live in southern India and are better off, and the Musta'lis (called Bohras in India) on the other. According to a leading Twelver Shi'ite scholar the two last-named schools are no closer to mainstream Shi'a than the Sunnis are. More recent foundations include the All India Muslim Personal Law Board Jadid, which represents the Barelvi school but is not visible to the public, and, vehemently rejected by traditionalists, the All India Muslim Women's Personal Law Board, which actively champions women's interests. It was founded as a reaction to the fact that the previously founded Law Boards were dominated by men and did not protect the interests of women sufficiently.⁵³

Besides the orthodox scholarly culture with its focus on scripture, we also find a type of popular Islam all over India that is more mystical and in some parts closely linked to other Indian religious groups.⁵⁴ Among intellectuals and in the middle classes we see a number of followers of unorthodox and pragmatic modern views. Despite a certain predominance of northern Indian traditionalism in the public debate, Islam in India emerges as a multifarious phenomenon.

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Finally we must point out the much lamented circumstance that the standard of education among Muslims in northern India is particularly low. Many children receive no or no appreciable school education. The standard in Muslim educational establishments is overall rather low, with the result that a degree from a Muslim university will have rather a detrimental effect on a person's career. Intellectual exchange and openness towards other doctrines takes place only on a small scale, and is more likely among Shi'ites⁵⁵ than

this Ayatullah (information from a conversation with the director of the Shi'ite Madinatul Uloom College in Aligarh, Mawlana Kamunpuri, on 3 May 2006 in Aligarh).

53 Statement made by Parween Abdi, General Secretary of the All India Muslim Women's Personal Law Board during a conversation with the author in Mumbai on 11 June 2006. This is not, she said, deliberate discrimination against women, but an automatic one due to the understanding and background of the members of the board.

54 Dargahs, gravesites of eminent Sufis, are visited by very many people, in some cases for musical meditation ceremonies, in others as a kind of pilgrimage shrine in order to ask for help in urgent matters. The author was able to confirm for himself that this culture is alive to this day, e.g. in South-Delhi (dargahs in Nizamuddin and near Qutb-Minar) and Fatehpur Sikri. The orthodox party usually rejects them vehemently. For their worshippers, on the other hand, they possess great significance, as became quite clear after the destruction of an ancient dargah in Gujarat.

55 All the Shi'ites with whom the author held conversations had also studied Sunni doctrine; instances were statements by Dr Kalbe Sadiq, the President of the Unity College Lucknow

Sunnis. Internal discussions on the subject of reforms are rare (more at 3 below). Last but not least, we have to keep in mind that religion is only one element of people's identity. Legal issues in particular do not play a major role in the life of most ordinary people, let alone the many among them who have little or no access to legal aid and law enforcement due to their deprived social status.⁵⁶ Nevertheless, since Muslim law has been controversially debated in India since the partition, it has to be considered as a possible identity-building factor among others.

2 The Legal Framework

a Introduction

The Indian constitution defines the state as secular in its preamble.⁵⁷ It grants 'liberty of thought, belief, faith, and worship'.⁵⁸ Secularity does not mean hostility to religion – otherwise the explicit mention of freedom of religion in the preamble would be contradictory – but state neutrality in religious matters.⁵⁹ The Indian constitution, similar to the German one, is open to religion, i.e. there is no strict separation of the spheres of state and religion, as opposed to strict laicism. Article 44 demands the creation of a Uniform Civil Code, which will also cover all existing religious rights on principle.⁶⁰ The interaction of these

and Shi'ite scholar of the highest reputation, during a conversation in Lucknow on 28 April 2006; Yusuf Hatim Muchhala, member of the executive committee of the AIMPLB during a conversation in Mumbai on 15 June 2006; Mawlana Ali Muhammad Naqvi in conversation with the author on 3 May 2006 in New Delhi.

56 Cf. only the impressive anthropological study conducted by Nida Kirmani in a New Delhi Muslim locality (Kirmani, *Questioning*, 6 ff., 144 ff. in particular). This is why lawyer and Shi'ite Muslim leader Yusuf Hatim Muchhala urgently pleads for and works towards the establishment of a legal aid structure regarding the awareness and enforcement of social, economic and administrative rights (information provided by Mr Muchhala in a conversation in Mumbai on 30 April 2014).

57 For clarification's sake, 'secular' was inserted in the preamble by the 42nd Amendment Act 1976; cf. Pandey, *Constitutional Law*, 293.

58 Article 25 (1) of the constitution.

59 Cf. Pandey, *Constitutional Law*, 293 and ff. with further references.

60 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.' Cf. Pandey, *Constitutional Law*, 376 ff. In detail on the discussion concerning the constitution: Raju, *Uniform Civil Code*, 24 ff., esp. 34 ff. with further references.

constitutional norms may seem to present a formulaic compromise reflected in the much-quoted maxim of 'Unity in Diversity'.⁶¹

Article 44 was created as a goal without immediate normative character⁶² in imitation of article 94 of the Canadian constitution.⁶³ Demands to introduce a deadline for its implementation⁶⁴ were unsuccessful. However, in a key decision the Supreme Court asked the then Prime Minister to take action to this effect,⁶⁵ as it would be vital not only to the protection of the oppressed but also to achieving national unity and integrity. The actual cause was a clash of religions. The question was whether a Hindu husband whose marriage had been contracted according to Hindu law could then enter into a second marriage after converting to Islam.⁶⁶ The court decided against this: the first marriage continued after his conversion with Hindu law still applying; according to the law (Sect. 3 Hindu Marriage Act) it should have been dissolved. The court considered Sect. 494 Penal Code to be applicable, which punishes polygamy, and thus spoke out clearly against the widespread custom of evading the prohibition of polygamy through conversion.⁶⁷ In a civilised society, they added, there is not usually a necessary connection between religion and personal status law and inheritance law, the latter two being secular matters.⁶⁸ Furthermore, several Islamic states have also taken legal steps against polygamy. In the

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- 61 Cf. only Raju, *Uniform Civil Code*, 140 and ff., and Zakaria, *Indian Muslims*, esp. 293 ff.
- 62 Regarding the relation between the regulation of state goals and the fundamental rights cf. Pandey, *Constitutional Law*, 381 ff. With regard to article 44, articles 25 and 26 which define liberty of religion cannot be restricted in spite of all changes in the constitution that have been enacted so far.
- 63 Raju, *Uniform Civil Code*, 24 with further references.
- 64 Cf. op. cit., 41 ff. with further references.
- 65 *Sarla Mudgal v. Union of India* (1995) 3 SCC 635; reference and discussion in Mahmood, *Uniform Civil Code*, 13 ff., 57 ff.
- 66 Unlike in traditional Hindu law, under the Hindu Marriage Act polygamy is prohibited; it is still, however, practised widely.
- 67 According to the figures published by Rokaiya Begum (*Incidence of Polygyny*, 128 ff., 133 f.), polygamy is more widely practised in society as a whole than among Muslims; cf. also Waheed, *Divorce and Remarriage*, 409 ff., 418 and *passim*.
- 68 Kuldip Singh, J., in *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635; reference in Pandey, *Constitution*, 376. Besides sound reasoning, the judgment in parts contains an irritating undertone against Muslims, when stating 'Those who preferred to remain in India after partition fully knew that the Indian leaders did not believe in two-nation or three-nation theory'; the author, being a retired judge at the court of appeal, can follow the critique of Mahmood (*Uniform Civil Code*, 13 ff., 36 ff.) regarding such remarks.

interest of the *ordre public*⁶⁹ it is possible to regulate (prohibit) it, just as human sacrifice or the practice of burning widows (suttee).

This argumentation is remarkable. It illustrates that in this context the *ordre public* is by no means defined as specific to each group and with regard to the norms of the respective specific legal system, but with a view of India as a whole.⁷⁰ In view of problems found in other specific religious laws (e.g. discrimination against women; highly restrictive regulation of divorce⁷¹) it would be necessary first to clarify what in fact is All-Indian *ordre public* in the individual case. Consequently composing a Uniform Civil Code which includes personal status law, family law and inheritance law is likely to become a Herculean task. Indeed, the court stated in clarification that its call on the government was a non-binding obiter dictum. Previously the prime minister had already declared to the ulama of Rampur (scholarly centre in the state of Uttar Pradesh) that his government would not be implementing it.⁷²

Those who support reform have criticised this attitude, which assumes that the traditionalists are the only representatives of all Muslims and tries to appease them, instead of employing the pluralism – which does exist among Muslims as well – and helping especially women to achieve equal rights.⁷³ No further steps have been taken in this direction since then, although the Supreme Court has repeatedly expressed its regret at the absence of a Uniform Civil Code.⁷⁴ It is just as remarkable that for decades there has not even been a parliamentary initiative which might have got at least the preparations for

69 Or public policy (doctrine), in the present context with the specific meaning of limiting the application of foreign legal rules.

70 Concerning the conflict between the right to a particular personal status as a factor in establishing a (separate) identity and the right of democratically legitimised institutions of defining the ‘common good’, cf. Jayal, *Secularism*, 159, 161 ff.

71 Thus Bombay High Court (*Pragati Varghese v. Cyril George Varghese*, AIR 1997 Bom. 349) declared sections 10, 17 and 20 of the then Indian Divorce Act incompatible with article 21 of the constitution (protection of personal freedom), because the Christian wife seeking a divorce had to prove that the husband had committed adultery and treated her cruelly or left her; Pandey, *Constitutional Law*, 377 f.

72 Cf. *ibid.*

73 Cf. Parashar, *Women and Family Law Reform*, 268 and *passim*.

74 *John Vallamatton v. Union of India*, AIR 2003 SC 2902 (reference in Pandey, *Constitutional Law*, 379) with regard to Christian inheritance law: ‘Article 44 is based on the premise that there is no necessary connection between religion and personal law in a civilized society.’

a Uniform Civil Code under way.⁷⁵ This includes the years in government of the Hindu nationalist BJP which keeps demanding this during its election campaigns.⁷⁶ In the words of a high-ranking judge, public debate is clearly not about substance or merits but about political aims.⁷⁷

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Ultimately, this discussion is a reflection of the Indian partition trauma. Many declarations at the time of independence stressed how very important it was to create a united Indian nation above and beyond religious affiliations. Whether it is at all possible to achieve this goal is still very controversial on a legal level, especially since the ruling of the Supreme Court in the famous Shah Bano case in 1985, in which the court undertook a reinterpretation of the law of post-marital alimony which went contrary to the prevailing opinion (which is prejudicial to women) (see also c.cc below). Many Muslims saw the ruling as attacking their identity, while others welcomed it or considered the matter of identity to be exaggerated by the traditionalist party.⁷⁸ Conversely, the so-called 'Imrana case' of 2005 caused considerable commotion in Indian society. According to the established version of the facts, Imrana's father-in-law had raped her.⁷⁹ In response the Dar-ul-Uloom in Deoband⁸⁰ published a

75 During a conference on minority rights in Delhi on 6 March 2008 the Minister of State in the Ministry of External Affairs, E. Ahmed, stated clearly that the government would retain the personal laws.

76 Cf. Engineer, Preface to Chavan/Kidwai, *Personal Law Reforms*, 8 f.; Williams, *Postcolonial Politics*, 155 ff.; Puniyani, *Indian Democracy*, 123 ff.

77 Justice Suresh, formerly judge at the Bombay High Court and expert in human rights, during a conversation with the author on 13 June 2006 in Mumbai.

78 For differing positions in the parliamentary debate on Muslim Personal Law in the wake of the ruling cf. the documented references in Noorani (ed.), *The Muslims of India*, 225 f., 229 ff.

79 The case is said to have taken place in Charthawal/Muzaffarnagar District. According to information received from Prof. Muhammad Yasin Mazhar Siddiqi, Dept. of Islamic Sciences at Aligarh Muslim University in a conversation on 2 May 2006 in Aligarh, the facts of the case as presented are fictitious. Some newspapers, he said, published – in rather tucked away corners and thus barely noticed – that the accusation of rape was raised during the course of an argument between father-in-law and daughter-in-law concerning property. This would not, however, change the significance of the opinions expressed regarding the case. His view was confirmed in another conversation, by Muhammed Abdul Haq Ansari, the president of Jamaat-e-Islami Hind, on 5 May 2006 in New Delhi: the association sent a delegation to the town and discovered that Imrana's father-in-law was intending to sell a house in order to be able to pay for his daughter's wedding. Imrana and her husband disagreed with him, and she threatened him to report him for raping her.

80 Fatwas are among the most important instruments of Deoband's public influence. Between 1911 and 1976 439,336 fatwas are said to have been published, cf. Reetz, *Dār al-'Ulūm Deoband*, 214 with further references.

highly criticised⁸¹ fatwa, stating that the marriage would have to be divorced as Islam forbids sexual relations with a father and his son at the same time.⁸² Not only liberal Muslims but also organisations of Indian Shi'ites – such as the All India Shia Personal Law Board and the All India Women Muslim Personal Law Board⁸³ – spoke out firmly against the fatwa. They pointed out that what is forbidden is marriage to a father and his son, a circumstance not met by a case of rape. Even so, the opponents of Muslim specific law had been handed the means to demand, depending on their views, the secularisation (or indeed Hinduisation⁸⁴) of the law.

The circumstances are similar in the case, discussed in the press in great detail during the spring of 2006, of a Muslim husband who had been drunk when he pronounced the divorce formula three times; according to traditional Hanafite Islamic law, after this action a divorce is irrevocable and final. As a consequence the local Muslim scholars forced the couple to live apart, even though both partners wished to continue the marriage. When in April 2006 the Supreme Court finally granted the couple police protection, there was vehement protest from some Muslims. Shortly afterwards there were reports of a comparable case in Bhubaneshwar. As a consequence of fatwas by the local community leaders the husband was forced to live in another village, and was not allowed any contact with his three children.⁸⁵ On the other hand cases such

81 Shaz, *Islam. Negotiating the Future*, 148: 'As long as the thinking Muslims do not make any organised effort to wrest the right to explain and interpret Islam from the muftis with half-baked knowledge of the Qur'an and the dim-witted ulema, no improvement in the situation can be expected. Instead of depending on a faction of ulema, Muslims should rely on the Qur'an. Moreover, it should be imprinted on the mind and heart of common Muslims that in Islam there is neither any scope for primacy for a particular section of the ulema, nor is there any validity of the notion of spiritual leadership by any faction.' Cf. also Engineer, *Communalism*, 92 ff.

82 Regarding further controversial fatwas from Deoband cf. e.g. Yoginder Sikand, *Deoband's War on Television*, *ISIM Review* 17/Spring 2006, 48 f.

83 Cf. 'It's Shia law board vs. Darul Uloom on rape', notice in *expressindia*, 29 June 2005, viewed on 14 April 2006 at <http://www.expressindia.com/fullstory.php?newsid=49687>; cf. also 'Imrana Rape Case Triggers a Storm in India', *Arab News*, 2 July 2005, viewed on 29 August 2014 at <http://www.arabnews.com/node/269374>.

84 Press commentaries frequently denounce the 'saffronisation' (i.e. immersion in the colour of religious significance for Hindus) of courts and school textbooks.

85 Cf. the reports, differing slightly in the details, 'Couple trips on triple talaq', *Hindustan Times*, 7 May 2006, 8; 'Another couple faces fatwa after talaq mess', *Times of India*, 7 May 2006, 6.

as these which are observed internationally⁸⁶ are the basis of a public debate in which Muslims and their norms are branded anti-secular and backward. Asghar Ali Engineer pointed out in this context that the quickly-sought opinion of any old village cleric could not justifiably be called a fatwa. Furthermore, only uneducated people seek such opinions at all. Consequently, he says, it is a problem caused by poverty and backwardness which ultimately leads to traditional ulama being accorded too much influence within (Muslim) society.⁸⁷

What criticism from 'outside', especially in the media, as well as liberal Muslims appear to find most deplorable is less the fact that there are specific Muslim laws as such and more its concrete substance. Here we find an approach for future development: should Muslims be able to implement internal reinterpretations, pressure from outside is likely to decrease significantly. Considering the Sunni majority opinion, however, the prospect seems unlikely the short term (see also 3) below).

A new path has been opened by a judgment of the Supreme Court in February 2014⁸⁸ regarding the adoption of a Muslim child under the Indian Juvenile Justice (Care and Protection of Children) Act 2000/2006 ('the JJ Act'). The court took into consideration the declaration of the AIMPLB, which stressed that the internationally recognised form of fosterage (*kafala*) under Islamic law would permit to keep the traditional Islamic legal order forbidding adoption regarding Muslims. The court refused this view by comparing the JJ Act with the Special Marriage Act 1954, which constitutes a form of secular opt-out rule within a religiously divided system of family law. The court stated that 'the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though they must be honoured, cannot dictate the operation of the provisions of an enabling statute. (...) an optional legislation that does not contain an unavoidable imperative⁸⁹ cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved.'⁹⁰

86 Cf. the report on the matter 'Wife told to marry another man for a day after a "drunken" divorce', Vancouver Sun, 22 Aug. 2006, A9.

87 Islam and the Institution of Fatwa, May 2006, viewed on 29 August 2014 at <http://www.csss-islam.com/iis-archive45.htm>. This was supported by many educated Muslim religious leaders in conversations with the author in 2006, 2008 and 2014.

88 SC writ petition (civil) no. 470 of 2005, Shabnam Hashmi v. Union of India & Ors., Judgment of 19 Feb. 2014.

89 SC: Adoption is an option based on free decision.

90 Ibid. para. 11.

This decision has the potential of a landmark. Firstly, contrary to previous decisions, it has dealt with the submissions of Muslim representatives and refrained from very blunt obiter dicta to be found in other judgments, which can lead to unnecessary rejection.⁹¹ Secondly, the opt-out solution leaves the further development to the discretion of the potential parties, opening space for internal debate as well. Thirdly, the court refrained from declaring the right to adopt and to be adopted as a Fundamental Right under the Indian Constitution, pointing at the evolutionary process in defining common legal convictions. While the court showed explicit sympathy for a Uniform Civil Code, it held that the time was not yet right, given the conflicting viewpoints prevailing between different communities.⁹² In fact, unlike the aftermath of the Shah Bano case (1985) and similar to the Danial Latifi case (2001), this judgment did not trigger strong public resistance in the Muslim community despite some criticism.⁹³

Nevertheless, intricate legal questions remain, in particular regarding inheritance as far as other Muslim heirs are involved. The court did not consider whether the underlying legal principles of adoption might all in all be fulfilled by Islamic *kafala*. The AIMPLB had submitted that this would be the case, and that the institution of *kafala* is even recognised under Art. 20(3) of the UN Convention of the Rights of the Child.⁹⁴ Obviously, the court was not inclined to explore whether the goal of protection could be achieved to the same degree under religious personal laws. On the other hand, the court's way

91 Cf. e.g. the Supreme Court's judgment in *Aram Shamim* (below c.bb). Mahmood (Uniform Civil Code, 163 ff.) has pointed out the detrimental effects of mistimed and potentially misleading obiter dicta.

92 Ibid. para. 13.

93 The verdict has been only mildly criticised e.g. by the prominent member of the AIMPLB Yusuf Hatim Muchhala in his statement of February 2014 and in a conversation with the author on 30 April 2014. Muchhala appreciated the possibility to maintain the affiliation to religious laws, the rejection of elevating adoption to the quality of a Fundamental Right; he further stressed that neither the (optional) Special Marriage Act nor the JJC Act were ever criticised by the Board. He only regrets that the court did not explore the possibilities of providing protection under the Islamic *kafala* system, which could be interpreted as a form of adoption under the JJC Act ('Mumbai based eminent lawyer's note on SC judgment on Adoption', TCN news, 21 Feb. 2014). Stronger criticism was formulated by M. R. Shamshad, Advocate-on-Record at the Supreme Court; he stressed that Islamic law, being a 'divine law', 'cannot be impeached by logic and changing human perceptions'. He advocated instead to have *kafala* recognised as a valid form of adoption under general Indian law ('Option to adopt a child', Milli Gazette, 16–31 March 2014, 7).

94 Cf. the criticism by Yusuf Hatim Muchhala, *ibid.*

of arguing is similar to earlier suggestions by the most renowned lawyer and scholar Tahir Mahmood. He pleaded for using particular constitutional provisions on women's and children's rights to promote their interests – thus restricting unfavourable norms of family laws, pushing instead the promulgation of a uniform civil code which is still likely to disintegrate the nation rather than to unify it.⁹⁵

b *The Areas of Applicability of Islamic Norms*

Until now the law in India has been divided in some areas, such as personal status law, family law and inheritance law as well as the law concerning religious trusts. Most religions adhere to their own written or unwritten regulations in these areas. Individual laws such as the Special Marriage Act 1954 make a degree of evasion possible. It should be mentioned that most of the religious laws in India, namely Hindu law, underwent considerable changes by framing them into statutes, which was heavily disputed in the past.⁹⁶

Normative principles are found in the Child Marriage Restraint Act 1929 (which applies to all religious groups), Shariat Application Act 1937, Dissolution of Muslim Marriages Act 1939, the Wakf Act and the Muslim Women (Protection of Rights on Divorce) Act 1986 which includes provisions for implementation. All of these Acts remain in force, some of them have been amended in the way of reform. Special rules apply in Jammu and Kashmir. In some regions local, tribal⁹⁷ or group-specific customary law survives; it is frequently assimilated to traditional Hindu law.⁹⁸

Since the British Raj, private law based on religion has also been applied by the general public courts. Those dispensing justice tend to be judges without any specific education. When directly applying Islamic law, the courts of the Raj followed the traditionalists: the 1897 key decision of the Privy Council emphasises that the court could not be permitted to provide its own interpretations of the Quran opposing 'authorities of such great antiquity'.⁹⁹ A. M. Bhattacharjee states that due to this attitude, which is confirmed in several instances, the

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95 Mahmood, *Uniform Civil Code*, 169f.

96 Cf. only Menski, *Comparative Law*, 249 ff.

97 E.g. the Meos in Haryana, cf. Diwan, *Muslim Law*, 9. Regarding them cf. Shahil Mayaram, *Rethinking Meo Identity*, in: Mushirul Hasan, *Islam, Communities and the Nation*, New Delhi 1998, 283 ff., 293 ff.

98 For detailed information on all these matters cf. Mahmood's fundamental work, *Statute-Law relating to Muslims in India*, 1995.

99 *Aga Mohammed Jaffar v. Kolsoom Beebee*, 24 IA 196: ILR 25 Cal 9; also Bhattacharjee, *Muslim Law*, 19 and ff.

textual sources of Islam, i.e. Quran and hadith, were ultimately replaced as laws by commentaries dating from the Middle Ages.¹⁰⁰ In the years after independence we begin to see a degree of change, especially since the spectacular ruling in the Shah Bano case (cf. c.cc below). The courts have increasingly criticised individual regulations or traditional interpretations and reinterpret them – including the Quran (sura 2:241 in the Shah Bano case) – independently or overrule them by applying different, nation-wide laws (article 125 Criminal Procedure Code).¹⁰¹ There does, however, appear to be a crucial problem here. A judiciary of secular inclination where Islamic law is concerned avoids contacts with representatives of Muslim organisations and educational establishments.¹⁰² Due to the prevailing traditionalist focus and the widespread lack of interest in discussing and reinterpreting sources, the latter offer few points of contact for comprehension and exchange of ideas. Not only during the British Raj but also after independence the courts in India relied on a few standard texts, such as the ones by Wilson¹⁰³ and Mulla,¹⁰⁴ which quote only selected opinions in the context of many issues, or – in the view of a number of Muslim scholars – even contain mistakes,¹⁰⁵ but which are quoted in some rulings as if they were law books. The study of law at state universities simply ignores religious personal status law. The legal rules of the different denominations are apparently applied according to the respective majority. Thus in Hanafite Northern India Hanafite law is applied unless other law can be proved

100 Muslim Law, 19 and ff. with further references.

101 Cf. the analysis in Deshta, Uniform Civil Code, 88 ff.

102 Cf. the remarks by Rao, Religion, 406: 'Judges are all products of an educational system that valorizes Hinduism and its followers while vilifying the minorities. Like the general population, therefore, judges are also raised on a staple of Hindu glory, Islamic "barbarity" (...); cf. also the references for how the courts deal with Hindu nationalist assaults, op. cit., 390 ff.

103 Wilson, R. K., Anglo Muhammedan Law, London 1912.

104 At first Dinshaw Faridunji Mulla's Principles of Muhammadan Law, Bombay 1906, most recently Mulla, Mohammedan Law, 2006. Tahir Mahmood's new amended edition was not published as the publishers rejected the entire text due to 'undesirable interference with the original work' (information by Tahir Mahmood, as n. 36 above).

105 Thus Tahir Mahmood explicitly in conversation in New Delhi on 25 April 2006. In his work Statute-Law he points out numerous mistakes. He concludes that Mulla simply compiled contemporary court rulings, not having any knowledge of Arabic, Persian or Urdu. These rulings were often arrived at on the basis of decisions made by colonial officials who lacked any training in jurisprudence ('collectors') who frequently relied on corrupt subordinates.

to be applicable;¹⁰⁶ the same is true with regard to Shi'ites in Kerala where the Shafi'ite school dominates.¹⁰⁷

Among the Muslims themselves – unlike in some of the courts – the norms of personal status are overall subject to the traditional petrified methods of deducing the law from the sources. In India they usually adhere to the medieval standard texts of the respective schools of law, especially among the Hanafite majority.

In theory the applicability of norms of Islamic law to Muslims is not much debated, but it is qualified by widespread customs some of which are probably due to adopting or retaining (after converting to Islam) Hindu rules. Thus among Muslims, especially in northern India, we also see the demand for payment from the bride's family to the groom's family, although this was outlawed by the Dowry Prohibition Act in 1961.¹⁰⁸ Sums of one, or even several, hundred thousand rupees are reported (ca. £1,700, or a multiple of this sum), while the dower stipulated by Islamic law is frequently only a minimal, symbolic sum of 500 rupees (ca. £8).¹⁰⁹ This is denounced not only by dedicated women's

106 Cf. the summary statement in: Government of India, India 2006, 600 (leaving out the restriction to northern India).

107 Information provided by Tahir Mahmood during a conversation in New Delhi on 25 April 2006.

108 Demanding a dowry is ubiquitous, among Muslims as well. Frequently it is designated with the word 'gift' (information provided in conversations with many persons, among them Prof. Vijander Kumar, expert for family law at the National Academy of Legal Studies and Research (NALSAR) in Hyderabad during a conversation on 20 June 2006 in that city). In marriage notices – in the English-speaking press as well – there are rare cases which emphasise that a dowry will not be demanded. There are in fact courageous women who are able to take advantage of the law. Thus according to a report in the press ('My father begged but they kicked him, so I called the cops', Times of India, 5 May 2006, 2, and Hindustan Times, 4 May 2006, 2) on a bride in Sangam Vihar, the father of the groom demanded a payment of 50,000 rupees (ca. £800) after all the preparations had been completed and immediately before the ceremony. The groom's family threatened to leave the celebration unless they received the money, even though the bride's father entreated them to stay and the bride's family had already spent 200,000 rupees on presents and furnishings. At this the bride had the bridegroom and the relatives involved arrested.

109 Another reason given for the low *mahr* is also, however, that many Muslims live below the (Indian) poverty line, who are consequently not able to raise even small amounts of money and would not be able to marry at all otherwise (thus Yusuf Hatim Muchhala, Member of the executive committee of the AIMPLB during a conversation on 15 June 2006 in Mumbai). Cf. also Moinuddin, Divorce, 146 and *passim*: of 128 divorced women interviewed in towns in West Bengal only two had received a *mahr*; 54 of these women had been divorced because of their husbands' (!) extra-marital affairs. The situation in

organisations and proved by more recent empirical studies, but also criticised explicitly in the standard marriage contract (*nikahnama*) produced by the overall traditionalist All India Muslim Personal Law Board, which is dominated by the Deoband school. At point 2 we read: 'It is absolutely against the Sharia and a grave sin for the bridegroom or his guardians to demand for a cash amount, dowry or a feast for the guests (*barat*).'¹¹⁰ Critically inclined minds wonder how long it will be before the appallingly widespread burning of brides because the payment to the groom's family was too low will begin among Muslims.

In addition, in everyday life many women are denied the share of an inheritance which ought to be theirs under Islamic inheritance law, with reference to Hindu norms.¹¹¹

A specific problem is and remains the educational lag of girls and women. The percentage of illiteracy among Muslim women ranges from ca. 22% in the urbanised south to ca. 84% in rural northern India. 59% of women never went to school, and fewer than 10% have a school leaving certificate. The reasons given most frequently are early marriages or housework, while in poorer families in particular school education is reserved for the sons.¹¹² Frequently uneducated women are denied access to even those limited rights to which they are clearly entitled in theory.¹¹³

Overall we can observe that trained Muslim jurists are able to use an entirely different approach to the issue of the applicability of Islamic norms than the ulama and their representatives in organisations. Often the ulama do not,

Delhi, Aligarh and Ajmer as examined in Tabassum, *Waiting for the New Dawn*, 98, yields results which are similar in principle, albeit less spectacular.

110 *Nikahnama*, Compiled by All India Muslim Personal Law Board, New Delhi, 6, Instructions for the Couple. Cf. also the criticism voiced in Islamic Fiqh Academy (India), *Juristic Decisions* (2005), 111 f. and also 30 (at 4.7.); id., *Important Fiqh Decisions*, 155 f.

111 Statement by Dr Zafarul-Islam Khan, chief editor and publisher of the *Milli Gazette* in conversation with the author on 10 May 2006 in New Delhi; according to him this is denied officially, but is true all the same (confirmed by Prof. Imtiyaz Ahmad during a conversation on 10 May 2006 in New Delhi, Asghar Ali Engineer in conversation in Mumbai on 14 June 2006 and Yusuf Hatim Muchhala, Member of the executive committee of the AIMPLB during a conversation on 15 June 2006 in Mumbai); these women often do not insist on their rights in order to keep the peace in the family.

112 Cf. the research by Hasan/Menon, *Unequal Citizens*, 48 ff., 233 f. According to the 2001 census, the literacy rate among Muslims was 59.1% (significantly below all other religions), and only 50.1% among Muslim females; cf. Alam in: *India, Council for Social Development*, 199.

113 Cf. only the research by Moinuddin, *Divorce and Muslim Women*, 2000, Tabassum, *Waiting for the New Dawn*, 118 and *passim*, and Ephroz, *Women and Law*, 378 and *passim*.

or hardly, know the legal framework that obtains in India and, indeed, have little interest in it. They focus exclusively on the mainly very traditionalist inside perspective of Islamic law. According to the classical view its applicability is limited only because it is not possible to implement every single sharia norm in non-Islamic countries. Properly educated jurists, on the other hand, approach by way of the existing law. While they do see the conflicts which arise, they usually look for solutions inherent to the system which will at the same time allow the developments recognised as necessary. The influence of the ulama, however, is generally described as significant – not, though, with regard to the government, the judiciary or well-off Muslims, but rather as regards the many poor and uneducated believers. Furthermore the idea that there is an inseparable connection between the Islamic faith and legal norms on personal status and inheritance law remains widespread indeed.¹¹⁴

Muslim scholarship in the country is largely based on a low educational level in the traditional institutions and the broad lower strata of Muslim society, which are extremely patriarchal.¹¹⁵ The quality of the work in Muslim organisations often suffers from little funds and poorly trained staff.¹¹⁶ The libraries accessible for those studying Islamic law in India are poorly equipped. In Islamic institutions, medieval mainstream literature prevails. Only a few modern authors are dealing with legal debates and reforms in Islamic countries.¹¹⁷ In sum, Islamic law in India is very much restricted to the national perspective and still dominated by extremely traditionalist approaches on the theoretical level. Hardships are often mitigated by case-by-case practical solutions.

114 Thus e.g. Tahir Mahmood during a conversation in New Delhi on 25 April 2006; *din* and *fiqh*, he said, are hardly distinguished, while on the other hand only few ulama are knowledgeable in the law, which explains the frequently deplorable level of their statements.

115 In a conversation with the author in Mumbai on April 30, 2014, the lawyer and Shi'ite Muslim leader Yusuf Hatim Muchhala mentioned the difficulties faced by initiatives to empower women from these backgrounds ('Do you wish them to sit on your head?').

116 Information given by Dr Zafarul-Islam Khan, President of the Muslim umbrella organisation All India Muslim Majlis-e Mushawarat and chief editor of Milli Gazette during a conversation with the author on 8 April 2014 in New Delhi.

117 Cf. e.g. the book by the US Muslim scholar Danish Yusuf, *Islamic Law and Divorce*, 2013, reporting inter alia Muslim feminist debates and legal initiatives in other countries (p. 49f.), available in the library of the Jamia Millia Islamiya in New Delhi (April 2014).

c *The Subjects Discussed in Indian Muslim Debates of Law and Reform*

aa Introduction

The goals to which article 44 of the constitution aspires by demanding a Uniform Civil Code should at first sight not provoke much opposition. The fragmented, in part unwritten, individual rules could be replaced by a uniform and self-contained legal system, which would even render the resolution of interreligious conflicts superfluous (legal argument). There is also cause for hoping that, comparable to the effect of the codification movement in Europe during the nineteenth century, national unity will increase (integrative argument). Finally, existing discrimination against persons who are suffering under 'patriarchal, gerontocratic, collective and oligarchical forms of social domination and control' could be abolished by such a law.¹¹⁸ The last of these items, however, will be difficult to put into practice at the present time, as these are precisely the types of domination which characterise Indian society as a whole. This is true not least of large parts of the Hindu majority with its constant and widespread thinking in terms of castes and clear discrimination against women in legal as well as social terms; in the worst case uniformity might even aggravate the position of those who are already being discriminated against.¹¹⁹ Should the law become unified, the plans for the implementation of a uniform standard of human rights and the (collective) protection of minorities pose a contrast with great potential for conflict.

290 Possible counter-arguments which might provoke, in particular, the opposition of religious minorities, may be found mainly on two levels. Firstly, initiatives 'from outside' are generally seen as attacks on the respective minority. This is especially true of those Hindu nationalist parties and movements who rule in some federal states, who formed the federal government in the 1990s and some of whom favour a most aggressive minority policy (cf. a) above).

On the other hand the areas of the law discussed here may be seen as a religious *proprium* that informs the believers' identity, with which a secular legislative authority must not interfere (internal reasons). While the respective specific laws of Christians or Parsees have been codified in recent times and in

118 Cf. the summary in Raju, *Uniform Civil Code*, 13. K. M. Panikkar's remark during the constitutional debate in 1947 is particularly pointed (quoted in Raju, 43): 'Legislation will be restricted by a new set of dogmas to which semi-religious sanctity will be attached by lawyers, and every act of legislature will be subject to the caprice of old men clothed with the authority of interpreting a new smriti.'

119 Regarding patriarchal formative influence cf. also Chavan/Kidwai, *Personal Law Reforms*, esp. 29 ff., 41 ff.

some matters been brought in line with the majority, Hindu norms,¹²⁰ this has not happened in the case of Muslim Personal Law.

The religious division of personal status, family and inheritance law corresponds to the Muslim legal tradition which dominated for centuries. Legal uniformity in these matters can be, and is, seen as an attack on the rights that have been granted until now. This is particularly true when the debate takes place not so much on the concrete level of contents and substance (the necessity to adapt regulations to present-day lifestyle and values) but rather focuses on establishing and/or retaining national identity and loyalty under pressure from the majority.¹²¹ Thus women's organisations have given up demanding a uniform civil code after the Hindu nationalists added this demand to their agenda – not in order to guarantee equal rights (reformed Hindu law still has a long way to go before it achieves gender equality) but rather in order to apply pressure to the Muslim minority.¹²² Traditionalists in turn can utilise this pressure to block internal reforms.¹²³ We must also bear in mind that when the rules applying to the majority and the minorities are unified, this usually takes place under unequal negotiating conditions; typically the pressure on the minorities to assimilate is far greater than the extent of necessary concessions made on the part of the majority. Under these circumstances the minority will furthermore fear for its identity much more than the majority.¹²⁴

bb Marriage Law

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Marriage law essentially perpetuates the traditional regulations. One representative example of recent literature is the 'Compendium of Islamic Laws' published by the All India Muslim Personal Law Board which contains a fair amount of detailed information.¹²⁵ It contains mainly traditional legal rules, with some religious aspects added: thus marriage in Sect. 4 is described as 'not just a civil contract' but also as 'worship'. According to Sect. 5 (b) a religious

120 Werner Menski (*Comparative Law*, 2006, 197) writes pointedly that modern Indian family laws are half-hidden reconstructions 'along chthonic lines with a Hindu flavour'.

121 Cf. e.g. Z. Hasan, *Governance*, 365 ff.

122 Cf. only Engineer, *Uniform Civil Code or Legal Pluralism*, August 1–15, 2003, viewed on 8 June 2006 at <http://ecumene.org/IIS/csss114.htm>; Raju, *Uniform Civil Code*, 135 f., 156 ff.

123 Imtiaz Ahmad sums it up (during a conversation in New Delhi on 10 May 2006) as follows: 'Sharia is then enshrined against its inherent dynamics'.

124 Cf. only Shakir, *Muslims in Free India*, 120 ff.

125 The author is referring to the English version, second ed., New Delhi 2001.

duty to enter into marriage obtains when a man (women are not mentioned) fulfils the legal requirements and would otherwise have to fear to engage in illicit sexual activity. Divorce, which is permissible under Islamic law, is seen as a sin.¹²⁶ The passages on entering into marriage (ibid. Sect. 7 ff.) reflect the social norm of arranged marriages. A secular legal system faces difficulty e.g. in the context of the classical rule that a non-Muslim man cannot marry a Muslim woman with legal effect (Sect. 52 (d)), or the provision of inheritance law that in the case of someone professing a different religion, that person is excluded from the inheritance (ibid. Sect. 43). Furthermore the classical gender role distribution is retained overall; there is no legal equality in many important points. There are, however, recommendations in favour of women in some places, such as in the case of non-obligatory (according to classical law) financial support (e.g. Sect. 160; cf. also Sect. 165, which is in its substance contrary to the supreme court decisions in the Shah Bano and Danial Latifi cases on post-marital maintenance; cf. c.cc below). Thus only the husband's apostasy, not the wife's, will result in the marriage being dissolved, (Sect. 68 f.).¹²⁷ The minimum dower is calculated in silver by weight (30.618 grams, Sect. 129) in order to guarantee independence from inflation.

In some passages we see a rejection of traditional rules which discriminated against women, such as concerning the preconditions for the one-sided divorce declared by the husband (ibid. Sect. 5) or concerning the very strict requirements for a divorce sought by the wife (ibid. Sect. 77 f.); not, however, with any firmness in the case of the 'illegitimate' triple *talaq*, which is 'merely' defined as a sin (ibid. Sect. 13). Traditional loving attention to detail is reflected in the regulation of a hermaphrodite's right to inherit (ibid. Sect. 38); s/he must make do with half the portion of a woman.

292 Consequently, individual agreements in marriage contracts, especially in favour of women, have acquired particular importance. The All India Muslim Personal Law Board, for instance, has developed a standard version of such marriage contracts – which are called *nikahnama* among Indian Muslims –

126 Law of divorce, Preliminary, p. 63.

127 Under Sect. 4 of the Muslim Marriage Act, 1939, the wife's apostasy does not immediately result in the marriage being dissolved. The case of the husband's apostasy is not satisfactorily dealt with: some courts have followed the traditional view according to which a marriage is dissolved in this case, while others have denied the applicability of Islamic law in this case, as they do not see Muslim law as being in force out of itself, but on the basis of the Sharia Act 1937 which presupposes that all parties involved are Muslims; references in Bhattacharjee, Muslim Law, 86 ff.

in mainly 'soft' wording providing recommendations; this is indeed the intention.¹²⁸

The authors refrained from declaring practices they criticise, such as the triple *talaq* (more below), invalid outright,¹²⁹ or including a clause – which would in fact conform with classical Islamic law – under which the wife would be able to pronounce the divorce 'in the husband's place' by previous agreement (and if she wishes!) (*talaq-e tafweed*), or stipulating a minimum amount of the dower by way of security. This kind of 'tough' wording, they argue, would not be accepted when concluding a marriage. The father of the bride (98% of marriages are thought to be arranged) would not be able to negotiate such clauses as after all he wishes to find a husband for his daughter. At the point of getting married, no-one would wish to discuss the details of a possible divorce, as after all, marriage is not a plain business transaction. Dowers of high value would indeed be desirable, but the majority of those living below the poverty line would not be able to afford them. However, there are some recommendations for arbitration which are indirectly trying to prevent the one-sided divorce being carried out.¹³⁰ 'Tough' reforms, for instance at the level of the law itself, would be in vain unless they meet with social acceptance. Consequently the necessary changes will have to be introduced gently. Education and improving people's social situation are the key to success. Until these have been achieved, reforms would be rejected as being contrary to religion. Attempts are made to reach the imams first, in order for them to inform women on their rights and prevent men from pronouncing the triple *talaq*, without, however, any significant success to date.¹³¹

There is much criticism, especially from women's rights organisations, that this *nikahnama* fails to address an essential part of the problems, or addresses them only in non-binding recommendations. Others see it as a first step in the

128 Remark made by Yusuf Hatim Muchhala, member of the executive committee of the AIMPLB, during a conversation on 15 June 2006 in Mumbai.

129 E.g. Engineer, Muslims and India, 269 ff., 272 ff., criticises this attitude.

130 The declaration by the conference on 'Genuine Problems of Women and their Solution in the Light of Sharia', organised by the AIMPLB on 7/8 April 2001, states at 4.: 'As frequent and irresponsible exercise of the rights to divorce seriously undermines the objectives of the sharia and as it brings in its wake distress to wives, children and other relatives, a concerted endeavour is required for the eradication of this evil'; quoted in Agnes, Judgement Call, 89f.

131 All this is information provided by Yusuf Hatim Muchhala, member of the executive committee of the AIMPLB, during a conversation on 15 June 2006 in Mumbai. On 30 April 2014 he stated that no progress has been made so far, the resolution being just on paper.

right direction which must be followed by more steps. Thus including concrete regulation of a suitable dower is being stipulated, as well as the prohibition of marrying a second wife, or rather linking this to a right to divorce for the first wife, and also the standardised introduction of the *talaq-e tafweed*, under which the wife does not lose her dower, unlike in the *khul'* type of divorce.¹³² The Women's Research and Activist Group (WRAG) has therefore proposed a *nikahnama* along these lines, and 20 already married couples repeated their marriage ceremony in public with reference to this *nikahnama*.¹³³

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Besides the specific problem of the triple *talaq* (more below), the husband's one-sided right of divorce together with little post-marital financial security (although Supreme Court judgments have now begun to tip the scale in favour of the wife) also proves to be a problem for the divorced wife. This is relevant not least in view of the fact that due to Hindu influence a remarriage is not infrequently met with social rejection,¹³⁴ and that the incidence of divorce is significantly higher among uneducated than among educated groups.¹³⁵

In fact in many cases the *talaq* is abused as a simple instrument of power, and yet there are only rare instances when its total abolition is demanded. Liberal Muslims and women's organisations in particular¹³⁶ aspire to a solution on the basis of sharia only, i.e. introducing formalisation¹³⁷ and enacting a standard marriage contract which stipulates post-marital security for divorced women as well as allowing them a less restrictive right of divorce (*khul'*). Furthermore the attempt at reconciliation before a final divorce, laid down by Islamic law but frequently ignored in India, is also demanded.¹³⁸ It seems

132 Demand made by Asghar Ali Engineer during a conversation on 14 June 2006 in Mumbai.

133 Information provided by Asghar Ali Engineer during a conversation on 14 June 2006 in Mumbai. This group is working on a draft Muslim Personal Law; further information on the website www.wragindia.org.

134 Information provided by Asghar Ali Engineer during a conversation on 14 June 2006 in Mumbai.

135 Cf. the research by Rafat, *Muslim Women's Marriage*, 109 ff., 115 f.

136 Cf. e.g. the opinion expressed by Hasima Khan, an activist of the women's organisation Aawaz-e Niswan, in a newspaper interview ('Personal law is major hurdle to Muslim women's progress', S. Balakrishnan, *Times of India*, 17 April 2003, viewed on 8 June 2006 at <http://www.hvk.org/articles/0401/68.htm>).

137 Regulation by the courts is put forward as well, and also the traditional Shi'ite rule according to which two witnesses are needed for the declaration of divorce to be effective (if concluding a marriage requires two witnesses, then why should dissolving it be any different?).

138 E.g. by Danyal Kahkashan, lecturer on Islamic law at the Jamia Millia Islamia in New Delhi in conversation with the author on 10 May 2006 in New Delhi.

that similar options under the Dissolution of Muslim Marriages Act 1939 are widely unknown or not socially accepted.¹³⁹ Section 2 of the Act lists nine possible grounds for divorce, which clearly exceed the very limited options recognised by the Hanafite school; under Sect. 5 the wife's claim to the dower remains untouched. Just as in other regions where Hanafite law prevailed (such as Egypt) the *takhayyur*, a technique of Islamic law, was employed – selecting from several opinions which all conform equally to Islamic law but are held by the different Sunni law schools.¹⁴⁰ In addition, The AIMPLB has taken position against new popular *talaq* procedures via telephone, email or sms.¹⁴¹

All this shows that first steps towards expanding the current internal Islamic debate are indeed being taken. This is all the more significant as women's options of seeking divorce under traditional Islamic law had been lost during the reorganisation of the judicial system under the British Raj. New judicial officials had not had the necessary knowledge of the law; and the reforms of the twentieth century were meant to adjust the situation.¹⁴² However, the divorce by means of *khul'* entails the woman losing her dower; consequently this option is not open to women who have no other financial security. Furthermore, so far *khul'* is permitted in India only if the husband gives his consent, while corresponding statutory rights of the kind e.g. enacted in Egypt in the course of the reform of 2000 (cf. Part 2, 3.1.i.bb above) have still not been recognised.¹⁴³

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A particular problem is opened up by the immediate triple declaration of divorce by the husband (triple *talaq*), which leads to an irrevocable divorce

139 Cf. Mahmood, Statute-Law, 143 ff. The Act was welcomed as a means of allowing women a way out of an unbearable marriage other than apostasy from the Islamic faith (concerning criticism of this 'solution' cf. already Iqbal, The Reconstruction, 169, with reference to the relevant deliberations in Marghīnānī's *Al-hidāya*; also Zaman, The Ulama, 29 f.; in Sect. 4 the Act stipulates explicitly that a marriage is not dissolved purely because of conversion). The lecturer on Islamic law at the Jamia Millia Islamia in New Delhi, Danyal Kahkashan, points out that it should be possible to build on this success – which was achieved, after all, as early as 1939 – in the matter of the triple *talaq* as well (in conversation with the author on 10 May 2006 in New Delhi).

140 Cf. Ahmed, Muslim Personal Law, 87 f.; Minault, Women, 154 f.; concerning attempts at reform in the 1920s and 1930s cf. also Mahmood, Statute-Law, 146.

141 Cf. Zafarul Islam Khan, 'The Muslim Personal Law', Milli Gazette, 1–15 Feb. 2014, 8.

142 Thus Mahmood, Statute-Law, 145 f.

143 Information provided by Asghar Ali Engineer during a conversation on 14 June 2006 in Mumbai.

(*ṭalāq bā'in*) according to the view of Hanafite scholars – other schools see it as single, revocable declaration.¹⁴⁴ There is agreement concerning the rule that the declarations must be made at monthly intervals. The immediate triple declaration of divorce is rejected, as emphasised explicitly by the standard marriage contract of the All India Muslim Personal Law Board.¹⁴⁵ However, the dominant Hanafite school will ultimately accept this kind of divorce as valid, even though it is an inadmissible divergence from the set rules and consequently classed as a 'sin'.¹⁴⁶ A scholar teaching at Aligarh University has very explicitly condemned this practice: '(...) triple divorce, which has come to the aid of those elements who enjoy destroying the life of helpless women in a single breath'.¹⁴⁷

A particular problem arises in the context of this type of divorce in connection with the traditional doctrine of the Hanafite school according to which the declaration of divorce is valid even if it was uttered during a state of unconsciousness or drunkenness. The protective measures put into place in the abovementioned case from Orissa were criticised in revealing ways: the president of the association of scholars (Jamiat-e Ulama) in Orissa (Odisha), Mawlana S. S. Sajideen Qasmi, has been quoted as saying that the court did not have the authority to interfere in Muslim personal status law. He continues: 'We will not obey the Supreme Court decision under any circumstance. If the Supreme Court next passes an order telling us to read namaz only four times a day instead of five, would we be expected to obey it? We are ready to give any sacrifice to protect our religion.'¹⁴⁸ What is especially remarkable about this statement is that a detail of family law which rests on the secondary interpretation of the sources of the law is simply equated with religion, and that the authority of the Supreme Court is explicitly ignored. Shi'ite Muslims emphasise in this context that the type of triple *talaq* under discussion is simply void under

144 Cf. Mulla, *Mohammedan Law*, 350 ff. with critical note; F. Ahmad, *Triple Talaq*, 36 ff. with further references; Shabbir, *Muslim Personal Law*, 179 ff.

145 *Nikahnama* (as n. 89), p. 7 at 'Husband's obligations towards his wife': 'To avoid Talaq (divorce) at all costs unless the circumstances become highly compelling. In such a case, one should avoid declaring 'Talaq' thrice at a time.'

146 Thus e.g. Abdul Haq Ansari, president of the Jamaat-e Islami Hind, in conversation with the author in New Delhi on 5 May 2006. Cf. also Asghar Ali Engineer ('Islam vs. modernity: Ban it, it's a sin', 17 June 2004, viewed on 29 August 2014 at http://www.irfi.org/articles/articles_201_250/islam_vs_modernity.htm).

147 Shabbir, *Muslim Personal Law*, 179.

148 *Sunday Hindustan Times*, 23 April 2006, 6.

Shi'ite law.¹⁴⁹ Interestingly, in a scholarly seminar organised by the Islamic Fiqh Academy in 2000, the majority, prominent Hanafi scholars among them, held that a *talaq* pronounced in the state of voluntary drunkenness is invalid.¹⁵⁰

Other scholars have found ways of offering solutions suitable for individual cases without directly challenging the traditional view. Thus in one instance a British subject who had converted to Islam and who had pronounced a triple *talaq* but wished to continue the marriage was asked which school he belonged to. When he admitted that he did not belong to any of the schools, he was permitted to continue the marriage on the grounds that not all the schools follow the strictest interpretation. In a comparable case a Hanafite husband was advised to profess himself a member of the *ahl-e hadith* who do not follow any of the schools and do not recognise the triple *talaq* as valid.¹⁵¹ Solutions of the kind are pragmatic and customary in many Islamic countries, but they do not guarantee legal certainty.

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Muhammed Abdul Haq Ansari, the president of the Jamaat-e Islami Hind suggests an especially remarkable interpretation.¹⁵² In his view basing the prohibition of triple *talaq* on Islamic law is not possible, as the practice is classed as 'detestable' (*makrūh*) and not as prohibited (*ḥarām*). It seems that the time-honoured maxim according to which that which is allowed under Islam must not be prohibited erects an insurmountable obstacle here. Ansari does, however, favour 'secular' legislation which would have a similar effect. The non-Islamic Indian state could thus penalise triple *talaq* with a fine or a prison sentence. This, he points out, would be in keeping with the spirit of Islam. Under this approach the non-Islamic legislative authority would be authorised to enforce the spirit of Islam, while the internal Islamic set of dogmas appears to be incapable of doing so.¹⁵³ It must be said that all the high-ranking representatives of Muslim organisations as well as scholars interviewed by the author

149 As pointed out by the president of the All India Shia Muslim Law Board Mirza Mohammed Athar during a conversation in Lucknow on 28 April 2006.

150 Islamic Fiqh Academy (India), *Juristic Decisions* (2009), 106 ff.

151 Reports by Prof. Muhammad Yasin Mazhar Siddiqi during a conversation with the author in Aligarh on 2 May 2006; this solution is pointed out also by Zafarul-Islam Khan, chief editor and publisher of the *Milli Gazette*, by Danyal Kahkashan, lecturer in Islamic law at the Jamia Millia Islamia in New Delhi in conversation with the author on 10 May 2006, and by Amin Usmani, acting secretary of the Islamic Fiqh Academy in a conversation in New Delhi on 9 April 2014; regarding the fatwa against the validity of triple *talaq* dating from 1993 cf. F. Ahmad, *Triple Talaq*, 140 f.

152 During a conversation with the author in New Delhi on 5 May 2006.

153 Ansari did, however, add that it would not be easy to convince the other ulama of this solution.

have confirmed that they reject triple *talaq*. Clearly it is most deeply-rooted in the understanding of uneducated poor people in rural areas and the similarly uneducated village dignitaries, a circumstance lamented frequently.

The suggestion that would have the deepest impact has come from Asghar Ali Engineer.¹⁵⁴ He supported a special law to prohibit the triple *talaq*, along the lines of the Dissolution of Muslim Marriages Act 1939. It is, of course, possible that such a measure would provoke a storm of outrage on the part of Muslim organisations, even if their representatives might support such a prohibition in private. Consequently we are unlikely to witness an initiative along these lines that could include organisations of a traditionalist inclination.¹⁵⁵ Furthermore, governments which rely on, among others, a Muslim electorate will not take steps in this direction of their own accord.¹⁵⁶

296 Imtiaz Ahmad, on the other hand, points out convincingly that a mere prohibition of the triple *talaq* – which is seen as unacceptable and outdated by many already – would not benefit anyone significantly:¹⁵⁷ the people most affected by it are women from the lower class who are less concerned with staying married but rather hope not to be in a worse financial situation after the end of the marriage than before. He sees one indication in the increasing number of cases where the matter before the court is not to criticise the divorce but to demand the outstanding dower or appropriate maintenance. If only the triple *talaq* were abolished, or divorce made to be subject to judicial authorities, it stands to be expected that men would come up with strategies to evade the difficulty altogether, and simply leaving their wives, which would exacerbate the latter's position even further. On the other hand, he adds, the prevalent attitude leads to the assumption that even internal Muslim arbitration authorities would just open the back door for patriarchal rules to return. The situation does not have its equal in complexity, and there are as yet no sociological studies of the matter which could serve as a basis for appropriate and widely acceptable measures.¹⁵⁸

154 N. 117.

155 Thus Dr Zafarul-Islam Khan, chief editor and publisher of the *Milli Gazette*, in conversation with the author in New Delhi on 10 May 2006; confirmed in statements by high-ranking members of Muslim organisations made in conversations with the author.

156 Thus Dr Zafarul-Islam Khan (as n. 155); the government's negative reactions to the demands from the Supreme Court to create a Uniform Civil Code appear to confirm this; cf. also Engineer (n. 76 above) 8f.

157 J. Ahmad, *Some Reflections*, 49 ff.

158 Imtiaz Ahmad has called for this on many occasions. Asghar Ali Engineer (*Uniform Civil Code or Legal Pluralism*, August 1–15 2003, viewed on 8 June 2006 at <http://ecumene.org/>

It must be said that individual courts have indeed curtailed the husband's one-sided right of divorce – which according to ruling Hanafite opinion is very nearly unlimited – considerably. Thus the Guwahati High Court (Assam) has interpreted this right in very narrow terms and declared divorce invalid if the required grounds are absent in the eyes of the court.¹⁵⁹ The Allahabad High Court (Senate in Lucknow) has declared the triple *talaq* with irrevocable effect to be unconstitutional (in breach of article 372) and an offence against Sect. 2 Muslim Personal Law (Shariat) Application Act 1937.¹⁶⁰ More references regarding the formalities and proof of *talaq* are included in the Supreme Court's judgment in the Shamim Ara Case in 2002.¹⁶¹ The court rejected the traditional understanding that a mere plea of a previous *talaq* could be considered valid, relying on a considerable number of judgments by Muslim judges and scholars' opinions. This was further developed in the Iqbal Bano case in 2007.¹⁶²

There are Muslim scholars who would not object to such approaches as long as they are compliant with the methodology of Islamic law. Thus, an Aligarh scholar¹⁶³ suggested as early as the 1980s that courts should be free to use sharia techniques such as *istihsān*, *takhayyur* and *talfiq* (see above Part 2, 2.4), which would lead to the applicability of interpretations declaring triple *talaq* invalid (qualifying only as a single *talaq*).

cc Maintenance Law

Under traditional Islamic law, paying maintenance after the end of a marriage is statutory only until the period of waiting for a new marriage, namely three menstrual cycles or lunar months, has elapsed.¹⁶⁴ If there are minor children of the marriage, the period is increased to two years from the birth of the child (cf. Sect. 3 (b) of the Muslim Women (Protection of Rights on Divorce) Act 1986). This very modest entitlement has been criticised in the court decisions

IIS/css114.htm) describes a case of a husband who, enraged because his wife would not vote for the same parliamentary candidate, pronounced the triple *talaq*.

159 Quoted in F. Ahmad, *Triple Talaq*, 102 ff.

160 Judgment of 15 April 1994, reported in F. Ahmad, *Triple Talaq*, 102 ff.

161 *Shamim Ara v. State of U.P. and Anr*, 10 October 2002, available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=18797> (last accessed 17 April 2014). Consequently, the wife was further entitled to maintenance.

162 *Iqbal Bano v. State of U.P. and Anr*, 5 June 2007, available at <http://indiankanoon.org/doc/390198/> (last accessed 3 May 2014).

163 Shabbir, *Muslim Personal Law*, 209.

164 Similarly Sect. 2 (b) (i), (ii) of the Muslim Women (Protection of Rights on Divorce) Act 1986.

in the cases of Shah Bano¹⁶⁵ and Danial Latifi,¹⁶⁶ which were attacked vociferously by traditionalists. In both cases the court awarded the divorced wives post-marital maintenance for a longer period than would have been statutory under traditional Hanafite Islamic law. According to Flavia Agnes' study of 243 maintenance judgments between 1987 and 2000, in 60% of cases the amounts awarded were up to 200 rupees per month (at the time ca. € 4–5/£ 3.50–4.00), and in only 6% of cases did the amounts exceed 500 rupees per month.¹⁶⁷ In the Shah Bano case the amount at issue was lower than 200 rupees, payable in the view of the court of lower instance by the husband whose monthly income was 5000 rupees. However, in the end Shah Bano gave up her claim in resignation: if Islamic law (allegedly) did not allow her the maintenance, she would rather be a devout Muslim.¹⁶⁸ According to an empirical study carried out in Delhi and Aligarh in the 1990s, the vast majority of male divorcers admitted that they were not paying any maintenance allowance to their divorcees (81.2%/Delhi 69.6%); an even greater majority (88.0%/79.0%) of the divorcees confirmed that they were not receiving any maintenance allowance.¹⁶⁹

Muslim women who welcomed such court rulings as just were frequently afraid to proclaim this publicly.¹⁷⁰ The abovementioned provisions of the Muslim Women (Protection of Rights on Divorce) Act 1986, which on the whole correspond to the traditional rules, make clear that the purpose of this act was to cause the court to rescind the ruling in the Shah Bano case at the insistence of the traditionalists.¹⁷¹ Some Islamic countries, however, have introduced regulations of more extensive post-marital maintenance (cf. Part 2, 3.1.1 above). They aim to compensate the divorced wife for the contributions she made to married life (and is consequently comparable to a certain extent to the *Zugewinnausgleich* of German law [i.e. the equalisation of gains accrued during the marriage]). One telling example from India is provided by the remarks of Mohammed Abdul Rahman Qureshi, secretary of the All India Muslim Personal

165 Mohd. Ahmad Khan v. Shah Bano Begum (1985) 2 SCC 556.

166 Danial Latifi v. Union of India (2001) 7 SCC 740.

167 Agnes, Judgment Call, 12, 6 ff., 104 f.

168 Reference op. cit., 5.

169 M. M. Siddiqi, Incidence, 287 f.

170 Statement by Hasina Khan, activist of the women's organisation Aawaz-e Niswan, in a newspaper interview ('Personal law is major hurdle to Muslim women's progress', S. Balakrishnan, Times of India, 17 April 2003, viewed on 29 August 2014 at <http://www.hindunet.org/hvk/articles/0401/68.html>).

171 Cf., among many, Diwan, Muslim Law, 155 and ff. as well as preface to the sixth ed., 1; Jayal, Secularism, 159 f. with n. 1.

Law Board, on the subject of the post-marital maintenance of women (after a divorce).¹⁷² He categorically rejected considerations like the ones mentioned above. Post-marital maintenance, he claimed, is primarily the sons' responsibility. Failing this, the (Islamic) state must help. However, there is no such state in India. Interestingly the president of the All India Shia Personal Law Board, Mirza Mohammed Athar, concurred with this view entirely,¹⁷³ although changes of the law on this issue have taken place in Iran (cf. Part 2, 3.1.1 above) as well as in other Islamic countries. Athar, however, classed such regulations as an inadmissible mixture of Islamic and Western law. In his view, too, the legally obliged relations are called upon first in case of need (thus Sect. 4 (1) of the Muslim Women (Protection of Rights on Divorce) Act 1986), then the (Islamic) state – which, of course, does not exist in his opinion, either. The suggestions of other representatives, who were striving for reform, have not been implemented. Thus M. Saud Alam Qasmi, director of the Department of Sunni Theology of the Aligarh Muslim University and founding member of the AIMPLB, had suggested that a wife should be awarded half the assets acquired by the husband during the marriage. The suggestion was rejected on the grounds that there is no support for such measures in either Quran or sunna.¹⁷⁴

However, the social problems facing in particular divorcees who lack a supportive family context were acknowledged even by traditionalists who fiercely criticised the Supreme Court's verdict.¹⁷⁵ Possible alternative solutions vary. Mirza Mohammed Athar suggested that an arrangement for, in extreme cases, lifelong maintenance should be included in the marriage contract; according to Shi'ite opinion this would be valid.¹⁷⁶ The abovementioned M. Saud Alam Qasmi agreed with this opinion as this clause, he maintained, does not contradict the principles of Quran and sunna and is consequently admissible.¹⁷⁷ Hasina Khan of Aawaz-e Niswan pursued the same approach.¹⁷⁸ Other scholars wanted to permit a single payment rather than maintenance over a longer time, as the contractual obligation to the latter would have lapsed – an exceedingly

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172 During a conversation with the author in New Delhi on 22 April 2006.

173 In conversation with the author on 28 April 2006 in Lucknow.

174 Information provided during a conversation with the author on 2 May 2006 in Aligarh.

175 Cf. e.g. Shabbir, *Muslim Personal Law*, 271f.

176 In conversation in Lucknow on 28 April 2006.

177 As stated during a conversation with the author on 2 May 2006 in Aligarh.

178 In a newspaper interview ('Personal law is major hurdle to Muslim women's progress', S. Balakrishnan, *Times of India*, 17 April 2003, viewed on 29 August 2014 at <http://www.hindunet.org/hvk/articles/0401/68.html>).

formalistic view.¹⁷⁹ Two fundamentally opposed schools of thoughts emerge over this issue. The former bases its arguments on generic analyses of the legal and economic interests of the parties involved (the wife's contribution to married life can and should be honoured financially even after the end of the marriage), while the latter view looks to provide relief in individual cases but is incapable of surmounting formalistic boundaries, or indeed unwilling to do so.

According to M. A. Qureshi, on the other hand, in such cases of need the *awqāf* (charitable foundations) ought to assume responsibility, as provided by Sect. 4 (2) of the Muslim Women (Protection of Rights on Divorce) Act 1986 (the Waqf Board being liable to pay).¹⁸⁰ The numerous foundations in India should have sufficient means at their disposal. Thus it has been suggested that monies intended for the poor of Mecca and Medina (of whom there are at present none) could be diverted to these women, and that the Waqf Act ought to be amended accordingly.¹⁸¹ All this was, of course, rejected in the Latifi case by A. M. Singhvi, the representative of the National Commission for Women: the relatives who were in principle responsible for the divorced woman's maintenance (descendants or parents) were either too young or too old to provide maintenance, while the *waqfs* themselves suffered from chronic underfunding.¹⁸²

It will be necessary to scrutinise carefully where the *waqfs* are concerned. The Waqf Boards as the parent organisation receive 6% of the individual *waqfs*' income; it would appear that at least some of the latter are quite well provided for. However, figures are frequently manipulated down, and the parent organisation (the Waqf Boards and the Central Waqf Council) are indeed underfunded.¹⁸³ Under these circumstances reassigning the *waqf* monies could in-

179 This was criticised also by e.g. Prof. Faizan Mustafa, Registrar of the Aligarh Muslim University, in conversation with the author on 1 May 2006 in Aligarh.

180 Cf. also the general remark by the representative of the AIMPLB, Yusuf Hatim Muchhala in the Latifi case (*Danial Latifi v. Union of India* (2001) 7 SCC 740), according to which Muslim society possesses internal mechanisms to help divorcees in need.

181 So far it has been the responsibility of the lower criminal courts (magistrate courts, cf. Sect. 2 c Muslim Women (Protection of Rights on Divorce) Act 1986, MWA) to instruct the State Waqf Board to pay under Sect. 4 (2) MWA.

182 This is comparable to remarks made by Hasina Khan of the women's rights organisation Aawaz-e Niswan in a newspaper interview ('Personal law is major hurdle to Muslim women's progress', S. Balakrishnan, Times of India, 17 April 2003, viewed on 29 August 2014 at <http://www.hindunet.org/hvk/articles/0401/68.html>). She stated that so far she has not heard of a single case in which a woman received any help from that quarter.

183 Information received from Prof. Tahir Mahmood during a conversation in New Delhi on 25 April 2006.

deed appear a realistic project, even if it would not, of course, provide a substantive solution to the fundamental problem of a fair distribution of means during and after a marriage. According to information from a different source only the Punjab Waqf Board possesses sufficient means for such projects. The president of the All India Shia Personal Law Board, Athar, has, however, expressed doubt along different lines. The management of the Waqf Boards, he suggested, is mostly unreliable and not very responsible.¹⁸⁴ M. Qasmi, a founding member of the AIMPLB, also expressed fundamental opposition: resorting to the Waqf Boards means avoiding responsibility.¹⁸⁵ Like a few other scholars, this addresses the fundamental problem. The evaluation of the substance of the contributions made to married life and their effect on the time after the end of the marriage are contrary to the prevailing and very formal view that a divorce ends the contractual bond between the parties and that consequently there could be no further legal obligations. It is, in fact, possible even within the existing system to override this view by means of agreements concerning post-marital maintenance and/or sharing the gains accrued, but this possibility is not even discussed by the traditionalist mainstream.

dd Inheritance Law

As regards inheritance law, the traditionally developed rules remain in force overall (cf. Part 1, 4.3 above). It is remarkable that in Sect. 2 the Muslim Personal Law (Shariat) Application Act 1937 declares Muslim intestacy inheritance law applicable to the relevant group of persons, but excludes agricultural land. In the practice this goes to the detriment of women, whose share in the inheritance, only half of that of a man of the same rank anyway, is then calculated without this landed property. The outcome under Sect. 3 of the Act may be similar, as it recognises more wide-ranging forms of making a will than traditional Islamic law, as well as adoption (which is prohibited under Islamic

¹⁸⁴ This is probably a discreet euphemism for the inclination to corruption and embezzling. We must bear in mind that one important demand by the All India Shia Personal Law Board states that specific Boards for Shi'ite foundations ought to be established all over India, in addition to the Shia Waqf Boards already existing in Uttar Pradesh and Bihar besides the Sunni Waqf Boards. It must be taken into consideration that in Athar's opinion the Shi'ites do not have a political 'vote bank', as they are dispersed all over India; consequently there was not a single Shi'ite among the more than thirty Muslim members of Parliament in 2006. Clear criticism of the *waqfs'* activities outside the Punjab was expressed by Ghulam Yazdani, lecturer in Islamic law at the Jamia Millia Islamia New Delhi, in conversation with the author in 9 May 2006 in New Delhi.

¹⁸⁵ During a conversation with the author on 2 May 2006 in Aligarh.

law). These norms were introduced at the insistence, or at least to the benefit, of Muslim landowners (*zamindar*) as well as some rulers (*nawabs*) and ulama.¹⁸⁶ There was no protest from the orthodox party against breaking with iron rules – as long as these were favourable to women – (with the exception of a seminar held by the Islamic Fiqh Academy (India) in 1995¹⁸⁷). Many federal states retained these norms even after independence,¹⁸⁸ thus in the Zamindari Abolition and Land Reforms Act 1951 in Uttar Pradesh,¹⁸⁹ or with continued recognition of norms of customary law.¹⁹⁰ Liberal Muslims see this as a sign that ‘secular’ legal norms which benefit men are readily accepted, while regulations of the kind are generally branded with the accusation of breaching the sharia and interfering with religious matters if they benefit women.¹⁹¹ These liberal voices also demand that women should at the very least be granted nowadays what even traditional Islam would have granted them.¹⁹² They add that furthermore it must be considered that the Quranic provisions were the first that allowed women a significant legal position under matrimonial property and inheritance law, and that this is the spirit that must be perpetuated and be given a form suitable for the twenty-first century.¹⁹³ Discussions of this kind, however, are limited in India mainly to academic circles without any significant influence beyond their own members, which is also due to the lack of interest on the part of the media who usually only cover statements by traditionalist dignitaries.¹⁹⁴ The absence of genuine leaders, personalities

186 Cf. Mahmood, Statute-law, 95 f.; Minault, Women, 149.

187 Islamic Fiqh Academy (India), Juristic Decisions (2005), 117 ff. During a conversation with the author on 10 May 2006 in New Delhi, Imtiaz Ahmad expressed criticism of the neglect of these questions of ownership.

188 Cf. Mahmood, Statute-Law, 99 f. In Andhra Pradesh (1949), Tamil Nadu (1960) and Kerala (1963) the exception was not included in the respective Muslim Personal Law (Shariat) Application Acts, Mahmood, *ibid.*

189 Cf. Islamic Fiqh Academy (India), Juristic Decisions (2005), 117.

190 Cf. Diwan, Muslim Law, 36.

191 Thus Prof. Faizan Mustafa, Registrar of Aligarh Muslim University, in conversation with the author on 1 May 2006 in Aligarh; cf. also Kehkashan, Muslim Women, 91, 103.

192 Thus already the approach employed by reformers in the nineteenth and early twentieth centuries, who vehemently expressed their opposition to retaining un-Islamic customs which discriminated against women; cf. Minault, Women, 139 ff. Present-day case studies may be found in Fazalbhoy, Muslim Women, 69 ff.

193 Thus e.g. Prof. Faizan Mustafa, Registrar of Aligarh Muslim University, in conversation with the author on 1 May 2006 in Aligarh. Cf. also Kumar, The status of Muslim women, 20.

194 As lamented by all liberal conversational partners.

who would be interested in true reform rather than political power games and of the calibre to forge new paths, is often lamented. The fragmentation into several Personal Law Boards is seen as an illustration that the respective sub-identities are defended vehemently, which of course is an additional bar to all innovation.¹⁹⁵ This is also true of the madrasas, which are seen as instruments of perpetuating a specifically 'Hanafite' identity, not least because knowledge of and information on other branches of Islam are rarely found there, or there is no interest in them.¹⁹⁶ In 2008, a public interest litigation challenging Muslim inheritance law for being gender-discriminatory, against the spirit of the Quran, and unconstitutional was filed in the Kerala High Court by the liberal Koran Sunnath Society Kozhikode and others in 2008.¹⁹⁷ The Indian Union Muslim League opposed the litigation on formal grounds without arguing to the substance of the claim,¹⁹⁸ in May 2014, the case was still pending.

ee Law of Charitable Foundations

The continued existence of the extensive Muslim foundations (*awqāf*) is not questioned.¹⁹⁹ The Wakf Act 1995, as amended by the Wakf (Amendment) Act No. 27 of 2013, regulates the relevant legal positions. Some court actions were brought in recent years regarding issues of the leading position within the

195 Thus explicitly Dr Zafarul-Islam Khan, editor-in-chief and publisher of the Milli Gazette, during a conversation with the author on 10 May 2006 in New Delhi.

196 Thus Imtiaz Ahmad during a conversation on 10 May 2006 and Amin Usmani during a conversation on 9 April 2014 in New Delhi. Detailed studies of the genesis, position and perspective of madrasas may be found in Sikand, *Bastions of the Believers* 2005, as well as in the collections by Akhtarul Wasey (ed.), *Madrasas in India. Trying to be relevant*, New Delhi 2005, and by Jan-Peter Hartung/Helmut Reifeld (eds.), *Islamic Education, Diversity, and National Identity*, New Delhi etc. 2006. Observations are confirmed by Marie J. Winkelmann's study, *From Behind the Curtain: A Study of a Girls' Madrasa in India*, Amsterdam 2005). Cf. also the reform proposals in Muhammadullah Khalili Qasmi, *Madrasa Education. Its Strength and Weakness*, New Delhi 2005, 103 ff.

197 Cf. the report 'Swamy allowed to implead in PIL on Muslim women's Inheritance' of 7 November 2013, available at http://zeenews.india.com/news/kerala/swamy-allowed-to-implead-in-pil-on-muslim-women-s-inheritance_888497.html, last accessed 3 May 2014.

198 Cf. 'Personal laws exempt from fundamental rights: Indian Union Muslim League', Times of India, 21 February 2014, available at <http://timesofindia.indiatimes.com/city/kochi/Personal-laws-exempt-from-fundamental-rights-Indian-Union-Muslim-League/articleshows/30761616.cms>, accessed 3 May 2014.

199 Cf. only Ahmedullah Khan, *Comentary on the Law of Wakfs in India*, Hyderabad 2000.

awqāf.²⁰⁰ In view of the widespread poverty among Muslims and the presumably considerable financial means of the foundations, the administration of these institutions is likely to be one of the most sensitive areas of all. This may be the explanation of the government's reluctance when it comes to intervening, while Muslims themselves formulate the need for reforms.²⁰¹ The Amendment of 2013 mainly aims at protecting *waqf* property against attacks and illegal occupancy, increasing viable commercial use and clarifying the administrative structure by increasing transparency. It was thus welcomed in a resolution by a scholars' seminar organised by the Islamic Fiqh Academy in March 2014,²⁰² but still has to be implemented in important aspects.²⁰³

ff Commercial Law

In Northern India openly sharia-inspired economic institutions seem to be virtually non-existent. Particularly in southern India types of commercial activity have become established that 'conform to Islam'. The companies in question do not engage in business that would be in conflict with religious commandments, and function interest-free, at least formally. Frequently, however,³⁰¹ 'fees' arise which are very close to actual interest. Consequently some Muslims reject these institutions, instead resigning themselves to the fact that they live in a societal and commercial system which recognises interest-bearing transactions on principle. Occasionally we find a distinction between prohibited usury and admissible interest as equivalent to the option of using the loan. There are, however, individual instances of 'oases' of genuinely interest-free commerce emerging. Thus the community of Bohra Ismailis in Mumbai, which has around 100,000 members, has created quasi-cooperative programmes to finance small loans for economic activity or small-scale property acquisition; the members receive interest-free loans from the programme.

200 Cf. also the reports and case studies in Syed Khalid Rashid (ed.), *Protection, Maintenance and Development of Awqaf in India*, New Delhi 2005.

201 Cf. the contributions in the collective volume *Waqf Role in Development*, compiled by Heshamul Haque Nadvi, IFA publications 2013; the English translation of the Urdu texts is a challenge for the reader. This demonstrates the usefulness of learning Urdu to get access to an abundance of underresearched literature.

202 Islamic Fiqh Academy (India), *Seminar on Auqaf in India* in Bangaluru, 29–30 March 2014, Resolution para. 11 (available at <http://www.ifa-india.org/english.php?do=home&pageid=resolutions>; last accessed 12 April 2014).

203 Cf. the report 'Return of 123 Waqf properties – no reason to rejoice', *Milli Gazette* 16–31 March 2014, 1, 9, and the 'Open letter to Chairman, UP Sunni Central Waqf Board' by the former CEO UP Sunni Central Waqf Board Akmal Husain, *Milli Gazette*, 1–15 February, 2014, 11.

Only Bohras are entitled to become members; the social pressure within the closely-knit community is seen as necessary and as having contributed to the fact that, as yet, there have been no problems with repayments (through the debtor's fault).²⁰⁴ All in all, Indian Banking law at present (2014) does not enable the establishment of Islamic Banking and finance on a regular basis.²⁰⁵

gg Arbitration Courts and Sharia Courts

Muslim arbitration institutions called *darul qaza* (Ar.–Pers. 'courthouse') have been established in a number of federal states. In Bihar and Orissa (since 2011: Odisha) they can look back on a decades-long history (beginning in 1921) and are organised systematically, including three stages of appeal (*murāfa'ā*).²⁰⁶ In some federal states, where they are represented in widely different numbers,²⁰⁷ they are joined together in an Imarat-e Sharia as umbrella organisation. In Patna/Bihar there is an academy training *qazis* (arbitrators).

The issues dealt with by the *darul qaza* are those legal matters covered by the Muslim Personal Law (Shariat) Application Act 1937. They function on a formally exclusively voluntary basis. The *qazis* have no judicial power, e.g. as regards summoning the opposing party or witnesses; their decisions are only informal, i.e. they cannot be enforced through official channels. Even so, it appears that not infrequently the public courts make use of the cooperation of the *darul qaza*, implementing the latter's decisions 'per decree'.²⁰⁸ There even

204 Information provided by Yusuf Hatim Muchhala, a member of the executive committee of the AIMPLB, during a conversation with the author on 15 June 2006 in Mumbai. It does indeed appear that public small loans for particularly needy members of minorities meet with considerable difficulty in this respect. The rate of repayment ranges from 69.75% in Haryana and 6.82 in Manipur; 80% would be the rate necessary for the system to function; cf. 'Minorities lending agency to get professional touch', *Asian Age*, 22 June 2006, p. 5.

205 Cf. only the contributions of Haq and Amin/Qureshi in: Ahmad (ed.), *Economic Conditions*, 221 ff., 253 ff.; and the report 'Prospects of Islamic banking in India', *Milli Gazette*, 1–15 December 2013, 8.

206 Information provided by Tahir Mahmood in conversation in New Delhi on 25 April 2006.

207 According to information provided by Amin Usmani during a conversation in New Delhi on 21 April 2006 there were 38 *darul qaza* in Bihar, 40 in Assam, 12 in Uttar Pradesh, 8 in Karnataka, 4 in Andhra Pradesh, 3 in Madhya Pradesh, 2 in Maharashtra and one in Himachal Pradesh at that time.

208 Information provided by Tahir Mahmood in conversation in New Delhi on 25 April 2006; examples in Mahmood, *Islamic Law in the Indian Courts*, 7 f.; this was confirmed by Yusuf Hatim Muchhala in a conversation with the author in Mumbai on 30 April 2014.

seem to be cases where the notoriously overstretched public courts suggest that help be sought from the *darul qaza*.²⁰⁹

Its supporters claim a very high degree of acceptance of its rulings ('99 %').²¹⁰ An essential advantage of these institutions, on which opponents and supporters are agreed, is the access to fast and affordable rulings. As a consequence even Hindus occasionally turn to the *darul qaza*.²¹¹ This underlines the main reason for the partial success of *darul qaza*: the lack of state courts providing adequate solutions.

Thus (as of 2006) in all of India, with a population of then ca. one billion,²¹² there were a mere 153 special family courts, the establishment of which was provided by the Family Courts Act 1984.²¹³ 14 of these were responsible for the more than 166 million inhabitants of Uttar Pradesh.²¹⁴ Lawyers sometimes oppose these institutions, as they are able only to appear as *amicus curiae* (Sect. 13 Family Courts Act 1984)²¹⁵ and consequently may end up rather worse off after cases here – some of which are complex – than in other trials.²¹⁶ Overall the number of judges is extremely small; lawsuits will frequently take ten years or longer.²¹⁷ In addition complaints about corruption are very common, especially in the lower courts. Consequently informal arbitration institutions would be the option of choice. However, even supporters of the *darul qaza* lament their unsatisfactory standard, except for the courts in Bihar and Orissa (Odisha) which were established a long time ago.²¹⁸

209 Cf. also Rizvi Syed Haider Abbas, 'Darul qazas are endangered', *Milli Gazette*, 16–30 April 2006, p. 10.

210 Statement by Mohammed Abdul Rahim Qureshi during a conversation in New Delhi on 22 April 2006.

211 Information provided by Tahir Mahmood in conversation in New Delhi on 25 April 2006.

212 According to the census of 1 Jan. 2001 the population numbered 1.028 billion; cf. *Government of India, India 2006*, 7.

213 *Op. cit.*, 582.

214 Cf. *op. cit.*, 10 table 1.2 and p. 593.

215 Cf. K. Panduranga Rao, *The Family Courts Act 1984*, 4th ed. Hyderabad 2006, 57.

216 Information provided by Ghulam Yazdani, expert in Indian family law, during a conversation with the author on 9 May 2006 in New Delhi.

217 Yusuf Hatim Muchhala's remark, made during a conversation with the author on 15 June 2006 in Mumbai, is one telling example. Cases are not dealt with efficiently, he says, and involved procedural regulations may lead to them taking even longer. It may furthermore happen that lawyers have to be admonished to advance the actions (cf. Justice Dananay Y. Chandrachud of the Mumbai High Court in the *NALSAR* newsletter 6/2, 2004, p. 12 f.).

218 Yusuf Hatim Muchhala, member of the AIMPLB, stated in a conversation with the author

Unlike the All India Muslim Personal Law Board,²¹⁹ which stresses the importance of the *darul qazas*, Yoginder Sikand has come to the conclusion that their role is in fact peripheral.²²⁰ He says that the 22 *darul qazas* established by the AIMPLB have judged only 6,433 cases since 1973, and that only 461 are pending.²²¹ The Imarat-e Sharia in Bihar, too, which is dominated by Deoband and has been in existence since 1917, has judged only 31,775 cases throughout its history – all this with regard to currently nearly 150 million inhabitants. The Delhi *darul qaza* has settled not more than 341 cases between 1990 and 2010.²²² There is also criticism of the insufficient education of the arbitrators involved who, following their own views (including not only social prejudice but also close ties to the Hanafite Deoband school)²²³ and prejudices have arrived at unsuitable conclusions to the detriment of, in particular, women.²²⁴ However, there are some clarifying remarks from women's rights organisations: there are in fact open-minded ('progressive') judges who have learnt, maybe in workshops or in cooperation with NGOs, awareness of the problems involved and may well be proactive.²²⁵ There are no initiatives to establish *darul qazas* among the Shi'ites, unless they are linked to organisations such as the AIMPLB.²²⁶

on April 30 2014 in Mumbai that the board had prevented the establishment of new *darul qaza* on several occasions, due to the lack of proper training and standards.

- 219 Cf. his 2003 booklet 'Guidelines to Dar-ul-Qaza', which includes the apologetic essay 'The Establishment of System of Qaza by Mawlana Hakeem-ul-Islam Qari Muhammad Tayyab, the former head of the Dar-ul-Uloom in Deoband, who considers this institution to be fulfilling a religious duty.
- 220 Yoginder Sikand, 'Dangerous portents: Shariah Court campaign in India', viewed 24 August 2005 at <http://www.Islaminterfaith.org/jan2006/article3.htm>.
- 221 Amin Usmani, on the other hand, quoted (during a conversation on 21 April 2006 in New Delhi) the figure of ca. 60,000 settled cases since its foundation in Bihar (long before the AIMPLB was founded).
- 222 Zafarul Islam Khan, 'The Muslim Personal Law', *Milli Gazette*, 1–15 Feb. 2014, 8.
- 223 According to research carried out by Tahir Mahmood there are rare cases where Shafi'ite or Shi'ite law is applied; information provided during a conversation with the author on 25 April 2006 in New Delhi.
- 224 Thus for instance Asghar Ali Engineer during a conversation in Mumbai on 14 June 2006, and Amin Usmani during a conversation on 21 April 2006 in New Delhi. The latter gave an account of a case in Andhra Pradesh where the judge refused to allow the cost of medical treatment as part of the maintenance payment due to a woman. An as yet unpublished survey of eminent legal scholars conducted under the supervision of the author confirms this picture.
- 225 Statement by Flavia Agnes during a conversation on 14 June 2006 in Mumbai.
- 226 Thus explicitly the president of the All India Shia Personal Law Board, Athar, during a conversation on 28 April 2006 in Lucknow; other Shi'ite scholars such as Mawlana Ali

The constitutionality of the *darul qaza* and of the fatwa culture was disputed in a public interest writ petition brought before the Supreme Court in 2005²²⁷. The federal justice secretary has been quoted as saying that the Muslims established a parallel judiciary²²⁸ – while the widespread institutions for reconciliation and mediation run by other religious and social communities remain unchallenged. In July 2014, the Supreme Court held that the ‘fatwas’ of the *darul qaza* had no legal sanction and therefore cannot be qualified as a parallel judiciary.²²⁹ Nonetheless, we have to bear in mind that merely pointing out the lack of legal enforceability of rulings by the *darul qaza* or of fatwas does not actually do justice to the facts: it is possible for social pressure to reach a degree which makes the implementation of rulings inevitable. Still, the conclusions reached by a seminar held by the Islamic Fiqh Academy in 2004 emphasise that ‘with respect to certain cases, the judgment of a Muslim Qazi *only* (author’s emphasis) stands appropriate and justified from the point of view of Shariah’.²³⁰

Some Sunnis have demanded the establishment of regular official, or officially recognised, sharia courts with competence in the issues covered by the Muslim Personal Law (Shariat) Application Act 1937; this would be an entirely new approach.²³¹ In order to safeguard Muslim identity these courts would be managed by ulama organisations; in cases which involve only Muslims they should be entitled to pronounce binding judgments. Instead of the judges entrusted with these matters so far, who have received state training, the judges in these courts would be educated in madrasas, as non-Muslim judges are seen as not fully capable of applying Islamic law satisfactorily.

As stated above, this criticism is by no means always without justification. However, it links arguments which have nothing in common in substance. Applying Muslim law, which is in the main uncodified, is indeed a challenging task and requires thorough training. Still, the uncritical adoption of older

Muhammad Naqvi approve of the *darul qaza* especially because it provides quick and cheap rulings (their silence on the quality probably speaks for itself).

227 ‘PIL (public interest litigation) petition’ by Vishwa Lochan Madan, Civil writ petition No. 386 of 2005; according to the SC database JUDIS, the case is still pending (7 April 2014).

228 References in Rizvi Haider Abbas, ‘Darul qazas are endangered’, *Milli Gazette*, 16–30 April 2006, 10.

229 Cf. ‘Shariat Courts have no legal sanctity: Supreme Court’, *The Hindu*, 7 July 2014, last accessed 4 September 2014 at www.thehindu.com/news/national/shariat-courts-have-no-legal-sanctity-supreme-court/article6185496.ece.

230 Islamic Fiqh Academy (India), *Important Fiqh Decisions*, 160 no. 9 (end).

231 Cf. Yoginder Sikand, *Dangerous portents: Shariah Court campaign in India*, viewable at <http://www.Islaminterfaith.org/jan2006/article3.htm> (sent by email on 24 Aug. 2005 from ysikand@islaminterfaith.org).

opinions, while favoured by the majority of scholars, is only one of several possible variants of applying the law; furthermore, it largely ignores the fact that there are differing trends among Muslims. The accusation frequently made against non-Muslim official judges, namely that with their interpretation they have been working towards abolishing Islamic law in a kind of anti-Islamic conspiracy, shows three things: the deep-rooted distrust in the state judiciary, the fundamental dislike of adapting to the circumstances prevailing in a particular place and time, and the profound ignorance of relevant developments in many parts of the Islamic world, which in fact show significant parallels with the Indian key decisions. The main concern is that women's rights will not stand a chance before institutions of this kind. This might be the reason for an initiative by a Muslim women's organisation (Bharatiya Muslim Mahila Andolan) to set up two 'All-women Sharia courts' in Pune and Mumbai in late 2013,²³² run by two Muslim women. It is unclear whether these institutions are actually operating.²³³

Another fundamental question is whether only Muslims can be authorised to apply Islamic law. Those who automatically count legal rules among the core principles of the faith may well reach this conclusion. In a secular legal system such as that in force in India, this is not, however, a valid standpoint. Under the standards of the secular constitution which is neutral in matters of religion law and religion must be kept separate. There are also conceptual reasons for this, some of which are in fact supported by the tradition of Islam (cf. the introductory chapter). As the standard of education increases among Muslims, we find a tendency to reject authorities seen as rather too traditionalistic. Those who are themselves educated will resort to these courts less frequently and are less likely to be guided by emotions charged with religious motives. Several eminent scholars as well as some representatives of Muslim organisations have confirmed this to the author.

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In view of the fact that even the activities of the *darul qazas*, which command none of this judicial authority, are attacked as being a non-constitutional parallel judiciary, it is unlikely that such initiatives will meet with success. Even among Muslims the Deoband school's attempt at establishing a hegemony will probably not find widespread approval. Other schools would have

232 Cf. the report 'Pune: All-women Sharia court to redress grievances of Muslim women launched'; Times of India, 6 Oct. 2013, available at <http://timesofindia.indiatimes.com/india/All-women-sharia-court-to-redress-grievances-of-Muslim-women/articleshow/23601722.cms>, last accessed 3 May 2014.

233 The author has tried repeatedly to establish contact in Mumbai in 2014, but without success.

reason to fear that the exclusive adherence to the traditional interpretations of the Hanafite school would undermine rather than strengthen their own authority. This is particularly true of the Shi'ites. Overall it would remain unclear which rules out of the mainly uncodified Islamic law would be applied according to which interpretation. The fragmentation into several Muslim Personal Law Boards, none of which are particularly well-disposed towards one another, illustrates the problem clearly.

hh Optional Standardised Law

The Special Marriage Act, which has been in existence for a long time and may be invoked by all Indian citizens as well as foreigners, offers solutions especially for interreligious marriages.²³⁴ Some of its most essential substance, however, is clearly divergent from traditional Islamic family law; consequently it does not meet with widespread approval among Muslims²³⁵ – or indeed Indian society in general:²³⁶

305 Unlike Islamic family law, which prohibits the marriage between a Muslim woman and a non-Muslim man and declares it null and void, it permits every kind of interreligious marriage. In addition it recognises only the monogamous marriage (Sect. 4 SMA). Any marriage contravening this rule is null and void (Sect. 24 I (i) SMA) and punishable by law (Sect. 43 SMA in conjunction with Sections 494, 495 Indian Penal Code 1860). The minimum marital age is set to 21 years for men and 18 for women (Sect. 4 c) SMA); there are no exceptions. A marriage contracted in breach of this rule is null and void (Sect. 14 I (i) SMA).²³⁷ Furthermore, while divorce is permissible in contravention of

234 Cf. Desai, *Indian Law of Marriage*, 11 f. with further references from legal practice (Himachal Pradesh High Court, AIR 1993, HP7; Kerala High Court (2001) 1 Ker LT 578) and Ephroz, *Women and Law*, 371; Jammu and Kashmir are subject to separate regulation, cf. Desai, *Indian Law of Marriage*, 14 f.

235 Muslims inclining to reform recommend using it, e.g. Prof. Zeenat Shaukat Ali of the Women's Research and Action Group (WRAG).

236 Information provided by several experts in family law, esp. Vijander Kumar, expert in family law at the National Academy of Legal Studies and Research (NALSAR) in Hyderabad during a conversation there on 20 June 2006, and representatives of Muslim organisations, e.g. Muhammed Abdul Haq Ansari, President of the Jammat-e-Islami Hind on 5 May 2006 in New Delhi. Thus in India the mere request for – permissible but not widely practised – official registration of a marriage can give rise to the question whether the respective family disagrees with this marriage (as reported by Prof Shalini Raneria during a conference in Brussels on the subject *The Response of State Law to the Expression of Cultural Diversity* on 29 Sept. 2006).

237 According to the legal practice this also applies if one of the partners involved pretended to be older; cf. Desai, *Indian Law of Marriage*, 14.

traditional Hindu and Christian laws, as regards content this is subject to a comparatively limited catalogue of reasons. The husband's one-sided right to divorce (*ṭalāq*) – which does furthermore not require any reasons – is explicitly ruled out.

Finally, the obligatory involvement of the state (solemnization, esp. Sect. 12 SMA, which states the minimum content of the declarations to be made,²³⁸ while above this the partners involved are permitted to determine the form they wish to use) on contracting and registering a marriage means that there are unavoidable formal requirements (Sect. 13 SMA). How important these regulations really are is illustrated by instances in which women divorced by *ṭalāq* later remarried, and whose previous husbands then denied having pronounced the *ṭalāq*. If the wife is unable to prove the first *ṭalāq*, she is in danger of prosecution for bigamy, to say nothing of devastating social consequences.²³⁹

It seems that the Special Marriage Act has so far been applied only rarely, presumably due to a lack of publicity and of social acceptance. A female Indian academic who intended to get married under this law was immediately asked by the official whether the family was against the marriage. The author even heard of a case in which a Muslim couple intending to get married were dismissed by the judge in charge and told to draw up a *nikahnama*, i.e. to choose the traditional Muslim form of marriage.²⁴⁰ It is true that the idea of further developing or creating a new optional civil code is demanded time and time again in a general fashion.²⁴¹ However, no even remotely concrete steps towards preliminary work are discernible or indeed to be expected in the near future. Clearly, there is a lack of shared fundamental beliefs within society of what must be the substance of such a law.

238 Sect. 12 (2): "The marriage may be solemnized in any form which the parties may choose to adopt: provided that it shall not be complete and binding on the parties, unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties – "I (A) take thee (B) to my lawful wife (or husband)!"

239 Cf. Amita Verma, 'Another Gudiya-like story emerges', *Asian Age*, 10/11 June 2006, 4. There was already a child of the second marriage. The impoverished family of the wife declared that the wealthy first husband had bribed the witnesses of the *ṭalāq* to give false evidence.

240 As reported by Danyal Kahkashan, lecturer in Islamic law at the Jamia Millia Islamia in New Delhi, during conversations with the author on 10 May 2006 in New Delhi; during a conversation with the author on 10 May 2006 in New Delhi the editor of the *Milli Gazette*, Zafarul-Islam Khan, commented on this case to the effect that the judge would certainly not have been able to enforce this, but that it was probably wise to suggest it.

241 Cf. e.g. Kishwar, *Religion*, 222 ff., 225 ff.

306 3 Conclusion

Conversations with representatives of Muslim organisations have made clear overall that the issue of concrete identity-forming aspects of Islamic law is usually not raised at all. Arguments mostly follow a defensive line, namely that as India is a plural state, every religious community has the right to live according to its own legal rules (as far as personal status and inheritance law are concerned). When it comes to the concrete forms taken by the law, the affiliation of the individual person/organisation is most significant. The Sunni traditionalists are predominant, but have had to give up their quasi-monopoly in recent years.

Among the traditionalists there are also some who support a cautious reform trend, without, however, addressing the vital issues of equality at a fundamental level. They usually search for individual pragmatic solutions. Liberal voices do not find much of an audience among the largely only poorly educated Muslim masses.²⁴² This is reflected in the literature on the subject. There is agreement that literature dealing with the issue in Urdu shows some extremely traditionalist traits. A sweeping statement found more than once claims that writings dating from the eleventh and twelfth centuries set the uncontested parameters from which nobody will distance themselves.

Overall the trend to traditionalism predominates, fed in particular by the influential Deoband school.²⁴³ Consequently there is hardly any *ijtihad* among Sunnis – unlike among Shi'ites who, however, do not play a significant part in the public perception due to their comparatively small number. *Takhayyur* and *talfiq* are generally rejected, too. 'We are Indian Muslims and have our own problems' is an entirely typical statement. The references used are typically classical sources of the Islamic middle ages which are adapted at best hesitantly to the circumstances prevailing in the present. Overall the mainstream of Islamic law in India resigns itself to a trend of simplification and unreflected equating of individual legal issues and religion; attitudes which in other parts of the Islamic world such as Sudan²⁴⁴ or Afghanistan (cf. Part 2, 3.4.b above)

242 Thus the rather resigned summary of a number of conversations with supporters of liberal approaches between April and June 2006 and in March 2008 in Delhi, Lucknow, Aligarh, Jaipur, Mumbai and Hyderabad. Nothing has changed since then according to similar conversations in Delhi and Mumbai in April 2014.

243 Cf. also Mulla (at first Dinshaw Faridjuni Mulla's Principles of Muhammadan Law, Bombay 1906; now Mulla, Mohammedan Law, 2006), 35 ff.

244 According to a report in the Hindustan Times of 24 April 2006, 12 ('Turabi declared apostate'), on the prominent Hasan al-Turabi who was often classed as an Islamist, Sudanese

have led to those demanding reinterpretation of the sources being branded as apostates in the most extreme cases.

Among Muslims in northern India in particular there were hardly any initiatives to develop Islamic norms further with regard to content until recently. A major reason for this may be found in the fact that in the course of the political partition of the subcontinent in 1947 large parts of the Muslim middle and upper classes emigrated to Pakistan.²⁴⁵ Those that remained were in the main uneducated and underprivileged poor Muslims, and intellectual advances were unlikely to come from their ranks. Consequently the ulama, most of whom were very traditionally inclined, assumed the leadership. To this day the Dar-ul-Uloom in Deoband, which adheres to this view, with its numerous alumni is probably the most influential Muslim institution. Its influence is enhanced by its reputation dating from the era of resistance against British colonial rule.²⁴⁶

According to several eminent scholars the madrasa alumni are neither willing nor able to conduct qualified debates on the issue of reforms: they are comfortable in their ivory tower, reject all new ideas – including those suggested by Muslims from other countries – and, as they have not even basic knowledge of economic and social correlations, they have no understanding of contemporary issues. This situation in itself could point the way towards possible solutions: adequate education, which would lead to jobs and consequently to material security. Nearly all the Muslims with whom the author conducted conversations saw this as the key to solving all the problems: people who are sufficiently educated and living in material security would approach the legal issues discussed here in an entirely different fashion, and would ignore the ossified traditionalistic ideas.²⁴⁷ The Aligarh Muslim University has reportedly started in 2013 to offer ‘Bridge Courses’ for qualified madrasa graduates in order to ‘prepare a team or generation of capable and liberal minded ulama who

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scholars attempted to have him declared an apostate because he supported gender equality and claimed that Muslim women had a right to marry Jewish or Christian men or lead the prayer.

245 Thus repeatedly stated by representatives of Muslim organisations and scholars; cf. also Noorani, *Muslim Identity*, 129.

246 Cf. e.g. Qeyamuddin Ahmad, *The Wahhabi Movement in India*, second ed. New Delhi 1994. The Deoband Dar-ul-Uloom self-presentation on the internet also draws on its well-known past.

247 Thus e.g. the explicit opinion of Mawlana Ali Muhammad Naqvi expressed during a conversation with the author on 3 May 2006 in Delhi; cf. also Kumar, *Islam and Human Rights*, 104, 117: ‘In the case of Indian Muslims, poverty, illiteracy and over-population are their real problem, not their personal law.’

along with good knowledge and command over English may be fully aware of the problems and challenges of modern times'.²⁴⁸

There is indeed clear evidence for the crucial role of education in handling Islamic rules. Thus the one-sided divorce, which is usually to the detriment of women, especially in the form of the triple *talaq*, is practised among the uneducated poor, but not in the middle and upper classes. In many cases the main issue is simply the distribution of – frequently scarce – resources. We would be inclined to hazard a cautious prediction that if the gap between the fundamental values²⁴⁹ of the majority and the minority (or minorities) were to close, tensions would decrease while education and economic prospects would improve. Many liberal Muslims also demand close integration into cross-religious organisations and involvement in national interests;²⁵⁰ narrow and interest-driven politics would not guarantee a sufficient firm connection with society as a whole, while formal protective legislation alone has only limited uses. They also emphasise that the really urgent social problems must be tackled first,²⁵¹ rather than getting stuck forever, like the traditionalists,²⁵² in the selfsame issues of personal status law, preserving Urdu, the status of the University of Aligarh, as well as the reconstruction of the Babri mosque in Ayodhya, which was destroyed by a Hindu mob in 1992. Of course, the hope for an improved social situation will not be able to bring about an ultimately satisfactory solution unless it is accompanied by legal measures. Law may not always be effective against arbitrariness and despotism, but in case of conflict it will help those who dare to use it.

Supporters of standardisation can refer to the constitutional demand laid down in Art. 44. There is a strong trend in the majority population in India which sees the special position of minorities and its legal basis as an infringement of national unity. The chairman of the National Commission for Minori-

248 Cf. 'AMU Bridge Course for madrasa graduates', Milli Gazette, 1–15 April 2014, 15.

249 Cf. the remarks by the Muslim (according to the name) judge at the SC Shah in *Aruna Rai v. Union of India*, AIR 2002 SC 2773. The point at issue was the Hinduisation ('saffronisation') of the school curriculum. Shah points out that *satya* (truth), *dharma* (religious conduct), *shanti* (peace), *prem* (love) and *ahimsa* (non-violence) are universal core values of all religions, and that in addition getting to know other religions will aid peaceful coexistence and prevents hatred, as the latter grows out of ignorance, presumption and mistaken preaching guided by personal interest.

250 Cf. only Noorani, *Muslim Identity*, esp. 134 ff.

251 Regarding an internal Islamic argumentation cf. Engineer, *Islam and the Challenge of Poverty*, 171 ff.; cf. also Zakaria, *Indian Muslims*, esp. 330 ff.

252 Cf. only AIMPLB, *Guidelines*, Foreword.

ties (NCM), Mohammed Hamid Ansari, said the following in the context of the killing of four Muslims by police in Aligarh in April 2006: 'Group rights are not properly interpreted. They are always regarded as something which undercut the national identity. The need is to build public opinion to recognise the existence of sub-identities.'²⁵³ This, he added, would not be easy but was necessary in view of the actual situation. The creation of a Uniform Civil Code as set down in the constitution is unlikely to be implemented in the foreseeable future.²⁵⁴ A parliamentary initiative along these lines in 1963 with the aim of reforming Muslim personal law was welcomed by liberal Muslims, but vehemently rejected by the strong orthodox party – which included the then Indian vice-president Zakir Hussain.²⁵⁵ Federal governments, in particular those led by the Congress Party which is always trying to attract Muslim voters, have repeatedly promised that nothing of the kind will be endeavoured.²⁵⁶ For political reasons it is unlikely that any but a very strongly Hindu nationalist government would be able to institute such measures. This, however, then feeds into many Muslims' fears that a Uniform Civil Code would turn out to be a law of the majority in substance, namely a Hindu code. Riots would have to be feared if these measures were, as seems likely, seen as an attack on the identity of the Muslim minority. Remarks in the parliamentary debate on the Muslim Women (Protection of Rights on Divorce) Act 1986 gave rise to such fears when the speaker of the house simply equated democracy and the will of the majority.²⁵⁷ As long

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253 'Aligarh riots: UP govt in NCM's line of fire', *Times of India*, 20 April 2006, 12. Prof Muhammad Yasin Mazhar Siddiqi confirmed this during a conversation on 2 May 2006 in Aligarh (Department of Islamic Studies of Aligarh Muslim University). The shooting had been provoked by policemen looting shops; this is a problem for Hindus as well, but mainly for Muslims. Regarding the relations between the police and minorities cf. Asghar Ali Engineer/Amarjit S. Narang's collection *Minorities and Police in India*, New Delhi 2006.

254 Recently and in detail cf. Raju, *Uniform Civil Code*; Chavan/Kidwai, *Personal Law Reform*, 2006. Cf. also Agnes, *Law and Gender Inequality*, 192 ff., which points out that petitions by individual Muslim women along these lines have not found support from organisations.

255 Cf. Diwan, *Muslim Law*, 41; Mahmood, *Family Law*, 102; regarding further Muslim supporters of standardisation cf. Deshta, *Uniform Civil Code*, 121 f.

256 Mullally, *Gender*, 203, expresses criticism.

257 Cf. Jayal, *Secularism*, 168. Several representatives of Muslim organisations have lamented that their specific concerns were not taken into account when the law was forced through parliament on the recommendation of the then prime minister Rajiv Gandhi. Later corrections promised by the government never took place, thus e.g. Abdul Rahim Qureshi, secretary of the AIMPLB during a conversation in New Delhi on 22 April 2006 and Muhammed Abdul Haq Ansari, president of the Jamaat-e-Islami Hind during a conversation on 5 May 2006 in New Delhi.

as there is no discussion of the substance to be included in the Uniform Civil Code,²⁵⁸ the debate is limited to the precarious constellation: will of the majority – protection of minorities.

It is true that it is in particular the norms or interpretations of Muslim personal status law which discriminate against women that trigger such debates.²⁵⁹ Seeing as Hindu women are in some respects in an even worse position under the law, and as severe discrimination against women in practice is an everyday occurrence in all religions, the issue is clearly not the debate concerning gender equality and individual freedoms as requested by the liberals.²⁶⁰ It would certainly not be easy to find a common denominator for the multitude of differing religious personal status laws, even though some liberal thinkers support the search for shared principles based on human rights.²⁶¹

A sufficiently broad coalition of reformers based in all affiliations and religious communities who would, in particular, be pledged to gender equality is not likely in the near future.²⁶² Consequently the situation is still the same as described by Niraja Gopal Jayal: 'As the Muslim woman's community identity is privileged over her identity as a citizen, there is a filter of community control through which alone she has access to the state, and that access is further restricted by the state's self-limiting assumption of the role of a mere arbiter (...):'²⁶³ Women's rights activists thus see the actual goal as being the establish-

258 Thus also F. Ahmad, *Triple Talaq*, 133 with further references. According to S. P. Pathe (quoted in Raju, *Uniform Civil Code*, 212), with whom Raju (*loc. cit.*) agrees, a Uniform Code might include several systems of personal laws based on uniform principles of gender equality and individual liberties. Kiran Deshta (*Uniform Civil Code*, 128) wants to 'enact a Uniform Civil Code embodying what is best in all personal laws. It should represent one, drawn up by the consultation between the different communities in India on the principle of give and take.'

259 Thus Archana Parashar (*Women*, 255 and *passim*) demands the legal implementation of gender equality.

260 Kishwar, *Religion at the Service of Nationalism*, 206 ff., esp. 215 ff., expresses himself very clearly along these lines.

261 The high court judge Krishna Iyer's remarks (preface to Bhattacharjee, *Muslim Law*, 13 f.) consequently sound rather illusory: 'Indeed, I often think that an Indian Uniform Civil Code may well absorb, by an eclectic choice and happy metabolism, some of the finer ideas of Islamic law. A Common Law is not Hindu Law, as some bigots fancy, but the best from many systems suited to Indian ethos and current acceptance of human rights. Islamic jurisprudence has much to offer with updated modifications.'

262 Cf. also Engineer, *Uniform Civil Code v. legal pluralism*, article, August 1–15 2003, viewed on 8 May 2006 at <http://www.ecumene.org/IIS/csss114.htm>.

263 *Secularism*, 174.

ment of gender equality; the law implementing it is a means that must not be raised to the status of a goal in itself.²⁶⁴ Furthermore, they point out, all the groups that make up Indian society have a patriarchal structure, which makes the implementation of women's rights particularly challenging.²⁶⁵

Nevertheless, things are about to change slowly but steadily, while there is not much hope of wider success in the near future. Despite legislative measures encouraging a rapprochement over the last decades, there are still visible differences between religious laws, which can be intensified in the practical social application. Furthermore, there are differences even within individual religions; several Hindu schools have developed over time, for instance in recent time a Dravidian (non-Aryan) separate trend in Andhra Pradesh.²⁶⁶ On the other hand legislative measures alone are unlikely to have any chance of success unless they are carried, or at least accepted, by a majority of the population. Serious doubt is indeed appropriate, as it has not yet been possible to enforce the Dowry Prohibition Act 1961,²⁶⁷ as even large numbers of non-Hindus have adopted this radical custom.²⁶⁸

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Among Muslims there is no broad majority perceptible for legislative amendments in the issue of post-marital maintenance for divorced women, which was the subject of the two most spectacular Supreme Court judgments in recent decades. Representatives of the traditionalists with their strong

264 Thus explicitly Justice Suresh, formerly judge at Bombay High Court, and the lawyer and chairwoman of the women's rights organisation Majlis, Flavia Agnes, at a book launch on 13 June 2006 in Mumbai.

265 Cf. I. Ahmad, *Some Reflections*, 33, 38 ff.; Kumar, *Islam and Human Rights*, 104, esp. 112 ff.; a qualifying view of the subject is presented by Anjum, *Muslim Women*, 64 f.: in the south and northeast of the country women profit from the matriarchal structures which are a factor determining the culture of non-Muslim communities.

266 Information provided by Prof. Vijander Kumar, expert in family law at the National Academy of Legal Studies and Research (NALSAR) in Hyderabad during a conversation on 20 June 2006 there.

267 Act No. 28 of 1961, as amended by Act 43 of 1986. Printed in e.g. K. Panduranga Rao, *The Family Courts Act, 1984*, fourth ed. Hyderabad 2006, 303 ff. In Sect. 3 (1) of the Act the standard penalty stated is at least five years imprisonment and a fine of at least 15,000 rupees or the value of the dowry (whichever is the higher amount). In Sect. 2. the *mahr* payable to the bride (dower) under Islamic law is explicitly excepted from the coverage of the law. Cf. Paras Diwan, *Dowry and Protection to Married Women*, third ed., New Delhi 1995.

268 Scholars in a seminar held by the Islamic Fiqh Academy in April 2001 (*Juristic Decisions* 2009, 105) expressed their concern over a 'general mentality of putting bridegrooms on sale, rampant in the present Muslim society (...)' in contradiction to the sharia system.

public presence reject them categorically. Characteristically the reason given by the Congress Party during the debate on the ‘neutralisation’ of the Shah-Bano judgment by the Muslim Women (Protection of Rights on Divorce) Act 1986 for the restitution of traditional law and order was that it was necessary to preserve Muslim Identity – thus arguing against the objections of liberal Muslims, not least Muslim women.²⁶⁹ Muslims who adhere to the traditional view criticise that the Act does not include all the aspects of Islamic law and the concerns relevant to it.²⁷⁰ Tahir Mahmood has come to the conclusion that the debate on the introduction of a Uniform Civil Code is in effect detrimental as it blocks the discussion – in his view indispensable – of the reform of Muslim personal status law.²⁷¹ The registrar of Aligarh Muslim University, Prof. Faizan Mustafa, emphasised that in the Danial Latifi judgment (cf. 2.c.cc above) the Supreme Court would have been well advised to base its ruling on Sect. 125 of the CrPC only, as surely no Muslim scholar would oppose the idea that women in need must receive help. What was objectionable was solely the argumentation based on Sect. 127 CrPC which interpreted the norms of Islamic law (up until sura 2:241) in a way that was entirely contrary to the traditionalists’ view.²⁷² The All India Muslim Personal Law Board initiative aimed at partial codification of the Muslim personal status law, on the other hand, has not got beyond the preliminary stage by now (2014).²⁷³ Demands formulated by Muslim women’s organisations to codify sharia law on the basis of the spirit of the Quran in a gender-neutral way²⁷⁴ are not likely to gain strong support in the community in the short term.

It will probably only become possible to implement gender equality once this is seen as a national (i.e. domestic) concern rather than one imposed from

269 Minister Pant in the parliamentary debate; references in Jayal, *Secularism*, 168 ff.

270 E.g. Muhammed Abdul Haq Ansari, president of the Jamaat-e-Islami Hind on 5 May 2006 in New Delhi.

271 As stated during a conversation with the author on 9 May 2006 in New Delhi.

272 During a conversation with the author on 1 May 2006 in Aligarh. A similar remark was made by the Member of Parliament Syed Shahabuddin in the parliamentary debate on the Muslim Women (Protection of Rights on Divorce) Act 1986; cf. Jayal, *Secularism*, 167 with further references.

273 Tahir Mahmood explained this (during a conversation with the author on 25 April 2006 in New Delhi) with the fact that the AIMPLB employs only very few jurists, and that the draft law was of such poor quality that it was withdrawn on his advice.

274 Cf. ‘Taking on Patriarchy’, *Frontline*, 21 August 2013, available at <http://www.frontline.in/cover-story/taking-on-patriarchy/article5037878.ece>, last accessed 3 May 2014.

outside.²⁷⁵ Starting points may be found on several levels. For instance, on 9 July 1993 India ratified the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁷⁶ There have been numerous court judgments, not least the cases of Shah Bano and Danial Latifi already mentioned here, where the judiciary ruled at least in its conclusions in favour of women's rights, even though there were difficulties, and the trend was not always an unambiguously universal one. We should mention furthermore that liberal Muslims in particular have been satisfied with the judgments mentioned and put their faith into the courts when it comes to further reforms. It is indeed the courts that have the power to bring Muslim opinions to public notice, although they may not be conforming to the traditionalist mainstream of the large organisations.²⁷⁷ The Shah Bano judgment was regarded as support for feminist Muslim interpretations of self-definition ('minority selves').²⁷⁸ Remarkably there was hardly any opposition after the even more far-reaching judgment in the Danial Latifi case; in addition there was hardly any relevant public debate on the matter and consequently it has, in the absence of significant media coverage, remained largely unknown among the population.²⁷⁹ The same is true of subsequent cases considerably improving Muslim women's rights to maintenance after the expiry of the *'idda* period (Shabana Bano case 2009),²⁸⁰ while some religious leaders still protested.²⁸¹ The Shabnam Hashmi

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275 Cf. Catherine A. MacKinnon, Sex equality under the Constitution of India: Problems, prospects and 'personal law', *IJCL* [2006] 4 (2), 181–202.

276 On this basis, Hajira Kumar, for instance, also demands (The status, 16f.) equal rights for women, stating that Islam is not opposed to this ('With a little bit of reinterpretation, all important human rights might be granted to Muslim women in India without creating any controversy'); this is an exceedingly optimistic view; cf. also Durrany, *Muslim Law of Divorce*, 397 ff., 403 ff., 406 f.

277 As pointed out by Mullaly, *Gender*, 213 ff.

278 Cf. *op. cit.*, 216.

279 Information provided by the lawyer and chairwoman of the women's rights organisation *Majlis*, Flavia Agnes, during a conversation on 14 June 2006 in Mumbai. It appears that other courts have also considerably increased the sums of post-marital maintenance for the divorcees in interpreting the Muslim Women (Protection of Rights on Divorce) Act 1986 generously in the sense of granting maintenance for the rest of their lives; cf. the report 'Personal laws: A reality check', *Frontline*, 21 August 2013 (Rohit De), last accessed 16 April 2014 (www.frontline.in/cover-story/personal-laws-a-reality-check/article5037670.ece).

280 *Shabana Bano v. Imran Khan*, AIR 2010 SC 305. Interestingly, according to the files the marital dispute had started over the dissatisfaction of the groom and his family with the dowry (!) the parents of the bride had paid.

281 Cf. the evaluation of several cases by Narain, *The Supreme Court*, 97 ff.

case from 2014 (cf. 2.a above) underlines this development. The reasoning in this case might clear the way for ‘parallel’ reforms of religious laws under common legal headings like ‘combating domestic violence’, which is widespread across communities, or legal interference in application of the Indian *ordre public*. The Protection of Women from Domestic Violence Act 2005 can be interpreted in the latter way. Other legal initiatives aiming at improving women’s rights regarding marital property distribution are further examples for common societal needs irrespective of religion or ethnicity. Interestingly, male opposition is organised in ‘men’s rights’ groups arguing that Indian law unduly favour women.²⁸²

Alternatively, particular parts of the legal areas covered by religious laws might indirectly be reformed by opt-out solutions like the Special Marriage Act and under the new legislation regarding adoption. Muslims supporting reforms are, however, not infrequently discredited as agents of the West or accomplices of Hindu nationalists and find themselves under pressure from strong traditionalist institutions. Clear-sighted representatives of Muslim groups, high-ranking ones among them, express great concern over this situation in private. In addition, initiatives for reforms mainly originate among the ranks of social scientists or members of socially engaged organisations, whose reputation is cast into doubt when it comes to matters of religion or religious law. The newly founded All India Muslim Women’s Personal Law Board is just one organisation attacked in this way. The pressure appears to be great, with the result that many women approach the Board privately but are afraid to show their support publicly.²⁸³

Still, the board has succeeded in developing a new standard marriage contract which, compared to the abovementioned form provided by the All India Muslim Personal Law Board, guarantees considerably more legal certainty, especially by means of the mandatory official registration of marriages.²⁸⁴ There are furthermore individual institutions and personalities from among the Islamic theological spectrum who put considerable effort into encouraging a reform debate. One prominent representative of this trend was Asghar Ali Engineer of the Institute of Islamic Studies in Mumbai.²⁸⁵ His writings aim at a broad Islamic reform debate, as is especially obvious from the title of one

282 Ibid.

283 As stated by Parween Abdi, general secretary of the All India Muslim Women’s Personal Law Board during a conversation with the author in Mumbai on 11 June 2006.

284 Cf. ‘New nikahnama to end harassment’, Times of India, 8 3 2008, 19.

285 He was a member of the Shi’ite Ismaili group of the Bohras. Because of this he was not accepted by some Sunni and other Muslims.

of his works, 'On Developing Theology of Peace in Islam'.²⁸⁶ Reformers criticise the adherence to uncodified law, as they believe that in view of the widely scattered sources, which are often less than clear with reference to one another, it renders well-founded decisions well-nigh impossible, leaving the field open to fatwas and (mis-)interpretations by opportunists and reactionaries.²⁸⁷

Overall, it seems that preserving the system of personal law with a religious background as such, rather than its specific substance, is regarded as shaping, and especially preserving, the group's identity. Consequently the demands by many high-profile Muslim scholars and representatives of organisations as well as scholars for reinterpretation with a focus on gender as well as religious equality may well start an internal Muslim debate, which will be a much more effective way to achieve reforms than measures which continue to be seen as being controlled from the outside and thus viewed with hostility.²⁸⁸ Liberals in particular find themselves under pressure on two sides: not only from the traditionalist corner but also due to the widely held anti-Muslim sentiments, especially in the wake of the attacks of 11 September 2001 and others in India. Thus, it would be difficult to conduct an internal reform debate on a scientific and dogmatic level even in the eyes of those who would foster it, since it might 'open the floodgate'²⁸⁹ to all sorts of external intervention and pressure. In sum, double-standard pressure on minorities by the majority to reform their laws is likely to trigger resistance to any changes, even if they are considered desirable, and to silence internal reform debates rather than to encourage them.

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The discussion described here shows in turn that the essential lines of argument are tied to the antagonism between the secular state on the one hand and Muslim specific interests on the other. Two important issues are ignored here: who represents the specific interests, and what is their substance? The legitimisation of the organisations involved is questioned by many Muslims; in addition, there is strong competition among those organisations.²⁹⁰ The other,

286 New Delhi 2003.

287 Ahmed, *Muslim Personal Law*, 85, 89; cf. also Engineer, *Communalism*, 8 ('Abuse of Sharia law is widespread and Muslim women suffer from various legal disabilities').

288 Thus for instance the summary of a conversation between the author and Mawlana Ali Muhammad Naqwi on 3 May 2006 in Delhi, and of numerous other conversations.

289 An expression used by Dr Zafarul-Islam Khan, President of the Muslim umbrella organisation All India Muslim Majlis-e Mushawarat and chief editor of *Milli Gazette* during a conversation with the author on 8 April 2014 in New Delhi.

290 Yusuf Hatim Muchhala, member of the AIMPLB, informed the author in a conversation in Mumbai on 30 April 2014 that the member organisations of the AIMPLB reject the

possibly even more significant, issue concerns the substance: is it admissible for pluralism to lead to a considerable group of people – in this instance Muslim women – being denied rights, namely equal rights for both sexes, to which other women are entitled at least formally?²⁹¹

Conversations between the author and numerous Indian Muslims from organisations, media and the academic world have shown that the majority would have no difficulty waiving traditional Islamic penal law being applied, even though its laws are occasionally defended – at least on a theoretical level – as effective deterrent.²⁹² In the view of traditionalists, too, applying Islamic penal law (and especially the *hudūd*) presupposes an Islamic state, which India is not.

Ulama and many representatives of important Muslim institutions do, however, see Islamic personal status law and inheritance law as an elementary component of this faith.²⁹³ Thus the resolution of the All-India Muslim Personal Law Convention in Bombay on 27/28 Dec. 1972 states:

This convention also expresses its belief that the Muslim personal law is a part of their religion and it is not proper for a Muslim to disregard the injunctions of Shariat (...). This convention also expresses its firm resolve that Parliament or state legislative assemblies have no right to amend or abrogate Islamic Shariat and that it is only the recognized and trusted Ulema of respective Islamic sects and schools of thought who can decide finally which laws are or are not in accordance with or related to the Islamic Shariat.' 'Any attempt to abrogate the Muslim personal law, which is an integral part of their religion, and to replace it by a uniform civil code or effect changes in the Muslim personal law through

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institutionalisation of this mere umbrella platform, fearing the loss of their own resources and influence.

291 Cf. Jayal, *Secularism*, 164 f.; Mahmood, *Reform of the Indian Penal Code in Pakistan*, 422 ff.

292 In India Islamic penal law was replaced with the Indian Penal Code in 1860; cf. Diwan, *Muslim Law*, 16.

293 Thus the great majority of the people with whom the author spoke mentioned above who, however, draw diverging conclusions. This appears to have been the opinion of the British colonial rulers, too; cf. Hunter, *The Indian Musulmans*, 121. Mulla's book, often used as a standard text by the courts although its contents are not entirely beyond doubt, *Mohammedan Law*, 13 f., also states simply: 'Muslim law is founded upon revelation and is blended with religion.' He quotes a court judgment of 1885 here (*Govind Doyal v. Inayatulla* (1885) 7 ILR 775, 781; op. cit. 16) which states 'It is to be remembered that Hindu and Mohammedan Law are so intimately connected with religion that they cannot readily be dis severed from it.'

direct legislation (...) is a negation of the International Charter of Human Rights, is equivalent to cultural genocide and is a contravention of the fundamental rights enshrined in the Constitution of India (...).²⁹⁴

Consequently Muslims in India must obey the respective sharia regulations of personal status and inheritance law.²⁹⁵ This appears to be the view held by great parts of the Muslim population,²⁹⁶ while more liberal persons are of the opinion that this is in some cases superficial and exaggerated and distracts from the Muslims' true problems.

In addition some of the substance of Islamic family and inheritance law is regarded as worth defending against the Hindu mainstream as well as other specific religious laws. One instance emphasised is that Islamic law permits divorce, which according to Hindu religious beliefs is a sin (even though Hindu law now permits it as well). It is pointed out that furthermore under Islamic law women are granted full and independent rights of ownership²⁹⁷ and are entitled to a share in an inheritance in their family of origin; this was also not originally provided by Hindu law²⁹⁸ and was instituted only by an amended law in 2005; its practical implementation is furthermore in some doubt.²⁹⁹ A further essential difference is the treatment of payments on contracting a marriage: there is diametrical opposition at least between the concepts behind the Islamic legal rule of the dower on the one hand and the traditional Hindu norms of payment due to the groom's family (which is still practised despite the prohibition) on the other.³⁰⁰

294 Quoted in Noorani (ed.), *The Muslims of India*, 157 f.

295 As remarked by, e.g., Mohammed Abdul Rahim Qureshi, secretary of the All India Muslim Personal Law Board during a conversation with the author in New Delhi on 22 April 2006, and many other persons with whom the author has spoken.

296 Cf. e.g. Kaleem Kawaja, 'Shall clerics dominate the nation's Muslim politics?', *Milli Gazette*, 16–30 April 2006, 2, who criticises the public dominance exerted by the ulama, but without further reflection assigns them responsibility for personal law, as being a matter of religion.

297 Mahmood, *Statute-Law*, 90 f.

298 Cf. *op. cit.*, 89 and ff.

299 As stated by Prof. Vijander Kumar, expert in family law at the National Academy of Legal Studies and Research (NALSAR) in Hyderabad during a conversation on 20 June 2006 in that place.

300 Social science research shows parallels between Hindus and Muslims with regard to gender-specific discrimination; cf. Patricia Jeffery/Roger Jeffery, *Confronting Saffron Demography. Religion, Fertility, and Women's Status in India*, Gurgaon 2006, 55 ff., 83 ff. Dowry payment demands are equally widespread among Muslims.

The traditional view is supported by the central statutory norm in the Muslim Personal Law (Shariat) Application Act 1937. Muslims are not defined according to their affiliation with a particular social class, to linguistic or other aspects, but solely as those with regard to whom Muslim law is applied. Other 'identities' are not taken into account by the law, not even with reference to the social discrimination against e.g. Muslim dalits. Besides, this corresponds to the view of the majority society: 'minorities' are usually defined by their religious affiliation ('non-Hindus').³⁰¹

314 Ultimately this might be influenced by the desire to retain the last vestiges of former national sovereignty, which remained with the Muslims even under the British Raj.³⁰² This is particularly clear among the Muslims of northern India who, unlike the South, cherish their historical memory of centuries of 'Muslim' rule. A resolution during the founding conference of the AIMPLB on 28 December 1972 in Mumbai expresses this longing in striking words: 'We have lost everything – the government, our honour, property, and the Urdu language – and if attempts are made to take away from us our religion and the personal law given by God himself, we shall be left with nothing to fall back upon.'³⁰³

Issues of the concrete application in individual cases are discussed in rather less detail. Organisations and institutes of liberal Muslim thinkers are one exception,³⁰⁴ committed Muslim women's organisations such as Aawaz-e Niswan (founded 1987) even more so. However, some influential Muslims do criticise that the religion of Islam is understood from the point of view of the study of legal norms (in their medieval guise), rather than the other way around by deriving religious law from the spirit of the religion. Thus the general secretary of the Islamic Fiqh Academy in New Delhi, Amin Usmani, pointed out in conversation with the author that while in the curriculum of the Dar-ul-Uloom in Deoband the study of Quran and hadith precede that of fiqh, 'they study Quran and hadith in the light of fiqh'.³⁰⁵ Several scholars stressed in conver-

301 Thus Prof. Imtiaz Ahmad during a conversation with the author in New Delhi on 10 May 2006.

302 Intimated by Dr Zafarul-Islam Khan, editor-in-chief and publisher of the Milli Gazette, during a conversation with the author in New Delhi on 10 May 2006.

303 'Muslims Oppose Change in Personal Law', printed in Noorani (ed.), *The Muslims of India*, 155 at 10a.

304 For instance the chapter 'Reforms in Muslim countries' in Chavan/Kidwai's book, *Personal Law Reforms*, 224 ff.

305 As stated during a conversation with the author in the Islamic Fiqh Academy in New Delhi on 22 April 2006 and again on 9 April 2014; regarding the curriculum cf. Sikand, *Bastions of the Believers*, 101 ff.

sations with the author that even the study of *fiqh* occurs on a very low educational level, ignoring all possibilities and exigencies of individual reasoning (*ijtihad*) and rejecting the study of developments in other countries applying Islamic law.³⁰⁶

Similarly Tahir Mahmood, prominent author and representative of important organisations, lamented that over the course of Islamic history *fiqh* has become reduced to being law only, and that issues relevant to present-day India are not part of jurists' training and education. Conversely, Islamic law taught in modern law schools is limited to only the field of family law, while any tie to its juristic foundations, its place within history and its development within the contemporary Muslim world are touched upon at best briefly.³⁰⁷ What is missing, he said, is any kind of exchange between the two institutions.³⁰⁸ A further concern is that 'things are learned by heart, but not really read.'³⁰⁹ The Islamicist and women's rights campaigner Zeenat Shaukat Ali criticised the transformation of the Islamic faith into law, and the thoughtless interpretation of the comparatively few Quranic legal norms without any reference to the greater context, concluding as follows: 'We go back to what Ṭabari³¹⁰ says, but not to what God says.'³¹¹ Tahir Mahmood stated that the prophet Muhammad 'was a social reformer above everything else; he was a thousand years ahead of his time, but those thousand years have passed.'³¹² There are more than a few representatives of traditionalist views who are willing to enter into discussions of these issues off the record – not, however, publicly. Nevertheless, the Muslim scholarly and activist scene is increasingly pluralistic. Social support 'from the inside', by Muslim women activists in the community is likely to encourage changes through 'law in action.'³¹³ New ideas can be increasingly spread by new

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306 Even basic skills such as learning English are highly disputed in the influential, extremely traditionalist institutions like Darul Uloom Deoband. According to information given by Amin Usmani in a conversation in Delhi on 9 April 2014, the attempt to teach English to 10–15 out of 4,000 students in Deoband failed due to strong opinions declaring this incompatible with Islam; the two English teachers left, and thus the experiment failed.

307 As stated during conversations with the author on 25 April and 9 May 2006 in New Delhi. The author is able to confirm from his own observation that not even the libraries of renowned legal studies departments contain much literature on these topics.

308 Mahmood, *Statute-Law*, 281 f.

309 Thus Imtiaz Ahmad during a conversation with the author in New Delhi on 10 May 2006.

310 Famous Quranic commentator and founder of a short-lived school of law, b. 225/839, d. 310/923.

311 As remarked during a conversation with the author on 15 June 2006 in Mumbai.

312 During a conversation with the author in New Delhi.

313 Cf. the report 'Personal laws: A reality check' by Rohit De, *Frontline*, 21 August 2013, last

forms of media, particularly within the emerging middle class. Some activities of the Islamic Fiqh Academy in Delhi,³¹⁴ including seminars for young scholars on *ijtihād* and *maqāṣid al-sharī'a*, and on contemporary research methods and tools may slowly but steadily open scholars' minds. Last but not least, according to oral reports³¹⁵ there is an increasing number of Hindu–Muslim marriages, with both male and female Muslim partners, among members of the middle class; the latter would not have been compliant with the views of all schools of Islamic law until now. Thus, the process of diversification by national interaction and globalisation can further encourage controversial debates and challenge authoritarian claims of long established institutions.³¹⁶ But practical help and advice on a case to case basis are still much more widespread than scientific debates on the general (re-)interpretation of Muslim Personal Law as such.

accessed 16 April 2014 (www.frontline.in/cover-story/personal-laws-a-reality-check/article5037670.ece).

- 314 Information is available at the Academy's website www.ifa-india.org/ (last accessed 3 May 2014).
- 315 Information given by Amin Usmani, administrative secretary of the Islamic Fiqh Academy India in a conversation in New Delhi on 9 April 2014.
- 316 This is at least the case in politics; cf. the report 'Days of Bukharis are history, say Aligarh Muslims', *Times of India*, 9 April 2014. The report deals with the statement of Delhi Jama Masjid's Imam Bukhari, who had asked Muslims to vote for the Congress party in the 2014 elections. One of the interviewees commented this by saying: 'I can tell you with certainty that Muslims are not at all bothered by such calls. It used to happen in our fathers' or grandfathers' era.'

Canada: An Example of a Typical Immigration Country

1 Introduction

Canada is a typical immigration country. There are around one million Muslims among its ca. 33 million inhabitants,¹ most of whom have immigrated from the Indian subcontinent and East Africa, in smaller numbers also from the Middle East, the former Soviet Union and former Yugoslavia.² The majority are Sunni Muslims of various denominations, but there is also a large minority, estimated around one third, of Shi'ites, also of differing denominations. The attitudes of individuals and groups toward their religion is highly diverse.³

Canadian society explicitly regards itself as multi-cultural.⁴ This is even laid down in the Canadian constitution: Sect. 27 of the Charter of Rights and Freedoms demands an interpretation of the constitutional statutes '(...) in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.' The unanimously approved Multiculturalism Act of 21 July 1988 confirms this fundamental principle and specifies it with emphasis on the prospects of multiculturalism.⁵ In a judgment of

1 According to the 2011 National Household Survey (available at <http://www.statcan.gc.ca/daily-quotidien/130508/dq130508b-eng.htm>, viewed on 30 May 2014), in 2011 people who identified themselves as Muslims made up 3.2% of the population (33,476,688 persons according to the May 2011 census). According to the 2001 census there were 579,640 Muslims living in Canada (more than twice as many as 1991); 352,500 of them in Ontario; cf. the data at <http://www12.stscan.ca/english/census01/products/highlight/Religion/Page.cfm?Lang=E&Geo=PR&View=1a&Code=01&Table=1&Start-Rec=1&Sort=2&Ba=Canada&B2=1> (the figure for Ontario may be found at the same address, but 'code=&35&Table'), viewed on 9 Aug. 2006.

2 Cf. the overview in Amir Hussain, *Muslims in Canada*, 359, 361, and the broader overview on *Muslims in Canada* in Hussain/Scott, *Muslims*, 167, 182 ff.

3 Cf. only the information provided by Amir Hussain, *op. cit.*, 362, 364; Moghissi/Rahnema/Goodman, *Diaspora*, 84 ff.

4 Cf. the overview in Resnick, *The European Roots*, 57 ff. with further references; for a basic overview see Kymlicka, *Multicultural Citizenship*; *id.*, *Finding Our Way*.

5 Sect. 3 (1) states: 'It is hereby declared to be the policy of the Government of Canada to (a) recognize and promote the understanding that multiculturalism reflects the cultural

2004⁶ the Supreme Court describes Canada as ‘a multiethnic and multicultural country (...) which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities – and is in many ways an example thereof for other societies (...)’

Legal plurality is also one of Canada’s characteristics: English and French legal heritage have coexisted since the eighteenth century; there are also legal systems and group-specific laws of the indigenous peoples (first nations).⁷ In 2003 Chief Justice Beverley McLachlin spoke of her pride in Canada’s ‘encouraging and nourishing the identity of the other, and celebrating the gifts of difference.’⁸

317 Until some years ago the presence of Muslims in Canadian society was on the whole a matter of course which did not provoke any wider public discussion. The large numbers of immigrating Muslims are of comparatively recent date (according to the 1981 census there were 89,165 Muslims living in Canada; according to the 1970 census, only 33,370).⁹ Since 11 September 2001 Islamic extremism has sparked debates in Canada, too.¹⁰ One specifically Canadian feature was the debate surrounding the establishment of Islamic arbitration courts in Ontario and Quebec to deal with issues of family and inheritance law from 2003 onwards. The debate was conducted vehemently in parts and generated international interest; it ultimately resulted in the creation of a specific legal basis on which to establish such courts being unanimously

and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage; (b) recognize and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada’s future.’

6 *Syndicat Northcrest v. Amselem* [2004] 2 R. C. S. 551, 595 f.

7 Cf. DeLloyd J. Guth/W. Wesley Pue’s (eds.) collection, *Canada’s Legal Inheritances*, Winnipeg 2001; Serge Rouselle, *La diversité culturelle et le droit des minorités: une histoire de développement durable*, Quebec 2006; Gaudreault-DesBiens, *The State Management*, 195 ff.

8 Quoted in Resnick, *The European Roots*, 59 f. with n. 76.

9 References in Amir Hussain, *Muslims in Canada*, 361.

10 Cf. the overview in Steven Frank, *Islam and Canada*, *Time Canada*, 28 May 2005, viewed on 23 July 2006 at <http://canadiancoalition.com/torontostar13/IslamAndCanada.html>; Ahmad F. Yousif, *The impact of 9/11 on Muslim identity in the Canadian national Capital Region: Institutional response and future prospects*, *Studies in Religion* 34/1 (2005), 49 ff.; the overview in Amir Hussain, *Muslims in Canada*, which contains a wealth of factual information; Zine, *Introduction*, 1, 6 ff.; Jiwani, *Colluding Hegemonies*, 115 ff.

rejected in the Quebec parliament, and the existing legal basis in Ontario was substantively changed (see more 2.d below). According to an opinion poll in October 2005 nearly two thirds of Canadians opposed religious arbitration in family matters in general, and also specifically against a Muslim arbitration system of the kind.¹¹ What is remarkable is that other religious communities, among them the Jewish¹² and the Ismaili Muslim ones,¹³ had had similar arbitration systems for some time, without the public ever having taken notice of it.

2 The Legal Framework for Applying the Norms of Islamic Law in Canada¹⁴

a Introduction

In Sect. 2 a) the Canadian Charter of Rights and Freedoms (Constitution Act 1982) guarantees among the fundamental freedoms of every citizen the fundamental right of freedom of conscience and religion. Sect. 15 (1) grants protection from discrimination on the grounds of religion and gender. The religious free-

11 Norma Greenaway, '63 per cent oppose faith based arbitration', *The Ottawa Citizen*, 31 Oct. 2005, viewed on 23 July 2006 at <http://www.canada.com/ottawa/ottawacitizen/soundoff/story.html?id=997485b8-bf66-41a1-bd58-8b8e1e4341193&rpf=dta>; in Ontario rejection was highest at 68%.

12 Cf. the statement by Jewish representatives in Marion Boyd's report at the request of her successors (Dispute Resolution, 55 ff.). The orthodox Rabbi Reuven Tradburk's comment is remarkable, according to which there is rarely any pressure brought to bear by the community to call on the religious judiciary (Beis Din), which is believed to be a religious duty. He adds that it does, however, happen occasionally that members' refusal to comply with the rulings of the Beis Din will be made public. The author had the opportunity to exchange ideas with Marion Boyd on the occasion of a shared public discussion in Montreal in October 2005 (thanks go to the Goethe-Institut and its head in Montreal, Mechthild Manus, as well as McGill University).

13 She does, however, apply Canadian law; particular attractions may be the comparatively intimate atmosphere which is understanding of cultural interrelations, the sufficient means of communication, and accessibility free of charge; information provided by Prof. Natasha Bakht during a conversation in Ottawa on 14 Sep. 2006; cf. also Boyd's report, Dispute Resolution, 58 ff.

14 This chapter is based on research carried out in Calgary, Greater Toronto, Montreal, Ottawa, Québec City, and Vancouver from June to September 2006, in August 2008, in March 2011 and in June 2014. I am deeply grateful to the Thyssen Foundation which generously supported this research in 2006 and 2014.

dom granted here as well as in the province constitutions is far-reaching. It includes not only religious beliefs and their expression but also religious education (not, however, in state schools)¹⁵ and promoting and practising religion in the public sphere.¹⁶ Islamic religious norms fall under these rules. The application of legal norms beyond the territorial limits of the state in which they have been declared binding, on the other hand, only ever happens in exceptional cases – as everywhere in the world – which are defined by the relevant legislator.

318 **b** *International Cases Involving Private Law*

In the case of international issues in private legal relations, international standard dictates that the law of the respective country in which the court is situated is not automatically to be applied, but the law which is closest in substance. This will be determined by means of the norms of private international law (conflict of laws), which can be shaped in different ways. Canadian conflict of laws¹⁷ does not tie family matters to the nationality of the parties

15 Concerning Ontario cf. Ontario Court of Appeal in *Canadian Civil Liberties Association v. Ontario (Minister of Education)*, [1990] 65 D. L. R. (4th) 1; criticism by Brun, *Droit constitutionnel*, 1032.

16 Cf. e.g. Brun, *Droit constitutionnel*, 1028 ff. with further references; Hogg, *Constitutional Law*, 964 ff.; Sharpe/Roach, *The Charter*, 132 ff.; for an in-depth-report on the legal aspects of Canadian diversity cf. Gaudreault-DesBiens, *The State Management*, 195, 208 ff. Québec has introduced bill 94 in 2010 practically banning the face-veil (*niqāb*) in connection with public services; cf. Art. 6 of the bill and the report ‘Quebec niqab bill would make Muslim women unveil’, *The Star* 25 March 2010, available at http://www.thestar.com/news/canada/2010/03/25/quebec_niqab_bill_would_make_muslim_women_unveil.html (last accessed 30 May 2014); for the debate on this bill cf. Zine, *Introduction*, 9 ff. and the very balanced brief of the Canadian Council of Muslim Women of 7 May 2010 to the National Assembly of Quebec, available at http://ccmw.com/wp-content/uploads/2013/02/ccmw_bill94_brief_may_7_2010-2.pdf (last accessed 16 July 2014). Equally, women must remove the niqab to testify in courts if their credibility became an issue, cf. Supreme Court in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, and the following decision of a Toronto court in the same case in April 2013 (report “Women to remove niqab to testify in Toronto case”, available at http://www.thestar.com/news/crime/2014/01/13/woman_to_remove_niqab_to_testify_in_toronto_case.html#, last accessed 9 June 2014).

17 Regulated by the legislative competency granted by the law of the provinces (in practice the majority of instances) or the country as a whole; the tie to forms of ‘domicile’ or ‘residence’ is the preferred one, and the closest to a common denominator; cf. only Walker, Castel & Walker, *Canadian Conflict of Laws*, §§ 4.1 and ff., § 18.1, § 25.1.b; McLeod, *The Conflict of Laws*, 235 and ff., 270 ff., 279 ff., 291 ff. Since 1994 Quebec has had a conflict of laws

involved but to the (common) habitual residence, or the *lex fori*, (Sect. 15 (1) Family Law Act Ontario 1990/2006 for property rights), or the matrimonial domicile for marriage contracts ('domestic contracts').¹⁸ The mandatory rules set out in Sections 33 (4), 56 (1) of the Act apply, to marriage contracts entered into outside Canada as well.¹⁹ In 'domestic' cases, this system usually leads to (the respective) Canadian substantive law being applied independently of the nationality of the parties involved. In 'foreign' cases, on the other hand, the international jurisdiction of Canadian courts is probably usually missing.²⁰ In addition, according to Canadian conflict of laws (unlike for instance under § 293 ZPO [(German) code of civil procedure]) foreign law is never regarded as law to be applied officially, but as a fact to be presented and proved by the party referring to it. Failing this, Canadian substantive law will take effect as *lex fori*.²¹ Consequently the application of foreign substantive law is relatively limited, mostly to cases related to the recognition of foreign legal acts or decisions, e.g. marriage or divorce.²²

Under Sect. 1 (2) Family Law Act 1990, polygamous marriages are recognised as marriages with respect to some legal issues, e.g. claims for spousal and child support, custody or regarding succession, as long as they were entered into within the jurisdiction of a legal system which permits such marriages.²³ Equally, *ṭalāq* divorces validly performed under foreign law can be recognised under Canadian law under certain circumstances.²⁴ On the other hand, in

standardised in the tenth book of the Code civil, which is similar to European regulations in part.

- 18 For the differences between civil law and common law systems in determining the connecting factors in Private international law cf. only Pitel/Rafferty, Conflict of Laws, 9f.
- 19 Cf. MacDonald/Wilton, The 2005 Annotated Ontario Family Law Act, 58 §1, p. 537f. with further references.
- 20 Cf. Walker, Canadian Conflict of Laws, §§ 11.1.2.c, 17.1.b; the fundamental rule applied in Quebec is Art. 3134 C. c. Q., which also ties the international jurisdiction to the defendant's domicile; similarly Art. 3148 para. 1 C. c. Q. (domicile or residence in patrimonial matters). Cf. e.g. the custody dispute case *Kanafani v. Abdalla* (2010), 89 R.F.L. (6th) 168.
- 21 Cf. Walker, Canadian Conflict of Laws, § 7.1 and ff. with numerous references; the law of Québec is more restrictive, cf. Talpis, L'accommodement, 318ff., distinguishing e.g. in succession matters whether the deceased was a resident or not.
- 22 Cf. e.g. *Hassan v. Hassan*, 2006 ABQB (Court of Queen's Bench Alberta) 544; *Sangi v. Sangi*, 2011 BCSC 523.
- 23 Cf. Payne/Payne, Canadian Family Law, 19f. with further references; Marvin Baer et al., Private International Law, 752ff.; Bailey/Baines/Amani/Kaufmann, Expanding Recognition of Foreign Polygamous Marriages, 9f.
- 24 Cf. Pitel/Rafferty, Conflict, 414ff. with further references. For Québec cf. Hardy-Dussault/

immigration cases Canadian jurisprudence now tends to completely reject the recognition of *ṭalāq* performed abroad, which can lead to all sorts of uneven legal relations.²⁵ New conflicts have arisen regarding adoption procedures in Canada based on *kafāla* (cf. above Part One III.2.b)hh) e.g. in Pakistan. Since 2013 Canadian authorities have refused to accept *kafāla* as a basis for a subsequent adoption in Canada.²⁶ In sum, the small number of published decisions does not allow for an in-depth analysis of details regarding the scope and limits of the application and recognition of Islamic legal norms. The following chapter on Germany, where a huge number of cases is available, will deal with these issues in detail.

c *Dispositive Substantive Law*

Canada's family law is regulated partly by provincial laws and partly by national law.²⁷ Sect. 91 (26) of the Constitution Act 1867 assigns 'Marriage and Divorce' legislation to the national level. Under Sect. 92 (12) the 'Solemnization of Marriage in the Province' is under provincial jurisdiction, as well as under Sections 13 and 14 further areas of civil law and the judiciary in the provinces. Under these laws (e.g. the Ontario Marriage Act, R. S. O. 1990²⁸ and the Code civil du Québec;²⁹ there are similar codes in all the provinces)³⁰ solemnising a marriage can be delegated to recognised religious representatives. Thus the Islamic Center of Quebec is believed to have solemnised 3,000 marriages in 1998 alone.³¹

Helly, L'ordre public, 719 ff. Obviously, the concrete approach in applying *ordre public* is still prevalent; cf. also Talpis, L'accueil, 307 ff., 334 ff. regarding the *ṭalāq*.

- 25 Cf. Fournier/Setrakian/McDougall, Islamic Divorce, 235, 238 ff., 246 f. with further references; cf. also Pitel/Rafferty, Conflict, 417 f.
- 26 Cf. 'Anger over ban on adopting Pakistani kids', Toronto Star 5 August 2013, 1, 4 (Nicholas Keung); for the legal reasoning cf. Québec, Ministère de la Santé et des Services sociaux, Kafala and adoption, available at http://www.adoption.gouv.qc.ca/en_adoption_kafala.phtml (last accessed 30 May 2014). In the years before, courts had accepted the *kafāla* validly performed abroad as a basis for a Canadian adoption; cf. Talpis, L'accueil, 330 ff. with references.
- 27 Regarding religious aspects of family law in Canada cf. Ogilvie, Religious Institutions, 365 ff.
- 28 Cf. the reference in *Kaddoura v. Hammoud* (1998), 168 D. L. R. (4th) 503 (Ont. Civ. Div.), 509.
- 29 Ibid. Art. 366; also Castelli/Goubeau, Le droit de la famille, 58.
- 30 Cf. Hogg, Constitutional Law, 974 at 39-9.
- 31 Information provided on the occasion of an information event of the Islamic Information Center Vancouver on 19 Aug. 2006 in Vancouver.

Marriage contracts (cf. Sect. 51ff. Family Law Act, R.S.O. 1990/2006) including proprietary regulations and separation agreements (cf. Sect. 54 (3) of the Act) with effect on the right of education and right of custody (Sect. 54 (3) (c) and (d) of the Act, restricted by Sect. 56 (1) of the Act)³² as well as alimony arrangements are permissible. Under e.g. Sect. 33 (4), 35 (3)–(5) Family Law Act, R. s. o. 1990/2006 of Ontario they are, however, subject to results being monitored. The slogan that there is only one uniform law for all (Canadians), which can be heard in the public debate surrounding the interpretation of the law according to religious principles, does not actually do justice to the situation. It is true with regard to the limits of scope under private law, but it ignores the numerous possibilities within this framework.³³

Divorce in Canada is the exclusive responsibility of public courts (cf. Sect. 8ff. Canadian Divorce Act 1985), which are also in charge of litigation concerning post-marital maintenance (cf. Sect. 15 (2) Divorce Act 1985).

In the area of family law Canadian courts have for instance had to judge in cases concerning the payment of the dower according to Islamic law, and have found different approaches. The British Columbia Supreme Court³⁴ considered the provisions for the payment of a dower in the marriage contract to be compatible with the relevant regulation of the province of British Columbia (Sect. 61 (2) (b) Family Relations Act, R. s. B. C. 1996) and declared it enforceable in the context of a divorce. A court in Ontario,³⁵ on the other hand, regarded it as a purely religious duty which could not be enforced by public courts.

Mistaken rulings like the last-named can indeed provide justification for demanding the implementation of religious law. The court quoted a mufti consulted during the proceedings, who had advised that such matters ought

32 Cf. MacDonald/Wilton, The 2005 Annotated Ontario Family Law Act, 54 § 5, p. 494, 56 § 1A, p. 507ff.

33 Thus also Natasha Bakht, Were Muslim Barbarians Really Knocking on the Gates of Ontario? The Religious Arbitration Controversy – Another Perspective, (2006), Ottawa Law Review.

34 Amlani v. Hirani (2000), 194 D. L. R. (4th) 543 (B. C. S. C.), p. 546ff. With good reason, the court did not take exception to the contract having been concluded after the civil ceremony during an Ismaili Islamic ceremony.

35 Kaddoura v. Hammoud (1998), 168 D. L. R. (4th) 503 (Ont. Civ. Div.), 507. It seems that the court – advised incompetently by imams – assumed that a marriage contract would be invalid under Islamic law without a *mahr* being agreed, while in these cases the *mahr al-mithl*, i.e. the customary *mahr*, is in fact deferred (cf. Part One IV.2.b)dd above). The case gives indications that the agreement may have been invalid or contestable due to other reasons covered by civil law. The Ontario Court of Justice ruled differently in the case of Khan v. Khan (2005 ONCJ 155) [2005] O. J. No. 1923 at no. 31ff.

to be dealt with exclusively before an Islamic religious authority, and appeared to agree with this opinion. The result would be that the parties involved in an extremely worldly matter – the adequate provision for divorced women as well as its legal limitations – are denied the protection of the state judiciary without necessity. The illusion that this decision could prevent the court stepping into the ‘religious thicket’³⁶ will in all likelihood come to an end at the very latest once an – entirely possible – maintenance action raises the issue of *mahr* and its influence on maintenance claims. In a more recent ruling the Ontario Court of Justice has taken a courageous step into said ‘religious thicket’ and classified a marriage contract concluded in Pakistan between a bride living in that country and a groom living in Canada as a ‘domestic contract’ according to Sect. 51 Family Law Act 1990 (i. c. w. Sect. 58). Subsequently it did declare the controversial provision concerning waiving post-marital maintenance under Hanafite Islamic law convincingly as invalid as it breached Sect. 56 para. 4 (b) as well as Sect. 33 para. 4 (a) and (b) Family Law Act 1990.³⁷

This judgment may establish standards for the future. The statement at no. 52 provides guidance: ‘The court (...) notes that defence should be given to the religious and cultural laws and traditions of all groups living in Canada. If, however, cultural groups are given complete freedom to define family matters, they may tread on the rights of individuals within the group and discriminate in ways that are unacceptable to Canadian society.’ The protection of weaker individuals against repressive group beliefs is subsequently defined in a more concrete fashion: waiving the claim to maintenance was not formulated clearly. Due to the cultural and social circumstances surrounding the arranged marriage, the bride was not able to take a genuinely free decision with regard to the controversial provision. She furthermore did not receive any independent legal advice.³⁸ Also it was not possible to foresee on the occasion of the marriage in Pakistan that later in Canada the bride would be living in complete isolation (enforced by her husband) and without any access to gainful employment. After all, she would otherwise have to rely on support from friends or

36 Op. cit., 512.

37 Ontario Court of Justice in *Khan v. Khan* (2005 ONCJ 155) [2005] O. J. No. 1923 item 32. Another aspect (which is not, however, relevant to the present context) dealt with the issue of whether the husband’s obligation of providing maintenance for ten years undertaken vis-à-vis the Canadian authorities on the occasion of the bride’s coming to live in Canada would have consequences in favour of the wife as well; cf. also the judgment of the British Columbia Supreme Court in *Achari v. Samy*, 80 B.C.L.R. (3d) 2000, 378.

38 Op. cit., item 48 ff.

social services, while he was able to provide maintenance.³⁹ This includes the most important case groups which can argue against such provisions being recognised.

What is remarkable is that the husband used his yearly income of C\$ 43,000 to support his father, his brother, and other family members. The court argued that in that case he would clearly be able to support his former wife as well.⁴⁰ At this point a conflict of legal culture arises: modern Western family law sets down a gender neutral duty of maintenance in the nuclear family, especially with regard to needy partners and children. Traditional Islamic maintenance law, on the other hand, all the more so in connection with customary practice, relies on extended family structures and a clear allocation of gender roles with the men being responsible for providing maintenance. Depending on social norms this responsibility also applies with regard to collateral relatives; regarding wives, however, only during the marriage and for a very short transitional period after a divorce. The prevailing opinion is that after this period the woman in need of maintenance must be provided for by her birth family. In international cases like the one described the role expectations of Western, gender neutral legal culture meet patriarchal extended family structures.

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According to polls among Canadian Muslims in 2006, 53% (55% women, 51% men) believe that traditional Islamic law (Sharia law) should be recognized by Canadian governments as a legal basis to settle family disputes; 34% rejected this idea. The responses have a clear social dimension: 63% of the least educated, 62% of the least affluent and 59% of the 18 to 29 age cohort supported the recognition of Sharia law.⁴¹ No specific questions on concrete instruments – Muslim arbitration, application within the framework of dispositive Canadian law, etc. were submitted. Thus, while the answers indicate the importance of Islamic family law for many Muslims, they do not indicate the means of realisation, nor do they illuminate individual preferences among the varying interpretations of Islamic family law or the reasons for their preferences (recognition in country of origin? Religious or cultural reasons?).⁴² Qualitative

39 Op. cit., item 58 ff., 74.

40 Op. cit., item 58 ff., 74.

41 Cf. Environics Research Group, Focus Canada Report 2006-4, 100 f., available at <http://www.environicsinstitute.org/uploads/institute-projects/focus%20canada%202006-4%20report.pdf> (last accessed 15 July 2014). The polls were based on 2,045 telephone interviews in December 2006 and 500 additional interviews between November 2006 and January 2007.

42 Cf. the enlightening report by Mcfarlane, Understanding trends, for the variety of attitudes

research done by Julie Mcfarlane in the US and Canada has shown that almost none of the 212 respondents advocated a formal legal status for Islamic law.⁴³

Regarding inheritance, Canadian law grants far reaching freedom of testation. Within the scope of Canadian mandatory law, wills on the basis of Islamic law can be accepted despite the fact that traditional Islamic law of inheritance grants male heirs double shares as compared to their female counterparts, and vastly excludes inter-religious inheritance (cf. part 1 4.3.); Canadian law itself enables a testator in general to double the shares of a heir to the disadvantage of others, or to even disinherit him/her in total in Common law dominated provinces within certain limits (protection of the interests of spouses and dependants⁴⁴). Organisations like the Islamic Society of North America Canada (ISNA Canada) provide forms for formulating such wills.⁴⁵ Nevertheless, the will could be invalid if the testator explicitly refers to the sex of the heirs being the reason for different shares.⁴⁶

Interestingly, arbitration in such matters might continue: The form contains a provision (no. 6) regulating possible conflicts in the interpretation of Islamic inheritance law among the trustees by declaring binding the decision to be made by the (US based!) Fiqh Council of North America of the ISNA.

A system of Islamic economy has evolved in Canada for those who are interested; it does not appear to have had any recognisable resonance in the public debate. Thus for instance financing real estate avoiding the payment of interest is possible in the form of the *mushāraka* of Islamic law. Some companies are engaged in this field.⁴⁷ The Royal Bank of Canada offers Sharia Compliant Equity-Linked Notes for financial investment endorsed by three Islamic scholars.⁴⁸ The Canadian Islamic Trust Foundations offers Islamic investments in

and reasons. Her report is based on 212 interviews done from 2006–2010 among divorcees, imams and other stakeholders in the US and Canada.

43 Mcfarlane, *Islamic Divorce*, xxi.

44 Cf. only MacKenzie, Feeney's *Canadian Law of Wills*, chapter 9; Oosterhoff on *Wills and Succession*, 813 ff., 851 ff.

45 Cf. ISNA Canada, available at http://www.isna.ca/downloads/misc/Last_Will_and_Testament/LASTWILLTestament_Br.pdf (last accessed 15 July 2014).

46 Cf. Talpis, *L'accommodement*, 339 f. regarding the law of Québec.

47 Cf. Hussain/Scott, *Muslims*, 191.

48 Cf. 'Muslim Mortgages' (Andre Mayer), *Friday Magazine*, 30 July 2004, viewed on 20 Sep. 2006 at http://www.canadianislamiccongress.com/fb/friday_bulletin.php?fbdate=2004-07-30; 'A Growing Interest in No Interest: Muslims and Ethical Finance' (Ron Csillag), *Friday Magazine*, 1 Apr. 2005, viewed on 20 Sep. 2006 at http://www.canadianislamiccongress.com/fb/friday_bulletin.php?fbdate=2005-04-1.

their forms for formulating wills according to traditional Islamic law.⁴⁹ There is also a multitude of businesses which offer – subject to Canadian contract law – for instance *halal* meat or Islamic burials.

d Arbitration

aa Introduction

Referring to arbitration courts in matters of family law appears to be quite common in Canada wherever it is permitted.⁵⁰ Besides the general reasons in favour of the mechanism of the so-called ADR (alternative dispute resolution, mediation or arbitration outside of public courts), public court judgments can often take a long time and can be comparatively expensive. In addition the threshold to receiving legal aid seems to be rather high. In the case of immigrants, language difficulties may be an additional problem, as are the general reluctance to become involved with public authorities and barriers due to different communication culture⁵¹ and the ignorance of many judges when it comes to cultural background.⁵² In fact, a number of Muslims have complained about discriminations by the public courts.⁵³ According to a study carried out by the Canadian Department of Justice in 2005, in these circumstances members of ‘visible minorities’ are 1.4% more likely to perceive court rulings unjust than the average of the population.⁵⁴ It is frequently not possible to fall back on internal, family mediation structures common in the regions of origin when the family members in question are not available.

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Furthermore, family “can either represent a comfort zone or a conflict zone to the individuals involved”.⁵⁵ Thus, family intervention may sometimes (not always!) have a negative effect, such as when e.g. sons are pressured to divorce their wives, or wives pressured to refrain from divorce even in cases of domestic

49 Cf. the website run by the ISNA Canada, available at http://www.isna.ca/downloads/misc/Last_Will_and_Testament/LASTWILLTestament_Br.pdf (last accessed 15 July 2014).

50 Cf. Boyd, Dispute Resolution, 9 ff., 35 ff.

51 Cf. Mathias Rohe, Executive Summary, in: Österreich, Bundesministerium des Inneren/Sicherheitsakademie, Perspektiven und Herausforderungen in der Integration muslimischer MitbürgerInnen in Österreich, Vienna, May 2006, 51.

52 Cf. Saris/Potvin/Bendriss/Ayotte/Amor, Étude de cas, 44 ff.

53 Cf. the account by Boyd, Dispute Resolution, 66.

54 Ab Currie, Problèmes juridiques et groupes vulnérables au Canada, 2005, 13. Juste recherche, viewed on 8 May 2007 at <http://www.justice.gc.ca/fr/ps/rep/justresearch/jr13/p5e.html>

55 Moghissi/Rahnema/Goodman, Diaspora, 58 in the enlightening chapter on Family and Spousal Relations in Diaspora, *ibid.*, 57 ff.

violence or strong suppression, or to waive their right to child custody.⁵⁶ It can also occasionally happen that Canadian judgments are not recognised in the country of origin if the latter's system of family and inheritance law is determined by religious legal norms.⁵⁷ On the other hand, some Muslim immigrants are not aware of the legal prerequisites for concluding a valid marriage in Canada (and other Western countries) and thus only agree on an Islamic "*nikah*" (marriage contract). If disputes arise from such legally invalid marriages, there will be only limited access to state courts; divorce cannot be obtained at all, while the (unofficial) marriage is socially binding.⁵⁸ All these are reasons supporting the demand for more or less institutionalised arbitration within the respective community but independent of the state judiciary.

The establishment of 'Islamic Sharia Courts'⁵⁹ to provide Islamic arbitration in Ontario and the heated public debate about it is of particular interest.⁶⁰ The 'courts' and the debate surrounding them provide an illustration of the problems and conflicts often discussed under the simplifying heading of 'parallel society'. So far, Canada is one of only a few Western states with a recently immigrated Muslim population that has allowed Islamic arbitration tribunals in a form regulated by law and with far-reaching competencies. In Europe, the only officially recognised Muslim Arbitration Tribunals are operating besides informal Sharia Councils in the UK (cf. IV.3.e below). Consequently the Canadian model will be analysed in more detail below, as it may allow us to derive standards for the future handling of such developments. After lengthy preparation, the Islamic Institute of Civil Justice⁶¹ introduced Islamic arbitration tribunals

56 Saris et al., *Étude de cas*, 77 ff.; Mcfarlane, *Understanding*, 29 ff.; Mcfarlane, *Islamic Divorce*, 86 f., 130 ff., 258 ff. regarding the attitudes of some families, imams and other community members.

57 Cf. op. cit., 33, 94 f. This is likely to be a significant reason for Muslim, but also Jewish, arbitration proceedings. Regarding the difficulties from the German point of view cf. BGH FamRZ, 2008, 1409 with note by Henrich.

58 Cf. e.g. the data in the report by Mcfarlane, *Understanding Trends*, 11 ff.

59 Employing the term 'court' in the debate was typical. Opponents frequently did not refer to the concrete legal provision which is limited to arbitration tribunals, but supporters, too, employed the term – probably deliberately and in order to express a claim to as extensive a jurisdiction as possible.

60 Cf. e.g. the contributions in Korteweg/Selby (eds.), *Debating Sharia*, 2012.

61 The institute was founded in October 2003 with 30 members, cf. 'Canada Moves Toward Accepting Islamic Sharia Settlements', *Friday Magazine*, 12 Dec. 2003; viewed on 20 July 2006 at http://www.canadianislamiccongress.com/fb/friday_bulletin.php?fbdate=2003-12-12#5. Seemingly, after the death of its president Syed Mumtaz Ali in 2009, it has virtually

on the basis of the Arbitration Act, R. S. O. 1991 in Ontario in 2004,⁶² Catholics, Mennonites, Jehovah's Witnesses, Jews and Ismaili Muslims having already established this kind of religious arbitration. Under the law the jurisdiction of these institutions covered all arbitration agreements as long as the application of the Act was not ruled out entirely or the International Commercial Arbitration Act 1988 applied. This included matters of family and inheritance law. It was not mandatory to have a legal representative.

Islamic arbitration has triggered extremely vehement debates on the limits of multiculturalism in Canada.⁶³ Should multiculturalism lead to legal pluralism on the basis of structural, ethnic or religious reasons (going beyond the opportunities opened by existing dispositive law) or is a unifying legal tie for all citizens of the state required?

The debate was conducted on a rather abstract level of social politics and social sciences, weighing the pros and cons of legal pluralism. The concrete consequences have been discussed in rather less detail, least of all the question of which are the actual differences between Canadian secular law and the norms applied by Islamic arbitration,⁶⁴ and what are the consequences for the parties involved as well as society as a whole. In fact, as in the UK the predominant practical concern seems to be resolving very particular legal and social conflicts between civil and Muslim 'religious' divorce,⁶⁵ which does not necessarily require recognised institutions beyond state courts.

As early as 1993, on the occasion of the first attempt at introducing norms of Islamic law, Shahnaz Khan brought the entire problem complex connected to it to the point: supporters reject the racism directed against Muslims, but not the sexism among Muslims (when the relevant legal norms are applied).⁶⁶ Ulti-

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stopped its activities; cf. the outdated website <http://muslimcanada.org/justice.html> (last accessed 17 July 2014).

62 On the events leading up to the introduction cf. the description by the main propagandist Syed Mumtaz Ali 'A Word from the President ...', viewed on 7 Aug. 2006 at <http://muslim-canada.org/word.htm>

63 Rosie DiManno's article 'It's absurd and repugnant to label critics of sharia as Islamophobic' is only one example (Toronto Star 16 Sep. 2005, viewed on 11 Aug. 2006 at www.muslimchronicle.blogspot.com). Cf. also the overview in Boyd's report, Dispute Resolution, 4 ff.; Natasha Bakht, Were Muslim Barbarians Really Knocking on the Gates of Ontario? The Religious Arbitration Controversy – Another Perspective, Ottawa Law Review (2006); Emon, Islamic Law, 389 ff.

64 A most helpful detailed report on such differences is provided by Clarke/Cross, Muslim and Canadian Family Law, 2006.

65 Cf. Cutting, Faith-Based Arbitration, 66 ff.

66 S. Khan, Canadian Muslim Women, 59 ff.

mately the discussion in 2006 led to the application of norms of religious laws, which had been possible in Ontario until then, being restricted universally in the context of the arbitration of matters of family law.

The broader debate has been conducted with some vehemence and, in parts, remarkable scarcity of facts.⁶⁷ In its announcements the Islamic Institute of Civil Justice as the driving force gave the incorrect impression (possibly also for advertising purposes) that the government of Ontario had granted it specific permission to establish a sharia court.⁶⁸ The president of the Canadian Islamic Congress (CIC), Elmasry, accused the Muslim critics of publicly deriding their religion, badmouthing the prophet, ridiculing the Quran and mounting uninformed crusades in order to smear Islamic law, the sharia.⁶⁹ Propagandists with considerable media presence such as Syed Mumtaz Ali⁷⁰ and Aly Hindy⁷¹ very

67 Cf. only Emon, *Islamic Law*, 389 ff. Detailed and discerning remarks are found in Boyd's report, *Dispute Resolution*; cf. also the report by Kutty, 'Sharia' Courts, 123 ff.

68 Criticised by e.g. Faisal Kutty, 'Ignorance and Islamophobia forces Ontario government to ban faith-based arbitrations in Ontario' (12 Mar. 2006), *Media Monitors Network*, 5 July 2006, viewed on 18 July 2006 at www.canadianislamiccongress.com/fb/friday_bulletin.php?fbdate=2005-09-30.

69 'Why Was Shariah Not Treated Like Halachah', *Friday Magazine* vol. 8, issue 83, 30 Sep. 2005, viewed on 18 July 2006 at www.canadianislamiccongress.com/fb/friday_bulletin.php?fbdate=2005-09-30. ('Shariah will only become relevant when Muslims in Canada can depend on secular members of their communities not to make a cause of publicly deriding their religion, badmouthing their Prophet, ridiculing the Qur'an – and mounting uninformed crusades to smear their Islamic Law, the Islamic Shariah.') The Muslim Canadian Congress demanded an apology for these accusations from Elmasry, pointing out that they are related to the accusation of blasphemy, which might lead to the members being held liable under criminal law in some Islamic countries; cf. 'Sharia opponents demand apology for Elmasry's critical remarks', *Globeandmail.com*, 26 Oct. 2005, viewed at <http://www.muslimcanadiancongress.org/20051026.html>. The opinions held by the CIC are illustrated e.g. by a book recommendation on the website ([canadianislamiccongress.com/books.php](http://www.canadianislamiccongress.com/books.php), viewed on 12 Sep. 2006), where one of seven titles recommended is Abid Ullah Jan, *The End of Democracy*, whose contents fulfil the promise of the title.

70 Retired lawyer, late President of the Islamic Institute of Civil Justice and the Canadian Society of Muslims; regarding his biography cf. 'Our President', viewed on 13 July 2006 at http://muslim-canada.org/csm_president.html

71 Imam of the Salaheddin Mosque in Scarborough near Toronto, to which some of the 17 young Canadian Muslim terrorism suspects had ties (cf. only Michelle Shephard/Harold Levy, 'Accusations vary, lawyer says', *Toronto Star*, 17 June 2006). Hindy saw it as his duty to support those involved. He came to public notice in the summer of 2005 after an interview in the *Globe and Mail*, when he demanded that the Canadian government should stop 'terrorising' Canadian Muslims: 'If you try to cross the line, I can't

aggressively propounded the view that Muslims should only take the course of Islamic arbitration tribunals, and indicated that their aim was indeed to introduce greater coverage of the sharia, even though they did later relativise some of their statements due to the pressures of the debate. Critics were branded across the board as anti-Islamic propagandists and traitors to the Muslim community.

Opponents have rarely distinguished between individual aspects of the sharia and the diverse ways of interpretation.⁷² The news report which triggered the discussion on a larger scale was headed 'Canada preparing to enforce Islamic law' and began: 'Canadian judges will soon be enforcing Islamic law, or Sharia, in disputes between Muslims, possibly paving the way to one day administering criminal sentences, such as stoning women caught in adultery.'⁷³ This mobilised all possible forces of rejection, even though the concrete point at issue was 'merely' one aspect of civil law. Others expressed the concern that repressive Islamic legal systems would be strengthened by the Canadian 'example', while liberal Muslims in the Islamic world might be hampered in their struggle against the enforcement of laws that breach human rights.⁷⁴ A campaign was mounted against the appointment of two scholars and experts in Islamic law to the law department of Toronto University – it seems that the academic study of a field of law relevant throughout the world is not a matter of course any more.⁷⁵ Consequently some supporters of arbitration in matters

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guarantee what is going to happen. Our young people we can't control'; cf. the report 'Imam no stranger to controversy. Aly Hindy a vocal critic of spy service knows several suspects in latest raid' (Michelle Shepard), *Toronto Star*, 7 June 2006, viewed on 22 Aug. 2006 at http://thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&call_pageid=971358971358&c=Article&cid=1149630613162. This picture corresponds to quotes by Aly Hindy from his work at the mosque (quoted in Boyd's report *Dispute Resolution*, 98) according to which he considered there to be religious justification for husbands in arguments to beat their wives if the latter are disobedient, while the wives should not inform the police even in case of violent beatings.

72 The debate under this aspect has been criticised by e.g. Richard Fidler, 'Ontario's "Sharia Law" Controversy: How Muslims Were Hung Out To Dry', *Monthly ReviewZine*, 26 May 2006, viewed on 22 July 2006 at <http://mrzine.monthlyreview.org/fidler270506.html>.

73 *WorldNetDaily*, 28 Nov. 2003, viewed on 22 July 2006 at http://www.worldnetdaily.com/news/printer-friendly-asp?ARTICLE_ID=35850.

74 Cf. remarks made by Tarek Fatah, the former director of communications and founding member of the Muslim Canadian Congress, 'Keep sharia law out of Canadian Judicial system', 12 Aug. 2005 at <http://www.muslimcanadiancongress.org>.

75 Meanwhile, professors Anver Emon and Mohammad Fadel are broadly accepted as distinguished scholars far beyond the scientific community. The author, himself a Chris-

of family law, such as representatives of the CAIR-CAN⁷⁶ have argued in favour of omitting the term sharia from legislation and designation, as it evokes wrong associations. Those who rejected the ‘introduction’ of (Islamic) religious arbitration authorities were also ill-informed, as this had already been possible for some time, on the basis of the law of 1991.⁷⁷

Overall the discussion was often conducted on the most emotional level imaginable, without sufficient information and, occasionally, with a considerable amount of self-righteousness. In fact, this is typical of this kind of debate in the recent past in the Western world. Ultimately many opponents reduced the discussion to the stereotype of the oppressed Muslim woman (or woman oppressed by Islam) and the backward and cruel Islamic law, while most supporters emphasised the ‘defence of the pure faith’ and the defence against Islamophobic attacks, without reference to the truly problematic substance in traditional interpretations. Rather less of the discussion focussed on the possible advantages and disadvantages of religious (not only Islamic) arbitration, or the concrete problems arising from such proceedings – which are concerned, in particular, with the attitude of the arbitrators and their selection and interpretation of specific norms. We will go into these substantive aspects in some more detail below.⁷⁸

tian, has had similar experiences with a German publication named ‘Emma’, whose journalistic style in these issues appears to delight in the standards of the former GDR; cf. ‘Schwarzers Kanal – Desinformation für Fortgeschrittene’, viewable at <http://www.zr2.jura.uni-erlangen.de/aktuelles/kanal.shtml>. Cf. also Bahners, Panikmacher, 226 ff., 235 ff.

76 Canadian Council on American–Islamic Relations; quoted are, among others, the director Riad Saloojee in ‘Islamic group against Ontario use of Sharia law’, Canadian Press, 22 Aug. 2004, viewed on 3 Nov. 2006 at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1093194233767_13?hub=Canada

77 Paul Carlucci, ‘Arbitration Confrontation’, *Eye Weekly*, 15 Sep. 2005, is only one example, viewed on 23 July 2006 at http://www.eyenet.net/eye/issue/issue_09.15.05/op/wanderingeye.php. Cf. also Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario? The Religious Arbitration Controversy – Another Perspective*, Ottawa Law Review (2006).

78 Besides the sources used here – information provided in conversations conducted in person with representatives of interested organisations and scholars of the subject (October 2005 and July–September 2006), publications and statements on organisation websites as well as the records of parliamentary debates in Ontario and Quebec – I would also like to refer the readers to the statements published in Marion Boyd’s, the former Ontario Attorney General and Minister for Women, report, *Dispute Resolution*.

bb General Discussion of Advantages and Disadvantages of Religious Arbitration outside the Public Courts

Supporters overall refer to arguments which emphasise the advantages of this kind of arbitration, such as the option of confidential negotiations and the achievement of lasting compromise solutions in comparatively inexpensive proceedings.

Opponents are concerned about possible structural imbalance, and consequently argue in general against arbitration in matters of family law.⁷⁹ A further line of argument – besides specifically legal reasons, which centred on actually existing problems – was directed against the religious element as such, the tone frequently expressing scepticism of or hostility towards religion. Actions with religious motivation were presented – especially with regard to Islam – as backward and outdated and consequently not suitable for arbitration in legal disputes.⁸⁰ From this point of view the so-called ‘abolition’ of religious arbitration in Ontario was overall celebrated as a victory.

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More discriminating arguments looked at the aspect that belonging to an immigrant community – and most Muslims in Canada immigrated in the recent past – may give rise to specific problems especially for the socially ‘weaker’ members of the community. Overall it is probable that establishing communitarian spheres of control will restrict the freedoms of ‘weaker’ members of the community, because their chances of opting against the former practically disappear in the face of strong social pressure.

What is remarkable in this context is that the advocates of Islamic arbitration repeatedly stress that a Muslim who does not call upon these authorities is not a (good) Muslim.⁸¹ These claims are maintained online even after years of public debate. At item 23 of the FAQ list of the Islamic Institute of Civil Justice⁸² which has managed the Islamic arbitration system in Ontario since 2004, the refusal to adhere to a voluntarily agreed arbitration and call in the public courts instead is branded as ‘blasphemy-apostasy’.⁸³ It must be

79 Cf. the references in Boyd, *Dispute Resolution*, 29 ff.

80 Cf. *op. cit.*, 39 ff. Peculiar traits of a new, extreme secularism as a new religion may occasionally be perceived here.

81 For the repercussions in the debate among Muslims cf. Reda, *The ‘Good’ Muslim*, 231 ff.

82 Viewed on 19 July 2006 at <http://muslim-canada.org/pfl.htm#1>; last accessed 17 July 2014 (<http://muslimcanada.org/pfl.htm#23>).

83 ‘Once the parties have agreed on being governed by Muslim PFL, then they will be committed to it by their prior consent. As a consequence, on religious grounds, a Muslim who would choose to opt out at this stage, for reasons of convenience, would be guilty

pointed out that according to the traditional view in Islamic law, apostasy is a capital crime.⁸⁴

Mubarak Ali, a Muslim activist living in Canada, is most explicit in his 'Muslim Handbook',⁸⁵ which is praised by the director of the al-Azhar Academy of Canada, Shaykh Hafiz al-Saeed Muhammad Ghars El-Din in the preface, and which – according to a certificate from the al-Azhar University in Cairo reproduced in the book – does not contradict the Islamic faith in any way. In the chapters on Islamic family law, which he clearly believes to be binding and applicable in Canada as well, in connection with divorce the author points out that even within the jurisdiction of Islamic legal systems the faithful should not take every disagreement to the courts. In a non-Islamic system it would be a grave decision to allow 'unbelievers' to apply their standards to resolve disagreements between Muslims. In this case it might be that the ruling goes against the universally binding norms of Islamic law. Consequently it would be preferable if believers found solutions for the parties involved.⁸⁶ Remarks which brand the refusal to apply Islamic norms in the context of Western law as a crime, possibly even apostasy, must have a devastating effect on the public debate. They are furthermore likely to motivate fanatics to attack those who publicly disagree as, in fact, appears to have happened more than once.

Marion Boyd's report⁸⁷ shows some discriminating approaches, as do the writings of some jurists.⁸⁸ They have attempted to link possible advantages to education, support and control mechanisms in order to rule out discrimination against weaker persons. According to the suggestions, some of which have been implemented in the fundamental reform of the Arbitration Act, arbiters

of a far greater crime than a mere breach of contract – and this could be tantamount to blasphemy-apostasy.'

84 Syed Mumtaz Ali appeared to share this view, as we can deduce from his remarks (quoted second hand) on the subject of Salman Rushdie ('According to Muslim Law, a male apostate (...) is liable to be put to death if he continue obstinate in his error (...)'; in 'The Salman Rushdie Issue: A Synthesis of the Islamic Law of Blasphemy/Apostasy in the Context of Canadian Multiculturalism', The Canadian Society of Muslims (August 2004), viewed on 21 July 2006 at <http://muslim-canada.org/aposno1.htm>; last accessed 17 July 2014 (<http://muslimcanada.org/apostasy.htm>)).

85 Mubarak Ali, *The Muslim Handbook*, Toronto 2001. According to information given by Mubarak Ali himself, (p. xiii) he is a Friday preacher, lecturer and imam of the Weston Islamic Community Center.

86 Op. cit., 301.

87 Dispute Resolution, 109 ff.; summary at 12 ff.

88 Fundamental information may be found in Shachar, *Multicultural Jurisdictions*, esp. 88 ff.

will be members of a professional body and receive training which will allow to uncover and prevent discrimination against any of the parties involved in disputes. Concrete procedural rules, the prohibition of discriminatory agreements before the dispute arises, documentation and independent legal assistance to inform the parties involved on the subject matter and import of the proceeding will be put in place to guarantee fairness and equality that can be monitored. The results will be subject to public judicial monitoring, and the entire body of regulations to ministerial evaluation. Finally, there will be public information regarding the existing legal system and the possibilities of religious arbitration. As monitoring, however, has its limits, the question remains whether it would be possible to reverse decisions such as, in the context of divorce proceedings, waiving the claim to maintenance and/or returning property which had been intended to provide future security.⁸⁹

The discussion concerning advantages and disadvantages of 'joint governance' is clearly looking to the future and undeniably interesting on the academic level, but it is really rather abstract.⁹⁰ It presupposes that intended protective mechanisms will already be in place, but does not, in the author's view, take sufficient notice of what is probably the most important issue, namely the current protagonists and their orientation as regards substance. Institution-alisation would grant them social as well as, within the existing framework, legal power. It will be possible to influence these people's recruiting monopoly within the institution only partially, using appropriate control mechanisms. However, we should be under no illusions as to the effectiveness of control mechanisms, especially within the context of comparatively strict segregation of those involved from society as a whole. This is true in particular in cases where there are linguistic barriers separating the minority from the majority society, and where the courts are very cautious when it comes to intervening in the application of private-autonomous law and out-of-court arbitration of disputes. The inclination of the protagonists and their ideological environment, such as for instance in Islamic bookshops, are in my view clear indicators against granting them even a semblance of government approval.

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89 Under Islamic law, even in more recent style such as the wife's seeking a divorce in the way of *khul'*, this is necessary, cf. Part Two, III.1.i)bb above. According to Muslims working in the field there are cases of this kind in North America as well.

90 Thus in Shachar's fundamental work, *Multicultural Jurisdictions*, esp. 88 ff.; ead., *Religion, State, and the Problem of Gender*, 49, esp. 71 ff.

cc Specific Issues of Legal Substance

The opponents of Islamic arbitration emphasise particularly that Islamic law – at least in its centuries-old interpretation by law scholars – significantly discriminates against women.⁹¹ They point out that rules made by humans (by way of interpretation) are erroneously considered to possess divine authority; it would be dangerous to accept rules of this kind as a substitute for parliamentary legislation.⁹² This is especially true of the exceedingly flexible Islamic system of applying the law: it allows a multitude of interpretations, and is consequently quite unpredictable. Alia Hogben, the president of the Canadian Council of Muslim Women, asked: ‘Islamic law is neither monolithic, nor simple, nor applied consistently: how should it be applied here in Canada? And why is it needed here, where the law in force attempts to be fair and just?’⁹³ The supporters’ terse response that the most suitable school of law would be applied in each individual case⁹⁴ ignores several facts, for instance that there are divergent opinions within the schools of law, that furthermore this does not answer the question of which school should be applied in cases involving ‘followers’ of different schools, and who among those involved (after all, they are likely to not have received any relevant training) would be competent to overcome these difficult problems. If, on the other hand, the rules of family and inheritance law were applied in the traditional interpretation, the result – according to the critics – would be clear discrimination, especially against women and non-Muslims.

91 Explicit statements by Homa Arjomand and the Canadian Council of Muslim Women; also the earlier remarks by Shahnaz Khan against the introduction of Muslim Personal Law. At the same time Muslims with traditional views practise gender segregation so extensive it borders on the obsessive; cf., regarding Toronto, the references in Amir Hussain, *Muslims in Canada*, 372.

92 Cf. only Tarek Fatah, ‘Keep sharia law out of Canadian judicial system’, 12 Aug. 2005 at <http://www.muslimcanadiancongress.org> with further references.

93 Quoted by Ron Gray, ‘Bringing Islamic law into Canada’, 21 Jan 2004, viewed on 22 July 2006 at http://www.chp.ca/arc-CHPSpeaksOut/islamic_law.htm. A critical response concerning the introduction of Islamic ADR in Canada from the Iranian jurist and Nobel Peace laureate Shirin Ebadi; cf. ‘Nobel prize winner speaks out against Islamic tribunals in Canada’, University of Pittsburgh School of Law Jurist Legal News & Research, 14 June 2005, viewed on 11 Aug. 2006 at <http://jurist.law.pitt.edu/paperchase/2005/06/nobel-prize-winner-speaks-out.php>.

94 Cf. Syed Mumtaz Ali in Interview: A Review of the Muslim Personal Family Law Campaign (Rabia Mills), 1995 at 26 (viewed on 11 Oct. 2006 at <http://www.muslim-canada.org/pfl.htm>).

Striking examples may be found in the abovementioned 'Muslim Handbook' by Mubarak Ali, which is steeped in traditional views of the laws (in vulgarised form).⁹⁵ It states that a woman wishing to enter into a marriage requires a marriage guardian who will represent her interests when the marriage is solemnised,⁹⁶ even though she herself has to agree. However, according to the traditional interpretation of the prophetic tradition, the silence of a virgin is regarded as agreement, which can lead to explosive situations in the case of forced marriages. The 'Handbook' furthermore states that it is not possible to enter into a marriage without the knowledge and agreement of parents and guardians.⁹⁷ On the subject of marital duties we read: 'In marriage, all the duties of the wife are summed up in one word, ta'a, or obedience to her husband.'⁹⁸ The preceding passages state that she must be particularly respectful of his needs and preferences as regards food, clothing etc. The husband has the sole duty to support his family; he must also treat his wife well and generously.⁹⁹ Another book by Ashraf Ali Thanvi ("A Gift for Muslim Couple"¹⁰⁰) sold in a Toronto bookshop has triggered public attention in 2012.¹⁰¹ The book, citing a hadith, states that the husband is entitled to "punish" his wife by beating her "with hand or stick", by pulling the ears, etc.¹⁰² The book was still available in another bookshop in Greater Toronto in 2014.

Classical divorce law (according to the Hanafite school), including the husband's one-sided right to divorce which does not require grounds being given, is described without comment. Contributions the wife makes to support the family are not accorded any relevance according to religious law but are expected in case the wife is already gainfully employed, as a wife should work only with the husband's permission.¹⁰³ Consequently sole custody of any children¹⁰⁴ after the

95 Toronto 2001.

96 The marriage certification service provided by ISNA Canada also sticks to this traditional prerequisite irrespective of the age of the bride; cf. no. 5. of the Marriage certification procedures, available at <http://www.isna.ca/1/programs-services/marriage-services> (last accessed 17 July 2014).

97 Op. cit., 266 f.

98 Op. cit., 273. For the variety of views on this point cf. Clarke, Lessons, 169 ff.

99 Op. cit., 276, 308.

100 Thanvi, Ashraf Ali, *A Gift for Muslim Couple*, New Delhi 2011 (translated by Yusuf Karaan).

101 Cf. "Store sold out of controversial Muslim book", Toronto Sun 26 March 2012 (Terry Davidson), available at <http://www.torontosun.com/2012/03/26/store-sold-out-of-controversial-muslim-book> (last accessed 18 July 2014).

102 Op. Cit., 128 f.

103 Mubarak Ali, *Muslim Handbook*, o, 308.

104 Unlike traditional Islamic law the book's author does not distinguish between personal

first two years of life will devolve on the father, or specific male relatives unless they are not suitable.¹⁰⁵ There is clearly real cause for the concerns voiced by critics, especially as this is repeating traditional legal opinions pure and simple.

Other Muslims can see opportunities for development and adaptation within the sharia or by means of it, while rejecting a system of arbitration or application of the law with traditionalist orientation. Thus the initiative to establish Islamic arbitration was supported by only very few Muslim groups; some did not attend preparatory meetings because they disagree with the opinions represented by the initiators.

329 Muslim opponents of Islamic arbitration tribunals do not perceive any substantive problems, and even less contradiction, in applying Canadian law to Muslims, too – to them the intent of Canadian law, too, is to find fair solutions and implement them. They point out that divergent demands are often postulated by ‘amateurs’ who have no or only little training in the field of Islamic law. One reason why they appeal to the community is because some believe that the ‘most severe’ members of the group must also be the most devoted believers. The advocates of Islamic arbitration tribunals received a degree of support from these quarters only when it became clear that the public debate attacked the Muslim initiative nearly exclusively, while other religions which already practised arbitration tribunals of this kind – and present similar problems when it comes to gender equality – were not included in the observations. What was offensive from their point of view was clearly not the substantive opposition against Islamic arbitration tribunals but purely the aspect of unequal treatment.

Supporters, on the other hand, assume the traditional gender relationship¹⁰⁶ and emphasise that each of the sexes occupies an important position in society with its own respective rights. The husband’s role as head of the family is seen as entailing more duties than rights.¹⁰⁷ This appears to be a widespread

custody (*ḥaḍāna*) and other custody or statutory duty of care of property (*wilāya, walāya*).

105 Op. cit., 305f.

106 The Canadian Council of Muslim Women’s statement describes this as follows: ‘The jurisprudence of fiqh [Islamic law, M. R.] does have some common understanding. It is based on a patriarchal model of community and the family. It is generally accepted that men are the head of the state, the mosque and the family (...).’ (Boyd, Dispute Resolution, 48).

107 One example are the remarks published in Mustafa Yusuf McDermott/Muhammad Manazir Ahsan, *The Muslim Guide – For teachers, employers, community workers and social administrators on Britain*, 2nd revised ed., Leicester 1993 (purchased in Ottawa in Septem-

preconception, illustrated by publications on the subject in many Islamic education centres and bookshops¹⁰⁸ as well as by the remarks made in public by some imams and other Muslims. It is also emphasised that Jewish law has these inequalities, too,¹⁰⁹ but they have never led to public controversy. The argument of equal treatment, which was propounded repeatedly, ultimately led to the extensive restructuring of religious arbitration tribunals in matters of family law overall, with protests from the Jewish side as well.¹¹⁰

It was also emphasised, contradicting these arguments to some degree, that the goal could by no means be the introduction of a competing legal system, as the application of the law would have to conform with the law of the land.¹¹¹ The main driving force behind the initiative, Syed Mumtaz Ali, used the phrase 'watered down version of Muslim personal law' in this context.¹¹²

ber 2006); cf. also Ahmad H. Sakr, *Islam & Muslims. Myth or Reality*, Milwaukee etc. 1994, 38f.: Women, he claims, enjoy many more privileges than men; mentioned are the exemption from ritual prayer and fasting during menstruation and while breastfeeding, the exemption from the communal Friday prayer (more than a few Muslim women would like to take part, but would not like to be banished to the far corners of the building), exemption from financial obligations and special recognition as mothers before God and the prophet.

108 Cf. only Mubarak, *The Muslim Handbook*, Toronto 2001, 273 ff., 296 ff., 305 ff. and *passim*, which describes traditional family law (the woman's need to have a guardian, *wali*, when entering into marriage, the husband having the ultimate say in decisions regarding family matters, his one-sided right to divorce, his dominant position regarding custody of the children etc.). The author has gathered a considerable number of similar publications in bookshops all over Canada and other Western countries.

109 Regarding the clear parallels cf. Judith Wegner, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, *Harvard Women's Law Journal* 5 (1982), 1 ff. (occasional errors concerning details do not detract from the general validity).

110 According to many reports there were deliberations on the part of B'nai Brith to take action against the new regulation, which seemingly did not occur in fact; cf. also the statements published by the Canadian Jewish Congress, Region Ontario (Stephen Adler, Rachael Turkienicz, Mark Freiman) in the parliamentary hearing of Bill 27 in Ontario on 16 Jan. 2006.

111 Thus the vice-president of the Canadian Islamic Congress, Wahida Valiante, cf. the published version of her remarks in 'Shariah Law Debate Badly Skewed, Says Boyd', *Friday Magazine*, 12 Aug. 2005, viewed on 20 July 2006 at http://www.canadianislamiccongress.com/fb/friday_bulletin.php?fbdate=2005-08-12.

112 Syed Mumtaz Ali in an interview on 2 Feb. 2005; cf. 'Sharia for Canada', viewed on 15 Sep. 2005 at <http://www.abc.net.au/rn/talks/8.30/re/rpt/stories/s1334120.htm>; cf. also his remarks in 'Is Shariah Incapable of Change?', viewed on 7 Aug. 2006 at <http://muslim-canada.org/explainsharia.html>.

The reasons why a specifically Muslim arbitration system is necessary in matters of family law and personal status are directed against the law of the land, in a rather abstract fashion to begin with. The FAQ list based on an interview with Syed Mumtaz Ali in 1995, emphasises the significance Muslim personal status law has for the identity of individuals as well as the Muslim community. The clever wording establishes an unbreakable connection between the universally recognised sources Quran and prophetic tradition on the one hand and the multifarious forms of the norms of personal status and family law that have developed over the centuries on the other.¹¹³

330 The subsequent paragraphs are devoted to showing the differences compared to Canadian law, in a general way to begin with at 3., where it is mentioned that the initiative is taking place in accordance with the Quran and the sunna in order to satisfy the needs of all Canadian Muslims who are not satisfied by secular Canadian law. Later (at 8.; cursorily also at 11., 12. and 13.), the areas in which there are clear differences are discussed. Ultimately they all refer to rules in which Canadian law provides for the gender equality, while traditional Islamic law retains the typified allocation of gender roles.

Finally it becomes clear that, while Syed Mumtaz Ali and the *darul qaza* obey the law of the land as 'guests' in accordance with classical Islamic legal doctrine, they reject it overall to the extent that it contradicts Islamic law as they understand it. Thus at 15. we read: 'If we prefer to disregard our religious duty to strive for inclusion or our rights within the Canadian system, then Canadian secular law will take precedence over the Law of Allah and His Messenger.'¹¹⁴

113 FAQ list, available at <http://muslimcanada.org/pflfaqs.html>, 'For Muslims, Personal/Family Law (PFL) is a key ingredient which helps the individual and the community struggle towards harmonious equilibrium. Muslim PFL governs fundamental aspects of individual and community affairs (...) Muslim PFL is rooted in and derived from the most basic sources of Islamic law – namely, the holy Qur'an and the Sunnah of the Prophet (...). Again and again, Muslims are informed in the Qur'an that one cannot consider oneself a Muslim (...) unless one follows the guidelines, counsel, and principles related to us through the Qur'an and the Prophet Muhammad (...)' The remarks at 5. are along the same lines: 'As Canadian Muslims, you have a clear choice. Do you want to govern yourself by the personal law of your own religion, or do you prefer governance by secular Canadian family law? If you choose the latter, then you cannot claim that you believe in Islam as a religion and a complete code of life actualized by a Prophet who you believe to be a mercy to all. You cannot shirk from your religious and moral duty to try for what can be achieved lawfully within the parameters of the Canadian democratic system and constitutional legal rights.'

114 The vice chancellor of the University of Medina, Abdul Muhsin bin Hamd al-Abbad, puts it even more trenchantly in his treatise 'The Islamic Shari'ah and the Muslims' (translated

All of which suggests that from Syed Mumtaz Ali's point of view the introduction of Islamic arbitration courts dealing with matters of family law and personal status law is by no means an end in itself, but rather the first step towards establishing a parallel judicial system with the greatest possible coverage. Thus at 4. the FAQ list states: 'We live in a non-Muslim country which subjects us to laws which, for the most part, do not allow us to live our faith to the best of our ability. Confining our campaign to those areas where the Canadian judicial system could accommodate Muslim minority concerns is far more feasible, realistic and practical than other areas of the Shariah. Family relationship is just such an area, in that while it does not make it necessary for Canadians to sacrifice the fundamental principles upon which the country was founded, it does enable the Canadian Muslims to have recourse to legal problem-solving based upon the Shariah.' Clearly the initiators see a fundamental opposition between some parts of the sharia and Canadian law and limit themselves to areas presumed less sensitive for reasons of practicability (only).

What is remarkable is that from the Muslim point of view, family law and personal status law are an area which touches on the interests of the faith community as well. On the other hand Canada's greater, rule-of-law community with its constitutional values of equality of the sexes and of religions that contrast with the (Islamic) laws on the subject is seen as having an 'interest' and ignored.¹¹⁵ Rather, the multicultural constitution, together with the model of states with a Muslim majority or of India, where there is religious judicial autonomy in these areas, are employed as the basis for demanding extensive autonomy. In the case of some people, experiences in their country of origin may indeed lead to them considering state intervention in these matters unusual.

from the Arabic by Muhammad Saeed Siddiqi), Lahore 1979, 32 (purchased on 26 July 2006 in Toronto): '(...) the Muslims by adhering to the Islamic Shari'ah can dominate other nations and (...) their indifferent attitude to Islam is bound to drag them into the mire of ignominy and disgrace (...). When the Muslims whom Allah had given prestige and honour due to their acting upon the decrees of Allah ignored the Commandments of Allah and depended upon the manmade laws and resolved their issues in the light thereof, dishonour and disgrace fell to their lot. What more dishonour and disgrace could be than that which the Arabs are suffering at the hands of the Jews today.'

115 The Ontario High Court ruled in the case of *Baxter v. Baxter* (1983) 6 D. L. R. (4th) 557, 559 f., that the religious prohibition of divorce relevant to one of the spouses cannot overrule the applicability of the state Divorce Act, as marriage is not a matter for the parties involved only but also concerns the fundamental interests of society.

The price of such institutional autonomy – too high, in my opinion – would be that the principles of equality of the sexes and religions would have to be generally suspended in an area of the law that is not only sensitive but also of significance to everyone.¹¹⁶ Those who hold the religious view that these principles constitute the message of Islam as well will be able to accept the law of the land as ‘Islamic’ in spirit.¹¹⁷ Those, on the other hand, who adhere to traditional Islamic family and personal status law complete with its strict allocation of gender roles and its claim to superiority over other religions, can hardly expect support from legal systems which are diametrically opposed to this opinion; we are talking here about legal issues, not about freedom of religion where the state has to stay neutral and refrain from preferring some interpretations from others. Thus for instance the chairwoman of the Muslim Canadian Congress Farzana Hassan-Shahid, who spoke out against the introduction of Islamic arbitration, has declared that sharia norms (of family law and inheritance law) could be applied only if they are interpreted according to their substance, following their timeless intention as norms to protect the weak – and consequently nowadays along the lines of gender equality – and the patriarchal interpretations of the past could be overcome.¹¹⁸

Individuals are of course able to renounce rights to which they are entitled, as long as voluntariness of their decisions is granted.¹¹⁹ They are not held to claim them in courts, and the arbitration can function only if all parties

116 Regarding the corresponding problem of *get* in Jewish divorce law cf. Freeman, *The Jewish Get*, 377 ff. with further references; BGH FamRZ 2008, 1409 ff. There is, however, a certain difference in that the *get* may be pronounced only in person, while the *ṭalāq* may be substituted with a judge's ruling; concerning enforced *get* cf. Biale, *Women and Jewish Law*, 97 ff. In addition it seems that there are means of exerting social pressure – e.g. women demonstrating outside the recalcitrant husband's office – in order to bring about a *get*; cf. Atlan, *Les juifs et le divorce*, 236. It is worth noting that there were also demands from the Jewish side to introduce religious divorce law in the UK, cf. Berkovits, *Get and Talaq*, 141 ff.

117 Thus e.g. Alia Hogben's, Executive Director of the Canadian Council of Muslim Women, remarks during a conversation with the author on 14 Sep. 2006 in Kingston.

118 Cf. Farzana Hassan Shahid, 'Is our society ready for Shariah?', *Mississauga News*, 29 June 2005, viewed on 10 Jan. 2007 at <http://islamtoday.ca/doc/MISSNEWS.html>, and ead., 'A Forward-looking Ijtihad in the Modern Era', 14 Dec. 2006, viewed on 10 Jan. 2007 at <http://www.muslimcanadiancongress.org/20061214.html>; cf. also the sceptical remarks by Jasmin Zine, *Unsettling*, 47 ("these tribunals might be a risky proposition for upholding women's rights").

119 Cf. only Foblets/Yassari, *Cultural Diversity*, 3, 45 ff., pleading for 'in dubio pro libertate' in a Private international law context.

involved submit to it voluntarily. Unlike entirely informal mediation on which the state has no influence at all, this system, however, is one of cooperation and assignment of tasks regulated by law. The state and its legal system would move closer to these tribunals, which may be interpreted as approval of the substance as well. In the present situation this would lead to state empowerment of a vastly traditionalist leadership which could exercise immense social pressure within some Muslim groups living in strong segregation.

Furthermore, the issue is not limited to cases of legal practice with an international dimension, where – for reasons of practicability and confidentiality – foreign legal norms are accepted to a certain extent, even though they may not conform with the standards in force in the country; there are also ‘domestic’ cases which immediately affect the society governed by the rule of law. They are consequently subject to the, necessarily, narrower domestic ‘*ordre public*’. The main function of law and order, that of preserving peace, can be guaranteed only if a minimum of uniform rules is set down and enforced in socially sensitive areas. In addition the pressure on the members of the community is increased indirectly: Syed Mumtaz Ali has stated more than once that in view of the currently available opportunities of settling disputes along the lines of Islamic law there is no excuse accepted by the sharia not to do this.¹²⁰

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The option of judicial monitoring of arbitration rulings does not fundamentally change the mechanisms described. If religious arbitration tribunals are seen as the ‘rule’, public courts monitoring the ruling is, at least psychologically, the ‘exception’. Especially persons of weaker social standing will find it difficult to defend themselves against the rulings based on religious norms pronounced by a tribunal approved by the state once they have agreed to appeal to this tribunal. This is particularly true in the case of a group of people conditioned by its religious and cultural code of conduct to incline to dealing with conflicts internally while demonstrating unity on the outside. State ‘approbation’ furthermore increases the pressure to appeal to such a tribunal, if this is not merely demanded within the community but if the state issues a kind of universal ‘certificate of non-objection’. It is important to distinguish between mere

120 Quoted in ‘Canada Moves Toward Accepting Islamic Sharia Settlements’, Friday Magazine, 12 Dec. 2003, viewed on 20 July 2006 at http://www.canadianislamiccongress.com/fb/friday_bulletin.php?fbdate=2003-12-12#5, and on the occasion of the founding congress of the Islamic Institute for Civil Justice on 21 Oct. 2003 in Etobicoke, Ontario; cf. ‘First Steps taken for Islamic arbitration board (Canada)’, Law Times News, 25 Nov. 2003 (Jady van Rhijn), viewed on 22 July 2006 at <http://www.freerepublic.com/focus/f-news/1028843/posts>.

non-interference and active support, and also between toleration and endorsement, as Michael Freeman does.¹²¹

Thus as long as there is no guarantee that the application of religious norms will not oppose the state's judicial protection of fundamental and human rights (for instance by formulating the corresponding religious laws in a compendium complete with the guarantee that the persons involved will adhere to the former as well), government involvement in religious arbitration is at the very least problematic, and in my opinion to be rejected. This applies independently of the fact that contrary to widespread prejudice Muslim women should not be seen as fundamentally weak, oppressed and consequently in need of protecting. It is, however, sufficient for a significant group to find itself under the kind of social pressure that makes resorting to the public authorities an impracticable option. This may in effect be true in the case of sons as well, as considerable pressure is sometimes exerted on them, too, in family matters.

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All the persons with whom the author discussed these issues were unanimous concerning the fact that there is a not insignificant number of people affected by this situation, even though academic investigations of the subject are rare. It is probable that this applies in particular to newly immigrated women who are not familiar with the living conditions and the laws of their new surroundings and who are furthermore living in isolation. With their in part positively threatening public statements, the chief propagandists of 'Islamic Arbitration' are likely to have influenced the decision against religious arbitration authorities not insignificantly. The hope, cherished by some representatives of Muslim organisations as well as scholars – and rather unrealistic in view of the active supporters¹²² – of establishing a 'trial ground' for the par-

121 The Jewish Get, 378: 'There are distinctions to be drawn between non-interference and active support, and also between toleration and endorsement.'

122 Marion Boyd's argumentation, which is based on a quotation, appears rather simple in this context (Dispute Resolution, 93). From the fact that the supporters of 'Islamic arbitration' use existing legal options (including, to a certain degree, state monitoring) she tries to deduce that they are entering into an institutional dialogue with the state: 'In multicultural societies such as our own, this type of engagement ultimately aims at creating a "genuine sense of shared identity, [and] social integration"'. However, it would appear that in these instances we are looking at the use of existing legal options for disintegration as extensive as possible. The Toronto political scientist H. D. Forbes puts it more even more explicitly, but with little awareness of the problem (Liberal Values and Illiberal Cultures: The Question of Sharia Tribunals in Ontario, Paper prepared for delivery at the conference Citizenship-Ethnos-Multiculturalism, Canadian Embassy, Berlin, 8 November 2005, p. 9): he calls the decision in Ontario 'a step away from the view that the fullest possible recognition of cultural differences, within the broadest

tial existence of evolved Islamic law within the limits of a liberal constitution offering protection to the weak,¹²³ was thus dashed.

In addition, a considerable portion of the texts on the subject sold in Canada is not only suited to but, in some cases, also clearly targeted at putting Muslims in opposition to Western concepts of law. Many Canadian educational centres, mosques and Islamic bookshops predominantly stock books of a traditional bent in Urdu, Arabic etc.¹²⁴ Texts in English tend to be translations of Islamist leaders such as Mawdūdī¹²⁵ and Sayyid Quṭb,¹²⁶ or else texts firmly delimiting

possible understanding of liberal principles, can overcome the feelings of alienation and resentment of those living in the margins of a liberal society in which they are aliens and which does not really welcome their presence (...). Instead, a step was taken in the direction of forced assimilation as the only realistic way to deal with scary Others.'

- 123 For an inspiring attempt in this direction cf. Emon, *Islamic Law*, 389, 417 ff. Nevertheless, Emon's proposition of competing family service organisations under state supervision is called a "long-term hope" by himself (*ibid.*, 422). The same applies to suggestions by Mohammad Fadel (*Political Liberalism*, 164 ff.), who thoroughly demonstrates the flexibility of Islamic family law and possible common ground with liberal Western family laws.
- 124 Author's observations made during visits to a multitude of such institutions in autumn 2005, during a research visit from July to September 2006 in Montreal, Ottawa, Greater Toronto, Vancouver, Calgary and Quebec, as well as in August 2008 and in March 2011 in Montreal, and in July 2014 in Greater Toronto.
- 125 Thus in S. A. al-Maududi's book 'Towards Understanding Islam', purchased in Toronto on 18 July 2006, we read: 'And in Jihad, he (sc.: the Muslim believer) sacrifices money, material and all he has – even his own life. (...) In Jihad a man takes away life and gives it away solely in the cause of Allah.' *Op. cit.*, 137. The meaning of jihad is defined as 'a war that is waged solely in the name of Allah against those who practice oppression as enemies of Islam' (p. 124); in the classical interpretation to which Maududi seems to adhere, this is not only meant as defensive action against attack; cf. Part One, iv.9.c above. In her book 'Islamic Jihad: An Historical Perspective' (Indianapolis 1990, purchased in Ottawa in September 2006), which is broadly based on Maududi and other extremists, Jamilah Kolocotronis, a teacher at an Islamic school in Kansas City who converted to Islam, explains that the basis for jihad has not changed, but that nowadays military and expansive jihad are dangerous while technological progress on the field of information and communication allow other means of waging jihad.
- 126 In Mohamed Ibrahim Elmasry's introductory volume '1,000 Questions On Islam' (reprint, New Delhi 2005), the Quranic commentaries by Mawdudi and Quṭb are given particular emphasis (p. 15 f., questions 124–127). Consequently it is hardly surprising that the early Islamic conquests of Central Asia, the Sudan, and Constantinople are called 'liberation' (p. 93, question 19; p. 97, question 69). Questions regarding the legal situation concerning gender relations are answered in keeping with the traditional allocation of gender roles, with the *khul'* type of divorce, which makes divorce easier for women, being implicitly

the allegedly purely materialistic, individualistic, secularist Western culture free from moral and value concepts against the Islamic world view, allegedly oriented purely towards religious values.¹²⁷ The works of liberal authors make only rare appearances.¹²⁸

endorsed (p. 107 ff., question 11 ff.; p. 113, question 73). Question 105 on p. 117 explains that Islam supports capital punishment for murder, illicit intercourse of married persons, and for voluntary apostasy from Islam. The book's author has lived in Canada since 1968, is a professor of Electrical and Computer Engineering at the University of Waterloo, Ontario, and, according to the book's cover, 'active in Islamic teaching to English-speaking Muslims and Non-Muslims'. A book by Sayyid Qutb (*Milestones*, Indianapolis, 47 f.) purchased in Ottawa in September 2006 states: 'Preaching alone is not enough to establish the dominion of Allah on earth, to abolish the dominion of man, to take away sovereignty from the usurper and return it to Allah, and to bring about the enforcement of the Divine shari'ah and the abolition of man-made laws.'

127 One striking example is provided by Shujaat A. Khan (Professor of Economics, St. John's University, New York), *A Critical Review of Islamization of Knowledge in the American Perspective*, in: Amber Haque (ed.), *Muslims and Islamization in North America: Problems and Prospects*, Beltsville/Maryland 1999, 49, 51 f. The final chapter by Saiyad Pared Ahmad/Saiyad Nizamuddin Ahmad, *American Muslims at the Millennium and Beyond*, continues in a harsh tone under the heading 'The Clash of Civilizations, – The Crash of Western Civilization, – and Civilizational Dialogue': 'Under the euphemism of a 'fundamentalist threat', the Western powers, in their sinister alliance with international hegemonist Zionism are trying to demonize Islam wherever they can.' Op. cit., 399, 416. Other works purchased in July 2006 in Toronto show a similar tendency, such as Muhammad Samiullah, *Muslims in Alien Society*, Lahore 1982: '(...) in all those societies where non-Muslims dominate, Muslims are generally subjected to discrimination as a consequence of being Muslims (...); Muslim minorities can survive best by developing and putting into action the Islamic way of life to the fullest extent (...). (...) Muslims have been given the leadership of mankind, and our duty as leaders, not imitators, is to establish the right and eradicate the wrong. (...) Among problems confronting Muslims living in non-Muslim countries especially in the West, the one most acute is how to raise the new generation (...) amidst a hostile, materialistic, atheistic culture', preface iii, iv, v; Abul Hasan Ali Nadwi, *Western Civilization – Islam and Muslims*, 5th ed., Lucknow 1982 (Engl. transl. by Mohammad Asif Kidwai); Maryam Jameelah, *Western Imperialism menaces Muslims*, Lahore 1978/2000 (p. 23: 'what is today being exported from Europe and America and Asia is merely the rubbish from the collapse of Western civilization along with the deadly poisons of atheism and materialism'); Bilal Philips, *Clash of Civilizations – An Islamic View*, Qatar 2004 (besides fundamental criticism of democracy on p. 27 ff. we read on p. 29: 'the social consequence of secular democracy and its basic principles is the removal of any foundation for stable morals in society').

128 Representatives of liberal organisations report that they are consistently prevented from displaying their materials and notices in these shops or the mosques connected with

Also worth mentioning are books which are attractively designed and clearly subsidised from Saudi Arabia.¹²⁹ Thus in Toronto a book entitled *Man-Made Laws vs. Shari'ah*¹³⁰ is for sale, in which the former mufti of Saudi Arabia is quoted at great length. We read, among other things, deliberations according to which a Muslim will become an unbeliever (*kāfir*) if he believes that secular legislation is better than, or equal to, Islamic sharia, that it is legitimate to submit to secular rulings ('to refer to them for judgment'), that the Islamic system is limited to the relationship between God and humans, or that God's laws and punishments regarding theft (the cutting off of a hand) or extra-marital intercourse of married persons (stoning) are not suitable for the present day.¹³¹ On the website of Muslim Youth Canada, which refers to a wealth of Islamist sources, we find an apologetic text by Taha Ghayyur¹³² concerning Islamic penal law, which supports its gradual introduction in North America.¹³³ The comparatively broad literature on the subject of 'woman in Islam'

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them. This coincides with the observations by the Canadian specialist in Islamic studies Meena Sharify-Funk regarding critical Muslim literature: "The ubiquity of these self-conscious dissident publications in mainstream Canadian bookstores finds a dramatic counterpoint in their virtually complete absence from shops that are oriented toward Muslim-minority communities. For a variety of reasons, few Muslim book merchants would deem it appropriate to sell them ..." (Marketing, 138).

- 129 On Wahhabi indoctrination in North American mosques and Islamic centres cf. also Shea, Conclusion, 195, 205 f.
- 130 Abdur-Rahman ibn Salih al-Mahmood, *Man-Made Laws vs. Shari'ah. Ruling by Laws other than what Allah Revealed – Conditions and Rulings*, transl. by Nasiruddin al-Khattab, Riyadh 2003.
- 131 Op. cit., 169; quotations by Ibn Baaz. Concerning this radical imam, highly regarded in Saudi Arabia and elsewhere, cf. Schwartz, *Shari'a in Saudi Arabia*, 32 ff.; cf. also Rohe, *Islamismus und Shari'a*, esp. 146 ff.
- 132 Taha Ghayyur, *Understanding Punishment in Sharia*, in the final chapter 'Shariah Today', viewed on 24 July 2006 at <http://www.youngmuslims.ca/articles/display.asp?ID=76>. The same author has his say in the Muslim youth magazine 'aver' (vol. 1 issue 0) 2006, 21 ff., in an article entitled 'In pursuit of knowledge', ending with the following passage, entitled 'Selective Islam': 'Some so-called "progressive Muslims" have a hard time digesting certain aspects of Islam or Islamic sources that to not seem "rational" or "compliant" with our modern age. They pick and choose whatever they like. Due to this cut and paste method of learning they fail to see the bigger picture and deny Islamic law any role in our society. This leads to privatization of Islam to the domain of personal worship only.'
- 133 A similar tendency is displayed by the collection of winning entries in a competition arranged by the Federation of Students Islamic Societies in the UK and Eire (FOSIS) (*Essays on Islam. Winning Entries 1995, London/Leicester 1995*), in which, on the subject 'Lashing, stoning, mutilating: Islamic law is barbaric and outdated. Defend the case of

mainly presents a patriarchal–traditionalist picture – certainly in legal matters – focussed on strict gender separation, which is contrasted to the exceedingly libertarian and immoral life in the West.¹³⁴ A book by the Majlisul Ulama of South Africa on the subject of inheritance law sold in the chief mosque in Ottawa explicitly calls upon Muslims not to recognise or adopt the legal system of the unbelievers (*kuffār*), and to follow it, if necessary, only formally, and at the same time to develop different rules which ‘conform with the faith’.¹³⁵ It is impossible to estimate how many readers this extremely traditionalist,

Islam’, apologetic statements on the use of corporeal punishment and the corruption of the West abound. Thus one essay (p. 37) quotes Sayyid Qutb as saying that the true reason for the European rejection of physical punishments is that Europeans are ‘criminal in nature’ and ‘persist in committing crimes which lack all justification’. Another passage (p. 58 f.) emphasises explicitly that the pertinent rules are divine and apply to all humans at all times. Also comparable is Abdallah Ibn Jarrallah Al-Jarrallah’s text *La Responsabilité de la Femme Musulmane*, printed in Canada (Scarborough 2002; transl. by Abdelfattah Bourouba), 61 at 1, where the punishments for extra-marital intercourse are demanded bluntly.

- 134 One example is M. Mazheruddin Siddiqi, *Women in Islam*, Delhi 1993, e.g. 108 f., 117, 118; Aboo Ibraheem ‘Abdul-Majeed ‘Alee Hasan, *Islamic Family Guidelines*, Hounslow 1998; ‘Abdur Rahman I. Doi, *Woman in Shariah*, London (reprint of the 1989 edition) 1996 (praising for instance the draconian physical punishments for illegal intercourse 117 ff.) and the leaflet by Sarah Sheriff, *Women’s Rights in Islam*, London 1989. Cf. also Abdallah Ibn Jarrallah Al-Jarrallah, *La Responsabilité de la Femme Musulmane*, Scarborough 2002, 127 ff., where a strict prohibition of women’s working outside the home is postulated, and 119 ff. with detailed remarks on women’s extensive duty of obedience towards their husbands. Mahmood Ibrahim El-Geyoushi’s ‘Islamic Reader. Islamic Studies for Young People’ (New Delhi 2002, purchased in Ottawa in September 2006) justifies the allocation of gender roles under Islamic family law simply by saying that women are ‘on physical grounds’ prevented from and thus not obliged to contribute to the financial upkeep of the family (162). Subsequently (163), false information is published regarding the allegedly lacking duty to support young girls from the age of 16 onwards under European law, and contrasted to the Islamic model (it must be pointed out that more than half of all 20–24-year old women in Canada live with their parents, and ca. two thirds of men of that age group; cf. Castelli/Goubeau, *Le droit de la famille*, 4 with further references). Saalih ibn Ghaanim al-Sadlaan’s book (purchased in Ottawa in September 2006 as well) *The Fiqh of Marriage in the Light of the Quran and Sunnah* (transl. by Jamaal al-Din M. Zarbozo), Boulder/Co. 1999, includes passages on the duties of the wife (122 ff.), such as staying in the husband’s house and the prohibition to leave it without his permission, on the duty to come to his bed on demand, not to allow anyone into ‘his’ house without his permission, to serve him etc.
- 135 Majlisul Ulama of South Africa, *Kitaabul Meerath. The Book of Inheritance*, New Delhi 2000, 13, 17 f.

sometimes extremist, literature will reach; it is highly unlikely to be a majority among the Muslim population.¹³⁶ The majority is probably much more accurately represented in Shahnaz Khan's statement that constructing an opposition between 'Canadian' and 'Muslim' is not compatible with the actual reality and in fact perpetuates precisely those racist prejudices according to which Muslims cannot possibly be part of Canadian society.¹³⁷ Thus, the blunt "othering" of Muslims as a whole in many debate contributions did not only miss reality, but also caused considerable damage particularly with respect to ambitious social and scientific attempts in search of common ground. The intensity and the heatedness of this debate was in sharp contrast to the practical impact of the concrete initiatives of establishing formal arbitration bodies. In this regard it was similar to the French and partly European debate on the "burka-ban", which can only be understood as a symbolic one to prevent the "opening of the (imagined) floodgate", and to widespread simplistic accusations of "Islamophobia" whenever (fact-based concrete!) criticism of certain Muslim attitudes is formulated.

The debate in Ontario found a temporary conclusion on 11 September 2005 when the provincial governor announced that religious arbitration courts would be significantly restricted in family matters (contrary to the public announcement they were not, in fact, abolished¹³⁸).¹³⁹ The announcement was

136 Cf. e.g. Memon, *From Mosques*, 186 ff. He deals with categories of "resistance" (against Western society), "embrace" (of liberal democracy) and "selective engagement" and states that "Those who fall under the category of 'embrace' comprise the largest segment of Canadian Muslims" (*ibid.*, 187). Cf. also the overall positive answers of Muslims regarding their status in Canada and their readiness to integrate in representative polls conducted in 2006 (Focus Canada Report 2006-4), available at <http://www.environicsinstitute.org/uploads/institute-projects/focus%20canada%202006-4%20report.pdf> (last accessed 15 July 2014), a new survey is about to be conducted by the institute in 2014.

137 Canadian Muslim Women, 62 f. Regarding the various attitudes towards sharia and Canadian law cf. also the interviews in Saris et al., *Étude de cas*, 74 f.

138 Thus also Prof. Natasha Bakht's, University of Ottawa, assessment during a conversation in Ottawa on 14 Sep. 2006.

139 McGuinty is quoted as follows: 'There will be no Sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians.' Religious arbitration courts 'threaten our common ground (...). Ontarians will always have the right to seek advice from anyone in matters of family law, including religious advice. But no longer will religious arbitration be deciding matters of family law'; cf. 'McGuinty rejects Ontario's use of Shariah law and all religious arbitrations', Canadian Press, 11 Sep. 2005 (Keith Leslie), viewed on 11 Aug. 2006 at <http://www.nosharia.com/McGuinty%20rejects%20Ontario's%20use%20of%20Sharia%20%20Law%20and%20all%20religious%20arbitration.htm>.

implemented by the Family Statute Law Amendment Act 2006. Under Sect. 2.2(1) arbitration that is not in complete agreement with Ontario state law, or that of another Canadian province, will not be recognised as arbitration in family matters, and rulings in such arbitration proceedings will not be allowed to have any legally binding effect. Sect. 3(2) declares that the relevant regulations of Canadian law (the exclusive applicability of Canadian substantive law with a limited scope of choice among the substantive laws of all Canadian provinces as according to Sect. 32(4) as well as the unlimited option of judicial monitoring) shall be binding in arbitration of matters of family law.

Those who previously endorsed 'Islamic Arbitration' have been very critical of the amended version of the legislative process, calling it a capitulation before anti-Islamic forces. They do not seem to intend to continue their work on the new basis. Those Muslims who felt only some degree of solidarity with the initiative due to unequal media coverage seem to be confident that it will peter out in the face of changed circumstances. The public debate on Islamic Arbitration has silenced down completely since then; no new statements of Muslim organisations followed in the years after.

It is, however, likely that Islamic mediation and arbitration of the kind employed before 2004¹⁴⁰ will continue to be practised without any official supervision.¹⁴¹ It seems that the main aim of the reform of the Arbitration Act, namely the protection of weaker persons, is unable to take effect here. The author has become convinced in a number of conversations that in many Muslim families in Canada, the formative influence of religious and cultural background leads to conflicts unknown to the average Canadian (or European) who has grown up in Western culture. Family expectations against which there is no rebellion, intensive exertion of influence by the entire family on the choice of marriage partners (including details of the wedding etc.), as well as a specific

140 Cf. also Carlucci's report 'Arbitration Confrontation', Eye Weekly, 15 Sep. 2005, viewed on 23 July 2006 at http://eye.net/eye/issue/issue_09.15.05/op/wanderingeye.php; quoting Mubin Shaikh, a Toronto imam, as saying that in a year (2005) he dealt with 13 to 14 arbitration cases; ironically, it has since become known that this vehement champion of Islamic arbitration was a member of the Canadian Security Intelligence Service (cf. 'Mubin Shaikh, the bomb plot mole', CBC news online, 14 July 2006, viewed on 23 July 2006 at <http://www.cba.ca/news/background/toronto-bomb-plot/shaikh.html>).

141 Cf. Faisal Kutty, 'Ignorance and Islamophobia forces Ontario government to ban faith-based arbitrations in Ontario' (12 Mar. 2006), Media Monitors Network, 5 July 2006, viewed on 8 July 2006 at http://usa.mediamonitors.net/headlines/ignorance_and_islamophobia_forces_ontario_government_to_ban_faith-based_arbitrations_in_ontario; Fournier/Setrakian/McDougall, No-Fault Talaq, 235, 252.

culture of dealing with conflict which relies on indirect mechanisms – these facilitate access to arbitration and mediation for experienced ‘insiders’.¹⁴²

As long as the decisions do not claim legally binding power, the positive potential for reconciliation and mediation may well prevail, if positions of responsibility are held by suitable (acting professionally and neutrally) persons. Supporters of assimilating the norms in question to the Canadian context are, however, sceptical, while a not insignificant portion of the proceedings is in the hands of self-taught men with very traditionalist attitudes. Instead, efforts could be made to professionalise communal mediation services regarding the technics, the possible contents and the limits of counselling and informal ADR. Equally, the scepticists are urgently calling for a modern Islamic education system, which could build a bridge between the Canadian legal and social system and the Islamic faith.¹⁴³ One problem highlighted is that some Muslim educational establishments accept weak or difficult pupils from other schools in order to train them in the traditionalist way to become ‘muftis’.¹⁴⁴ Consequently a strict and consistent separation between contemporary interpretation of Islamic sources on the one hand and the widespread, often very traditionalistic and patriarchal cultural context on the other, is demanded as being essential.

The conflict arising from the discrepancy between the principles of national law and the ideas of law present in everyday social interaction ultimately remains unresolved. This is particularly true – and similar in Great Britain (cf. IV.3.e below) – of divorce proceedings. In Canada, too, there are cases of women in the community who are seen to be married in spite of an official divorce, or who understand themselves as such even without social pressure. In other cases there may be uncertainty whether the legal system in force in the country of origin will recognise the official divorce.¹⁴⁵

Several paths are open in this context. On the one hand the public courts, if they have been appealed to, can force the husband to pronounce the divorce, by making it a criminal offence if he refuses to do so without grounds.¹⁴⁶ However,

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142 Cf. the telling report by Mcfarlane, *Understanding*, 29 ff., and Saris et al, *Étude des cas*, 77 ff.

143 Cf. e.g. the initiatives by the Canadian Council of Muslim Women; information is available at <http://ccmw.com/what-we-do/projects/the-qiwanah-and-wilayah-project/>; <http://ccmw.com/what-we-do/projects/common-ground-project>, last accessed 17 July 2014.

144 Information provided by the Canadian lawyer and Muslim activist Faisal Kutty in conversation with the author on 28 July 2006 in Toronto.

145 Cf. Cutting, *Faith-Based Arbitration*, 66 ff.

146 Regarding parallel considerations when refusing Jewish ‘get’ cf. Freeman, *The Jewish Get*, 2001. However, the Quebec Cour d’Appel (*Marcovitz v. Bruker* [2005] R. J. Q. 2482, 2495 ff.)

the problem immediately arises of whether such a divorce, pronounced as it was under indirect 'duress' would then be accepted.

On the other hand it should be sufficient in an informal or, at least, not legally binding arbitration if the husband is induced to pronounce the divorce, or if the arbitration tribunal declares the divorce. If it commands the authority in the community that a public court may be lacking in some case or other, the ruling would have to be socially effective. After all, a certain contradiction is perceivable if on the one hand the public courts are rejected for reasons of religious law, and on the other public mechanisms to implement the law are being called upon; the institute led by Syed Mumtaz Ali explicitly advertised along these lines.¹⁴⁷ We must also bear in mind that the abolition of religious arbitration will not help those who are afraid of appealing to the public courts for the reasons mentioned; purely internal informal arbitration solutions may well – if unsupervised – be at their expense.¹⁴⁸ The dilemma presented by Ayelet Shachar, of having to decide between either public implementation of the law or informal community-based conflict resolution, still remains.¹⁴⁹

What has become clear in numerous conversations with representatives of Muslim organisations as well as scholars (both male and female) is that for many (certainly not for all¹⁵⁰) Muslims in Canada the issue of whether the norms of Islamic law are applied in the area of private law is at best of subordinate importance, as compared to social issues or the observance of (some) religious rites. Supporters of the 'secular' system simply reject the implementation of such norms and are happy with the Canadian law in force. The latter is, indeed, true also of many rather more traditionally devout Muslims for whom the observance of the religious norms of orthopraxy (prayer, fasting, food laws)

refused to award damages to the wife seeking divorce due to the *get* having been refused: such a 'religious' obligation (agreed before a public court because of the divorce) could not be enforced under civil law. The ruling (op. cit., 2492) also refers to the mistaken decision in *Kaddoura v. Hammoud* (1998), 168 D. L. R. (4th) 503 (Ont. Gen. Div.), 507 ff. Comparable as regards the obligation to contribute to the *get* with reference to the freedom of religion (presumed breach of Art. 4 GG, 9 EMRK, 6 EGBGB): OLG Oldenburg StAZ 2006, 295, 297.

147 The brochure 'An Essential Islamic Service in Canada: Muslim Marriage, Mediation and Arbitration Service' (viewed on 18 Aug. 2006 at <http://www.muslim-canada.org/brochure.htm>) emphasises repeatedly as a unique advantage that the decisions are binding and enforceable.

148 Cf. only Eileen Morrow's remarks (Ontario Association of Interval and Transition Houses) during the parliamentary hearing in Ontario on 16 Jan 2001.

149 As expounded in *Multicultural Jurisdictions*, 2001.

150 Cf. the reports in *Fournier/Setrakian/McDougall, No-Fault Talaq*, 235, 247 ff., but also the data mentioned above c).

is of great importance, but who unquestioningly presume the validity of Canadian law in matters of the application of the law. The potential substantive conflict between the norms of Islamic law and the Canadian equivalent is frequently not perceived, or discussed. If it is broached, it frequently reveals a considerable amount of insecurity. Many Muslims have clearly never thought of this question. To the extent that the norms of Islamic law applicable in their countries of origin are being observed (informally), this is probably in many cases unreflected adherence to a practice which has more cultural than specifically religious significance. The number of people publicly canvassing for its wider application in private law beyond its existing scope seems to be relatively small. In fact international issues and the circumstances of recent immigrants can be dealt with adequately under the provisions of private international law and dispositive material law, supported if necessary by suitable informal mediation procedures. Proper information and efficient access to legal aid are indispensable prerequisites here.

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Still, what is presented without comment as 'Islamic' in the texts on the subject accessible to the public, and in internet presentations by Muslim organisations, is traditional family law, usually following the Hanafite Sunni school. The prevailing attitude is clearly that these norms should 'actually' be applied. A similar attitude has been displayed in many conversations with Muslims in organisations or during events, although it must be said that the great majority of those interviewed do not attach any importance to it.¹⁵¹ Many people refer to the imams who are able to defend an 'official' position.¹⁵² According to some representatives of Muslim organisations, the imams for their part in the main follow the traditionalist opinion. This may open a gateway to fundamentalist indoctrination of the kind observed among some Muslim associations which are supported by Saudi Arabia and some other states of the region. In fact, their worldwide traditionalist sharia agitation has strongly contributed to

151 It was pointed out in many conversations that Muslims in Canada have other problems than these issues. We may assume disinterest among the majority. Due to the limits of the research it has not been possible to arrive at representative results. Specific questioning some dozens of Muslims who are involved in organisations, who attend events on the subject or who work or buy in Islamic bookshops does, however, justify conclusions as to tendencies among those who have a more than average interest in matters of Islam. These observations are in accordance with sociological fieldwork done in the country e.g. by Ann Saris et al. and Julie Mcfarlane, and the facts given in the report of Marion Boyd.

152 Regarding the particular role played by imams especially in the diaspora cf. also Saris et al., *Étude de cas*, 16. With respect to the pluralisation of Islamic authority among Canadian Muslims cf. Karim, *Islamic Authority*, 85 ff.

public anxiety in the debate.¹⁵³ The 'liberal' Muslim side, on the other hand, shows but little willingness to engage in an internal Islamic debate on reforms. The majority of this group is generally against applying norms of religious law, especially in the context of the traditionalist mainstream, which in turn does not possess any real understanding of reformist considerations. The debate on Islamic arbitration has furthermore shown that a considerable number of supporters was not interested in the application of particular rules due to their substance, but rather concerned with equal rights for members of all religions.

Consequently it is a valid assumption that parallel legal structures may be found, especially among more recent immigrants, in which the social reality diverges from the substance of applicable Canadian law, in particular as regards issues of divorce. The task arises, similar to many European states, to create an awareness of the foundations of the legal system in force across all classes of society and all levels of education. Ignorance of these foundations is widespread, and not only among Muslims. A crucial factor in this context is the necessary, internal Muslim debate of the question to what extent and within which limits tenets of Muslim faith can be realised within the limits of the principles of Western legal systems. As for the field of private law discussed here, potential conflicts might be defused if reform developments within Islamic law were taken into account, which could lead to substantive accord with Western principles of law and justice. So far, however, as has been mentioned above, only few Muslims engage with these issues – which are, it is true, challenging indeed –, the uncritical adoption and acceptance of traditional ideas prevailing by far. On the other hand courts and administrations clearly need information on immigrants' socio-cultural and religious conditioning which may govern their actions and behaviour, in order to be able to analyse conflicts correctly and solve them as satisfactorily as possible in cooperation with the parties involved.¹⁵⁴

At the same time the debate on the extent of the autonomy of Muslims in Canada ties in with a wider discussion on the causes and the limits of multiculturalism. Until only a few decades ago multiculturalism in Canada essentially concerned differences and contrasts between English- and French-speaking Canadians, and the position of the Native Americans (First Nations).¹⁵⁵ Due to the constantly growing immigration from Asia and Africa the range of cultural variety has grown considerably, the potential for tension increasing con-

153 Cf. Clarke, *Lessons*, 158 with further references.

154 Cf. *op. cit.*, 88f.

155 Cf. Gerald Kernerman, *Multicultural Nationalism. Civilizing Difference, Constituting Community*, Vancouver etc. 2005.

comitantly. Thus the ruling by the Quebec Court of Appeal, which had granted permission to a Sikh schoolboy to bear a ritual dagger (*kirpan*) not intended as a weapon subject to specific safety conditions, was met with considerable hostility.¹⁵⁶ It is no coincidence that a book was published recently which recalls the European roots of Canadian identity, and which spells out that ‘emphasizing what core Canadian values really are instead of making of diversity an end in itself’ is necessary.¹⁵⁷

Will Kymlicka, a prominent champion of Canadian multiculturalism, had pointed out earlier that ‘Canadians want to know that being a Canadian citizen entails certain “non-negotiable” requirements, including respect for human rights and democratic values (...).’¹⁵⁸ Such clarity is also in the interest of the immigrants, who want, and ought, to know which precisely are the ‘non-negotiable’ principles of coexistence within the new society. In case of doubt, freedom and individual choice should prevail. Overall it seems that when weighting conflicting communitarian and individual rights,¹⁵⁹ the scale is tipping in favour of the latter. This is, of course, always criticised by unbridled multiculturalists as being too focused on liberal Western values, and not sufficiently sensitive to cultural differences.¹⁶⁰ Kymlicka’s position is likely to be seen as the guideline for dealing with legal issues as well. In the context of group-specific laws he distinguishes between ‘external protection’ and ‘internal restrictions.’¹⁶¹ The former is concerned with the – legal requirement of – equal treatments of all groups, such as religious communities. The latter refers to the phenomenon of exerting pressure on the members of a group in order to strengthen it internally, for which legal protection cannot be claimed. In this context Ayelet Shachar has coined the pithy phrase of the ‘paradox of multicultural vulnerability’¹⁶² with regard to the associated difficulties faced by – in particular – women in patriarchal systems.

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156 *Multani v. Commission scolaire Marguerite-Bourgeoys*, 241 D. L. R. (4th) 336 (judgment of 4 Mar. 2004); cf. also the relevant criticism in Brun, *Droit constitutionnel*, 1035.

157 Resnick, *The European Roots*, 61. The author points out (64, 85ff. and *passim*) that on the whole these values have European (English and French) origins. Cf. also Kymlicka’s criticism of the lacking precision of the limits of multiculturalism (*Finding Our Way*, 66 and *passim*).

158 Kymlicka, *Finding Our Way*, 68f.

159 Cf. *op. cit.*, 61ff.

160 Cf. M. Malik, *Communal Goods as Human Rights*, in: C. Gearty/A. Tomkins (eds.), *Understanding Human Rights*, London 1996, 138. For an attempt of far reaching accommodation of difference within Western legal frameworks cf. Rohe, *Family*, 49ff.

161 Kymlicka, *Finding Our Way*, 62 and *passim*.

162 Shachar, *The Puzzle*, 385, 386; in detail *ead.*, *Multicultural Jurisdiction*, 62 and *passim*.

In all of this we must not forget that until only a few decades ago, essential parts of Islamic family law were in accordance with the legal situation in Quebec, or were even more favourable to women than the law in Quebec, for instance as regards married women's freedom of action under property law.¹⁶³ Consequently it would indeed be an error to present certain legal and cultural areas as being in structural opposition to the 'Western' model. On the other hand the comparatively recent legal equality in Canadian (and European) family law may provoke particularly vehement rejection of norms and values which have been overcome with some effort, or are still being overcome.

163 Cf. Castelli/Goubeau, *Le droit de la famille*, 101: 'Par les réformes de 1964, 1969, 1981, 1989 et 1992, on est passé d'un régime de complète subordination de la femme à un régime d'égalité entre époux.'

Germany (Also Taking into Account Other European Countries)

1 Introduction

Germany, like other European countries, now has a stable Muslim population. They number ca. 3.8–4.3 million, around half of whom have German citizenship.¹ Among them we find every hue of religious affiliation, Sunni, Shi'ite, Alevi and Ahmadi, more and less devout believers, some focussed on scripture, others adhering to mysticism or strong popular beliefs, people of very diverse levels of education, cultural background and individual convictions. Their views and living environments are usually influenced more by non-religious factors such as immigrant background, linguistic competence and education or employment than by religious attitudes. This variety is occasionally in contrast with the uniform image of public perception which tends to focus overall on the more traditionally inclined Islam professed by many Arab or Turkish immigrants, or those with Turkish roots. The secular attitude of many Muslims, and the Alevis in particular, is often overlooked precisely because it is comparatively inconspicuous in normal everyday life.

The question that arises is whether and to what extent Islamic norms could be applied in Germany and other European countries. While there are many differences in details,² it is possible to observe shared principles; the situation in Germany is consequently typical of Europe as a whole in many respects.

1 Bundesamt für Migration und Flüchtlinge/Deutsche Islamkonferenz, *Muslimisches Leben*, 59 ff., 81.

2 Cf. e.g. Rohe/Elster, *Zur öffentlich-rechtlichen Situation von Muslimen in ausgewählten europäischen Ländern*, in: Bundesministerium des Innern/Sicherheitsakademie Wien, *Perspektiven und Herausforderungen in der Integration muslimischer MitbürgerInnen in Österreich*, Vienna, Mai 2006, 51pp; the contributions in Aluffi Beck-Peccoz, Roberta/Zinconne, Giovanna (eds.), *The Legal Treatment of Islamic Minorities in Europe*, Leuven 2004; Fournier, *Muslim Marriage in Western Courts*, 2010; Büchler, *Islamic Law in Europe?*, 2011; Ferrari, Silvio/Pastorelli, Sabrina (eds.), *Religion in Public Spaces. A European Perspective*, Farnham/Burlington 2012; Bowen, *Blaming Islam*, 2012; Rohe, *Sharia and the Muslim Diaspora*, 261 ff. For Europe-wide actual reports cf. Nielsen, Jørgen et al. (eds.), *Yearbook of Muslims in Europe*, vol. 1 (2009–).

Every legal system with territorial applicability requires absolute precedence within its territory and has the autonomous determining power of whether, and to what extent, 'foreign' norms can be allowed. As regards validity, there is thus no plurality of norms along the lines of legal multiculturalism.³ Someone who tries to establish a parallel or opposing legal system would be, in Heiner Bielefeldt's words, be pursuing an anti-constitutional project, which cannot be permitted by the secular rule of law.⁴

341 The legal system in a democratic state committed to human rights must offer a stable and fundamentally constant framework for profitable coexistence and, if necessary, must enforce this with official sanctions. On the other hand, being a liberal system it cannot be employed to simply prohibit everything some or many citizens disapprove of or reject on moral or socio-political grounds, as such matters ought to be subject to a *societal* debate. Furthermore it must always be taken into account to what extent the 'non-legal' – for instance religious – basis for norms is contrary to applicable law, or whether it is situated within the established legal context and thus is not in opposition to it.⁵ This also applies to large numbers of Islamic norms.

There is a fundamental difference between the implementation of religious norms on the one hand and legal ones on the other. From the Muslim point of view both are instances of applying Islamic rules. From the point of view of the state, however, religious norms come under the freedom to practise religion as guaranteed by the constitution. Legal norms, being foreign law, may be applied to some extent on the basis of the respective German laws. In my view, however, they do not enjoy the same protection of the freedom of religion, as under a secular rule of law the delimitation of competences between law and religion is the preserve of the legislative authority rather than the religious communities. Consequently there is a fundamental separation of law and religion.

In spite of differing specific forms concerning some details, the rule of law limits the implementation of religious as well as legal norms. Neither is the freedom to practise religion above other fundamental rights that might be in conflict with it, nor would permitting foreign legal norms without restriction be compatible with the principle of European rule of law. Here we can determine shared principles under an *ordre public* that comprises all areas of the law, unifies fundamental substance and ensures its equal application to all citizens and others present within the territory.

3 For different models of organising normative pluralism in Europe cf. Rohe, Family, 49 ff.

4 Bielefeldt, Muslime im säkularen Rechtsstaat, 96.

5 Cf. only *op. cit.*, 97 ff.

The general rule is that the more the public interest, or third party interest, is affected, and the less weighty the individual concern based on a religious or other specific norm, the more important does uniform application of the law, also as regards substantive norms, become. On the other hand, individual concerns based on these specific norms are accorded more importance the weightier they are and the less they affect the public interest, or that of a third party.

Even in cases of high individual urgency there are limits to the application of foreign norms. These limits are drawn by the legislative authority which has to find the balance between the interest in uniform implementation of the law and the safeguarding of law and order on the one hand and the interest in private-autonomous liberty and variety on the other. In a polity based on the rule of law and committed to human rights this delimitation must remain static at its core. Where less weighty matters are at stake, extra-legal considerations and information may in due course lead to different emphases. One instance illustrating this kind of development is the area of legally accepted opinions concerning forms of non-marital and same-sex partnerships which have changed fundamentally over the course of a few decades, as have those concerning divorce.⁶

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2 Applying Islamic Religious Norms in Germany and Europe

a *Public Law*

The implementation of religious norms can be discussed only cursorily in a book dealing with issues of Islamic law. Religious norms – for instance as regards rules for prayer and fasting – enjoy the protection of the freedom of religion, which includes the active practice of religion, visible in public.⁷ All religions are to be treated equally in this respect; there are no ‘foreign’ religions deserving a smaller degree of protection according to the constitution. This freedom is limited by other, conflicting fundamental rights, including the inviolability of human dignity as set down in Art. 1 of the German constitution (GG).

Much ink has been spilt over the relation between the different fundamental rights guaranteed by the constitution. Konrad Hesse’s ‘practical concordance’

6 Cf. BGH NJW 1964, 976, or BGH NJW-RR 2007, 145, 148 on prohibition of divorce being contrary to the *ordre public*.

7 Cf. e.g. BVerfG BVerfG NJW 1995, 2477, 2478; BVerfG NJW 2003, 2815, 2816; BVerwG NVwZ 2012, 162 (ritual prayer in school).

provides the appropriate guideline.⁸ The fundamental rights acquire significance as defensive rights and participation rights benefiting Muslims in relation to the state, as well as in the form of 'objective values', and with indirect effect under private law. There is potential for conflict in this area, e.g. as regards some Muslim attitudes to gender relations and interaction with non-Muslims, including apostasy from Islam. In some cases the relationship with the democratic rule of law may require clarification (see 4 below regarding Muslim fundamental attitudes).

Freedom of religion is an individual right; and to a certain, constitutionally regulated, extent also a collective one. Besides special norms such as Art. 7 para. 3 GG or Art. 140 GG in connection with Art. 136–139, 141 WRV, the freedom to practise religion according to Art. 4 GG is particularly relevant in the context of applying Islamic norms. It relates to a multitude of areas such as e.g. prayer, building mosques and call to prayer, clothing customs and fasting, dietary rules, burial regulations and naming laws, but also spiritual guidance for the military and for prisoners, education and even social, tax, alien and citizenship legislation.⁹

Freedom of religion also has limits that may be seen as the effects of a broadly interpreted *ordre public*. Within the area of applicability of public law we will have to distinguish according to how close the implementation of religious ideas is to government action. Thus permitting animals to be slaughtered without stunning them first, or the dead to be buried without a coffin, is much less closely linked to government action than Islamic religious education lessons at state schools.

When limiting actions motivated by religious considerations – also when weighing them against the conflicting fundamental rights of others – the principle of proportionality must be observed with great care. Thus when a mosque is being built, structural safety is indispensable. The neighbourhood will, however, be obliged to accept a certain degree of inconvenience, as it is not a factory or a residential building but one with a religious purpose. As regards the administration of cemeteries, coffining or calculating the period of rest of the dead, Muslims' needs must be restricted only within the limits of justifiable

8 Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th ed. 1995, marginal n. 72.

9 Cf. e.g. Bielefeldt, *Muslime im säkularen Rechtsstaat*, esp. 85 ff.; Muckel/Tillmanns, *Die religionsverfassungsrechtlichen Rahmenbedingungen*, 234 ff.; Coumont, *Islam und Schule*, 240 ff.; Rohe, *Der Islam*, 133 ff.; id., *On the Recognition*, 145 ff. For a basic overview of religious constitutional law see e.g. von Campenhausen/de Wall, *Staatskirchenrecht*, 4th ed. Munich 2006.

requirement. Burial laws have been changed accordingly within the last years in several states.¹⁰

When defining the extent of freedom of religion the *ordre public* displays a certain fluctuation range. It was frequently pointed out that the requirements for time off school for religious reasons were much more stringent for Christians than for Muslims in the past. This might be due to the fact that for a long time Islam was associated in Germany with a temporary 'guest status' ('Gastarbeiter', guest workers); Muslims were a marginal group who were not perceived to have significant bearing on society as a whole. In keeping with this perception the children of these guest workers received supplementary lessons in their native language, to prevent them being alienated from their cultural and linguistic background. Nowadays, however, it is understood that people with a migrant background will increasingly live in Germany for longer periods, and that more of them will become German citizens. Consequently their circumstances are an elementary part of society as a whole, and the balance between the tasks of society as a whole, such as state education and freedom of religion, may be redefined in the sense of opening equal space and drawing equal limits. The tendency of more recent court judgments follows these lines.¹¹

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On the other hand establishing religious infrastructure is simple normality for those Muslims who do stay, and enjoys protection under the freedom of religion. The debates, some of them highly emotional, concerning the building of mosques show that there is a considerable need for information on the principles of the German constitutional system throughout society as a whole.¹²

b *Penal Law*

Special considerations apply in the field of penal law. Its norms are the *ultima ratio* safeguarding peaceful coexistence and, consequently, law and order. They can only fulfil their function to secure the peace if the norms of penal law apply

10 Cf. the reports on Germany by the author in Nielsen (ed.), *Yearbook of Muslims in Europe*, 2010–.

11 Cf. e.g. BVerwG NVwZ 2014, 81 regarding the duty of a schoolgirl to participate in mixed swimming classes as long as she can wear a 'burkini' covering the whole body; VG Hamburg judgment of 12 Jan. 2004 (15 VG 5827/2003), NordÖR 2004, 412, concerning the rejected exemption from sex education lessons. The judgment was welcomed by Muslim (ZMD; cf. 'Zentralrat begrüßt Hamburger Urteil', *Islamische Zeitung* 02/2004, 15) and Turkish ('Türkische Vereinigungen begrüßen Urteil zur Sexualkunde', *Frankfurter Allgemeine Zeitung*, 22 Jan 2004) associations. In more detail Rohe, *Muslime in der Schule*, 257 ff.; Rohe, *Muslimische Schülerinnen im Schwimmunterricht*, *Schulverwaltung* 12/2013, 338–340.

12 Cf. Rohe, *Shariah in Europe*, 656 ff., esp. 667 ff.

throughout the territory without restriction, i.e. regardless of the residence status or the personal beliefs of all persons present in the country.

As a consequence religious norms which conflict with objects of legal protection can be implemented only within very narrow limits, and only if their impact is negligible and does not go beyond what is 'socially adequate' or at least justifiable. One instance of this is the circumcision of boys customary in Judaism and Islam.¹³ In this case the requirements are that it must be conducted by an expert according to the medical state of the art and that the legal guardian/s – or, depending on his intellectual capacity, the boy himself – must agree with legal effect.¹⁴ In 2012, the German regional court of Cologne¹⁵ ruled that male circumcision in a particular case concerning a Muslim boy is punishable under German penal law, even if performed in accordance with medical standards of care. This decision went against the unanimous opinion of the judiciary¹⁶ so far, which had held this procedure to be lawful. It was based on short and poorly balanced reasoning, simply stating that the parents cannot validly consent to the harm caused to the child. The court made no attempt whatsoever to weigh the parents' motivation of integrating the child into a religious community according to their definition of the best welfare of the child with the (relatively minor) violation of the integrity of the child's body. This decision caused uproar in the Jewish and Muslim communities and was rejected by most of the political parties and by leading politicians including the Chancellor.¹⁷ The German legislator amended German family law (para. 1631 d Civil Code) to clarify the situation.¹⁸ The ongoing debate shows an increasingly aggressive secularist tone condemning any religious rites as backward and irrel-

13 Cf. e.g. Beulke/Dießner, '(...) ein kleiner Schnitt', 338 ff. with further references including opposing opinions; cf. also OVG Lüneburg FEVS 44, 465 ff.; OVG Lüneburg NJW 2003, 3290 regarding social security covering expenses for the celebration.

14 The OLG allowed damages to a boy whose father, despite not having care and custody of the child, had arranged for him to be circumcised without the consent of the mother (who had care and custody of the child).

15 LG Köln decision of 7 May 2012 (151 Ns 169/11), LG Köln JZ 2012, 805.

16 According to German law of social welfare, the state even has to finance the costs of a decent celebration of the circumcision in case of need, cf. Administrative Court Frankfurt/Main (NJW 2007, 3580), Appeal Lüneburg FEVS 44, pp. 465.

17 Cf. the report 'Umstrittene Rechtslage: Kanzlerin warnt vor Beschneidungsverbot', Spiegel online 16 July 2012, available at www.spiegel.de/politik/deutschland/bundeskanzlerin-merkel-warnt-vor-beschneidungsverbot-a-844671.html, accessed 30 January 2014.

18 According to OLG Hamm (FamRZ 2013, 1818, 1819f.) the child has to be informed and consulted about the act in a way appropriate to his age and state of development.

evant in a secular society.¹⁹ This debate was exemplary for Europe in the sense that an increasing anti-religious sentiment is not ready to accept anymore that the socialisation within a religious group may be decided first and foremost by the parents of a minor for his best welfare, which is still the case under Art. 6 of GG.

On the other hand, penal law may provide protection from crimes committed on religious grounds, in particularly grave cases even across national boundaries. Thus for instance the Spanish parliament has enacted a law which makes the brutal female genital mutilation practised mainly in some parts of Africa a crime, even when parents take their children to another country for them to undergo the procedure, and then return to Spain.²⁰ This custom is basically not an Islamic rule,²¹ even though it is practised in some Islamic countries and regions especially in West and East Africa, and occasionally justified on religious grounds.²² The fact that the Coptic Christians of Egypt also practise this custom provides additional evidence of its pre-Islamic origin.²³

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Granting a more extensive 'cultural privilege' beyond minor offences would not be compatible with the fundamental principles of penal law. It is true that

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- 19 Cf. the lucid essay of Heiner Bielefeldt, UN special rapporteur for freedom of religion and belief and full professor at the University of Erlangen-Nürnberg, 'Marginalisierung der Religionsfreiheit?', available at www.polwiss.uni-erlangen.de/professuren/menschenrechte/UN%20Sonderberichterstatter/bielefeldt_beschneidungsurteil_vorabfassung.pdf, accessed 9 February 2014.
- 20 Cf. 'Scharfes Gesetz in Spanien gegen Mädchen-Beschneidung', *Neue Zürcher Zeitung*, 24 June 2005, 2. Cf. also the first Swiss case concerning the matter, 'Sechs Monate auf Bewährung für Genitalverstümmelung', *Neue Zürcher Zeitung*, 12 June 2008.
- 21 For modern views cf. Muslim Women's League, 'Female Genital Mutilation', 1999, viewed on 29 August 2014 at <http://www.mwusa.org/topics/violence&harrassment/fgm.html>, 4; Shamiri, Yemen, 9,5 Ban on women's circumcision, *Yearbook of Islamic and Middle Eastern Law* 7 (2000–2001), 344; in more detail Marion Rosenke, *Die rechtlichen Probleme im Zusammenhang mit der weiblichen Genitalverstümmelung*, Frankfurt/Main 2000, 59 ff.
- 22 This kind of justification is also found in e.g. a book by Abu Bakr Abdu'r-Razzaq, *Circumcision in Islam*, London 1998, transl. Aisha Bewley, ed. by Abdalhaqq Bewley and Muhammad 'Isa Waley, London 1998, 62 f., 100 f. and *passim* (purchased in an Islamic bookshop in London 2004).
- 23 Cf. 'Beschneidung bei Mädchen erlaubt', *Frankfurter Allgemeine Zeitung*, 25 June 1997, 9; 'Die Prominenz begehrt gegen die Islamisten auf', *Süddeutsche Zeitung*, 5/6 July 1997, 14; 'Ägypten verbietet weibliche Beschneidung', *Süddeutsche Zeitung*, 20/21 July 1996, 1; 'Die Frauen und Mädchen schützen', *Frankfurter Allgemeine Zeitung*, 12 Nov. 1998, 14.

penal law's constitutionally laid down emphasis on culpability can give rise to the consideration that criminal actions 'acceptable' in certain cultural or religious environments show the perpetrator's culpability in a gentler light, or that they do not comply with subjective elements of a crime such as murder due to 'base motives'. There have indeed been occasional rulings, not only with respect to Muslims or Orientals but also Italians or Eastern Europeans, which display this kind of view.²⁴

This does, however, overlook the limits of the subjectivisms to be considered, and invariably conflicts with the function of penal law detailed above. The parallel problem of the criminal liability of perpetrators motivated by religious reasons provides supporting evidence: their blindness for the law does by no means exempt them from punishment.²⁵ In addition a cultural or religious reservation in penal law presumes that crimes such as so-called 'honour killings' are viewed sympathetically throughout certain population groups. This is evidently incorrect: even in states where such crimes are committed comparatively frequently we find embittered resistance, not least, in fact, by faithful Muslims, against granting the criminals any legal privileges. The debate on domestic violence, which has been conducted in the Turkish press for some time, displays very clear tendencies in this context. Large parts of the population consider these crimes at best 'customary wrongs', for which of course no allowance must be made. A diverging view would, after all, relegate entire parts of the population to being potential victims meriting reduced protection. This result would be similarly contrary to the basic function of penal law. Consequently the Bundesgerichtshof (Federal Supreme Court) has revised judgments along those lines and emphasised that the standards for judgments must be those applied to the entire society under the rule of law, not the views of a group which does not recognise the moral and legal values of this society.²⁶ In addition, however, it pointed out correctly that the motive does not necessary have to be sought in particular cultural concepts, but may be due to universal factors such as rage, anger or desperation.²⁷

24 Cf. Britz, *Kulturelle Rechte*, 38 ff.; Rohe, *Auswirkungen der Migration*, 75 ff. with further references.

25 Cf. only Schönke/Schröder/Lenckner, *StGB*, § 46, marg. n. 15 with further references.

26 BGH NJW 2006, 1008, 1011 with further references; cf. Valerius, *Ehrenmord*, 912, 914 ff. with further references.

27 BGH NJW 2006, 1008, 1011 f.

c *Civil Law*

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In the area of civil law religious norms can become indirectly legally relevant not only because they are protected by specific anti-discrimination laws²⁸ but due to the fact that the fundamental right to freedom of religion set down in Art. 4 GG can develop formative effect with regard to legal relationships governed by civil law. Just like the other constitutional fundamental rights, freedom of religion originated as a subjective defensive right.²⁹ It is in addition an element of the objective legal system and thus affects circumstances governed by private law such as e.g. employment contracts. According to the prevalent opinion it has 'indirect effect on a third party'.³⁰

Employees are able to some extent and depending on the circumstances of the individual case to refer to the effect of freedom of religion when arranging the terms of their employment. In mutual consideration with the respective requirements of the employer it is thus possible to effect the observation of prayer times or holidays, or to defend oneself against being given notice due to exercising such freedoms.³¹ The protection of such concerns provided by the European anti-discrimination guidance 2000/78/EG as implemented by the Allgemeines Gleichbehandlungsgesetz (AGG) goes further still.³²

Of course the legal protection of the freedom of religion in this context cannot possibly be as extensive in this context as it would be with reference to the state. Private persons – including employers – are also protected by fundamental rights and thus able to pursue their business interests according

28 Cf. ArbG Hamburg judgment of 4 Dec. 2007, Az. 20 Ca 105/07 of 4 Dec. 07 (regarding damages for the exclusion of a Muslim job applicant for the position of social education worker with the Diakonisches Werk der Evangelischen Kirche in Deutschland paid out of the public purse).

29 Cf. Zippelius, *Bonner Kommentar* (Loseblattsig.), Art. 4, marg. n. 63.

30 While the legal construction of the consequences has been very controversial in recent years (cf. e.g. *Münchener Handbuch zum Arbeitsrecht*–Blomeyer, 2nd ed. 2001, § 48, marg. n. 42 with further references; Hans Hanau, *Der Grundsatz der Verhältnismäßigkeit im Privatrecht*, Tübingen 2004, esp. 51 ff. with further references), its results have not.

31 Cf. e.g. BAG NJW 2003, 1685, 1687 and BVerfG NJW 2003, 2815; LAG Düsseldorf JZ 1964, 258; LAG Hamm NJW 2002, 1970; LAG Hamm NZA 2002, 1090, 1092; a comprehensive overview may be found in Hoevels, *Islam und Arbeitsrecht*, 2003.

32 Cf. Rohe, *Schutz vor Diskriminierung aus religiösen Gründen im Europäischen Arbeitsrecht – Segen oder Fluch?*, in: Rüdiger Krause/Winfried Veelken/Klaus Vieweg (eds.), *Recht der Wirtschaft und der Arbeit in Europa*, *Gedächtnisschrift für Wolfgang Blomeyer*, Berlin 2004, 217 ff.; ArbG Berlin 28.03.2012, NZA-RR 2012, 627 (the claimant was granted damages under the AGG for having been rejected by a dentist because she was wearing a headscarf).

to their own freedom of decision.³³ There are of course restrictions due to the abovementioned third-party effect of the fundamental rights. They affect e.g. the interpretation of what constitutes ‘important grounds’ on which a notice that does not observe the contractual period or the term of notice could be justified.

Practical legal issues usually arise when the requirements of a business come in conflict with the observation of religious rules. A very clear instance is the commandment of praying five times a day, at changing times depending on the position of the sun,³⁴ or the Friday prayer which ought to take place in the (Friday) mosque. Its particular significance is due to the fact that the entire mosque community gathers on this occasion and the prayer leader will give a sermon (*khutba*) which also deals with important community matters. Consequently people may feel a particularly urgent desire to be present.

347 Further important concerns are fasting during the month of Ramadan and the subsequent celebrations of breaking the fast, as well as the Feast of the Sacrifice in the month of Dhū l-Hijja, which also play an important social part. For some women the wish to wear a headscarf during working hours may also be relevant. Of smaller practical significance are instances of conflict with religious dietary laws such as the prohibition of consuming pork or alcohol, or the desire to go on a pilgrimage to Mecca, which is incumbent on wealthier persons. As for the dietary laws, while it may be possible to come in contact with prohibited items, consuming them does not, of course, follow; although even the contact with prohibited items may constitute a problem for some Muslims. Problems may arise concerning social welfare laws if a certain possible employment is not accepted, or terminated, due to religious reasons.³⁵

In the concrete application of the law the issue tends to be how to balance the employer’s right to give directions in order to best implement the interests of his business against the employee’s desire to be absent from work at a certain time (possibly by allowing the latter to take annual leave at that time, or by arranging the working hours accordingly) or be exempt from certain types of work. In the end the question is whether the refusal to fulfil a set task can lead to extraordinary dismissal, and whether the employer’s requirements constitute legal grounds to justify him dismissing the employee. In a different context the question may arise of whether the religious requirements of a Muslim looking

33 Cf. LAG Düsseldorf JZ 1964, 258; Hans Heinrich Rupp, *Verfassungsprobleme der Gewissensfreiheit*, NVwZ 1991, 1033, 1037 f.

34 Cf. LAG Hamm NJW 2002, 1970.

35 Cf. only BVerfG NJW 1984, 912.

for work can constitute grounds on which he may refuse to take a position or be refused a position. This also applies in the case of state employees.³⁶

The deliberation of whether (objectively justifiable) business requirements or (similarly objectively justifiable) requirements of individual employees are given precedence depends on the circumstances of the individual cases. It is not possible to present details here.³⁷ It is, however, possible to refer to the legal practice in cases of conflict which dealt with the observation of Christian religious rules or convictions. Overall the employee's requirements will be accorded particular weight if the religious observation is of greater importance (there are degrees in Islam, too), if the employer was already aware of the requirement at the start of the employment and/or if he is able to allow the requirement without great difficulty. The latter will be particularly relevant if the business in case is a larger concern, and/or the work of the person involved can be fulfilled either by other colleagues or at a later time. In cases in which a change in the running of the business or the specific work required are the cause of the religious conflict, the employee's protection will be given priority.

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The requirements of the business, on the other hand, are of particular importance if acceding to the employee's wishes would cause considerable difficulties, would reduce the effectiveness of his work, or if the religious commandments cited are of lesser importance. One instance is the case of the English bus driver who insisted that he must observe the daily prayers; when he was dismissed the court declared this to be justified.³⁸ It is indeed not reasonable that public transport should come to a standstill during Islamic prayer times. After all, this does not happen in most Islamic countries, either, which allows the conclusion that observing the daily prayer times is not necessarily more important than the requirements of everyday life.

A further most important concern for businesses is health and safety, for instance with regard to clothing. In cases where the employee changes his religious convictions after the start of the employment, the business requirements are likely to be prioritised at least for a certain time, too. On the other hand the employee's right to change his convictions cannot be restricted for an unlimited time, even though they may affect his fulfilling his job. Finally, the employee

36 Regarding a practical instance from England (teacher) *Ahmad v. Inner London Education Authority* [1978] 1 AllER 574.

37 For a comprehensive overview cf. Hoevels, *Islam und Arbeitsrecht*, 2003; Frings, *Musliminnen und Muslime*, 1 ff.

38 Reported in Shadid/van Koningsveld, *Religious Freedom*, 102.

will be granted less protection if he took a job despite predictable conflicts between the job and his religious beliefs.³⁹

Overall there is a stable base for compromise solutions. The generic Quranic statement that God does not expect humans to do anything that is beyond their abilities (sura 2:286) can be helpful in this context. Thus a Muslim in employment is permitted to 'conflate' the daily prayers at other times than those prescribed, or perform them later.⁴⁰ On the other hand it must not be concluded from this that performing the prayers is a concern that does not require any consideration. In the eyes of the persons affected remedial solutions due to external necessity do not possess the same quality as the originally 'commanded' procedure.⁴¹

349 If the participation in Friday prayers is desired, this ought to be permitted if possible. They take place during the lunch hour, a time at which a break is often planned anyway. Fulfilling a task in advance or later should usually be possible. Taking part in celebrations such as at the end of Ramadan, or embarking on the pilgrimage to Mecca can usually be made possible by taking paid or unpaid annual leave.⁴² Unwillingness to compromise on the part of individual employers is not acceptable under the law. Thus in an English case⁴³ Muslims were awarded financial compensation⁴⁴ after they had not been allowed to take unpaid leave to celebrate the breaking of the fast, even though this had been previously acceptable, and they had offered to work overtime to make up for the day off. Under German law, a formal warning or notice in such a case would have been illegal. A rare German case concerning a conflict between employment law and the requirements of Muslim prayer or Eid feasts dates from 1964,⁴⁵ indicating that mutually acceptable solutions to such potential conflicts are readily found. A new case in 2009⁴⁶ was decided in favour of a Muslim employee who wanted to perform the ritual pilgrimage to Mecca. Her

39 Cf. BAG NZA 1986, 21, 22.

40 Cf. Balić, *Ruf vom Minarett*, 70.

41 Similar: LAG Hamm NJW 2002, 1970, 1971.

42 Cf. Hoevens, *Islam und Arbeitsrecht*, 202 ff.

43 Ruling of the Employment Appeal Tribunal in *J. H. Walker v. Husain and others* (1996) IRLR 11.

44 The legal basis is set down in Sect. 57 (3) Race Relations Act 1976; this law was fundamentally problematic as it only covers religious discrimination if it has an ethnic aspect as well.

45 LAG Duesseldorf JZ 1964, 258.

46 ArbG Cologne (Az. 17 Ca 51/08), BeckRS 2010, 73919.

interests⁴⁷ were taken to be of superior importance in comparison to the needs of her employer.

As a rule it should also be possible to avoid coming in contact with pork or alcohol. Should it not be possible – for instance in production processes involving alcoholic substances or when working in catering – there is a difference between something having to be consumed or only touched in another way. Despite mental reservations, the latter is likely to be feasible. On the other hand, the employer has the duty to examine whether the contact with alcohol could be easily avoided by internal arrangements. In 2011, the German Federal Labour court (Bundesarbeitsgericht) decided in favour of a Muslim employee in a supermarket who was ordered to refill shelves with bottles containing alcohol after having worked in other parts of the market before and was dismissed when refusing the new work.⁴⁸ According to the court, the employer had failed to check whether the employee could reasonably have been given other duties which would not put him in conflict with his religious convictions. A British labour tribunal dismissed a similar claim by an employee in 2008.⁴⁹ In this case the employer was obviously able to convince the tribunal that he had made every effort to find alternative work for the employee; in such a case German jurisprudence would also uphold the dismissal. Interestingly, the broad media debate in both cases – which seem to be extremely infrequent in Europe – is in stark contrast to the widespread problem of dismissals due to alcohol abuse.

Contact with interest-bearing business transaction is to be treated similarly, as it might occur in financial business or in the accounting department of a business. The most difficult problem may be the employment of women who wish to wear a headscarf for religious reasons, if their work brings them into contact with the public.⁵⁰ The employer is, of course, also protected by fundamental rights such as the right to the free development of the individual and the right to freedom of profession (cf. Art. 2, para. 1, Art. 12, para. 1 GG). Thus

47 The 53-year-old woman was employed in the school administration. The next period of holidays coinciding with the time of the pilgrimage would have been 13 years later, at which point, she would have reached the age of 64 [Explain why this is a problem. The pilgrimage has to be done before a specific age?]. Additionally, she feared that her mother, who was taking care of her disabled child, would not be able to continue this at that time.

48 BAG NJW 2011, 3319.

49 Cf. The report available at <http://www.thisisderbyshire.co.uk/Muslim-worker-loses-Tesco-booze-bid/story-11581305-detail/story.html>.

50 Regarding dismissals due to clothing worn for reasons of religious or other beliefs cf. LAG Düsseldorf DB 1985, 39; ArbG Hamburg ArbuR 1996, 243; LAG Hessen NJW 2001, 3650, as well as recently BAG NJW 2003, 1685.

an employer may be faced with the difficulty that while he has no problem with someone wearing a headscarf, his customers may hold different views. As a rule it will at present not be possible to force him to ignore his legitimate business interests and persuade his clients to be more tolerant in future – they are more likely to terminate their business association with him.

It is still not possible to simply dismiss an employee for an important reason, or on grounds of conduct subject to protection against dismissal. There are decisions in favour of Muslim female employees wearing a headscarf in cases where no security reasons are at stake. The German Federal Labour Court accepted the claim of the appellant who wore her headscarf to work at a warehouse.⁵¹ Stressing the great importance of religious freedom, the court ruled that this freedom cannot be abrogated by mere suppositions of possible economic disadvantage to the employer. Even in case of proven economic disadvantage, the employer would first have to consider whether the employee could work in a less sensitive capacity before being entitled to terminate her contract. Since European legislation on protecting employees against discrimination on religious grounds was introduced, the scope of protection will probably broaden even more. A case from Berlin in March 2012⁵² might illustrate this. The application of a well-qualified Muslim woman from Iraq wearing a headscarf for a job in a dental surgery was rejected because the employer insisted on 'religious neutrality' in his enterprise. The Berlin Labour Court argued in favour of the claimant, stressing that there is no right to unconditionally keep any sign of religion outside the (non-religious) enterprise.⁵³ The employer was ordered to pay 1,500 Euros in damages to the claimant. This decision was regarded as a milestone by NGOs fighting discrimination.

There has not yet been a case in the legal practice known to me of the inverse situation of an institutional employer with Islamic sympathies dismissing an employee on the grounds of significant infringement of essential tenets of the faith. Should such a case happen it will be necessary to determine, in comparison with Christians in employment, whether the corporate credibility requires the infringement to be penalised by dismissal. One striking example of such a situation is the argument surrounding a supermarket in Évry near Paris. The mayor intended (without any legal basis) to force the Muslim management of the shop to sell pork and alcohol. This strange action may, however, have

51 BAG NJW 2003, 1685.

52 Cf. ArbG Berlin, NZA-RR 2012, 627.

53 Cf. the report 'German Dentist Fined for Anti-Hijab Bias' of 20 Oct. 2012, available at <http://www.onislam.net/english/news/europe/459596-german-dentist-fined-for-anti-hijab-bias.html>.

an explanation in the fact that when taking on the shop the management dismissed all non-Muslim employees.⁵⁴ They, too, could be protected under the implemented EU guidelines in future.

Similar to the cases of individual employment law just referred to, the fundamental right to freedom of religion can have indirect effect on e.g. tenancy law.⁵⁵

There are further areas of civil law in which religious concerns develop significance simply through interpretation of the relevant norms; the fundamental principle of all religions being equal must, of course, be observed. Thus the OLG Schleswig had to rule in the case of a quarrel between the Muslim father and the Christian mother of a three-year-old girl, the mother wishing to have the child baptised.⁵⁶ The court ruled that the father's refusal – he wished for the child to have the decision herself on reaching 'religious majority' – did not constitute grounds on which to grant only the mother custody and care of the child which had so far been shared. On the other hand, the Court of Appeals of Cologne⁵⁷ has prevented the father of a little boy from any contact on the mother's request, due to previous domestic violence and continuous jihadist propaganda which has already led to punishment and expulsion of the father. In a decision regarding sales law the OLG Hamm ruled it possible that the vendor of a house that had been used as a brothel-style swingers' club had a duty to inform the Muslim buyer of the previous use of the property. In the case in question, however, the plaintiff lost because this use had been some time in the past.⁵⁸

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Stereotypes regarding the Muslim way of life, some of which may be widely believed, are, however, rejected: in the context of a husband and wife's shared obligation to pay, the Federal Court⁵⁹ pointed out that living in a 'typical Muslim marriage' does not immediately allow the conclusion that the wife's freedom of decision is restricted.

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- 54 Cf. 'Ohne Schweinefleisch und Alkohol', *Frankfurter Allgemeine Zeitung*, 24 Dec. 2002, 3.
 55 BGH NJW 2008, 216, 217f. on the demand to install a satellite dish for Turkish Alevites (rejected in the present instance); concerning similar cases cf. also OLG Munich NJW 2008, 235.
 56 OLG Schleswig FamRZ 2003, 1948.
 57 Court of Appeal Cologne 15.03.2013 (26 UF 9/13), available at <http://openjur.de/u/618834.html>, accessed 10 February 2014.
 58 OLG Hamm NJW-RR 2000, 1183f.
 59 BGH NJW 1999, 135.

3 Applying the Norms of Islamic Law

Under German law there are two scenarios in which it would be possible to apply foreign legal norms – including those with religious self-legitimation. On the one hand it is possible to implement a genuine ‘application of foreign law’ under private international law, i.e. on the basis of the applicability of laws anchored in German law. In state courts, only foreign state law can be applied; thus, it is not ‘Islamic law’ as such that may be applied, but only in its various shapes given by state legislation or by recognised customary law. In international arbitration, ‘Islamic law’ or ‘sharia law’ could be applicable in principle; regarding the broad variety of interpretations, it cannot be recommended to agree on such law without specifications.⁶⁰ On the other hand these norms may be applied within the boundaries of the application of German civil substantive law as long as this allows scope of autonomous choice (so-called dispositive substantive law). In addition, some European states – although Germany is not among them – have integrated some ‘Islamic’ norms into their national law.⁶¹ Finally, these norms are applied informally in many states, although this situation can be investigated and monitored to only a limited extent.⁶²

a *Private International Law*

aa Introduction

Unlike public law, the function of private law is primarily to shape and safeguard legal relations between private persons. Their individual interests are of particular significance in this context. This is true also when they are connected to more than one legal system due to their circumstances. If someone’s life is structured according to the conditions of a certain legal system, this structure of life deserves protection even when the person in question changes his or her domicile or residence. Consequently the familiar law of the home country should still apply once he or she has crossed a border. The basic principle of such regulations is the assumption that all systems of private law are fundamentally of equal value together with the fact that for reasons of legal certainty it is preferable not to interfere with legal relations once they have become established with legal effect, even if they may not comply with the regulations of German substantive law in every detail. On the other hand it

60 Cf. Bälz, *Das islamische Recht als Vertragsstatut?*, IPRax 2005, 44–47 regarding an English case.

61 Cf. Rohe, *Shariah in Europe*, 686f.

62 Cf. Rohe, *Shariah in Europe*, esp. 687ff.

is in the interest of the community under the rule of law that there should be certain areas in which the same law applies to all those present in the country.

The question of whether domestic or foreign substantive law (rules of material law) should be applied is determined according to the statutes of private international law (conflict of laws), which in Germany⁶³ is mostly included in the introductory laws of the civil code (Art. 3 ff. EGBGB) and several European regulations (e.g. the Rome I, II and III regulations regarding contract, tort and divorce law). These statutes provide the balance between the restrictions sketched above. Of course the specifically legally formulated 'ordre public international' (cf. e.g. Art. 6, 13 para. 2; 17 para. 2 EGBGB) draws clear boundaries: in cases with sufficient domestic relevance where the result of applying foreign substantive law would be incompatible with essential principles of German law (including the fundamental rights), the norms of foreign law will not be applied. The German legislative authority determines in every single case the framework within which differences of laws will be adopted due to superior considerations.

The *ordre public* is not static but, in the words of the Federal Supreme Court,⁶⁴ 'being a substrate of the legal system in force the former as well as the latter are expressions of the elementary values and principles of domestic and, increasingly, also European society under the rule of law [...] subject to the transformation of these values and principles and following it, albeit at times with some delay.'

In the case of persons and families with foreign citizenship or dual German and foreign citizenship German conflict of laws rules until recently provided for the application of the law of citizenship in most issues of family and inheritance law. Unlike many countries of the Anglo-American family of laws, where regulations are tied to the forms of habitual residence (or domicile; cf. 4.2.b above regarding the Canadian situation), in Germany we still see the everyday application of foreign norms in these areas.⁶⁵ With reference to Muslims it must be pointed out that German substantive law applies to the increasing number of German citizens among them. The large group of Turkish Muslims is subject to the extensively reformed Turkish law which has the same

63 On conflict of laws under Swiss law cf. Schwander, *Die Anwendung*, 403 ff.

64 BGH NJW-RR 2007, 145, 148 on the prohibition of divorce under canonical law applying to Syriac Christians.

65 Cf. Rohe, *Rechtsfragen der Eheschließung*, 161, 163 f.; id., *Eheschließung*, StAZ 2006, 93 ff.; Scholz, *Islam-rechtliche Eheschließung*, 321.

attitude as German law towards traditional Islamic ideas. In addition, new EU legislation e.g. regarding divorce and succession⁶⁶ tends to replace citizenship with habitual residence as the most important connecting factor, thus leading to an increase in the application of domestic law. Nevertheless, citizenship still plays an important role in this field.

353 In the case of the not insignificant number of Muslim citizens of states which follow the traditional system of Islamic law, the rules applied are generally those which differ – sometimes fundamentally – from German law in some important aspects such as the equality of the sexes, religions and beliefs. German legislation aimed at limiting the application of foreign statutes is in many cases directed at such norms in particular. In the following we will discuss cases of conflict between typical institutions of Islamic personal status, family and inheritance law on the one hand and German legal principles on the other. At first, however, we must clarify the standards according to which such conflicts should be judged.

bb Standards by Which the *ordre public* Limits Norms of Islamic Law:
For Example, Divorce

The question of how to draw boundaries for the application of foreign norms is answered in the main by the choice of legal criteria. The system of German conflict of laws (cf. the core statute of Art. 6 EGBGB)⁶⁷ relies solely on examining the concrete implementation. Similar to Italy and Spain, but unlike for instance in Austria, Belgium, France and the Netherlands according to more recent jurisprudence,⁶⁸ it is not examined whether the abstract substance of a certain foreign norm is contrary to the principles of the German legal system, but only whether this is the case in the concrete result of its application in the individual case.⁶⁹ A conflict of laws is furthermore presumed only if the case in question has sufficient domestic relevance, such as citizenship or habitual residence in

66 Cf. the Rome III regulation (no. 1259/2010) of 20 December 2010 on divorce and separation, and the regulation no. 650/2012 of 4 July 2012 on succession.

67 'A legal norm from another country must not be applied if its application will lead to a result that is clearly incompatible with essential principles of German law. It must on no account be applied if the application is incompatible with the fundamental rights.'

68 For different approaches in Europe cf. Büchler, *Islamic Law*, 27 ff.; Foblets, *The Admissibility*, 10 ff.; Bowen/Rohe, *Juridical Framings*, 135 ff.; Rohe, *Sharia in Europe*, 656 ff.; Gärtner, *Die Privatscheidung*, 2008; Koch, *Die Anwendung*, 2012.

69 Cf. here only BGH FamRZ 2004, 1952, 1955; OLG Hamm BeckRS 2010, 06463; OLG Hamm BeckRS 2011, 06358.

Germany.⁷⁰ Only essential divergence from German substantive law will be relevant.

There are advantages as well as disadvantages in both approaches: limiting oneself to examining only individual cases can give rise to the impression that the norms applied are 'endorsed' as such, even if their substance may be contrary to German substantive law. On the other hand this is the only way in which the concrete interests of the parties actually involved can be considered. The abstract monitoring approach avoids the danger of even seeming to endorse any such norms, but it does not provide protection to those affected in concrete cases.

The difference between the two approaches may be illustrated using the example of divorce law, and in particular the husband's one-sided right to divorce (*ṭalāq*; cf. Part 1, 4.2.b.gg; Part Two 4.1.i). As a legal institute, it is contrary to the constitutional statutes on gender equality (Art. 3 GG) and the protection of marriage and family (Art. 6 GG.). A *ṭalāq* declared in Germany is void (cf. Art. 17 para. 2 EGBGB):⁷¹ within Germany a marriage can be divorced only by a court of law. The same is true of divorces outside of Germany as long as German law applies to them.⁷²

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All the same, a *ṭalāq* that has legal effect under a legal system that may be relevant to the case can under certain circumstances be recognised under German law. In a ruling concerning an Iranian case the Federal Constitutional Court judged that failure to recognise a divorce effective under foreign law could be in breach of the right to remarriage (after a divorce) guaranteed by Art. 6 GG.⁷³

Overall the court judgments on the matter do not display complete consistency.⁷⁴ However, the tendency is that a foreign *ṭalāq* will be recognised if in the concrete case the requirements of German substantive law for a divorce

70 Cf. BGHZ 120, 29, 34; OLG Saarbrücken, FamRZ 1992, 848; KG NJW-RR 1994, 199; OLG Düsseldorf, FamRZ 1998, 113, 115; OLG Hamm NJW-RR 2010, 1090; OLG Koblenz NJW 2013, 1377; OLG Munich FamRZ 2013, 36 ff.

71 Cf. OLG Frankfurt/Main, the president, StAZ 2001, 37 (concerning a comparable Japanese case); OLG Munich BeckRS 2012, 04354.

72 Cf. only BGHZ 110, 267, 276 (a Thai case); Staudinger/Mankowski, BGB, Art. 17 EGBGB n. 116 with further references.

73 BVerfG FamRZ 2007, 615; cf. also BGH NJW-RR 2007, 145, 148 f.

74 Cf. BayObLG IPRax 1982, 104, 105; OLG Munich IPRax 1989, 238, 241; OLG Koblenz NJW-RR 1993, 70, 71; KG NJW-RR 1994, 199; OLG Hamm IPRax 1995, 174, 175 with notes. Henrich, 166; OLG Cologne FamRZ 1996, 1147; OLG Düsseldorf FamRZ 1997, 882 (LS) = IPRspr. 1996 no. 6; OLG Stuttgart FamRZ 1997, 882, 883; OLG Düsseldorf FamRZ 1998, 1113, 1114; OLG Cologne FamRZ 2000, 895; AG Frankfurt/Main IPRax 1989, 237, 238; AG Esslingen IPRax

would have been met,⁷⁵ or if the wife submits a request for recognition herself.⁷⁶ Recognition is thus possible if e.g. the partners have lived separately for more than a year, and if the wife was informed of the *ṭalāq* in suitable fashion and was able to present her side of the case. A *ṭalāq* is not recognised if the wife was not informed of it, and was thus unable to state her views on the case.⁷⁷ Some courts do not even recognise a *ṭalāq* even if the requirements of German substantive law for a divorce would have been met.⁷⁸

It is not entirely clear, either, how to proceed before a court if norms of, or based on, Islamic law regarding *ṭalāq* must be applied.⁷⁹ Some courts reject the *ṭalāq* as a precondition for the subsequent divorce decree, in order to prevent norms being applied under which the wife is only the object of actions and has no rights of her own.⁸⁰ The Kammergericht (Court of Appeal) in Berlin even refused to concern itself at all with divorce proceedings according to Iranian law at the wife's request. The relevant reason given was that a *ṭalāq* would have to be the consequence, but that a non-religious German court could not be a part of such a proceeding.⁸¹ Furthermore, a ruling by a German court in this matter would not be recognised in Iran anyway, and would consequently be futile.⁸²

1993, 250, 251 with notes. Beitzke, 231; AG Hamburg FamRZ 2000, 958; Wähler, Islamische talaq-Scheidungen, 113 ff.

75 Cf. OLG Cologne, FamRZ 1996, 1147; BayObLG, NJW-RR 1998, 1538; OLG Düsseldorf, FamRZ 1998, 1113; OLG Cologne, FamRZ 2000, 895; OLG Zweibrücken, NJW-RR 2002, 581; OLG Hamm 7 Mar. 2006, BeckRS 2007, 00423; OLG Hamm NJW-RR 2010, 1090; AG Hamburg, FamRZ 2000, 958; AG Kulmbach, FamRZ 2004, 631; a different opinion: Farnkfurt/Main, IPRax 1989, 237. In OLG Frankfurt/Main the president, StAZ 2003, 137, the *ordre public* problem is not raised, possibly because the wife did not object to the recognition of the private Pakistani divorce in Germany. Cf. also OLG Hamm, 7 UF 123/05, 7 Mar. 2006 (BeckRS 2007 00423).

76 Cf. e.g. OLG Frankfurt/M FamRZ 2009, 1504.

77 Cf. BayObLG IPRax 1982, 104; OLG Stuttgart IPRax 2000, 427; a very complex but instructive Iranian case was tried by the OLG Frankfurt/Main NJW 1990, 646.

78 Cf. OLG Stuttgart IPRax 2000, 427; OLG Stuttgart FamRZ 2004, 25; a different opinion: OLG Koblenz NJW-RR 1993, 70.

79 Cf. Wähler, Islamische talaq-Scheidungen, 113–125.

80 Pointing clearly in this direction: AG Frankfurt/Main NJW 1989, 1434.

81 This opinion was shared by an Iranian Muslim respondent in a divorce case, who wanted to be divorced by a Muslim scholar or a person appointed by him only; the OLG rejected his request (cf. OLG Stuttgart FamRZ 2004, 25 ff.).

82 Cf. KG IPRax 2000, 126 with critical note, Ch. Herfarth, 101. Cf. also the similar judgment in Ontario in the case of Khaddoura v. Hammoud (1998), 168 D.L.R. (4th) 503 (Ont. Gen. Div.), 507.

In this case the character of the relevant Islamic norms was fundamentally misunderstood. While it may be true that the *ṭalāq* is regulated according to the religious dimension furnished by the rules of the Quran, pronouncing a *ṭalāq* and reviewing it is a legal act and consequently within the competency of a court of law.⁸³ Thus it was entirely justified that the Federal Supreme Court overturned this ruling.⁸⁴

Other courts replace the *ṭalāq* with the court ruling and consider the declaration itself to be a mere procedural rule which does not need to be applied under the regulations of international civil procedural law, as courts only apply their own procedural law on principle.⁸⁵

The wife's request for divorce is relevant at the level of the *ordre public* in Germany: in this context there may be an inadmissible restriction by regulations of the Islamic law of the home country. As a result the wife is entitled to divorce irrespective of the regulations of the law in her home country.⁸⁶

A new dispute has arisen in German jurisprudence regarding whether the *ordre public* applies in every case of unequal treatment of the sexes, or only in cases of fundamentally different treatment.⁸⁷ The EU Rome III Regulation expressly demands equal treatment of the sexes regarding divorce; in case of inequality under the applicable foreign law, the *lex fori* has to be applied according to Art. 10. If the husband declares *ṭalāq* at his wife's request, or in

83 Cf. also OLG Stuttgart FamRZ 2004, 25 ff.

84 Cf. BGH FamRZ 2004, 1952. Now cf. also OLG Hamm, 7 UF 123/05, 7 Mar. 2006 (BeckRS 2007 00423) on concluding a marriage before a mufti in northern Greece, and the similar judgment by the Ontario Court of Justice in Khan v. Khan (2005 ONCJ 155) [2005] O.J. No. 1923 sect. 31 ff.

85 Cf. OLG Düsseldorf, FamRZ 1998, 1113.

86 Cf. OLG Stuttgart FamRZ 1997, 882; OLG Cologne FamRZ 2002, 166; OLG Zweibrücken NJW-RR 2002, 581 f.; OLG Stuttgart FamRZ 2004, 25 f.; OLG Rostock FamRZ 2006, 947; this stable jurisprudence is not dealt with in OLG Hamm FamRZ 2012, 1498. According to OLG Stuttgart FamRZ 2004, 26 it would not be suitable to confer onto her only the 'male' right to declare *ṭalāq*.

87 Cf. the controversial remarks in OLG Hamm FamRZ 2013, 1481, 1484 ('the German state respects other, particularly extra-European, cultures, including their legal culture, but equally demands their respect towards German culture. According to the bench's conviction, this would not be met if in cases where religious Muslim divorce law poses higher hurdles to the wife's request for divorce as compared to the husband, in a kind of reflex reaction *ordre public* always is referred to'), and Henrich in his comment on OLG Hamm FamRZ 2012, 1498, 1500.

accordance with her wishes, the problem of insufficient equality is neutralised by the result.⁸⁸ This concrete approach is the only efficient way to help the divorced wife, in cases when she wishes to remarry and therefore needs the recognition of the previous *ṭalāq*, for example.⁸⁹ In case of non-recognition she would be forced to seek a divorce from a European court, which could often turn out to be equally time-consuming and expensive, particularly if the husband is living in a country which is not easily accessible for judicial correspondence, or if his address is unknown. If the residence permit for the woman is dependent on the new marriage, her need for having the *ṭalāq* recognised is even more pressing. The abstract 'human rights approach' would then turn against the very person it is intended to protect, and the woman would consequently be punished twice. In my opinion the wife should also retain her claim to the dower in any case, and not be obliged to (re-)pay any sums of money, which would be expected under existing norms of Islamic law (cf. Part Two 4.1.i above). In my view, applying rules of this kind would be a breach of the *ordre public*.

Another aspect is that of the post-marital pension rights adjustment under German law (cf. Art. 17 para. 3 EGBGB). Its function is to divide the right to a pension according to the respective contribution to the marriage, irrespective of which partner contributed the financial support during the marriage and was able to acquire such rights. This is an internationally hardly known specific norm of German law. Consequently in German–Iranian cases most courts did not consider the pension rights adjustment to be part of the German *ordre public international*,⁹⁰ while the OLG Oldenburg maintained the opposite view.⁹¹ In my opinion decisions must be made according to the circumstances of the individual case: if the married partner who looked after the housekeeping did not receive any financial compensation during the marriage, and if s/he does not receive any compensation in case of divorce, invoking the *ordre public* ought to be considered.

If, finally, the wife is granted a right to divorce against the husband's wishes even if he is unable to provide financial support due to unemployment

88 Von Bar/Mankowski, *Internationales Privatrecht* I, § 7 n. 266 with further references.

89 This was the case in the decisions of the German Federal Supreme Court of 2004 (BGH FamRZ 2004, 1952) and of 2007 (NJW-RR 2007, pp. 145, 148 ss).

90 BGH NJW-RR 2005, 1449 f.; OLG Cologne FamRZ 2002, 613 f.; OLG Frankfurt FamRZ 2011, 1065; confirmed by ECtHR FamRZ 2011, 1037.

91 OLG Oldenburg FamRZ 1995, 1590.

through no fault of his own it should also be possible to apply the *ordre public*,⁹² unless there are further grounds for divorce.⁹³ 356

cc Minimum Marital Age and Marriage Guardians

In many Islamic states the minimum marital age is below the limits set down by German substantive law (§ 1303 BGB). In the case of a minimum age of fifteen it is possible that, due to the proximity of the regulation in § 1303 para. 2 BGB, even if there is sufficient domestic relevance a breach of the *ordre public* will be assumed frequently but not necessarily.⁹⁴ The marriage of a fourteen-year-old, on the other hand, will definitely be considered a breach,⁹⁵ while the minimum age of twelve or fourteen is under no circumstances permissible.⁹⁶

If the married partners have reached the minimum marital age required by the standards of German law, the question arises of whether this constitutes a remedy of the invalid marriage, or whether a new marriage must generally be contracted.

The one decisive factor is in my view the vulnerability of the respective minor, usually the wife. In this view it would be appropriate to consider the marriage valid if this entails benefits for the vulnerable party. Otherwise a reaffirmation of the marriage will be necessary. This must not necessarily take the form of a marriage ceremony as stipulated by German substantive law, in order to prevent the possible result – which might go against the wishes of the parties involved – of declaring the preceding relationship ‘illicit’. This is a particularly valid point if there are children of the marriage. It should, in fact, be sufficient for the vulnerable partner to declare voluntarily and in earnest her wish to continue with the marriage.

There are, however, some requirements that must be met in this context. Marriage between minors takes place under what is *de facto* duress, as there is no decision by the parties involved for which they can take responsibil-

92 Along these lines OLG Bremen FamRZ 1999, 1520 f.; a different view, without explanations, OLG Stuttgart FamRZ 2004, 25, 26.

93 Along these lines but unclear OLG Düsseldorf, FamRZ 1998, 1113 f.

94 Cf. also KG FamRZ 1990, 45, 46; AG Tübingen ZfJ 1992, 48; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 203 with further references.

95 Thus also Staudinger/Mankowski, Art. 13 EGBGB marg. n. 203 with further references; a different opinion e.g. Scholz, Islam-rechtliche Eheschließung, 328, with reference to the respective cultural background.

96 Cf. OLG Cologne NJWE-FER 1997, 55 (on former Iranian law); OLG Cologne FamRZ 1997, 1240 (Iranian case on the guardianship for a ten-year-old girl); KG FamRZ 2012, 1495 (mixed German-Lebanese case).

ity. This situation may continue beyond the acceptable minimum age. The option of divorce does not appear sufficient in cases where the vulnerable person is prevented from taking independent steps in this direction. Thus the registrar's tact and sensitivity are an important factor. Declarations presented by the husband or other family members are certainly not sufficient unless they are supported by explicit independent declarations of the vulnerable person. Family pressure, or pressure exerted by the husband, would seem to recommend interviewing the vulnerable woman on her own or with a neutral adviser.

Subjecting women who are of age to a marriage guardian (cf. Part 1, 4.2.b.cc; Part 2, 2.1.e above) must be considered a breach of the *ordre public*, irrespective of the question of whether this is an instance of a non-applicable procedural rule.⁹⁷ This is all the more true of the guardian's option of selecting a groom and agreeing a marriage contract with him.⁹⁸

dd Proxy Marriage

Some problems arise in the application of the law in the context of proxy marriage, which is permitted in the Islamic world (and elsewhere).⁹⁹ It allows the declaration of agreement to a marriage to be delivered by a third party appointed by one or both the future spouses. There is no personal decision by the acting third party in this instance; he merely transmits the previously taken decision. Thus it really is a variant of transmitting the relevant declaration of willingness by intermediary. Texts dealing with this subject often refer to 'declaration by proxy' in order to distinguish it from the more extensive 'voluntary decision by proxy'.¹⁰⁰ This type of proxy marriage must thus be described as an issue of the type of marriage subject to Art. 11 EGBGB and Art. 13 para. 3 EGBGB (marriage within Germany only ever in the statutory form).¹⁰¹ It does not necessarily constitute a breach of the *ordre public*.¹⁰²

97 LG Kassel StAZ 1990, 169, 170 and AG Wildungen with a critical unconvincing note. Kremer 171f.

98 AG Giessen StAZ 2001, 39.

99 Cf. only LG Stuttgart StAZ 1992, 378 and Kotzur, Kollisionsrechtliche Probleme, 72 with further references.

100 Cf. Staudinger/Mankowski, Art. 13 EGBGB marg. n. 220; OLG Zweibrücken NJW-RR 2011, 725.

101 BGHZ 29, 137, 139 ff.; OLG Karlsruhe StAZ 1994, 286 f.; Palandt/Thorn Art. 13 EGBGB marg. n. 10; Wall, Anerkennungsfähigkeit von Ahmadiyya-Eheschließungen, StAZ 2012, 120 ff.

102 Cf. BayObLG StAZ 2001, 66 f. (concerning Iranian law); VG Koblenz IPRspr. 1993 no. 55, 134 ff.; OLG Zweibrücken NJW-RR 2011, 725 (it is even not necessary that the spouses have

Where the problems arise is in the prevailing application of the law under which the determining place of the conclusion of a proxy marriage is solely the place in which the declarations of the appointed third party were delivered.¹⁰³ This is a means of avoiding the formal requirement set down in Art. 13 para. 3 s. 1 EGBGB in those cases where the persons willing to enter into matrimony are already present in Germany, or intending to reside there permanently. The severity of the problem becomes apparent when marriage to a second wife is intended, as long as this is permitted in the country where the marriage is to be declared. In this way the principle of monogamy could easily be circumvented. Similarly, the proxy marriage of a minor girl does not grant the necessary minimum protection of her free will, at least in cases where the family has arranged the marriage.¹⁰⁴

In cases of this kind there is in my opinion a breach of the spirit and the purpose of the regulations in Art. 11 and 13, para. 3 s. 1 EGBGB. The purpose of permitting a foreign formal requirement is to keep legal procedures effective as long as they have taken place in the formally correct manner and are genuinely foreign actions. In the cases discussed here the aim is not, however, to adhere to familiar local law, but to circumvent the law in force in the actual place of residence.

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These avoidance strategies may be prevented if the appointment in Germany of a third party is defined as being part of concluding a marriage which will result in German substantive law being applied. In view of the concrete circumstances of the case (authorising a notary, or a similar person, by telephone to deliver the declaration immediately), a type of irrevocable authority has been given, which under German law is tied to the form of the transaction to be realised on this basis. Comparing it to a 'declaration of willingness' delivered by an intermediary may be even more apposite in the present case: the declaration is considered to take effect as soon as the intermediary has been dispatched, not only once he has delivered it. The concept of 'anticipatory connection'¹⁰⁵ (to remedy breaches of formal requirements) can also be considered, which would mean that the focus for the formal effect of the declaration would be on the married partners' definitely intended place of residence.

ever met before); vG Stuttgart StAZ 2014, 55, 56; a different opinion: AG Giessen StAZ 2001, 39.

103 OLG Hamm StAZ 1986, 134ff.; MünchKomm/Coester Art. 13 EGBGB marg. n. 148 with further references, restricting; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 755f. with further references.

104 AG Offenbach BeckRS 2010, 23013.

105 Cf. MünchKomm/Coester, 3rd ed. 1998, Art. 13 marg. n. 95, 96 with further references.

Employing an intermediary in the case of a proxy marriage is entirely different from actual ‘voluntary decision by proxy’. The latter is subject to the regulation set down in Art. 13 para. 1 EGBGB.¹⁰⁶ If the intermediary is permitted to make an independent decision regarding the choice of future marriage partner, this constitutes a serious breach of the constitutional fundamental rights of human dignity and free development of the individual (Art. 1, 2 para. 1 GG). This kind of marriage is in fact nothing but a kind of trafficking in humans.¹⁰⁷

ee Rules and Agreements Concerning the Dower

Under classical as well as modern Islamic law agreeing a bridal gift (paid by the groom to the bride, *mahr*) is an integral part of concluding a marriage. The origin of this institution is to provide financial security to the wife in compensation of only small post-marital alimony and the overall lack of security in old age.¹⁰⁸ Agreeing an obligation to pay in the event of a divorce can furthermore erect a financial barrier against the husband’s widely granted one-sided right to divorce.¹⁰⁹

359 This background displays clearly that there is a problem of qualification according to the conflict of laws.¹¹⁰ The courts appealed to did not have any distinct or uniform approach for a long time.¹¹¹ The Federal Supreme

106 Cf. Staudinger/Mankowski, Art. 13 EGBGB marg. n. 219 f. with further references.

107 AG Giessen StAZ 2001, 39; cf. also Scholz, Islam-rechtliche Eheschließung.

108 Cf. only Wurmnest, Die Brautgabe, 1878, 1879 with further references.

109 Cf. only OLG München IPRspr. 1985 no. 67; OLG Hamm FamRZ 1988, 516, 517; OLG Celle FamRZ 1998, 374, 375.

110 Cf. BGH NJW 1999, 574; OLG Cologne IPRspr. 1982 no. 43; OLG Hamburg IPRax 1983, 76; OLG Munich IPRapr. 1985 no. 67; OLG Hamm FamRZ 1988, 516, 517; OLG Hamm FamRZ 1991, 1319 ff.; OLG Düsseldorf, FamRZ 1993, 187, 188; OLG Frankfurt/Main FamRZ 1996, 1478, 1479; OLG Celle FamRZ 1998, 374, 375; OLG Cologne NJW-RR 2007, 154, 155; AG Hamburg IPRspr. 1992 no. 122; AG Kerpen FamRZ 1999, 1429; AG Fürth FÜR 2002, 450. Krüger, Ehe und Brautgabe 114, 115 f.; Menhofer, Religiöses Recht, 152 ff.; Elwan, Le droit interreligieux, 62 ff.; Wurmnest, Die Brautgabe; most recently Yassari, Die Brautgabe, 269 ff.

111 Cf. OLG Nuremberg NJWE-FER 2001 (Art. 14 EGBGB, which provides fundamental regulation of the legal consequences of valid marriages, comes to bear when the payment is demanded during an existing marriage); similar also OLG Zweibrücken FamRZ 2007, 1555, 1557. In the author’s opinion in this case the regulation on marital property regime (Art. 15 EGBGB) ought to be applied. The difference is that in the former case the applicable substantive law would change if citizenship or habitual residence were changed, while in the latter case the applicable law would be ‘frozen’ with regard to the time at which the marriage was concluded. The latter option would offer more legal certainty in the context of this financially very relevant issue; in addition the dower appears to have the function of

Court,¹¹² finally, classified the dower as being subject to the statute of the general effects of marriage (Art. 14 EGBGB).

If a dower has been agreed, a breach of the *ordre public* does not necessarily follow. After all, the *mahr* has the function of providing security for the wife-to-be, as compensation for little or no claim to maintenance, or as a protective measure against the one-sided divorce¹¹³ declared by the husband. It is not a payment to the bride's family, which does still exist in some parts of the Islamic world,¹¹⁴ and which would indeed be in conflict with the German *ordre public*.¹¹⁵ Consequently in my opinion the *ordre public* does not intervene in these cases.¹¹⁶ On the contrary, the allowance of a dower may be a recommended course of action even if the marriage takes place in Germany.¹¹⁷ The court ruling of 1980,¹¹⁸ which judged simply that agreeing a dower was contrary to the German *ordre public*, would be incorrect in this view, and would probably not be repeated in this way nowadays.¹¹⁹ Otherwise German courts might be preventing foreigners from getting married in a fashion that guarantees legal effect under the law of their home country, or they might prevent wives from possessing the financial security that is often so essential.

compensating for the very strict division of the possessions of the spouses, as there are no rules providing for compensation in the event of divorce or the death of one of the spouses; cf. also OLG Saarbrücken NJW-RR 2005, 1306; OLG Cologne NJW-RR 2007, 154, 155.

112 BGH NJW 2010 1528 ff.

113 Cf. OLG Koblenz NJW-RR 1993, 70, 71; KG NJW-RR 1994, 199; OLG Hamm IPRax 1995, 174, 175; OLG Cologne FamRZ 1996, 1147; OLG Düsseldorf, FamRZ 1997, 882 (LS) = IPRspr. 1996 no. 6; OLG Stuttgart FamRZ 1997, 882, 883; OLG Düsseldorf, FamRZ 1998, 1113, 114; OLG Frankfurt/Main, the President, StAZ 2004, 367; OLG Hamm NJOZ 2013, 1006 ff.

114 Concerning *başlık* in Turkey cf. Rumpf, Einführung, 118.

115 Cf. only OLG Hamm NJW-RR 2011, 1197 (Yezidi marriage); Staudinger/Mankowski, Art. 13 EGBGB marg. n. 385 f. with further references.

116 A similar tendency to that expressed by Scholz, Islam-rechtliche Eheschließung, 330 ff. It is not correct to classify a contract concerning *mahr* as a breach of the *ordre public* in general (thus LG Cologne IPRspr. 19890 no. 83); comparable to the view presented also Palandt/Thorn, Art. 6 EGBGB marg. n. 20.

117 Cf. Rohe, Der Islam und deutsches Zivilrecht, 47 f. A completely distorted evaluation is contained in the judgment of AG Brühl 12.10.2010, BeckRS 2011, 00423. Instead of dealing with the concrete case at stake alone (600 gold coins), which is required by German procedural law, the court held that the sum of gold promised in all Iranian marriage contracts could possibly exceed the available quantity worldwide.

118 LG Cologne IPRspr. 1980 no. 83; opposing view: Palandt/Thorn, Art. 6 EGBGB marg. n. 20.

119 Agreeing a dower in Egypt is recognised by the AG Fürth (FPR 2002, 450, 451) subject to German substantive law.

ff Interreligious Impediments to Marriage

Many legal systems in the Islamic world state an absolute prohibition for Muslim women to marry non-Muslim men (see above).¹²⁰ From the German point of view this kind of prohibition of marriage on religious grounds is contrary to Art. 4 and 6 GG and consequently also if there is sufficient, in my view even slight, domestic relevance, also to the German *ordre public* under Art. 6 EGBGB.¹²¹ The same applies to corresponding prohibitions of marriage between Muslim men and non-Muslim women under Shi'ite law.¹²²

360 However, in 1967 the OLG Oldenburg recognised such a prohibition of marriage without further deliberation, even though there was already a child of the marriage.¹²³ In the context discussed here it must be borne in mind that couples of different religions not infrequently travel to another country in order to be able to enter into a marriage that would be forbidden under the law of their home country. Thus many Lebanese of different religious affiliation¹²⁴ marry in Cyprus or other states as they know that under Lebanese conflict of laws their future relations under family law will be subject to the law of the place in which they entered into the marriage (cf. Part 2, 2.6 above). These regulations furthermore show that the law in their home country – i.e. Lebanon – ultimately recognises this kind of marriage; if not at the level of substantive law, then with the aid of the conflict of laws. Tunisian courts seem to argue along the same lines when they recognise marriages entered into in other countries, albeit not entirely consistently.¹²⁵

A similar procedure used to be found in Tunisia for a considerable time. There are no explicit legal provisions concerning interreligious marriages.

120 Concerning the practice cf. OLG Oldenburg IPRspr. 1967 no. 68; OLG Cologne IPRspr. 1982 no. 43; OLG Koblenz FamRZ 1994, 1262, 1263; AG Kaiserslautern IPRspr. 1992 no. 105; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 390 with further references; Ebert, Das Personalstatut, 1996, 103 f.

121 Cf. BGHZ 56, 180; OLG Munich FamRZ 1970, 408, 410; OLG Hamm NJW 1977, 1596 (commandments of the Jewish law); BayObLG FamRz 1970, 656 (commandments of Greek Orthodox law); OLG Koblenz FamRZ 1994, 1262; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 393 ff. with further references; MünchKomm/Coester Art. 13 EGBGB marg. n. 86 with further references; also Marcks, Tondernehe, 18 ff.; a different opinion: OLG Oldenburg IPRspr. 1967 no. 68.

122 Concerning Iranian law on the subject cf. Elwan, Zur Eheschließung, 124 ff.

123 OLG Oldenburg IPRspr. 1967 no. 68.

124 Regarding the prohibition of interreligious marriages for Muslim women cf. Bergmann/Ferid, Internationales Ehe- und Kindschaftsrecht, Länderbericht Libanon, as of 31 May 1996, 18 (Chaussade-Klein).

125 Cf. Benjemia/Ben Achour/Bellamine, L'ordre public, 216 ff. with further references.

When the practice of the courts appeared to implement the traditional prohibition of Islamic law, the question of the religious affiliation of the couple to be married was simply omitted (cf. already Part 2, 2.3 above). This is an illustration of the ways, typical of the Islamic world, of bringing about desired reforms without entering into direct confrontation with a strong traditionalist party. Consequently these marriages should be considered valid if the difference of religion of the partners would have been the only impediment to marriage. In my view it is incomprehensible to accuse these couples of 'Machenschaften'¹²⁶ (scheming) that cannot be accepted by the German legal system; this is the same kind of scheming of which one might accuse Romeo and Juliet.

A further problem may arise when the Muslim husband of a Muslim wife apostatises from Islam after the marriage has been concluded. Under Islamic law such apostasy leads to the marriage being dissolved (cf. Part 1, 4.2.b.gg above). In this case it is not Art. 13 EGBGB but only Art. 17 EGBGB that is relevant.¹²⁷ However, in my view the dissolution of a marriage as a consequence of apostasy from Islam is contrary to German *ordre public*. Thus in Germany, people divorced under duress are considered to be still married, unless they were divorced with legal effect according to another form.

gg Temporary Marriage

Shi'ite Islamic law developed the institution of temporary marriage (the so-called *mut'a* marriage, cf. Part 1, 4.2.b.bb above). In Iran, for instance, this type of marriage is admissible.¹²⁸ In Germany it would not be possible because of Art. 13 para. 3 S. 1 EGBGB, as limiting the term of a marriage also involves a formal aspect.¹²⁹ If defined primarily under the aspect of substantive law, the *mut'a* marriage would still be in breach of the principle that marriage is for life (cf. §§ 1311 S. 2, 1353 para. 1 S. 1 BGB) as an element of the *ordre public*, despite the extensively liberalised divorce laws. Some forms of *mut'a* marriage are comparable to those circumstances covered by the regulations of the German law on prostitution.¹³⁰ The enactment of this law, which no longer classifies prostitution as immoral and even allows a judicial way of enforcing the claim to remuneration, is likely to result in property claims arising from *mut'a* marriages

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126 Thus Fritz Sturm, *Eheschließungen im Ausland. Nachweis, Wirksamkeit und Folgen von Rechtsverletzungen*, StAZ 2005, 1, 14.

127 OLG Cologne IPRspr. 1982 no. 43.

128 Art. 1075–1077 ZGB, printed in Bergmann/Ferid, *Internationales Ehe- und Kindschaftsrecht, Länderbericht Iran*, as of 1 Oct. 2002, 123f. (Enayat).

129 Staudinger/Mankowski, Art. 13 marg. n. 794.

130 Cf. Mohaqeq Damad, *Legal and Civil Aspects*, 57, 62f.

being enforceable in Germany in the future. The term 'marriage', however, is unlikely to be used in this context, and the German *ordre public* is still opposed to recognising its status.

hh Polygamy

In spite of some restrictions, entering into polygamous marriages with several women is still permitted in many parts of the Islamic world (cf. Part 2, 3.1.h above). Such marriages do exist, with considerable regional differences. Art. 6 para. 1 GG, on the other hand, insists on the principle of monogamy. § 1306 BGB adds explicit regulations to this principle, presenting it as a bilateral impediment to marriage.¹³¹ Entering into a polygamous marriage in Germany¹³² is in breach of the *ordre public* even if the law in the home countries of all those involved would permit it. The preliminary question of whether there is an existing marriage is connected independently, i.e. it has to be judged according to the law in the home country of the person wishing to marry.¹³³

What is possible in principle, and in part provided explicitly by law, is the legal recognition of polygamous marriages concluded with legal effect under foreign law.¹³⁴ This is by no means an indirect endorsement of this legal institution – entering into a bigamous marriage is punishable by law (cf. § 172 StGB), clear proof to the contrary. Rather, the concern is that those involved do not lose legal positions in establishment and continued existence of which they have put their trust, simply because they have decided to change their place of residence. Thus for instance women in originally legally concluded polygamous marriages would lose their claim to maintenance and inheritance, if the marriage were treated as having no legal effect. Consequently, insofar as

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131 Cf. OLG Hamburg StAZ 1988, 132f.; AG Paderborn StAZ 1986, 45 (both on the identical situation before the amendment of the marriage laws); MünchKomm/Coester Art. 13 EGBGB marg. n. 68; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 233 and 235 ff.

132 As far as the author is aware such marriages are concluded informally in Germany, in some cases simply to 'legitimise' extra-marital relationships. For a broader European legal perspective cf. Rohe, Shariah in Europe, 680 ff.

133 Cf. BGH FamRZ 1997, 542, 543; OLG Koblenz IPRax 1996, 278, 279; OLG Nuremberg NJW-RR 1998, 4; Palandt/Thorn Art. 13 EGBGB marg. n. 6 with further references also concerning the different view; of a different view: MünchKomm/Coester Art. 13 EGBGB marg. n. 72 with further references.

134 Cf. only LG Frankfurt/Main FamRZ 1876, 217 with further references; LG Osnabrück NJW-RR 1998, 582; AG Bremen StAZ 1991, 232, 233; BVerwGE 71, 228, 230 f.; BFHE 152, 537; Department of public prosecution at the LG Munich 1 IPRspr. 1996 no. 62; VGH Kassel NVwZ-RR 1999, 274, 275; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 251 with further references.

the women involved would have a legal advantage over the husband due to the marriage – which can be dissolved at any time in Germany¹³⁵ – the marriage is considered valid. Social legislation also follows this principle in § 34 para. 2 SGB I which provides for the widows of a polygamous marriage by distributing a pension due per capita.¹³⁶ The legislative authority has taken the decision of putting the protection of the persons involved in individual cases above the – unchanged – rejection of the institution supporting this situation. On the other hand a man who is married polygamously under the law of his home country will have no claim to widower's pension if one of his wives dies, as the continued marriage has the same effect as a remarriage, in which case such claims become void under § 46 SGB VI.¹³⁷

If on the other hand the legal interests of third parties or the community are involved, a polygamous marriage cannot be recognised. This is relevant to the spouses' immigration privilege under the law concerning aliens: second wives are not considered wives under this rule (cf. § 30 para. 4 Aufenthaltsg).¹³⁸ This explains why we can assume a comparatively small number of actively polygamous marriages in Germany, unlike in France, apparently.¹³⁹ The same standard should apply to privileges under social legislation, such as spouses' co-insurance, as long as the entitlement is not based primarily on financial contributions by the husband but expected to be undertaken by the general public for reasons of social policy. It is not necessary to provide any reasons why the general public cannot possibly be expected to finance such relationships.

135 Cf. Rohe, *On the Applicability*, 187f.

136 The English solution differs fundamentally from the German one: none of the widows is considered rightful; cf. Court of Appeal in the case of *Bibi v. Chief Adjudication Officer* [1998] 1 FLR 375.

137 Hessen LSG 29 June 2004 (L 2 RA 429/03), BeckRS 2005, 41725.

138 Cf. vGH Mannheim NJW 2007, 3453 and also OVG Koblenz judgment of 12 Mar. 2004, InfAuslR 2004, 294ff. Criticism in some media, sometimes characterised by profound ignorance and strong desire to persecute (cf. 'Polygamie legal in Deutschland?', Emma May/June 2004, an article which does not even refer to the ruling court and its ruling correctly) has no factual basis; cf. 'Schwarzers Kanal – Desinformation für Fortgeschrittene', viewable at <http://www.zr2.jura.uni-erlangen.de/aktuelles/kanal.shtml>; a correctly discriminating approach, on the other hand, e.g. 'Rechtsprechung. Zweitfrau darf bleiben', Tageszeitung, 30 March 2004 (Cosima Schmitt).

139 Cf. 'Verwahrlosung durch Polygamie', Frankfurter Allgemeine Zeitung, 17 Nov. 2005, 3. It seems that France permitted the privileged immigration of these persons over a considerable time; the article quotes an estimate of 30,000 such marriages in France.

ii Maintenance

In most cases concerning maintenance that have an international dimension, the regulations of German conflict of laws (cf. Art. 3 sect. 1 of the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations) result in German substantive law being applied anyway. The law of the home country of the persons involved may apply e.g. in cases of designation of the law under Art. 8 of the Hague Protocol or subject to bilateral agreements such as the 1929 German–Iranian agreement on domicile, if all parties involved are Iranian citizens.¹⁴⁰

363 In such cases the frequently very restrictive rules on post-marital maintenance in many Islamic countries (cf. Part 2, 3.1.l above) may be contrary to the German *ordre public*. This is particularly true in cases where the needy divorced spouse has to provide for small children or is unable to pursue gainful employment for health reasons.¹⁴¹ On the other hand, significant payments of dower or comparable gifts may alleviate the need and supersede (possibly in part) the claim to maintenance.¹⁴² The prevalent opinion is that the mere necessity to claim social security if no maintenance payments are forthcoming should not automatically result in the *ordre public* being invoked.¹⁴³ In my view, however, there is a clear breach if the needy spouse contributed to maintenance during the marriage by looking after the household (according to §1360 BGB) but did not receive a financial equivalent such as post-marital maintenance; this will frequently be the case.

jj Guardianship/Care and Custody of Children

In spite of a certain degree of softening, most legal systems in Islamic countries retain the overall generalising gender-specific allocation of guardianship and care and custody of children (cf. Part 2, 3.1.k). As a rule the father (or the

140 For details cf. OLG Bremen IPRspr. 1984 no. 92, n. D.H. IPRax 1985, 296s.; under this judgment both parents are ‘involved’, although demands were made only on the father. Exceptions are made in cases of refugees and asylum seekers. Cf. OLG Munich IPRax 1989, 238.

141 Cf. OLG Zweibrücken FamRZ 2000; OLG Zweibrücken FamRZ 2001, 920, 921f.; AG Kerpen FamRZ 2001, 1526, is reluctant to apply the *ordre public* and accepts some hardship, while emphasising that Islamic law would itself be capable of administering such cases to benefit the women.

142 Cf. OLG Munich IPRax 1989, 238. 241 (an Iranian case).

143 Cf. OLG Hamm NJW-RR 1995, 456, 458 (concerning a Turkish case); Staudinger/Mankowski, Art. 11 HUÜ marg. n. 386 ff. with further references.

nearest male relative) will be awarded sole guardianship, while the care and custody of children is divided according to age between the mother (younger children) and the father (older children). A mother usually loses the care and custody of children if she remarries after a divorce.¹⁴⁴ In some jurisdictions, a non-Muslim mother loses her rights solely because of her religious affiliation. The fundamental principle of German law, on the other hand, focusses on the child's welfare which must be determined in specific cases, and not by means of typecasting gender roles or discriminating against non-Muslims. In case of conflict the *ordre public* can be invoked.¹⁴⁵ First, however, it must be investigated whether the law in question includes regulations for hardship cases which take sufficient account of the child's welfare.¹⁴⁶ In this sense, the courts have to investigate which of the parents is likely to best support the child in developing its personality.¹⁴⁷

These principles also apply in cases of significant breaches of the rights of the child caused by traditional 'family values' and educational ideas including physical violence.¹⁴⁸ In such cases decisions can be made under German family law subject to Art. 15, 5 ff. KSÜ, for instance by transferring the parental care to the relevant youth welfare office.

kk Adopting Minors

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The continuing prohibition of adoption may be a fundamental breach of the *ordre public*.¹⁴⁹ It must, however, be borne in mind that some legal systems in the Islamic world have comparable institutions which allow a legally secure inclusion of children within the respective nuclear family (*kafāla*; cf. Part 1,

144 Cf. BGHZ 120, 29, 35 f.; OLG Bremen FamRZ 1999, 1520; AG Kerpen FamRZ 1997, 105.

145 Cf. BGHZ 120, 29, 34 ff.; BGH NJW 1997, 3024, 3025; BGH NJW-RR 1993, 962, 963; OLG Karlsruhe IPRax 1993, 97; OLG Düsseldorf NJW-RR 1994, 7 on doubtful grounds; OLG Düsseldorf FamRZ 1998, 1113, 1115; OLG Koblenz IPRspr. 2005 no. 71; more reserved OLG Frankfurt/Main NJW-RR 1992, 136; OLG Bremen NJW-RR 2000, p. 3; very reserved AG Korbach FamRZ 2002, 633; cf. also Staudinger/Henrich Art. 21 EGBGB marg. n. 46 ff. with further references.

146 Cf. OLG Bremen FamRZ 1992, 343, 344 in an Iranian case.

147 Cf. BGH FamRZ 1993, 316; FamRZ 1993, 1053; Staudinger/Henrich Art. 21 EGBGB marg. n. 50 with further references.

148 Cf. AG Korbach FPR 2003, 334 ff. In this case the Yemeni parents of two daughters had tried to force the eldest into a marriage she refused; the other daughters were beaten violently especially by the mother; the parents forbade the youngest, 16-year-old daughter to have girl friends and to use a mobile phone, she was forced to wear a headscarf outside the house, and the mother rejected any further schooling and prevented the girl from doing her homework.

149 Cf. AG Hagen IPRax 1984, 279.

4.2.b.hh above). Preventing the full status including the right to inherit within the extended family would not be automatically a breach of German *ordre public*.¹⁵⁰ In particular a child who does not live only in Germany would benefit if his/her personal law status were recognised in the other legal environment. Spanish law is worth mentioning in this context, as it offers a functional alternative to adoption with regard to issues of care and custody as well as financial support of a child ('inclusion in a family').¹⁵¹ Similarly, the institution of *kafāla* is recognised under Art. 20(3) of the UN Convention of the Rights of the Child. The ECtHR has held in 2012¹⁵² that the French legal refusal of the adoption of a child already living in a *kafāla* status does not violate Art. 8 and 14 of the ECHR.

In a specific case the Landgericht (regional court) Osnabrück recognised the prohibition of adoption which prevented the German wife of an Egyptian man from adopting his Egyptian child with his Egyptian second wife. The court ruled that as all parties involved lived together in harmony in Germany, breaking the legal relation of the child and the biological mother would not be necessary.¹⁵³

II Inheritance Law

Under classical Islamic inheritance law (cf. Part 1, 4.3 above) as well as most of the legal systems in force in the Islamic world (cf. Part 2, 3.1.n above) women (wives, daughters etc.) usually receive only half of the share of men of the same relation to the testator. This generic halving of inheritance quotas is a clear inequality which in view of Art. 6 EGBGB (also in connection with Art. 3 para. 2, 3 S. 1 GG) could be in breach of the German *ordre public*. The same applies in possible cases of closely related female heirs being superseded by more distantly related male heirs. This is another instance where it is not suitable to simply measure the Islamic rules against the German legal system in an abstract manner;¹⁵⁴ 'only' the result of its application on a concrete case¹⁵⁵ must be taken into consideration, taking into account the intensity of its effect within

150 Cf. OLG Karlsruhe FamRZ 1998, 56, 57; cf. also the critical remarks by Mansel, Die kulturelle Identität, 137, 196 f.

151 Cf. Art. 173 Código civil, printed in Bergmann/Ferid, Internationales Ehe- und Kindschaftsrecht, Länderbericht Spanien, Loseblattsammlung as of 31 July 1998, 37 ff.

152 Chamber judgment in Harroudj v. France of 4 October 2012, application no. 43631/09.

153 LG Osnabrück NJW-RR 1998, 582.

154 An abstract breach of the principle of equality is not sufficient; BVerfG NJW 1989, 1275; BGH FamRZ 1993, 316, 317; OLG Saarbrücken FamRZ 1992, 848, 849 (on the Iranian law of child custody); OLG Hamm IPRax 1994, 49 (= FamRZ 1993, 111) w. neg. n. St. Lorenz, op. cit., 148.

155 OLG Hamm IPRax 1994, 49, 52 (on the Shi'ite Islamic prohibition of interreligious marriages).

Germany. The wording chosen by established case-law, however, does require some specification.¹⁵⁶

It is possible that in individual cases the result of applying this law may be devoid of informative value, as for instance in the case of a wife's share in the inheritance: there is no absolute standard to determine whether the share is fair or not. The calculation might be considered offensive with regards to the inequality compared to the husband's claim to the inheritance (theoretically, that is; in actual fact the wife would have survived). Thus the opinion to be endorsed is not stricter but simply defines more precisely that such theoretical considerations must also be taken into account. Otherwise the reference in Art. 6 p. 2 EGBGB would have no effect, for instance with regard to Art. 3 para. 2, 3 GG. Thus not only the concrete proportion of sons' and daughters' shares in an inheritance has to be examined with reference to the *ordre public*, but also the wife's inheritance quota. It may also be necessary on occasion to consider the corresponding liabilities of the respective male counterparts, which are incumbent only on them but not the women.¹⁵⁷

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While German jurisprudence found itself repeatedly having to investigate breaches of the principle of equality as cases in which to invoke the *ordre public* regarding inheritance law, invoking it was not supported in any of these cases.¹⁵⁸ Firstly, differences in inheritance law are regularly an expression of evolved traditions, which warrant particular attention as private international law deliberately decided in favour of the law of the home country as the point of reference. Secondly, the German freedom in making a will informs inheritance law significantly – unequal treatment is also possible within this wider framework, and the protection of legitimate expectations may be less virulent than in other areas.¹⁵⁹ On the subject of wills by Muslims in a Western context cf. b) below.

156 Cf. St. Lorenz, n. on OLG Hamm IPRax 1994, 149 f., following him also Hans-Georg Pauli, *Islamisches Familien- und Erbrecht und ordre public*, (PhD) Munich 1994, 170 on daughters' right to inherit, not consistent; different regarding widows' right to inherit (op. cit., 173 f.). Detailed, Pattar, *Islamisch inspiriertes Erbrecht*, 471 ff.

157 In more detail Rohe, *Gutachten zum Internationalen und Ausländischen Privatrecht* 2002 no. 25, IPG 2002.

158 Cf. von Bar, *Internationales Privatrecht* II, marg. n. 384 with further references and the rulings quoted in Rohe, *Gutachten zum Internationalen und Ausländischen Privatrecht* 2002 no. 25, IPG 2002.

159 Cf. MünchKomm-Leipold, vol. 9 *Erbrecht*, Einleitung marg. n. 17 ff.; MünchKomm-Birk vol. 11 IPR Art. 25 EGBGB marg. n. 114 ff. with further references.

Of the existing interreligious prohibitions of inheriting (cf. Part 2, 3.1.n above) the objectionable ones are those preventing non-Muslims inheriting from Muslims but not vice versa.¹⁶⁰ They can furthermore be in breach of the constitutional protection of marriage and the family, especially if wills in favour of close relations are prohibited if they are of a different religious affiliation.

mm Conclusions

Overall the handling of divergent legal concepts by German courts displays a thoughtful approach that seeks an appropriate balance between recognising international differences benefiting those concerned on the one hand and maintaining indispensable common principles within Germany on the other. Over recent decades two essential tendencies have shown up clearly:

On the one hand, in cases with a clear domestic dimension courts are not willing to accept the application of Islamic (and other, comparable) norms significantly infringe on constitutional values such as the equality *before the law* of genders and religions. They do, however, permit these norms to be applied where the application of German substantive law would lead to a comparable result. This is also true in cases in which the norms of the Islamic law, or law influenced by Islam, to be applied include regulations for hardship cases on whose basis suitable results can be reached. However, not in all cases – especially before overstretched lower courts – is there a sufficiently in-depth appreciation of the applicable foreign law instead of immediately invoking the *ordre public*.

On the other hand, a (probably unique) case before the Amtsgericht (local court) Frankfurt led to outrage throughout Germany in 2007. A wife originally from Morocco, who reported being abused by her Moroccan husband, was denied legal aid necessary for a divorce due to hardship without observing the statutory separation period (cf. §1565 para. 2 BGB). The (female) judge based her decision among other reasons on the fact that the Quran (sura 4:34) permits beatings¹⁶¹ and that consequently according to the wife's home culture this was no hardship case. She had, however, previously imposed protective measures

160 A different opinion, in contrast with his view on gender-specific regulations, is put forward by Pattar, *Islamisch inspiriertes Erbrecht*, 503 with further references, also regarding the view presented here.

161 For a different interpretation ('separation' rather than 'beating') cf. e.g. Zentrum für Islamische Frauenforschung und Frauenförderung (ed.), *Ein einziges Wort und seine große Wirkung. Eine hermeneutische Betrachtungsweise zum Qur'an, Sure 4 Vers 34, mit Blick auf das Geschlechterverhältnis im Islam*, Cologne 2005; also Ghaemmaghami, S. A. Hosseini, *Der Qur'an bekämpft Torheit*, Al-Fadschr no. 127 (2007), 63 f.

against the clearly violent husband, and the question under discussion was merely whether the formal bond of matrimony could be dissolved instantly.

The ruling contains several errors: the law primarily involved in this concrete instance is Moroccan family law, which prohibits domestic violence (cf. Art. 98 Sect. 2, 99, Family Code 2004) and allows the affected wife to take steps to get a divorce.¹⁶² If things had been different, German *ordre public* ought to have been invoked, as according to the correct rulings of many courts physical violence provides sufficient grounds for a divorce due to hardship. Referring to a Quranic verse is doubly mistaken, as firstly the Quran must not be regarded as applicable Moroccan law, and secondly there are numerous interpretations of the verse which prohibit any kind of violence, or certainly sustained and brutal violence as in the case in question.¹⁶³

While this isolated ruling was corrected as soon as it became known, some anti-Muslim activists from different camps exploited this occurrence in order to prove the alleged 'Islamisation' of the German judiciary, providing further 'evidence' such as the implementation of the constitutional principle of freedom of religion through the building of mosques etc. Of course, in doing so these apologists position themselves in conflict with the very constitutional foundations they pretend to defend.¹⁶⁴

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In addition a considerable part of the potential for conflict will be eased if international marriage, family and inheritance laws are reformed. As a rule such conflicts arise out of opposition between the norms of the home country as determined by citizenship on the one hand and the norms of the country of (habitual) residence on the other. A foreign population with long-term residence can thus lead to foreign – and 'Islamic' – legal enclaves growing on German territory. If the norms of Islamic law are entirely incompatible with the principles of the German legal system, they will be blocked by the rule set down in Art. 3 EGBGB (*ordre public*). This does, however, lead to constant legal conflict becoming 'normality'.

German International family and inheritance law is increasingly regulated by EU rules which replace the citizenship of the parties involved (as the prime connecting factor) with their habitual residence. Thus German law will be applied much more frequently. This will also be more suited to people's

162 Cf. only Shahbūn, Al-shāfi, Part I, 256.

163 Regarding especially the still widely held opinion that a 'light' beating is permissible and the view of gender roles informing it cf. Krüger, Allgemeine Ehwirkungen, 649 ff. with numerous references.

164 For details cf. Rohe, Shariah in Europe, 657 f., 664 ff., 667 ff.

everyday circumstances, especially in cases where citizenship law means that 'foreign' citizenship is the determining factor even for people who have lived in the new legal environment for a long time and have adopted its standards. This applies especially in cases where the return to the home country, frequently assumed to be a certainty at the time of immigration, does not happen, and even more with regard to the offspring born and raised in Germany. It is the duty of the law to provide suitable legal norms for this group of persons as well. The application of foreign law would then be limited to cases with a genuine international dimension, and the fact that Germany has become an immigration country would be acknowledged. However, immigration countries typically try to limit legal diversity by involving territorial criteria. This is the point at which the legislative authority must take steps.¹⁶⁵ The application of Islamic law will then increasingly shift from private international law to substantive domestic law, as far as it grants autonomy and choice (cf. b) below).¹⁶⁶

On the other hand, the new EU regulations allow a choice between the laws of habitual residence and citizenship. If we bear in mind that the primary purpose of private international law is to serve the interests of the private persons involved, widening the options of choice of legal system suggests itself, as long as the interests in the orderly application of legal relations including third-party protection are not affected adversely in the long term. They can be made more accessible by ensuring that the choice of legal system is subject to formal requirements and restricted to those legal systems linked to the individual through citizenship, habitual residence or property location. This would ultimately be the same thing as the allocation – undertaken with independent providence – of legal relations according to their 'residence' according to von Savigny.¹⁶⁷

b *Dispositive Substantive Law in the Areas of Civil and Commercial Law*

A second level of (indirect) implementation of Islamic norms is in the area of dispositive substantive law.¹⁶⁸ To the extent that the system of private law

165 Cf. Rohe, Staatsangehörigkeit, esp. 25 ff. Cf. also Foblets/Overbeeke, Islam in Belgium, 1, 23 ff.

166 Cf. Rohe, Family, 49, 67 ff. with further references.

167 Friedrich Carl von Savigny, System des heutigen Römischen Rechts vol. 8, Berlin 1849, 28, 108.

168 For different approaches in Europe in this field cf. Büchler, Islamic Law, 57 ff.

allows freedom of scope, private preferences could play a part in shaping the law. For instance, the Federal Supreme Court and other courts have declared marriage contracts valid in which the payment of a dowry to the wife-to-be was agreed according to Islamic legal tradition.¹⁶⁹ The same is true of legal hybrids like gifts for couples of Turkish origin under Turkish (non-Islamic) or German family or contract law. Sometimes such gifts are called '*mehir*', alluding to Islamic traditions, sometimes they are apparently part of regional customs. Conflicts in cases of failed marriages after engagement or short-term divorces are increasingly to be dealt with in German courts; usually it has to be decided who is entitled to keep the gifts, whether gifts have to be restored to the donors or whether jewellery worn by the bride has been given as a gift or was only lent for the wedding ceremony.¹⁷⁰ The result is highly dependent on personal and regional particularities.

Those who wish to avoid interest-bearing and speculative transactions will also have ample freedom of scope.

The financial sector has already taken the needs of Muslims with a traditional outlook into account, so far on a relatively low level in Germany.¹⁷¹ German and Swiss banks distribute 'Islamic' equity fund shares for financial investments which rule out any involvement with companies dealing in games of chance, alcohol, tobacco, interest-bearing loans or illicit sex.¹⁷² The Kuvveyt Türk Beteiligungsbank (participation bank) has opened a branch in Mannheim and applied for a full banking licence in 2013.¹⁷³ Stock exchange values are already being listed in Dow Jones Islamic Market Indexes¹⁷⁴ or in the FTSE

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169 BGH NJW 1999, 574; cf. also AG Memmingen IPRax 1985, 230 ff.; AG Fürth FPR 2002, 450, 451; OLG Hamm NJOZ 2013, 1006, 1009; for a detailed overview cf. Wurmnest, Die Brautgabe, 1879 ff. with further references.

170 Cf. e.g. OLG Munich from 16 April 2013 (21 U 74/13), unpublished; cf. the report 'Die Braut, die sich was traut', SZ 15 April 2013, available at <http://www.sueddeutsche.de/muenchen/prozess-um-hochzeitsschmuck-die-braut-die-sich-was-traut-1.1649699> (last accessed 20 May 2014).

171 Cf. the instructive report by Farhoush/Mahlknecht, A critical view, 203 ff.; for other European countries cf. the other reports in Cattelan (ed.), Islamic Finance, 143 ff.

172 Cf. 'Islamischer Aktienfonds in Deutschland', Freitagblatt 2/2 Feb. 2000, 13; regarding legal issues cf. Bälz, Islamic Investment Funds in Germany, 7; id., Islamische Aktienfonds, 49 ff.

173 Cf. Becker, Islamic Banking, 22 and following regarding the challenges for the practice of notaries involved.

174 The Dow Jones Islamic Market Indexes comprise a number of product- and market-related indexes (up-to-date information may be found at <http://www.djindexes.com/islamicmarket>).

Global Islamic Index, and appear to be quite capable of keeping up with the competition.¹⁷⁵

If these investments take place with religious authorities involved, some points of regulatory law¹⁷⁶ must be clarified, such as the documented definition of the investment principles, cf. e.g. § 165 para. 2 no. 2 KAGB, the lawful cooperation with Islamic expert panels, or the limits of applications by appealing to 'good Muslims'. The customary, if not entirely unproblematic at the regulatory level, determining or monitoring of company policy by sharia boards is likely to be unavoidable if the necessary trust of the religious clients is to be retained. It is the only way in which the desired 'exonerating effect', i.e. safeguarding activity according to religious norms in a subjectively satisfying fashion, can be achieved. The advantages of domestic providers subject to regulatory laws are obvious, as the author is aware of numerous Muslims in Europe having lost considerable sums with suspicious providers from the Islamic world who present themselves in religious guise,¹⁷⁷ or with comparable European organisations.¹⁷⁸ Even the state of Saxony-Anhalt has launched an Islamic bond (*sukuk*,¹⁷⁹ 100 million euro to begin with), based on a Dutch holding company.¹⁸⁰

As for loan and investment transactions by means of types of shares and contracts that adhere to the principles of Islamic law, it is important to consider their advantages and disadvantages compared to the traditional instru-

175 Cf. 'Das Geschäft mit islamischen Fondsanlegern wächst kräftig', Frankfurter Allgemeine Zeitung, 20 Dec. 1999, 35; Bälz, *Islamische Aktienfonds*, 447 ff.

176 For the European scene cf. Belouafi/Belabes, *Islamic Finance and the Regulatory Challenge*, 149 ff.

177 It is not coincidence that several Islamic countries have agreed to establish a regulatory and monitoring authority for Islamic finance (Islamic Financial Services Board; found at www.ifsfb.org); cf. 'Regelungsbehörde für Islam-Banken', Frankfurter Allgemeine Zeitung, 5 Nov. 2002, 27.

178 Cf. reports of suspicious investments by such organisations in Turkey in 'Neuer Markt auf Türkisch' (Michael Fröhlingendorf), Spiegel Online, 29 Jan. 2004 (viewed on 29 August 2014 at <http://www.spiegel.de/spiegel/print/d-29787309.html>).

179 Based on a combination of leasing contracts which relate to the state's real estate property. Muslims emphasise that this kind of loan is much more advantageous to future generations than simple credits which have to be paid back, as it is limited by the value of the real estate which will be passed on to future generations; cf. 'Finanzmarkt: Islam-Anleihe aus Magdeburg', Die Bank, 1 Jan. 2004.

180 Cf. 'Sachsen-Anhalt bereitet erste islamische Anleihe vor', Frankfurter Allgemeine Zeitung, 6 Nov. 2003, 31; 'Anlegen mit Allahs Segen', Handelsblatt, 14 July 2004, 29. Cf. also the thorough study by Sacarcelik, *Rechtsfragen islamischer Zertifikate*, 2013.

ments.¹⁸¹ Deliberations may for instance use the purchase of real estate to illustrate this: advantages of the *murābaḥa* (cf. Part 2, 3.2.b. above) are that obligations are transparent and fixed. The client is at the same time the owner of the item ‘financed’, but also has to bear its obligations (including possible insurance); on the other hand the ‘funder’ receives real securities that are easily recoverable, and claims with comparatively small risks attached. Disadvantages may be due to a higher tax rate, and also to a lack of flexibility with regard to the fluctuating cost of refunding or the desire to terminate contracts ahead of term. Under Islamic law, customers’ claims cannot be used for hedging transactions.

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The forms of so-called *ijāra*, which is similar to leasing, with or without the option to purchase, have the advantage – compared to the *murābaḥa* as well – that payment can be adapted according to the amount and the payment term; as the ‘funder’ has to be the owner, he can use the item for asset-backed securities when refinancing. Disadvantages are that clients are less than fond of the funder’s position as the owner and of his resultant obligations which cannot always be covered by insurance. The more recent type of the diminishing *mushāraka* – a corporate partnership depending on the progress of repayment – avoids the abovementioned disadvantages and offers shared property with flexible payments. In Germany this would have to be operated in the form of a Gesellschaft Bürgerlichen Rechts (non-commercial partnership; §§ 205 ff. BGB).¹⁸² The purchaser would rent the bank’s share until the final repayment. Legal problems may arise with respect to the wording of the purpose of the partnership (‘financing’ or ‘possessing’ the item), the possible need for formal requirements in the partnership agreement under § 31b BGB, the application of the provisions on consumer credits (e.g. regarding termination of the contract, § 499 BGB), the question of whether the partnership agreement will be exempt from AGB-monitoring in accordance with § 310 para. 4 BGB and, finally, the possible liability of the bank in accordance with § 128 HGB regarding real estate obligations. In addition the double tax rate remains.

In the UK the practical implementation of traditional models of acquisition avoiding interest compatible with Islamic law has been facilitated through legislation. The customary way of financing real estate purchase with interest-bearing loans appears to be rejected by many Muslims. A possible way of avoiding this was found: the credit institution financing the transaction acquires the

181 Cf. the overview in Keith Leach, Islamic real estate financing – experiences of an international bank, *Immobilien & Finanzierung* 12/2005, 436 ff., on which the following remarks are based.

182 Cf. Becker, *Islamic Banking*, 22, 28 ff.

property, then sells it to the Muslim buyer at a higher price. However, such transactions frequently fall through due to the tax due on both transaction, i.e. the double amount.

Now new rules have been implemented to levy the stamp duty only once in cases of 'Islamic mortgage'.¹⁸³ HSBC Amanah offers such Islamic mortgages, other banks have followed suit. A market for real estate financing on a specific religious basis is beginning to emerge in Germany, too. German banks offer similar plans in cooperation with partners from the Islamic world for customers to whom the religious aspect is important. The German partners primarily manage sales and distribution, while the Arab partners provide the specific know-how.¹⁸⁴ The problems of double taxation have on the whole not been resolved in Germany. It remains to be seen whether Muslims will accept the possible division into transaction subject to the law of obligations and transaction subject to property law (with the property being acquired directly by the client in order to avoid two taxable transactions¹⁸⁵) as conforming to Islamic law.

In this context we must refer to the developing culture of expert opinions, which deals with matters of economy among other things. Especially Muslims with an Arab background are active in this field, but also a number of German converts to Islam. Traditionally devout Muslims are concerned even outside the borders of the Islamic world with arranging their everyday activities in a fashion compatible with their faith, and consequently feel themselves bound by the rules prohibiting *ribā* and *gharar*. However, despite the initiatives discussed, commercial activity in the Islamic diaspora is not generally prepared for such requirements. Consequently those involved are faced with issues which they wish to have resolved in time-honoured tradition. There are individuals who resolve such issues, as well as, more recently, institutions, such as the European Council for Fatwa and Research which was founded in 1997.¹⁸⁶

As regards interest-bearing transactions we generally find a very strict position which does not refer to modern considerations of credit economy with a single word, even among Muslim scholars – clearly every type of interest, including default interest, is considered to be prohibited. The expert opinion on

183 Cf. 'Chancellor abolishes double stamp duty', Muslim News, 25 Apr. 2003, 4; Iqbal Azaria, Islamic home finance arrives on UK's high streets, Muslim News 25 July 2003 (no. 171), 6. Regarding the situation in the USA cf. Maurer, Pious property, 2006.

184 Cf. Leach, Islamic real estate financing – experiences of an international bank, Immobilien & Finanzierung 12/2005, 436 ff.

185 Cf. Kilian Bälz, Rechtliche Aspekte der islamischen Immobilienfinanzierungen, Immobilien & Finanzierung 12/2005, 439, 440.

186 Cf. Al-majlis al-awrubi li-l-iftā' wa-l-buḥūth, Fatāwā, vol. 1, Cairo n. d. (1999), 19 f.

credit cards, however, states that the sin is only on the part of the interest creditor, not the person who uses a credit card as a necessary means of payment.¹⁸⁷ This illustrates the tendency to ease living circumstances. The contrary legal rule of *sadd al-dharā'i'* ('blocking the means' – actions are forbidden if they lead to forbidden actions) is not even mentioned.¹⁸⁸ A regression to medieval ideas can be seen in the opinion of the Shi'ite grand ayatollah al-Shīrāzī, which permits Muslims to take interest from non-Muslims (*kāfir*), but to pay interest only if it is inevitable.¹⁸⁹

Islamic understanding can also be significant when applying laws, especially when interpreting contractual relations. The author's own experience as a judge yields the example that the prohibition to take interest may define transactions among Muslims. Thus it would be possible for this kind of understanding to inform an argument regarding whether the allocation of capital for business reasons is a loan or a silent partnership. The same is true of the question of whether the lack of documentation of important transactions – without formal requirements – is evidence of lack of interest in a legally binding transaction, or whether Islamic law's traditional focus on witness evidence¹⁹⁰ reduces the significance of written documents. The traditional understanding of gender roles may also have an impact. While Islamic law has always known separation of property – the wife is always entitled to dispose of her own property – it seems that there are frequent instances of the husband managing the wife's property as well. This may be relevant when assessing transactions between the spouses. Thus a court in New Jersey had to judge whether the transfer of \$400,000 from an Iranian wife to her husband had been a gift, as US law would presume in similar cases. The court, however, ruled against its having been a gift, based on the fact that the husband's managing the wife's property was customary, without changing the separate property status.¹⁹¹

German law allows wide scope for private autonomous decisions. If this scope were to be used intensively in the long term along the lines that the sharia's civil law sections could replace German dispositive civil law, some upheaval of legal culture cannot be ruled out. The German *ordre public interne* draws limits to autonomous regulations under German substantive law, e.g.

187 Op. cit., 40 ff.

188 In detail regarding the Council and its expert opinions: Rohe, *The Formation of a European Shari'a*, 161, 173 ff.

189 Ayatullāh al-'Uzmā al-Sayyid Ṣādiq al-Ḥusaynī al-Shīrāzī, *Mas'ala*, 393.

190 Cf. Wakin, *The Function of Documents*, 4 and ff.

191 *Shayegan v. Baldwin*, 566 A. 2d 1164, 1166 (N.J. Superior Ct., Appellate Division 1989), reference in Rosen, *The Justice*, 211 f.

§ 138 BGB that declares immoral legal transactions to be void. Unlike the *ordre public international* it draws stricter boundaries, as domestic cases warrant higher importance being accorded the domestic fundamental principles. Group-specific interpretations of what is moral would be in breach of the principle of maintaining a uniform minimal standard set down in § 138 BGB. Nevertheless, in individual cases there might be a legitimate interest in legal arrangements which are enforceable not only under German law, but also in other states which the parties involved are connected to e.g. by family relations or assets located there. Such cases are not purely “domestic”, but rather hybrid in nature. In consequence, the threshold for the application of *ordre public interne* would be appropriately placed between the *ordre public international* dealing with foreign law and the *ordre public interne* concerning purely domestic cases. In general, the limits drawn by mandatory law have to be applied equally without cultural biases whatsoever.

One question not yet answered in all details is whether an interpretation of the law that is permissible in principle becomes immoral under dispositive substantive law if it is explicitly based on motives contrary to fundamental decisions of the legal system. Thus a testator has the option of reducing his or her heirs’ apparent, e.g. children’s, share in the inheritance by half to the so-called ‘legitimate share’ under § 2303 para. 1 BGB without giving any grounds. However, what if this type of will distinguishes between sons and daughters and apports the latter only a half share on the grounds that this would be in keeping with the norms of Islamic inheritance law?¹⁹² The author is aware of such wills being made in Germany, even by persons who have lived there in the long term. Some solicitors refuse to cooperate in drawing up such wills (but under German law this cooperation is not mandatory).

Besides the issue of legal effectiveness this also shows up a requirement of future Muslim educational policy: the distinction under inheritance law is implemented with recourse to traditional rules of Islamic law (cf. Part 1, 4.3 above). Many Muslim scholars reject the accusation that women are treated unfairly under inheritance law, pointing out that this disadvantage is just in compensation of the preferential treatment of women under Islamic maintenance law: unlike men, women have no obligation to contribute financially to the upkeep of the family, even if they are wealthy (regarding the unrealistic nature of this scenario cf. Part 1, 4.2.b.ff above).

192 Cf. Rohe, Gutachten zum Internationalen und Ausländischen Privatrecht 2002 no. 25, IPG 2002, Bielefeld 2004 with further references.

As regards claims to maintenance, in Germany the regulations of substantive law in the place of habitual residence of the entitled party apply (cf. a.ii above), independent of the citizenship of the parties involved. German maintenance law does, however, focus on the neediness of the entitled party and the financial capacity of the liable party, without distinguishing according to gender. Thus Muslim women who have the necessary financial capacity are obliged to pay maintenance. Treating women unfairly under inheritance law thus loses its purpose inside Germany, even from an internal Muslim perspective.¹⁹³ In a dynamic interpretation, granting a half share may be seen as a ‘minimum’ which does not rule out more extensive claims.¹⁹⁴ There is, however, so far a dearth of educational establishments where these considerations might be discussed and taught. This might, in fact, be a starting point for Islamic religious education¹⁹⁵ which could look at these issues in secondary schools.

The German law regarding “inadmissible questions” could possibly solve another case dealt with in France. The Tribunal de la Grande Instance in Lille recognised in a later repealed ruling the untruthful statement of a bride that she was a virgin as grounds on which to annul the marriage in accordance with Art. 180 Code civil (not just to divorce the marriage).¹⁹⁶ The legal system knows the phenomenon of inadmissible questions and agreements, i.e. cases in which untruthful statements and breaches of agreement do not result in legal consequences due to the protection of overriding legal interests of the other party or third parties. This is the case in agreements on contraception, which if not adhered to do not constitute grounds for damages payable to a parent liable to paying maintenance,¹⁹⁷ or in inadmissible questions concerning employment

193 Thus e.g. with reference to the comparable situation in Canada the Canadian lawyer and Muslim activist Faisal Kutty in conversation with the author in Toronto on 28 July 2006; similarly the Iranian scholars Mahmud Taleghani and his daughter, quoted in Amirpur, *Islamischer Feminismus*, 35 f., and the German Imam Benjamin Idriz, *Grüß Gott*, 143 ff.

194 Thus the Muslim professor of law Enes Karić of the Islamic Department Sarajevo on the occasion of a conference there, with reference to the Bosnian scholar Husein Dozo; similarly also the Indonesian religious scholar and women’s rights activist Mulia, *Toward a Just Marriage Law*, 137 f.

195 Cf. Wolfgang Bock’s (ed.) collection on the subject, ‘Islamischer Religionsunterricht?’, Tübingen 2007; Myrian Dietrich, *Islamischer Religionsunterricht: rechtliche Perspektiven*, Frankfurt/Main 2006; Coumont, *Islam und Schule*, 440 ff.

196 Judgment of 1 Apr. 2008, viewable at <http://prochoix.org/cgi/blog/index.php/2008/06/02/2013-affaire-de-lille-le-texte-du-jugement>; judgment on appeal Cour d’appel Douai, 17 Nov. 2008; cf. ‘Virginité, la cour d’appel de Douai “remarie” les époux de Lille’, *Le Monde*, 19 Nov. 2008.

197 Cf. BGHZ 97, 372, 379.

law.¹⁹⁸ In my opinion, virginity as a 'prerequisite for marriage' should be on the same footing; the obsession with virginity in (not only) some Oriental cultures should not be granted legal support.

Nevertheless, from a legal point of view, making use of the scope of private autonomous decisions should generally be regarded as neutral. We must not forget that in Germany and other countries courses of action based on religious or ethical beliefs and affecting the system of private law are not an unknown phenomenon. However, a compact parallel legal system outside the applicability of private international law would be a new phenomenon in the area of dispositive law in Germany. In connection with mechanisms of implementing the law out of court (cf. e) below) Muslims might find themselves exposed to group pressure to make use of these. From the outside this would look as though the legal culture of this part of the population was going to be permanently separate and homogenous. Still, there are no initiatives of the kind among Muslim organisations in Germany.

On the other hand we cannot emphasise enough that we must not express a general suspicion of Muslims who attempt to harmonise the principles of their faith with their everyday life in the diaspora. This is especially true of cases in which the parties plan to spend their lives in more than one country. Here it would seem entirely sensible to seek legal regulations recognised by all the legal systems that might become involved. Making use of permissible freedom of scope in cases with a domestic dimension is not universally suspicious either. Legal certainty and the freedom to manage one's own life are highly valued assets of the rule of law, and all those who recognise the foundations of these freedoms and certainties must be permitted to benefit from them.

c *International Commerce*

Islamic private commercial law may apply outside the borders of the Islamic world as long as the statutes of private international law (cf. 3.a above) make this possible. Germany and many other countries permit freedom of choice in this area ('party autonomy'; cf. Art. 3 Rome I Regulation). In commercial relations with certain Islamic countries such as Saudi Arabia or Iran the law governing the contract is frequently inspired by Islamic law. On the other hand, Islamic conflict of laws governing contracts may limit the choice of legal system. The Islamic *ordre public* – in some countries – objects to agreements or regulations which include interest.¹⁹⁹ Other countries have specific provisions

198 Cf. BAG NJW 1994, 1363f.; BAG NJW 1999, 3653.

199 Regarding present-day Egypt see H. Jung, *Ägyptisches internationales Vertragsrecht*, 98 ff.

for international commerce which permit internationally customary activities such as interest or transactions concerning indefinite subjects of a contract (cf. Part 2, 3.2.b above). The provisions of (not only) Islamic law of *ḍarūra* ('necessity knows no law') or *maṣlaḥa* ('greater benefit outweighs smaller damage') are legal justifications put forward (cf. Part 1, 2.7 above).

In the case of international contracts, Western contractual partners frequently attempt to rule out the applicability of Islamic contractual law, or at the very least to assign conflict solution to 'neutral' institutions such as arbitration courts outside the Islamic world. However, Muslim partners have found these not to be universally reliable in the past. This is one reason why countries such as Saudi Arabia insist as a rule that the Saudi Board of Grievances is appointed to solve conflicts. Unlike other courts in the country, this board meets with a comparatively high level of acceptance among international business partners.²⁰⁰

Remaining uncertainties regarding the expected result of the domestic judiciary or the implementation of, in particular, foreign decisions²⁰¹ ultimately lead to frequent demands for reliable, but also expensive, provision of collateral securities.

If a matter is brought before the public courts, in Germany and in many other countries the prevailing opinion²⁰² holds that only a particular national law may be selected, not 'the sharia' per se. When interpreting contracts it will be necessary to take into account – and there are comparable cases in international practice – whether the parties involved made this choice in order to state the terms of the contract more precisely, for instance by inserting clauses to waive interest.

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A specific issue of international commerce is the establishment of financial transfer systems. According to press reports in recent years, a system of so-called 'Ḥawāla banks' has become established in Germany. In the opinion of the Bundesanstalt für Finanzwesen (BaFin) they conduct illegal banking transactions; investigations into 485 of these organisations took place some years

For a limited application under European conflict of laws rules cf. Bälz, *Zinsbeschränkungen*, 277 ff.

200 Cf. Krüger, *Vermögensrechtliches Privatrecht*, 485, 499 ff.

201 Cf. op. cit., 499 ff., 506 ff.

202 Concerning how to handle a contract intending to implement the 'principles of the Glorious Shari'a' cf. the decisions in *Shami Bank of Bahrain vs. Beximco Pharmaceuticals and Others* (Judgment of the High Court of Justice 2002 Folio 1172, QBD Commercial Court; Court of Appeal (Civil Division) [2004] EWCA Civ 19); also Bälz, *Das islamische Recht als Vertragsstatut?*, IPRax 2005, 44 ff.

ago.²⁰³ Still, the *hawāla* is an established institution in Islamic law (cf. Part 1, 4.4.a above).²⁰⁴ It is a basic model of cashless transactions²⁰⁵ and was exported with great success to Europe in the Medieval and Early Modern periods. The term of *aval* credit or surety is a linguistic reminder of the origin of the institution, which essentially corresponds to the money order as regulated in §§ 783 ff. BGB, or the bill as in Art. 1 WG.

Using such cashless forms of transactions is not generally objectionable per se. The economic justification seems to be on the one hand the desire to transfer money abroad quickly and cheaply – with a fee of only 1–2 % of the transaction amount.²⁰⁶ In view of the very high fees still customary among commercial banks this is entirely understandable. Furthermore employing such mechanisms becomes almost unavoidable when it comes to transfers to countries without a functioning banking sector. In some Asian countries cashless transactions are possible only in this way. It is also possible to avoid restrictive regulations of currency imports.²⁰⁷ The economic dimension of the *hawāla* is remarkable. In Pakistan alone the number of *hawāla* agents is estimated at more than a thousand who facilitate the transfer of ca. \$2,500–3,000 million into that country. IMF experts conclude that in 15 selected states (among them Iran, Pakistan, Bangladesh, Algeria, India and Turkey) \$760,000 million flowed through these channels over the past 20 years.²⁰⁸

Legal difficulties arise if these transaction types take place in an institutionalised fashion and go through bank-like organisations. According to the reports mentioned this appears to have indeed been the case. Due to the dangers attendant on these transfers, in 1998 the German legislative authority included the

203 Cf. 'Hawala – das Wort eines Mannes gilt', Frankfurter Allgemeine Zeitung, 6 Oct. 2001, 3; 'Schattenbanken – ihr Geschäft ist die Geldwäsche', Erlanger Nachrichten, 10 Oct. 2001, 7. Regarding the legal facts and the legal evaluation cf. Findeisen, 'Underground Banking', 2125 ff.

204 Cf. only Nasir-e Khosrou's report from eleventh-century Baghdad (Nasir-e Khosrou, *Safarname*, 156): he mentions 'receipts' from money-changers which could be used to purchase goods.

205 Cf. Duri, *Arabische Wirtschaftsgeschichte*, 89 and n. 77, 179.

206 Profits are probably made mainly from differences between currency rates, cf. Findeisen, 'Underground Banking', 2127.

207 Cf. 'Hawala-System verliert an Gewicht', Frankfurter Allgemeine Zeitung, 12 June 2002, 27.

208 Ulrich Schneekener, *Strukturen des islamistischen Terrorismus: Das Netzwerk 'Al-Qa'ida'*, in Berlin, Senatsabteilung für Inneres, Islamismus. Diskussion eines vielschichtigen Phänomens, Berlin 2005, 33, 41.

money transfer transaction in §1 para. 1a p. 2 no. 6 KWG in the list of financial services subject to prior approval; penalties for breaches are found in §54 para. 1 no. 2 KWG (statutory offence) and in §§37, 50 KWG (if need be, suspension of business activity). According to information provided by the Bundesanstalt für Finanzwesen (BaFin) ca. 350 companies have reported such activity. Breaches of the duty to keep records according to commercial and tax law have also been mentioned.²⁰⁹ If these *hawāla* banks are used to launder dirty money²¹⁰ or maintain the infrastructure of terrorist organisations, the dangers are obvious. It is for this reason that the Islamic world is taking initiatives for improved monitoring, such as the obligation to register with the central bank in the UAE.²¹¹

d *Incorporating Norms of Islamic Law into the National Legal System*

Unlike situations with an international dimension, citizens of the country of habitual residence are as a rule subject to the substantive laws of that state only. Some European countries – not, however, Germany – have incorporated some norms of Islamic law into the national legal system.

In Greece this is the case with regard to family and inheritance law applying to the Turkish minority in Thrace.²¹² This is a special situation, dependent on historical circumstances, based on the Lausanne treaty after the First World War. It must be emphasised in this context that due to this regulation traditional norms of Islamic law are preserved, while Turkey has implemented compete gender equality since the law reform of 2002.

In 1992 Spain introduced provisions allowing marriage in accordance with Islamic formal requirements.²¹³ In order to guarantee sufficient legal certainty a mandatory registration duty was added.²¹⁴ Applicable substantive law is not affected by these norms. The situation in Italy is slightly different, where purely 'Islamic' marriage is not compatible with local formal requirements, but

209 Cf. Findeisen, 'Underground Banking', 2127.

210 Cf. op. cit., 2129 f.

211 Cf. 'Hawala-System verliert an Gewicht', Frankfurter Allgemeine Zeitung, 12 June 2002, 27.

212 Cf. Tsitselikis, The Legal Status of Islam in Greece, 417 ff.; id., Old and New Islam, 367 ff.; OLG Hamm, 7 UF 123/05, 7 Mar. 2006 (BeckRS 2007 00423). For a critical report cf. Lina Papadopoulou, Trapped in History: Greek Muslim Women Under the Sacred Islamic Law (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877048, last accessed 23 May 2014.

213 Cf. Mantecón, L' Islam en Espagne, 130 ff.; Martínez-Torrón, The Legal Status, 50 ff.

214 Cf. Art. 59 Código Civil in connection with the administrative rule by the general directorate of registries and notaries of 10 Feb. 1993.

due to conflict of laws the law of the home country of one of the spouses-to-be is sufficient.²¹⁵ Once again, this is purely a matter of formal requirement.

In the UK Muslim institutions, like other religious organisations, are entitled to apply for a permission to register marriages.²¹⁶ Furthermore, under the Divorce (Religious marriages) Act 2002 a court can demand that a marriage is dissolved according to the religion in question before granting a civil divorce.²¹⁷ In Germany, however, Art. 13 para. 3 p. 1 EGBGB states that in the country a marriage can be entered into only in the form prescribed here. Thus a marriage in an Islamic centre in Germany is void, even if it has been confirmed – in purely declaratory fashion – by a person authorised under Art. 13 para. 3 p. 2 EGBGB.²¹⁸

Also in the UK, the Adoption and Children Act of 1989 was amended in 2002 to include regulations (Sect. 14 Aff.) permitting a specific form of guardianship or family membership below the threshold of full adoption, i.e. with no consequences for status. While the introduction of this institution is certainly linked to the prohibition of adoption under Islamic law and less strict alternatives (cf. Part 1, 4.2.b.hh above), it is open to everybody and thus increases the options open to the nuclear family without necessarily affecting the extended family context.

More far-reaching demands along the lines of introducing a system of private law divided along religious boundaries in the areas of personal status, family and inheritance have been raised mainly in the UK. As early as the 1970s and 80s the Union of Muslim Organisations of UK and Eire developed a resolution that envisages a separate Muslim system of family law to be applicable automatically to all British Muslims.²¹⁹ The idea at the back of this resolution is that Muslims, most of whom have roots in the Indian subcontinent,²²⁰ were subject to their own system of family and inheritance law (which was based on religion) during the time of the British Raj, and that this situation should

215 Fritz Sturm, *Eheschließungen im Ausland. Nachweis, Wirksamkeit und Folgen von Rechtsverletzungen*, StAZ 2005, 8.

216 Information provided by the solicitor Nadeem Malik, Leicester/Birmingham, during a conversation in Leicester in March 2002.

217 Cf. Lord Nazir Ahmad, *Notes*, 71, 72; Khaliq, *Islam and the European Union*, 246 ff.

218 Cf. Wolfgang Jauß, *Wirksamkeit der in einer Moschee geschlossenen und im ägyptischen Generalkonsulat beurkundeten Ehe eines Ägypters und einer Tschechin*, StAZ 2005, 111 f.

219 Cf. Poulter, *The Claim*, 147 with further references.

220 Cf. only M. Y. McDermott/M. M. Ahsan, *The Muslim Guide*, 2nd revised edition, Leicester 1993, 11.

be perpetuated (universally).²²¹ Others would like such rules to be introduced according to the choice of those involved. The model cited is Islamic law, as well as the situation in most Islamic countries.²²² Substantive law applicable in these areas is indeed determined according to the religious affiliation of the parties involved. Social pressure seems to have by now increased to the extent that in 2008 the then Archbishop of Canterbury Rowan Williams said that introducing these (not: all) points of sharia law would be unavoidable.²²³ This would lead to important areas of application, including ones highly charged as regards legal policy, being subject to a model of religious segregation.

Remarkably, the situation in France is quite different, in spite of a superficially similar colonial history. No widely expressed need for Islamic laws has surfaced beyond instances where conflict of law is invoked. The idea of *citoyenneté* for all those who recognise the foundations of the French Republic and identify with them appears to have left its mark on the Muslims as well. Unlike British colonial rule, while sharia courts had some competency in e.g. Algeria, their rulings were subject to French appellate courts.²²⁴ In addition many Muslims seem to regard receiving French citizenship by no means as a rejection of Islam. This is particularly true of those who were compelled to taking this step in the aftermath of the Algerian civil war.²²⁵

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It is not likely that there will be any public discussion regarding the possible introduction of legal norms based on Islamic law, as even the occasionally used phrases of a 'communauté musulmane' or 'identité musulmane' are met with quick rejection.²²⁶ The prohibition of (group) particularism goes so far that that the newly-created institution of civil partnership (PACS)²²⁷ is open to heterosexual couples, too, in order to avoid creating a group privilege for same-sex couples.²²⁸ It must furthermore be borne in mind that more than

221 Cf. Poulter, *The Claim*, 148 with further references.

222 E.g. Ahsan, *The Muslim Family in Britain*, 21, 24.

223 Cf. 'Civil and Religious Law in England: A Religious Perspective', lecture of 7 Feb. 2008, available at <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective>, last accessed 23 May 2014. For the broader debate cf. Rohe, *Shariah in Europe*, 656 ff.

224 Cf. the reference in Charnay, *La Charïa et l'Occident*, 25.

225 Op. cit., 28.

226 The continuing existence of Islamic personal status law in Mayotte is fairly exotic, widely unknown and has no effect to speak of with regard to debates on the subject.

227 For an overview cf. Anne Röthel, *Nichteheliche Lebensgemeinschaften*, ZRP 1999, 511, 514 f.

228 Information provided by Prof. Francis Messner, Directeur du Centre Société, Droit et Religion en Europe (CNRS) in Strasbourg during a conversation on 28 Mar. 2002.

a few Muslims in France come from countries such as Tunisia, Morocco or Turkey, whose legal systems have moved quite a long way away from the narrow confines of classical Islamic personal status, family and inheritance law.

Prominent voices from Saudi Arabia, finally, call on Muslims in the West generally to seek ways of living their lives according to the norms of Islamic law and governed by Islamic courts and arbitration authorities.²²⁹ This kind of opinion was clearly shared by the Iranian respondent in a divorce case who refused to be divorced by the competent German court but insisted on a Muslim scholar or a person appointed by him.²³⁰

A legal division along religious-personal lines is not, however, in keeping with established European legal tradition.²³¹ In summary we must emphasise that the reasons against a general religious division of the law far outweigh those in favour of it. There is scope for interpretation at the level of dispositive substantive law. While marriage in a registry office is a legal requirement, nobody is prevented from bringing along witnesses, which would allow the forms of traditional Islamic law to be observed. On the other hand the sensitive areas of personal status, family and inheritance law have a high degree of social importance, although they regulate primarily private legal relations. The debates of past decades on gender equality – achieved after a long struggle – and religious neutrality – legally implemented slightly earlier – as well as the current discussion of the legal acceptance of same-sex partnerships illustrate the far-reaching significance this area has for social cohesion, too. Establishing segregated legal enclaves especially in these areas would be contrary to the fundamental function of the legal system in centralised and structured states under the rule of law whose civil society is similarly firmly structured. In such a polity, pluralism is founded on the establishment of possible, optional courses

229 Cf. Ibn Baz/Uthaymeen, *Muslim Minorities*, esp. 71 ff.; most recently the Fiqh Council of the Muslim World League during its 16th meeting in Mecca, reported in 'A message from Muslim scholars to Muslim Minorities in the West', *Daawah* no. 4 1422AH/Feb. 2002, 8, 11. The Muslim jurist Khaled Abou El Fadl (*Speaking in God's Name*, 268 f.; 170 ff.) does not mince his words when he comments on legal opinions of this sort: 'I confess that I find the virtual slavery imposed on women by the C.R.L.O [the Saudi Permanent Council for Scientific Research and Legal Opinions, M. R.] and like-minded special agents to be painfully offensive and unworthy of Shari'ah. To claim that a woman visiting her husband's grave, a woman raising her voice in prayer, a woman driving a car, or a woman travelling unaccompanied by a male is bound to create intolerable seductions, strikes me as morally problematic. If men are morally so weak, why should women suffer?'

230 Cf. OLG Stuttgart FamRZ 2004, 25 ff.; the court rejected this request.

231 In detail: Rohe, *Religiös gespaltenes Zivilrecht*, 409 ff., esp. 415 ff.; Rohe, *Family*, 49 ff. with further references.

of action based on one and the same system of substantive law, with the debate on legal politics being conducted at all levels of society.

Further formal and substantive reasons are found within Islamic law itself. We must remember that in the areas discussed here, there is no uniform Islamic law that could be used as the basis for legal relations between Muslims. The variety of beliefs in the area of legal culture is even greater among Muslims, and an agreement would appear to be illusory.²³²

In addition a significant portion of the personal status, family and inheritance law in force in parts of the Islamic world is contrary to international, and even more so national, *ordre public*. Many Muslims – not least those of Turkish or Balkan origin – vehemently reject these regulations for these very reasons. Any potential assimilation would ultimately result in an extensive adoption of applicable rules of substantive law. Mandatory implementation of faith-based rules on Muslims would be untenable under the constitution.

A religious division of the law would furthermore result in problems at the level of interreligious conflict of laws. Which of several possible legal systems would apply in cases involving members of more than one religious group? The religious group with the greatest political power would reserve the final power to adjudicate to its own legal system. In Egypt this has for instance led to the bizarre situation that dominant Islamic law also applies to Christians of differing denominations (cf. Part 2, 3.1.b above).²³³ The introduction of the mandatory²³⁴ civil marriage in Germany and other European states is not least a consequence of comparable disagreements in cases of interdenominational marriages.²³⁵ This final power to adjudicate could not easily be established on the basis of German and European constitutional law. Taking religious affiliation as a starting point would already be questionable. Interreligious conflict of laws would thus be difficult to solve. A option-based solution would also have to be designed in accordance with the fundamental rights and in the

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232 This also reflects to some extent the different political, ethnic and general cultural affiliation; cf., representative of many, Fred Halliday, *Islam and the Myth of Confrontation*, London etc. 1996, 120 ff.

233 Cf. Bergmann/Ferid, *Internationales Ehe- und Kindschaftsrecht*, Loseblattsammlung, Länderbericht Ägypten, 8 f.; Wähler, *Internationales Privatrecht und interreligiöses Kollisionsrecht*, 163 f.; regarding the self-definition of Islamic law as dominant law in family relationships cf. Areti Demosthenous-Pashalidou, *Rechtskollisionen bei der Auflösung von Mischehen zwischen Muslimen und Andersgläubigen*, *Der Islam* 76 (1999), 313, 315 ff.

234 The sole legal effectiveness of civil marriage is not affected by the change of personal status law as of 1 Jan. 2009, which means that purely religious marriages are now admissible.

235 Cf. the references in Coing, *Die Auseinandersetzung*, 360, 370 ff.

end would be very far removed from the development of the law in the Islamic world so far.

Yet another difficulty could arise out of the desire to leave a certain religious legal system and instead become subject to one that has no religious ties. There is an instance which has become legal practice in England.²³⁶ An orthodox Jewish mother refused to be satisfied with the ruling of an Israeli court on the grounds that she as a woman had been discriminated against on the basis of the applicable law. The English court rejected the action as her religious affiliation had been the reason for the Israeli religious court to be competent in the case in the first place. Clearly, this kind of decision will not be satisfactory. On the other hand, in view of the legal certainty necessary especially in matters of family law, it would be just as questionable to allow a change of legal system indiscriminately. Consequently a legal affiliation based on religion appears to be misguided from the outset. It would also be contrary to the freedom of religion under Art. 9 ECHR, or corresponding national constitutional statutes, to tie persons – possibly against their will – to laws based on religious precepts they may well disagree with. This is particularly clear in the case of rules which disregard gender equality and for instance adhere to a rigid social allocation of gender roles that does not correspond to the realities of life any more.²³⁷

The Islamic charter of 20 Feb. 2002²³⁸ of the Central Council of Muslims in Germany (ZMD) is worth mentioning as an example in this context. It expresses clearly that the fundamental recognition of the German political and legal system must include family and inheritance law as well as procedural law.²³⁹ This delineates precisely the areas of potential conflict. It seems that there is sufficient potential for freedom of scope within the boundaries of German dispositive substantive law. This attitude corresponds to the concept of integration (individual interpretation within the boundaries of universally valid principles) as opposed to concepts of assimilation or segregation. Larbi Kechat, the Imam of the Paris Ad-Da'waa mosque who is very well known throughout France, made similar remarks on the subject of family law: 'We agree with the legal framework; we are not imposing parallel laws.'²⁴⁰

236 Re s (Abduction: Intolerable Situation: Beth Din), [2000] 1 FLR 454, 460.

237 Cf. also Esposito, *Women in Muslim Family Law*, 48.

238 The charter is available in print published by the ZMD, and also on the ZMD's homepage (www.islam.de).

239 *Islamische Charta* Art. 13.

240 Kechat, *Le coran*, 183, 189: 'Nous sommes en harmonie avec le cadre des lois, nous n'imposons pas une loi parallèle.'

e *Informal Application/Application out of Court*

Beyond the coverage of territorially applicable private law, finally, are relations formulated according to Islamic norms whose legal effect is not enforced by means of public mechanisms by those concerned. Cases have occurred in the UK in particular,²⁴¹ but also in Germany, in which Muslim parties have e.g. entered into a marriage or divorced a marriage solely in accordance with traditional Islamic norms.²⁴² There are widely differing reasons for this: some extremists are attempting to establish a religious parallel system because they do not wish to be subject to the institutions of a secular non-Islamic state. Others wish to ensure recognition in their countries of origin where German state acts are not recognised. Others again see it as the only way in which they can 'legalise' their relationship, if for instance the documents necessary for a civil marriage are impossible to procure in the country of origin, as is the case in many parts of Iraq at present. Occasionally the reason is simply ignorance of the legal requirements in the country of residence, including the access to legal aid. Some people simply follow the system with which they are familiar from their home country, not realising that their actions have no legal effect in their country of residence. Finally some people may be reluctant to turn to public authorities whom they do not trust to have the sensitivity necessary when dealing with their specific circumstances (cf. 3.2.d.cc above).

Such informal acts may well have legal effect within a foreign territory on which an Islamic legal systems applies, but not in Germany itself. They may, however, produce binding social effect especially in the case of people who are unable or unwilling to ask for the cooperation of public authorities. Of course this may result in the problem that a court is not usually prepared to declare a legal relationship at an end if it was never entered into with legal effect according to applicable law.

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²⁴¹ Cf. Pearl/Menski, *Muslim Family Law*, ch. 3–81; Shah-Kazemi, *Untying the Knot* 2001; Bowen, *Blaming Islam*, 2012; Bano, *An exploratory study*, 2012; id., *Muslim Women*, 2012; Malik, *Minority Legal Orders*, 2012.

²⁴² Little research has been done so far in Germany in this field. The author is currently running a field research project after having chaired a working group on 'parallel justice' in the Bavarian Ministry of Justice in 2012–2013. It should be stressed that phenomena of 'parallel justice' which ignore or even counteract the state legal order are far from being typical of Muslims in Germany and Europe. Instead, such phenomena occur in all social, ethnic and religious groups living in segregated extended families or tribal-like communities in far distance from society as a whole.

In the UK the 'Sharia Councils', an unofficial system of arbitration, have been developed for precisely these cases.²⁴³ They do not have any official function, but they provide mediation at comparatively low cost, especially in the area of personal status law. Many of the cases dealt with involve Muslim wives who have sought a divorce ruling from the state courts and now wish to have this affirmed under Islamic law by means of *ṭalāq* (one-sided divorce by the husband).²⁴⁴ This course of action is intended to result in the social environment accepting the decision as well.²⁴⁵ This is of particular importance to English Muslims many of whom have close ties to the Indian subcontinent.

These arbitration councils have developed in England in particular for a reason. They derive their relevance especially from the comparatively great distance – greater than typical in Europe – many Muslim communities preserve to English family and inheritance law. In communities where forced marriages are still possible, for instance among groups of Pakistani origin – even though Muslims themselves point out that this is an un-Islamic tradition²⁴⁶ – solutions that clarify these situations not only on the legal but also on the social level are indeed necessary.

On the other hand the concerns regarding the quasi-public role of such institutions are not to be taken lightly (cf. above regarding the parallel concerns in Canada). While their decisions appear to present a comparatively reformist line within the Islamic spectrum, there is no denying the fundamental inequality of genders and religions. Thus the wife wishing to be divorced is able to

243 Cf. Philip Lewis, *Islamic Britain*, 119 f.; Pearl/Menski, *Muslim Family Law*, ch. 3–81 ff.; Shah-Kazemi, *Untying the Knot*; concerning the development in other European countries cf. Foblets, *Community Justice*, 371 ff.

244 Cf. Philip Lewis, *Islamic Britain*, 119 f.; Pearl/Menski, *Muslim Family Law*, ch. 3–81 ff., esp. 3–96 ff.

245 Cf. e.g. Abdulrahim, *Islamic Law, Gender and the Policies of Exile. The Palestinians in West-Berlin*, in: Mallat/Connors (eds.), *Islamic Family Law*, 181 ff., 197 f., regarding concealed polygamous relationships in spite of an 'official' divorce.

246 The founder and chairman of the oldest Islamic Shari'a Council, Zaki Badawi, describes two dramatic cases in *Muslim Justice*, 73, 75 f. and 79. The first concerned a young Pakistani woman who was a university lecturer and had been forced to marry a Pakistani relative. After the civil marriage ceremony she refused to agree to the Islamic one. When her father tried to force her, she fled. One of her brothers attempted to kill her, because in his view she had defiled the family name and the father's soul would not be able to rest. Ten years later the husband had another family in Pakistan (under Pakistani law he was able to be married to several wives at the same time; M. R.), but the woman was unable to marry again as her family rejected her and the husband refused to agree to a divorce. This is a point where the civil courts' ability to pacify has indeed reached its limits.

proceed with the *khul'* (cf. Part 2, 3.1.i above), but unlike a divorce according to national law this results in financial disadvantages. Correspondingly there are said to be cases of husbands refusing a divorce, or pressurising their wives to divorce them, with the intention of bringing about precisely this situation. Ultimately the women involved are denied rights which the legislative authority grants to everybody. Consequently these mechanisms cannot remain a purely private matter, all the more when social pressure is applied and those who wish to insist on the rights guaranteed by the state are then branded 'bad members' of the religious community (cf. 3.2.d above). These problems become more urgent if the public legislative authority officially recognises mechanisms for out of court settlement, as is the case in England, Wales and Northern Ireland in the area of family law,²⁴⁷ thus according them a kind of general 'certificate of non-objection'. Due to its particular sensibility in connection with legal culture, binding family law decisions (except merely financial issues) ought to be the preserve of the public judiciary.

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When deliberating how much uniformity is necessary within a legal system, blindly perpetuating the status quo must be ruled out, as well as the implementation of supposedly universal but in fact only particular ideas, and also challenging the fundamental elements of the 'house rules' without which any peaceful coexistence would be impossible. As regards points of law, in my opinion the primary aim of the legal system – namely establishing and guaranteeing peaceful coexistence governed by human rights and the state monopoly on the use of force – can only be achieved, a degree of abstraction notwithstanding, with a view to the concrete situation prevailing.

'Domestic' cases must be distinguished from those with an international dimension: frequently the domestic dimension in the latter is comparatively small, and the importance of worldwide legal plurality increases where the parties involved rely on certain norms when privately applying laws. In cases with a greater domestic dimension, on the other hand – and having lived in the country for a certain time usually plays a part – the shared, stabilising fundamental beliefs of the legal entities must be protected. Parallel legal systems that polarise society are not acceptable in this context, either. Any individual interpretation of the law in concord with public authority is only possible in the case of Islamic norms if reliable interpretations and scholars are found who (and which) are firmly rooted in a system of law and order based on human rights.

²⁴⁷ Based on the Arbitration Act (1996) several so-called Muslim Arbitration Tribunals have been established which are active in this area; cf. the information at www.matribunal.com (viewed on 9 Sep. 2010).

Conflicts where the parties involved are afraid to turn to the public authorities will, however, remain unresolved. This paves the way for new tasks in schools as well as adult education: immigrants need information on existing legal remedies and protective mechanisms, which must of course be effective, in order to have the option of determining the way in which a conflict should be resolved.

Long-term institutionalisation of a division of the legal system along religious lines is consequently not in the interest of the national legal system if the possible beneficiaries are citizens of the country of residence, or live there in the long term. In this case the principle applies under which applicable law provides sufficient freedom of scope of interpreting the law in concrete instances.²⁴⁸ Besides, all those concerned are free to consult private mediators without recourse to official sanctions. There are for instance reports of such arbitration initiatives among Alevis in *cemevis*.

4 Muslims' Basic Attitude towards the Legal System in Force

In recent years a few comprehensive surveys were conducted in Germany and Europe concerning Muslims' basic attitude towards their life in the respective countries.²⁴⁹ Some surveys asked general questions regarding views on democracy, the state monopoly on the use of force, the use of force or capital punishment.²⁵⁰ There is not, however, any empirical, sufficiently confirmed data on attitudes to considerable parts of those legal norms that are contrary to traditional views of Islamic law (especially gender equality and religious equality; secular standard norms and guaranteed observance of human rights; physical punishment), for either Germany or most other European countries. The

²⁴⁸ For details cf. Rohe, *Family*, 49, 55 ff. with further references.

²⁴⁹ Cf. the survey by the PEW Research Center on 'The World's Muslims: Unity and Diversity', published on 9 August 2012, based on more than 38,000 face-to-face interviews with Muslims in 39 countries, available at http://www.pewforum.org/uploadedFiles/Topics/Religious_Affiliation/Muslim/the-worlds-muslims-full-report.pdf (last accessed 2 June 2014); no questions relating to legal issues were implemented. Cf. also the evaluation of 50 quantitative surveys and polls concerning Muslims taken in Europe since 2000 by Spielhaus, *Measuring the Muslim*, 695–715; Johansen/Spielhaus, *Counting Deviance*, 81–112; Jeldtoft, Nadia/Nielsen, Jørgen S. (Eds.), *Methods and Contexts in the Study of Muslim Minorities*, Abingdon, Oxford/New York 2012.

²⁵⁰ Regarding Germany cf. Bundesministerium des Innern, *Muslimen in Deutschland*, Hamburg 2007 (Brettfeld/Wetzels), esp. 140 ff. For Austria cf. Ulram, *Integration*, esp. 32 ff. For scholarly positions cf. e.g. March, *Islam and Liberal Citizenship*, 163 ff.

following remarks are thus only initial evaluations made possible by the individual surveys available as well as the author's many years of research in several European countries. The resulting models do not refer to concrete individuals but to typical basic attitudes.

'Everyday pragmatists': Presumably by far the largest group of Muslims in Germany and other countries in continental Europe is made up out of people who have fitted into the framework of democratic rule of law without any theoretical reflection. They do not question the claim to validity of the rule of law, even though – as, indeed, is the case in society as a whole – there will be criticism of individual norms, or infringements of such norms. Many of them have roots in countries such as the former Yugoslavia or Turkey, where traditional Islamic law has been abolished for a long time.

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If there are problems they mainly have their causes in economic or educational circumstances, or in particular cultural background ideas. Some people also lament the lack of opportunity for political participation unless they become German citizens.

'Opponents of Islam': In more recent times in particular, individual Muslims have spoken out who have developed a basic attitude that is very critical of Islam, due to a history of negative personal experiences. Their frequently very generalising remarks range from demanding fundamental reforms on the one hand to calling for a complete rejection of what they perceive as the antidemocratic and anti-human-rights Islam.²⁵¹ Even some organisations of 'ex-Muslims' with a decidedly anti-religious background have emerged; they tend to support the legal system in force without any more detailed specification, and often demand more stringent secular modifications.

'Islamists': The contrast to such attitudes of general rejection is furnished by a small fraction of Muslims who hold extremist Islamist views and aggressively reject the society they live in and its values.²⁵² They range from superfi-

251 Cf. Bahners, Panikmacher, 131 ff. One example is provided by Mrs Kelek's writings which are becoming increasingly unreliable; cf. Rohe, Das ist Rechtskulturelativeismus, FAZ, 22 Feb 2011, viewed at <http://www.faz.net/s/RubCF3AEB154CE64960822FA5429A182360/Doc~EB5E4E252433E45E9BCADAE2F6002BCA7~ATpl~Ecommon~Scontent.html>; Bade, Klaus, Kritik und Gewalt, Schwalbach 2013, 147 ff.

252 This numerically small, albeit dangerous, group is the section of the Muslim community about which there have been the most publications in recent years; cf. e.g. the collections Bundesministerium des Innern, Islamismus, Berlin, 2nd ed. 2004; Berlin, Senatsverwaltung für Inneres Abteilung Verfassungsschutz, Islamismus. Diskussion eines vielschichtigen Phänomens, Berlin 2005. Well worth reading is also Farschid/Rudolph, Zeitgenössische Akteure, 403 ff.

cially non-violent indoctrination to a small number of violent extremists. These include groups like *Khilavet Devleti*, *Hizb al-Tahrir* or *Murabitun* as well as individuals commanding a certain public appeal. Some of their representatives openly refuse to be subject to the legal system of the country they live in. Remarks²⁵³ calling for the principles of Islamic law to be applied in Europe ‘when the majority of people in this society decides in favour of it’ are also a cause for concern. The obvious collision between a few widely accepted interpretations of Islamic law in the areas of criminal law, family and inheritance law as well as the legal situation of non-Muslims and the majority-proof (!) principles of the constitution is presumably well known and shines a particular light on such remarks. Furthermore, the oft-repeated remark that the sharia should not be reduced to its objectionable norms of criminal law does not provide an answer to the question of how these norms, seeing as they do exist, should then be approached.

In his book ‘Das deutsche Kalifat’²⁵⁴ Muhammad Ahmad Rassoul, whose books are sold by many Islamic bookshops and Mosques in Western countries,²⁵⁵ speaks out in vehemently against democracy and Christians. In a vulgar fashion he turns real political and societal grievances against the idea of democracy as such; one chapter on the issue is tellingly entitled ‘Vom Untergang der Demokratie’ (On the fall of democracy).²⁵⁶ Instead the author favours the establishment of a German caliphate, with a caliph who must, of course, be a Muslim and male, among other things.²⁵⁷ Whether the author’s concluding desire to ‘make the hearts of the Germans beat for Islam and to found a caliphate (...) on German soil as a shining example for Europe and the rest of the world’ has any real chance of coming true is another matter.

Missionary attitudes are similarly problematical. While these frequently distance themselves from acts of violence, they spread deeply anti-Christian and anti-Western propaganda which goes far beyond normal debates concerning

253 Ahmad von Denffer, ‘Platz für das islamische Recht’, *Die Gazette* no. 2, June 2004, 63 ff., 65, viewed on 14 Mar. 2007 at www.gazette.de/Archiv2/Gazette2/denffer.pdf.

254 Cologne 1993 (Islamische Bibliothek).

255 The author has seen it for sale e.g. in the UK, in Canada and Germany. One company in Munich is remarkable which besides this kind of publication sells suitable clothing for women: ‘Niqaab with slit for the eyes from €8, closed from €8, Burqa in the Afghan style from €60’ (which is a considerable profit margin, as the author was able to purchase a similar item in Kabul for the equivalent of €4). Advertisement viewed on 11 Oct. 2006 at www.muslimmarkt.de/al-madina-markt.htm.

256 Op. cit., 81.

257 Op. cit., 124.

the delimitation of different substance, and cultural criticism. The fact that groups such as Tablighi Jamaat appear to be deliberately aiming to find supporters among those who are going through a transition, such as recent immigrants, gives particular cause for concern.

In 2001 the co-founder of an Islamic centre²⁵⁸ in Berlin, who emphasises his thirteen years of experience of life in Germany, published a work on comparative law²⁵⁹ which is permeated with such criticism. The author's severely anti-Western attitude is illustrated firstly by the language he employs: non-Muslims are called unbelievers (*kuffār*) throughout, German legal norms and court judgments as 'judgments of unbelief' (*aḥkām al-kufr*);²⁶⁰ it is also clear from the subjects he discusses. The author declares Western society to be reprehensible as it believes only in material things, power, and lusts of the flesh;²⁶¹ he calls on all Muslims living here to always follow the norms of the (traditional) sharia. With fierce consistency he endorses physical punishments for sexual relations deemed illicit by Islamic law – in the traditional view these are stoning or lashes (cf. Part 1, 4.7.b.cc above). Among these he includes Muslim women who marry non-Muslim men, even if they were not aware of the culpability of their action.²⁶² While the German social security system is at first praised, he then criticises it with the argument that women can always stop obeying their husbands as they are not dependent on maintenance payments.²⁶³ Based on all this the author's belief that leaders of Islamic centres ought to be authorised to rule in matters of family law such as divorce, as long as applicable German family law does not claim validity in a concrete case ('divorcing' a marriage concluded in Germany according to Islamic law and thus void) is worrying indeed.²⁶⁴

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There are indeed some efforts by small numbers of extremist Islamist groups and the Neo-Salafi movement aiming at the construction of an exclusive Muslim normative order opposing the governing rules of the land, based on the

258 The mosque in question is clearly the al-Nur mosque in Berlin-Neukölln; the book's author was an imam there and later moved to the Lebanon where he is said to be working as a judge.

259 Sālim ibn'Abd al-Ghanī al-Rāfi', *Aḥkām al-aḥwāl al-shakhṣiyya li-l-muslimīn fī l-gharb*, Riyadh 2001.

260 Op. cit., 618.

261 Op. cit., 146.

262 Op. cit., 394.

263 Op. cit., 79.

264 Op. cit., 624.

concept of *al-walā' wa-l-barā'*, which restricts Muslim loyalty to Muslims.²⁶⁵ The proponents of this approach would propagate strict separation from the non-Muslim environment, e.g. by not participating in the political process, reducing contacts with non-Muslims to the minimum, and establishing parallel Islamic structures as far as possible. A new trend may be seen in Islamist youth culture: instead of theoretical debates on sharia-relevant topics, an exclusivist and totalitarian social life is advocated, which in its rejection of everything divergent ultimately states a claim to political domination.

'Traditionalists': Representatives of a traditionalistic approach act in clear delimitation from Islamist extremism. Evidence suggests that they constitute a considerable minority among Muslims in the EU and command the most advanced infrastructure at present. In many mosque associations in particular the dominant attitude rejects violence and aspires to cooperate with the majority society, while maintaining an explicitly traditionalistic view on important issues such as, in particular, gender relations. Matters such as the externally displayed religious observance are also viewed from a traditionalist point of view. The prevailing concern is to 'conserve the faith' in an environment that is perceived to be 'foreign' in vital matters. These attitudes reflect the *'wasatī'* (middle ground) approach to Muslim life in the diaspora by preserving the 'core' of Muslim faith, but equally searching viable solutions for Muslim life in a predominantly non-Muslim environment.²⁶⁶

This approach is often expressed in the form of uncritical adoption of centuries-old values, while the tradition, which is similarly Islamic, of reinterpreting the sources according to the circumstances prevailing in one's own time and place, is frequently not invoked. Thus the religious literature for sale in many Western countries mainly follows this fundamental trend, in some cases clearly inclining towards Islamist extremist ideology. Highly subsidised texts from the Gulf states must be mentioned in this context.

Assuming a defensive stance towards the 'true' Muslim existence in Muslim majority societies is typical of the traditionalist attitude in Europe. Instances are that diverging from the religious mainstream is explained as *ḍarūra* (necessity; cf. Part 1, 2.7 above) along the lines of 'necessity knows no law'. Ultimately this means that they live in a constant state of emergency. This does by no means rule out peaceful coexistence; after all, Islamic law laid down centuries

265 Cf. only Shavit, *The Wasatī*, 416, 427 ff. with further references.

266 Cf. Shavit, *The Wasatī*, 416, 420 ff. with further references; in Europe, Tariq Ramadan might be taken as a representative of this approach; cf. e.g. his works *Western Muslims and the Future of Islam*, Oxford 2004, esp. 62 ff., and *Radical Reform*, Oxford 2009; *Al-muslimūn fi-zill al-'almāniyya*, Beirut 2009.

ago the foundations for the legal and religious duties Muslims have to observe the laws in force 'abroad' (cf. Part 1, 4.9.e above).

The modern term describing these concepts is *fiqh al-aqallīyyāt*,²⁶⁷ 'minority fiqh' etc. Unless, however, the legal and social fundamental consensus regarding the rule of law tied to democracy and secularism and observing human rights is actively endorsed, difficulties may arise in particular when a Muslim assumes a public office or is granted citizenship. Similar concerns arise when it comes to education future generations who will accept the existing legal system, but at the same time consider it in need of replacing. 389

When conducting numerous individual, yet non-representative interviews with some comparatively firmly observant Muslims in several Western countries²⁶⁸ on issues such as whether applying traditional Islamic family law would be preferable to that of the respective country, the author found a degree of uncertainty. As a rule it was suggested he ask the imam for conclusive information. It is noticeable in this context that on their websites some Muslim organisations present information on Islamic personal status, family and inheritance law which are basically in agreement with the traditional view of the law and consequently contrary to fundamental values of the applicable law. Frequently a brief notice is added, stating that at the place of residence national law must be observed.

Finally, migrants must probably be counted among the traditionalists if they live in comparatively secluded circumstances and adhere to the (although possibly not exclusively) Islamic culture of their country of origin. In parts they use the options offered by the freedom of scope allowed by dispositive substantive law (cf. b above) – as long as they are fundamentally unproblematic. In some cases family law will be applied which will follow the principles of Islamic law but be ultimately invalid, as it is in breach of mandatory rules in the host country. While it is likely that there will be fewer cases in Germany than in the UK, the author does have information concerning several.

'Indigenous Muslims': Those who champion the independent and equal position of Islam in Europe do not regard the life of Muslims in Europe as an exception but as the new rule. Muslims ought to embrace the legal system in force and the society in which they live, and contribute to their further prosperous development. 'Indigenous' in this context does not refer to birthplace or nationality but to an inner attitude of belonging.

²⁶⁷ Cf. Rohe, *The Formation*, 161 ff.; Hellyer, *Muslims*, 79–99; Albrecht, *Islamisches Minderheitenrecht*, 2010; Caeiro, *Transnational 'Ulama'*, 121 ff.; for a critical reflection cf. Saeed, *Reflections*, 241 ff.

²⁶⁸ E.g. in Islamic bookshops and in mosques.

390 Recently an increasing number of scholars have come to the fore within this spectrum, some of whom dedicate themselves to training Islamic teachers of religion. Some of them are teaching in the newly established departments for Islamic theology in the German universities of Erlangen-Nuremberg, Frankfurt and Giessen, Münster and Osnabrück, and Tübingen. In addition the Turkish reform debate (cf. Part 2, 1.2 above) shows its influence especially where larger numbers of Muslims of Turkish origin live; the same is true of Bosnian Muslims. As an example of Muslim scholars living in the West, in France the theologian Soheib Bencheikh²⁶⁹ is looking for a 'minority theology among other minorities' within a secular framework and observing human rights as well as freedom of religion and conscience. In his 1998 book 'Marianne et le Prophète' he says the following:

Islam's presence in France offers the Muslims the unexpected option to experiment and develop a minority theology among other minorities. This option is the result not only of the fact that France is a cosmopolitan society which contains a large Islamic community, but especially of the fact that France is a secular country whose secularism is expressed by the neutrality of its public authority towards everything concerning the issue of religious denominations. This absence of public intervention, coupled with the absence of social pressure present in Muslim societies, allows reformist and liberal tendencies to be produced to the benefit of Islam in France.

Such a minority theology is not only interesting and beneficial to the Muslims in France in that it ensures their peaceful and brotherly coexistence with other communities. An important factor is that it may be transferred onto the Islamic world as well. If Islam does not want to be excluded from the new international order which is becoming visible on the horizon, it must prepare internally, too, for the universal world and accept that in the world as a whole it is one among many minorities, a partner who plays a part and not a conquering opponent.

Nowadays human rights, freedom of religion and conscience, and secularism are the principles which meet with the highest degree of endorsement; they are able to lead the human, pluralistic community. These principles are free from ideological character that could object to the ruling ideologies or oppose one of them. They do not demand respect for one

269 Bencheikh, *Marianne et le Prophète*, Paris 1998, chapter entitled 'La théologie de la minorité', 188–190.

ideology or faith but respect for humans, for every human being, whatever his conviction or denomination. This is today's *ma'rūf*.²⁷⁰ These ethical principles known to and recognised by all of humanity must inform the work of every exegete wishing to give new life to the Quran here and now.²⁷¹

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Followers of this trend base their support on time-honoured institutions of Islam, such as the question of the reasons for the revelation (*asbāb al-nuzūl*) which can provide the basis for historical-critical interpretation of the sources. Independent reinterpretation according to the circumstances of time and place (*ijtihād*) is more universally accessible. This is the kind of dynamic interpretation favoured by champions of Islamic feminism (cf. Part 2, 2.4.c above). Other examples of 'entrenched' Muslim scholarship in the Western diaspora can be found in the works of e.g. Tareq Oubrou,²⁷² Ahmad Moussalli,²⁷³ Abdulaziz Sachedina,²⁷⁴ Khaled Abou el-Fadl,²⁷⁵ Amina Wadud,²⁷⁶ Farid Esack,²⁷⁷ Abdullah Saeed²⁷⁸ or Mouhanad Khorchide.²⁷⁹ A common denominator in all these works seems to be a shift in the perception of Islamic normativity. Sharia is delegalised and instead understood as a set of religious-ethical rules providing guidance.

270 *Ma'rūf* refers to the Islamic principle of *al-amr bi-l-ma'rūf wa-l-nahy 'an al-munkar*, namely the commandment to behave decently and abstain from indecent actions.

271 Bencheikh, Marianne et le Prophète, Paris 1998 (translated from the German version).

272 Oubrou, Tareq, Introduction théorique à la chari'a de minorité, Islam de France 2 (1998), 27–34; id., La charia de minorité: contribution pour une integration légale de l'islam (21.02.2003), available at <http://www.islamlaicite.org/article24.html> (last accessed 3 June 2014).

273 Moussalli, Ahmad S., The Islamic Quest for Democracy, Pluralism, and Human Rights. Gainesville etc. 2003.

274 Sachedina, Abdulaziz, The Role of Islam in the Public Square: Guidance or Governance?, in: Khan, Muqtedar, (ed.), Islamic Democratic Discourse, Lanham et al 2006, 173 ff.

275 Cf. his books The Great Theft. Wrestling Islam from the extremists, San Francisco 2006, 142 ff., and Speaking in God's Name. Islamic Law, Authority, and Women, Oxford 2001.

276 Cf. her work Inside the Gender Jihad. Women's Reform in Islam, Oxford 2006, 92 ff.

277 Cf. his works Qur'ān, Liberation & Pluralism. An Islamic Perspective on Interreligious Solidarity Against Oppression, Oxford 1997, and On Being A Muslim: finding a religious path in the world today, Oxford 2000.

278 Cf. Islam in Australia, Crows Nest 2003, 114 ff., esp. 198 ff.

279 Cf. his works Islam ist Barmherzigkeit. Grundzüge einer modernen Religion, Freiburg/Br. etc. 2012, p. 116 ff., and Scharia – der missverstandene Gott, 2nd ed. Freiburg/Br. 2014.

Even among followers of the traditional view there is a considerable range of opinions, some leaning towards the attitude described here. Thus within the abovementioned European Council for Fatwa and Research there has been an animated discussion of whether a woman who has converted to Islam may continue her marriage to a non-Muslim man. In this context we find the opinion that this is permissible (only) in the West, because women are respected here (and able to practise their religion freely), which constitutes a fundamental difference from the situation elsewhere.²⁸⁰

In individual cases non-theologians may employ the instruments of classical theology. Thus expert opinions by the English Muslim intellectual Ziauddin Sardar are in the form of fatwas. He expressed his anger at extremists who use Western freedom of expression to propagate the idea of 'Islamic states', even though in such states they would be silenced without further ado, as follows: 'Any Muslim involved in the planning, financing, training, recruiting, support or harbouring of those who commit acts of indiscriminate violence against persons or the apparatus or infrastructure of states is guilty of terror and no part of the Ummah (the Islamic faith community, M. R.). It is the duty of every Muslim to spare no effort in hunting down, apprehending and bringing such criminals to justice.'²⁸¹ Sardar himself recognised the 'novelty' of his approach, but hoped to help this 'novelty' to establish itself; according to him the thinking Muslim is able to provide information himself without being obliged to refer to 'superior' authorities.

The Bosnian chief imam in Germany, Mustafa ef. Klanco, also has a clear message: the sooner the Islamic community stops seeing itself as diaspora, the sooner progress could be made towards the desired integration. He points
392 out some obstacles in this context, which result from the current practice of sending imams abroad for only a limited time and insufficiently prepared.²⁸²

The variety of these models shows clearly that it would be mistaken to position 'Islam' in general in opposition with the foundations of European states and societies, even though this view of extremist Islamists is shared by many right-wing extremists as well as some small Christian fundamentalist groups and a few authors with little claim to having arrived at their views using schol-

280 Reference in Caeiro, *Transnational 'Ulama'*, 121, 135.

281 Ziauddin Sardar, *My fatwa on the fanatics*, 23 Sep. 2001, viewed at 29 August 2014 at <http://theguardian.com/world/2001/sep/23/afghanistan.religion>. Cf. also his collection *How Do You Know? Reading Ziauddin Sardar on Islam, Science and Cultural Relations*, London etc. 2006.

282 During a conference at the Islamic department of Sarajevo University on 20 Nov. 2007.

arly methods.²⁸³ On the other hand it is clear that the further development of Islamic theology within the indispensable European legal boundaries is necessary indeed in order to communicate to religiously inclined Muslims living here the firm conviction that they can be good Muslims, Germans, and Europeans all at the same time. It is particularly important to immunise the younger generation against attempts at radicalisation. The former judge with the constitutional court, Böckenförde, has pointed out in a much-quoted remark, that the libertarian, secularised state, too, is nourished by (spiritual and intellectual) prerequisites it is able neither to create itself, nor to guarantee.²⁸⁴ This makes it doubly significant that a religious self-image should not call for structural opposition against the foundations of a liberal system of social coexistence based on human rights. Of course, Muslims must see in everyday practice that the freedom of religion that is one of the fundamental rights does indeed also apply to them. Democratic rule of law has a future not as a mere concept but only everyday applied practice. This is true not least in the context of establishing religious infrastructure within the boundaries of applicable law. Some self-styled defenders of western values are clearly in need of more education in this area.

Muslims in Europe have usually deliberately chosen the existence outside a Muslim majority society, which is a new historical development. In their everyday life, many have adapted more or less to their new environment. Religious identity – which is extraordinarily multi-faceted among Muslims as well – only plays a small part in this context. Many problems arise from reasons that are not religious but economic or social (language, education, discrimination etc.) or rooted in cultural concepts (family structures and gender relations). It is,

283 Examples of such books, which tend to summarise a few correct details but leave out all evidence to the contrary and thus arrive at statements which should not, in my opinion, be considered to be reliable scholarship, are publications and public statements by Hans-Peter Raddatz (culminating in the claim ‘to simplify we can say that a Christian abuses his religion if he uses violence, while a Muslim abuses his religion to the same degree if he does not use violence’), *weltwoche.ch* 16/04, *Weltwoche-Gespräch* (Thomas Widmer), viewed on 14 Mar. 2007 at www.weltwoche.ch/ausgaben/2004-16/artikel-2004-16-islam-bedeutet-f.html. Cf. also Christian Troll, *Islamdialog: Ausverkauf des Christlichen? Anmerkungen zum Buch von Hans Peter Raddatz, Stimmen der Zeit* 2/2002, 1, 7 (about Raddatz’ book *Von Gott zu Allah? Christentum und Islam in der liberalen Fortschrittsgesellschaft*, Munich 2001), web version viewed on 4 Sep. 2002 at <http://www.sankt-georgen.de/leseraum/troll5.html>; Werner Höbsch, *Diffamierter Dialog. Hans-Peter Raddatz und das christlich-islamische Gespräch, Die neue Ordnung*, 6/2005, viewed on 17 Mar. 2006 at <http://www.die-neue-ordnung.de/Nr62005/WH.html>.

284 Ernst Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit*, Frankfurt/Main 1976, 42, 60.

however, important whether one's own understanding of religion makes for a positive, neutral or negative attitude towards the foundations of coexistence under the liberal and democratic rule of law.

393 It is possible to reach an agreement that incorporates religious beliefs by means of a systematic approach (democracy as a procedure; cf. Part 2, 3.3.a above) as well as at the level of human rights.²⁸⁵ Derivation along the lines of religion would ultimately rely on an understanding of divine rules as the guarantee of human liberties. It must be understood at all times that the constitution is out of bounds, with the exception of permissible (!) changes through legislative channels. Legislation must, however, develop genuine persuasive power and be 'taught'. This is a particular challenge for a Muslim education system in Europe.

Thus there are two preconditions for positive identification with the concept of democracy. On the one hand an inner conviction is required. On the other the democrat's environment must convey to him a feeling of belonging. Appropriating democracy exclusively for the Western cultural group ('Kulturkreis') (if, indeed, such a thing exists) would be counterproductive from this point of view, as well as being factually incorrect. In an interview one of the influential voices of European Islam, the chief mufti of Bosnia and Herzegovina, Mustafa Cerić, pointedly said: 'We are living through the development from slavery to freedom, from the law of the strongest to the democratic rule of law. The world owes this development to Western civilisation, and to Europe in particular. The legitimisation of the state, i.e. democracy, is one of the greatest achievements of all time. But now these values are not tied solely to Western civilisation any more, but they are values others recognise, and claim for themselves, as well. What is happening now is really a crisis of Western civilisation, which apparently does not wish to share these values with anybody else.'²⁸⁶

The phrase 'European Islam' or 'European-influenced Islam' is frequently put forward in this context. It can be helpful if its denotation is sufficiently defined. Islamists will generally reject it vehemently, as they disapprove of its essential meaning. Some Muslims, however, reject the phrase only because they fear a falsified faith may be forced on them, up to and including the simple fear of having to eat pork etc. There is of course no intention of regionalising the theological foundation of Islam. The sole goal aspired to would be to limit the possible ways of interpreting it to the range which moves within the

285 Cf. e.g. the beginnings of a synthesis in Mbaye Lo, *Muslims in America*, Beltsville/Maryland 2004, 132 ff. as well as the literature referred to in Part 2, 2.4.c above; cf. also Ḥanafī, *Democracy*, 435.

286 'Patrioten im Namen des Islam' (Erich Rathfelder), *taz*, 16 Apr. 2004.

boundaries of freedom of religion as well as those of the liberal and democratic constitutional rule of law in Europe. This makes it quite clear that the Islamist positions we have mentioned by way of example – and which are, after all, desired by few Muslims only – have no place in these societies under the rule of law. This refers not only to violent extremists but also to the media surrounding them, which are active not only in the UK but also in Germany, and sometimes surprisingly openly. 394

On the other hand it is important to avoid drawing generalising boundaries as this may put off people willing to integrate, and even unintentionally result in the extremists finding more recruits. Extremism does not lurk behind every headscarf and every beard. Of course (exclusively) traditionalistic attitudes may offer points of attack in the public discussion. Still, we can frequently discern opinions which clearly delimit themselves against Islamist tendencies and are furthermore willing to cooperate with other public and social organisations and groups to try and contain Islamism. Drawing the boundaries too narrow may underestimate dangerous developments, while drawing them too wide may push people who look favourably on our political and legal system into a marginal position. Consequently it is vital to find the appropriate path between trivialisation and demonisation.

PART 4

*Islamic Law and Its Prospects
in a Globalised World*



Between Secularisation and Re-Islamisation

Since the confrontation with expanding colonial powers during the eighteenth century Islamic law has not stood still. A multitude of wide-ranging reforms began to take shape from the nineteenth century onwards, and has still not been completed. Legal provisions, the introduction of formal requirements, centralisation and the containment of customary law are keywords in this context. Changes to the substance are usually supported by the widespread application of independent juristic reasoning (*ijtihād*) and the political ruler's competency to guide the state (*siyāsa*). Where classical law did not provide (definitive) rules, other legal systems would be consulted and suitable statutes adopted. Some states turned away from Islamic law altogether, but they are still occasionally faced with reminiscences of the legal culture.

Reforms concern above all the laws pertaining to constitutional and administrative organisation, the legal position of women and, to a smaller degree, the legal position of religious minorities. They have been enacted in large parts of the Islamic world, and are advanced further in some countries.

A great challenge to modern Islamic law is posed by the debate centred on human rights and democracy. There are innumerable studies on the subject of the compatibility of sharia and human rights, or the human rights contents of the sharia, and on the compatibility of Islam and democracy. Individual human rights are increasing in importance in the Islamic world as well, as the state is able more than ever to intervene in people's circumstances and direct them.¹ Discussions on these matters – if, indeed, political and social circumstances permit them – have by no means come to a conclusion. They are not made any easier by grievous breaches of the law by the administrations of leading constitutional democracies in parts of the Islamic world, or by support (dictated by foreign policy) of totalitarian regimes.

In the recent past tendencies aimed at re-Islamising the law have emerged.² Some of these can be interpreted as a shift towards the real or imagined traditions of one's own legal culture. One of these is, e.g., the development in Malaysia which has a clear anti-Western impetus. Others are due to legal policy making concessions to Islamist and traditionalist movements, one example

1 Cf. El-Affendi, *Reviving Controversy*, 117, 144 ff.

2 Cf. Ebert, *Das Personalstatut*, 31 ff. with further references.

being Egypt (cf. Part 2, 3.1.i above). There, however, we also see internal opposing development, such as the constitutional court adhering to the reformist course.

There is a variety of motives, very worldly ones occasionally joining a widespread insistence on traditional attitudes. Thus land owners in Pakistan support initiatives to (re-)introduce the sharia in order to defend their lands against agrarian reform. Smugglers near the borders are in favour of the sharia as it prohibits taxes on their business.³ Others hope to use the guise of rediscovered faith for the creation of a type of political Islam that has never existed historically in this form (Islamists). The attractiveness of these movements rests especially on the great economic and social inequality and suffering. Not infrequently their criticism is justified, but they do not offer any concept for better, concrete solutions.

Overall it is the case that initiatives for re-Islamisation focus in particular on those areas of the law that are endorsed by legal sources of high rank. This includes in particular personal status law, family and inheritance law as well as some areas of criminal law and a few facets of commercial law.

Wherever traditionalist or Islamist forces gain in importance, the first and most incisive effect is regularly to the detriment of women's rights.⁴ Frequently, religious minorities also come under pressure. Despite all the differences between the two movements there is a high degree of similarity, especially when it comes to their attitude to gender relations.⁵ In Egypt or Tunisia we can observe that as the Islamists de-radicalise, they move closer to the traditionalists in substance, and vice versa. In points of law regarding gender relations or change of religion we frequently find agreement between Islamists and traditionalist scholars even at the al-Azhar university.⁶ In Algeria, for instance, a presumably similar constellation in 2006 was responsible for a law that is clearly directed against the public presence and employment of non-Muslims.⁷

The course taken by the reform of family law in Jordan in 2001 is remarkable.
399 As in Egypt, one goal was to grant women the legal right to divorce without hav-

3 Masud, *Muslim Jurist's Quest*, 4.

4 Cf. e.g. Lamchichi, *Femmes et Islam*, 259 ff. and *passim*.

5 Cf. Rohe, *Islamismus und Shari'a*, 143 ff. with further references. Cf. also Gundula Krüger's enlightening study *Islamismus und Familienbild*, esp. 51 ff.

6 On the controversy surrounding a prize given to the Egyptian author Hilmi Salim being withdrawn because of alleged blasphemy cf. 'Gott ist kein Polizist', *Frankfurter Allgemeine Zeitung*, 12 Apr. 2008, 35.

7 Law of 8 Mar. 2006, official Algerian register 14/27; cf. also 'Algerische Christenverfolgung', *Frankfurter Allgemeine Zeitung*, 5 June 2008, 7.

ing to provide grounds (*khul'*), and to improve some areas of maintenance law.⁸ The government's draft bill was passed by the upper house (appointed by the king), but blocked by the (elected) lower house due to Islamist resistance. Subsequently the law was enacted under Art. 94 of the Jordanian constitution as a limited executive order to ensure the equality of all citizens as demanded by the constitution. This is an instance of reform 'from above', as it was clearly impossible to enact it in the course of parliamentary discourse, especially against Islamist or traditionalist opposition which simply refuses to recognise other opinions. Events in Morocco were similar. At the opening of parliament on 10 October 2003 the king announced far-reaching reforms of the family code, which have been enacted in the meantime. The Islamists vehemently criticised this, discrediting the planned reforms as 'destruction of Islamic society'. Particular targets for criticism were the increase of the general minimum marital age from 15 to 18, the introduction of a division of property in the case of divorce (if one-sided and pronounced by the husband), the restriction of polygamy and the easing of the involvement of a guardian for the bride, until that time a requirement, in case of marriage.⁹ It seems that in the meantime opposition has weakened.

Where a regime based on religious principles establishes itself, such as in Iran, the perceivable development leads both the state and the religion into a precarious situation. The Iranian model of *velāyat-e faqīh* does not allow genuinely democratic structures, as it is really rather the opposite to democratic rule of law. It does, however, seem that political and social reality have brought the faith into a considerable degree of disrepute as well. The former vice-president Muhammad 'Alī Abtāhī pointed out laconically that if religion wishes to hold sway, it must avoid interfering in people's affairs as much as possible; otherwise it will lose. Religion should be seen as universal support (*qiyām*), not as a (state) institution (*mu'assasa*).¹⁰

In some cases the re-Islamisation of the law must be interpreted as a political 'act of desperation': this is likely to have been true of the calls to jihad (against other Muslims!) by the past government of Iraq, as well as of some instances in Sudan or in Pakistan (cf. Part 2, 3,4 above). This is a playing field on which it is

8 Information provided by Rīm Abū Ḥasan, General Director of the Arab Center for Development of the Rule of Law and Integrity in Jordan, during a conference on religion and the rule of law in Amman on 28 Feb. 2008.

9 Cf. 'Ghurma mu'aradat al-'ulamā', Al-Waṭan al-'Arabī, 14 Dec. 2003.

10 Remark made during a conference on religion and the rule of law in Amman on 28 Feb. 2008.

400 possible to prove particular ‘conformity to Islam’ at no great cost. Spectacular instances also connected to this attitude are public whipping as a punishment for selling and consuming alcohol in Yemen,¹¹ beatings for men who shaved or gambled in Afghanistan under the Taliban¹² or the new forms of perverted sharia-terrorism by the “Islamic state” (*dawla Islāmiyya* in Iraq and Syria). Meting out *ḥadd* punishments to non-Muslims, as was done in Sudan, is entirely contrary to tradition.¹³ Viewed like this, ‘re-Islamised’ criminal law is a modern and artificial product.

There is a wide range of opinions concerning the question of how far re-Islamisation should go. Islamism as a political movement does not offer a unified picture. Thus the Sudanese Islamist al-Turābī, mentioned several times above, rejected theocratic systems and expressed his opinion as follows: ‘The power of the state and the religious beliefs of the individual are not compatible.’¹⁴ Others, however, believe that Islam is state and religion, indissolubly and in equal measure (cf. Part 2, 3.3.b above).

Voices demanding the secularisation of Islamic states have not gone silent, either. Their aim is to focus Islam, and consequently Islamic law as a God-given and untouchable instrument of power, on its religious substance. This is not necessarily an endorsement of the adoption of Western ideas: there is, indeed, an internal Islamic debate centring on secularisation, although many proponents avoid this often misunderstood term, preferring to replace it with ‘civil state’ (*dawla madaniyya*). Muhammad Arkoun¹⁵ for instance considers Islam (Quran and historical evolution) to be genuinely secular. It should not surprise that the debate is conducted using the same arguments found in the Western development of separating law/state and religion: further deliberations are not the preserve of Western culture. After all, the classical Islamic jurists often use arguments from non-Muslim Classical and later Western texts.

To quote but one example, Halim Barakat, a US-based Syrian scholar and literary figure, pointed out: ‘Secularisation is the alternative to the claim of the ruling classes that they govern the people on the basis of a divine power and that their fundamental aim is to ensure God is worshipped and his commandment of obedience and prohibition of that which is prohibited are observed.

11 ‘Achtzig Stockschläge wegen Verkaufs von Alkohol’, Frankfurter Allgemeine Zeitung, 14 Nov. 1998, 9.

12 ‘Männer in Afghanistan wegen Rasierens bestraft’, Frankfurter Allgemeine Zeitung, 13 Nov. 1998, 1.

13 Cf. Köndgen, *Das islamisierte Strafrecht*, 48.

14 ‘Eine Theokratie wird es nicht geben’, interview in *Der Spiegel* 21/1998, 190.

15 Arkoun, *Islam: To Reform*, 261 and *passim*.

Their true aim is to govern the people to the benefit of their own class and groups, to take possession of all societal potential and abuse their privileges. The most important aim of secularisation is to stop the abuse of religion. It is not necessarily against religion, but provides relief for its endeavour to free itself from the interpretations of the regime and the scholars who are beholden to the system. The Arab countries are in dire need of secularisation, not of imported ideas from abroad. (...) ¹⁶

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It is noticeable that those who express an opinion in the present day are increasingly not scholars of law. They evolve and present their own interpretation of Islam, without having studied the subtle details of classical literature. ¹⁷ They contrast an ethical understanding of Islam, which is also found in human rights and equality of religions with the sometimes restrictive and rigid medieval doctrine. In his much-discussed book *Al-kitāb wa-l-Qurʾān* Muhammad Shahrūr distinguishes between the religious and the legal component of Muhammad's mission. ¹⁸ The latter of these he sees as subject to possible adaptation according to time and place. ¹⁹ Thus he interprets the rules of inheritance as the outermost limits within which the distribution of shares in an inheritance could vary, which would allow equal treatment of both sexes. ²⁰ Quite apart from the problem of its authenticity, he says, the sunna cannot simply be declared a source of the law, but only a non-mandatory recommendation of the correct way to act according to a concrete person living during the seventh century on the Arab peninsula – with the exception of those passages that directly refer to Muhammad's prophetic mission. ²¹ His teachings have earned him the blind hatred of traditionalist scholars. ²²

The numerous contributions by persons who are not law scholars do not have any direct influence on legislation or the application of the law, but they can contribute to a prevailing climate which will allow or support reforms; all the more so in the age of media pluralism. ²³ In regions of the world beyond those states whose legal systems are shaped by Islam these voices are partic-

16 Glaube und Herrschaft in der arabischen Gesellschaft von heute: eine Analyse, in: Heller/Mosbahi (eds.), *Islam, Demokratie, Moderne*, 110, 126.

17 Cf. only Feener, *Muslim Legal Thought*, 14 ff.

18 Regarding him and his work cf. L. Müller, *Islam und Menschenrechte*, 277 ff.

19 *Al-kitāb wa-l-Qurʾān*, 37 and *passim*; cf. also L. Müller, *Islam und Menschenrechte*, 283 ff.

20 *Al-kitāb wa-l-Qurʾān*, 457 ff. Cf. also Hallaq, *History*, 249.

21 *Al-kitāb wa-l-Qurʾān*, 547 and ff.

22 Cf. the references in L. Müller, *Islam und Menschenrechte*, 278 f.

23 Cf. e.g. Nacim Pak-Shiraz, *Filmic Discourses on the Role of the Clergy in Iran*, *BJMES*, vol. 34, no. 3 (Dec. 2007), 331–349.

ularly important for the development of religious attitudes that fit into the framework provided by the secular rule of law with a focus on human rights. On the other hand, media globalisation also allows the worldwide popularisation of traditionalist or modern-Islamist legal concepts.²⁴

Any further development depends significantly on whether the historicising and idealising view of Islamic law will prevail, or whether the other opinion will hold sway, which can just as convincingly claim its origin in the sources of Islamic law. The academic Mashuda Khatun Shefali from Bangladesh points out: 'In fact the whole burden of Islamic tradition rests on the shoulder of women. The Quranic text exposes universal values and principles. But these are often expressed through the context of the cultural and historical specifications of the centuries of Arabia. Muslim scholars have always recognised this characteristic of the Quran (...). Therefore, differences of opinion will always exist on how to apply Quranic injunction in differing and changing socio-cultural situations. For the similar reasons Muslim reformists also argue that it is not the religion but the male interpretation of the Quran and Hadith at large (...) that keeps and puts women oppressed, along with the texts that were added on in the Middle Ages.'²⁵

Against the backdrop of observations such as these Naşr Ḥāmid Abu Zayd calls for sharia norms concerning the rights of women and minorities as well as human right in general to be contextualised. The idea that the corpus of sharia literature is binding for all Islamic communities independently of time and place, he says, imbues a human, historical production of knowledge with divine nature. Demanding the creation of a 'theocratic' Islamic state is nothing but an ideological call to create unchallengeable authority and consequently a 'deeply diabolical and dictatorial political regime' at the expense of the spiritual and ethical dimensions of Islam.²⁶

24 Cf. Bettina Gräf's thorough study of Yusuf al-Qaradawi's media fatwas, 2012.

25 Mashuda Khatun Shefali, Islam, economic, social and cultural rights with focus on women, paper presented to Islamic Perspective on the Universal Declaration of Human Rights Seminar, Geneva 9–10 November 1998, 9.

26 Abu Zaid, *Gottes Menschenwort*, 196; concerning his background in intellectual history and methodology cf. Hildebrandt, *Neo-Mu'tazilismus?*, 376 ff.

Conclusion: The Search for New Approaches

The interested reader may now be wondering whether in view of the confusing multitude of the most diverse sources of the law, ways of interpreting it, and solutions it is even possible to discern any kind of contours which characterise Islamic law. It must be said that an overview of European law over the last 1400 years would present a hardly less faceted picture. It should be clear that these contours will not be found in individual points of law or institutions, but above all in the way in which people approach the sources. While comparatively great openness for flexible solutions appropriate for a particular time and place could be observed during the formative period and the time since the thirteenth/nineteenth century, many Muslim scholars of recent times regard the period between the tenth and the nineteenth century as a time of stagnation and ossification especially in Sunni Islam. Even though this impression had to be relativised in some points, it cannot be dismissed out of hand.

It must also be borne in mind, however, that the transmitted 'scholars' law' found expression in only parts of the practical application of the law. On the one hand local customary law, which formally recognises Islamic norms but ignores them in practice, still dominates in more than a few regions in the Islamic world. On the other hand, norms that appear rigid are often less so in the social context, and consequently looking only at the written law and the literature on the subject would present a distorted picture. Mediation and other forms of out-of-court conflict solution were and are widely used. In addition a considerable amount of distrust persists towards public authorities which not always focus on the welfare of the parties concerned but are more interested in deriving personal benefit from their office.¹

Social context may also have a stronger effect on behaviour than the formal allocation of legal positions: thus a husband will seriously consider whether to make use of his right to one-sided divorce against his wife's will if the marriage, as is frequently the case, was between cousins. A divorce that was not arrived at by mutual consent might cause antagonism between different branches of the same family who are not only closely connected socially and

1 The remuneration of public officials in many parts of the Islamic world appears to be based on the conviction that this kind of additional income is necessary as well as customary.

economically but who also depend on each other existentially in the absence of wide-ranging social security networks.

Still, in many parts of the Islamic world social structures have been changing considerably. The tendency to nuclear families is unmistakable.² The increased participation of women in economic and social life is probably even more significant. Traditional legal norms based on a rigid allocation of gender roles do not correspond to this development anymore. It is not surprising that women in particular demand rights as equal as possible in many parts of the Islamic world, and base their demands at least partly on Islam.

The key to these arguments lies in the way relevant texts are read. While traditionalists essentially tend to focus on the wording and its interpretation, ever more detailed through the centuries, reformers apply a more dynamic way of reading texts, inquiring into the meaning of norms and taking their historical context into account. It is then possible to disregard the individual rules of family and inheritance law if one refers to the intention, which is perceivable in the revelation, of making the significant improvement of women's rights a core concern. While traditionalists will again point out that both genders possess the same dignity but different roles to play, reformers demand equal rights in the twenty-first century. The situation with regard to non-Muslims is similar.

Nowadays the search for new approaches and interpretations certainly unites the vast majority of Muslim jurists. This is true not only of liberal reformists who take an interest in human rights but also of Islamists and many moderate traditionalists. The debate on these matters must be conducted by Muslims themselves. What does become clear, however, is that an opinion that looks to historical events of the time of the prophet as its foundation has recourse to very little reliable information when it comes to law. In view of the extant sources, contrary claims are simple presumption.

405 Future development will significantly depend on the degree to which traditionally evolved legal rules and interpretations are regarded as constituents of the faith and thus the identity of literalist Muslims, or whether a dynamic interpretation can establish itself at least to some degree and distance itself from the historically grown and conditioned details, reducing and limiting the religious aspect of Islamic law to fundamental provisions such as justice, equal rights for all and protection against arbitrariness and despotism. Law reforms in e.g. Morocco appear to be taking the latter path.³

2 Cf. e.g. Shaham, *Family*, 227 and *passim*.

3 Cf. Lamchichi, *Femmes et Islam*, 159 ff.; Foblets/Carlier, *Le code marocain*, 129 ff.; Nelle, *Marokko*, 276 ff.

Not least in the diaspora, free from power politics and without the considerable pressure exerted by traditionalist or even extremist self-styled 'orthodoxy', it is possible to evolve solutions that would fit into the framework of secular states under the rule of law. This might even have an effect on Muslim majority societies. Of course the 'gentle' reform strategies common in the Islamic world, which avoid direct discussion of the rank and interpretation of the sources of the law, will not get results. If for instance the curriculum for Islamic religious education and the concept for training the teachers to teach it are to be drawn up, clear statements and topics are required. It will not be possible to evade stating a clear position.

The author hopes that the present book has not only communicated facts but also elucidated two things in particular: Whoever studies Islamic law is at the beginning rather than at the end of academic evaluation. There is still a multitude of sources awaiting analysis, especially those originating in the periphery of the Islamic world, from West Africa to Indonesia. It may well be necessary to resign ourselves with the fact that our knowledge is woefully incomplete, especially as regards the period in which Islamic law originated. In the author's view this is not necessarily a disadvantage: especially in a culture that to this day looks mainly to its formative period, knowledge of too much detail might turn out to be an impediment.

The extant and analysed material, on the other hand, shows that since its inception Islamic law has been characterised by a considerable degree of dynamism and variety, albeit not total arbitrariness. On the whole it fulfils the function of a legal system independently of how it derives its validity. Of course, details are informed – as in every legal system – by legal background understanding, and pre-legal circumstances. We must always beware of simple truths: someone who claims to have found the right approach and interpretation may at best be accused of having too little knowledge. The author, despite being a Christian and thus viewing the subject 'from the outside', is happy to close this book with a dictum frequently used in texts on Islamic law: *wa Allāhu a'lām* – and God knows best.

The Structure of the *Kitāb al-mabsūṭ fī l-furūʿ* by the Hanafite Jurist al-Sarakhsī (d. 483/1090)¹

The following overview is limited to particularly significant points of law

Preliminary remarks (2 pp.)

Book: The prayer (*al-ṣalāt*) (397 pp.)

(...)

Book: Prostrating oneself (*al-sajda*) (7 pp.)

(...)

Book: The prayers during the nights of Ramadan (*al-tarāwīḥ*) (6 pp.)

Book: The alms tax (*zakāt*) (220pp.)

(...)

Book: Rare instances of *zakāt* (34 pp.)

Book: Fasting (*al-ṣawm*) (92 pp.)

(...)

Book: Rare instances of fasting (10 pp.)

(...)

Book: Menstruation (72pp.)

(...)

Book: The ceremonies (during the pilgrimage) (*al-manāsik*) (190 pp.)

(...)

Book: Marriage (*al-nikāḥ*) (265 pp.)

The marriage of minors (16 pp.)

The marriage of (adult) virgins (7 pp.)

The marriage of a non-virgin (1 p.)

The marriage without a guardian (15 pp.)

Representation on the occasion of the marriage (7 pp.)

Equality of birth (8 pp.)

Marriage of those under protection (*dhimmī*) (10 pp.)

The marriage of an apostate (*murtadd*) (2 pp.)

Marriage with persons not belonging to the Islamic sphere of influence (*ahl al-ḥarb*) (9 pp.)

The dower (32 pp.)

Rescission rights and marriage (7 pp.)

¹ For his biography cf. Taştan, al-Sarakhsī, 239 ff.

- The infertile man (5 pp.)
- The *shighār* (two marriages linked by conditions) (2 pp.)
- The marriage of persons of equal birth (1 p.)
- Marriage with female and male slaves (12 pp.)
- Milk kinship (14 pp.)
- Good repute (*al-ihsān*) (6 pp.)
- Marriage for a limited period (*mut'a*) (2 pp.)
- 410 The alleged marriage (4 pp.)
- Deception concerning whether the wife is free (2 pp.)
- Several marriages (20 pp.)
- Maintenance (18 pp.)
- Maintenance for a slave (2 pp.)
- Maintenance for a non-Muslim protected person (1 p.)
- Maintenance in the event of divorce, separation and marriage (6 pp.)
- Care and custody of children in the event of divorce (7 pp.)
- Use of household goods (5 pp.)
- Sharing between the (several) wives (5 pp.)
- Maintenance of relatives (8 pp.)
- Book: Divorce (*al-ṭalāq*) (295 pp.)
- Revoking (the declaration of divorce) (11 pp.)
- The divorced woman's period of waiting before remarriage, and moving out of the house (27 pp.)
- Refuting those who deny that unplanned divorce is null and void (1 p.)
- Dress and perfume of the widow (4 pp.)
- Compensation (*mut'a*) and bride price (9 pp.)
- Reasons for separation which are similar to those for divorce (16 pp.)
- Ruling out divorcing the wife (1 p.)
- Regarding the declaration of divorce (55 pp.)
- A mute's declaration of divorce (2 pp.)
- Witnessing the divorce (9 pp.)
- A sick man's divorce (15 pp.)
- Care and custody of children on the occasion of separation (2 pp.)
- The wife's contractual right to dissolve the marriage (*khul'*) (25 pp.)
- Release of the wife to ensure the divorce is effective (14 pp.)
- The right of withdrawal (*al-khiyār*) (11 pp.)
- Transferring the right to divorce onto the wife (3 pp.)
- Dissolving a marriage by means of *zihār*² (2 pp.)

2 Pre-Islamic form of divorce employing the formula *anti 'alayya ka-zahri ummī* – you are to me like my mother's back.

- Manumitting slaves in penance for *zihār* (10 pp.)
 Fasting in penance for *zihār* (2 pp.)
 Feeding the poor in penance for *zihār* (5 pp.)
 Dissolving a marriage by means of *ilāʿ*³ (20 pp.)
 Dissolving a marriage by means of a curse (*liʿān*⁴) (5 pp.)
 Witnessing a *liʿān* (6 pp.)
 Book: Manumitting slaves (*al-ʿitq*) (181 pp.)
 (...)

 Book: The partner in a redemption contract (*al-mukātab*) (80 pp.)
 (...)

 The redemption contract with an apostate (2 pp.)
 The *mukātab* as partner in a company and in the pre-emptive right (*shufʿa*) (3 pp.)
 Book: The relationship with clients (*al-walāʾ*) (45 pp.)
 (...)

 Book: Vows/oaths (*al-aymān*) (97 pp.)
 (...)

 Book: Quranic penal law (*al-ḥudūd*) (97 pp.)
 The confession of illicit sexual intercourse (*zinā*) (12 pp.)
 Bearing witness in a case of false accusation of illicit sexual intercourse (*qadhf*) (28 pp.)
 Book: Theft (*al-sariqa*) (72 pp.)

 Highway robbery (*qitāʿ al-ṭuruq*) (10 pp.)
 Book: Legal relations between Muslims and non-Muslims (*al-siyar*) (44 pp.)
 How the army deals with unbelievers (32 pp.)
 Acquiring the property of unbelievers that originated with the property of Muslims (26 pp.)
 Imposing the land tax (*kharāj*) 98 pp.)
 The treaty of submission (*al-ṣulḥ*) and the peace treaty (*al-muwāḍaʿa*) with the rulers (12 pp.)
 Marriage with inhabitants of territory not under Islamic rule, and merchants travelling to them with safety guaranteed (*amān*) (3 pp.)
 Apostates (26 pp.)
 The Kharijites/ 'those who walk away' in the civil war (*al-khawārij*) (24 pp.)
 Further chapter on spoils of war (9 pp.)

3 The husband's oath affirming that he has not had intercourse with his wife for at least four months.

4 Swearing that the spouse committed adultery.

- Book: The *istihsān*⁵ (40 pp.)
 The man who sees someone else killing his father or someone else (5 pp.)
 Book: Evaluation according to probability (*al-taḥarrī*) (24 pp.)
 Book: The foundling (12 pp.)
 Book: The find (14 pp.)
 Book: The fugitive slaves (*al-ubbāq*) (18 pp.)
 Book: The missing person (*al-mafqūd*) (15 pp.)
 Book: Robbery (59 pp.)
 Book: The deposit (*al-wadī'a*) (25 pp.)
 Book: The loan (*al-'ariya*) (18 pp.)
 Book: The company (*al-sharika*) (69 pp.)
 The general partnership (*al-mufāwada*) (4 pp.)
 The goods of a company partner (5 pp.)
 Litigation among company partners (30 pp.)
 The void company (4 pp.)
 Book: Hunting (36 pp.)
 Book: Sacrificial animals (25 pp.)
 (...)
 Book: The foundation (*al-waqf*) (20 pp.)
 Book: The gift (*al-hiba*) (71 pp.)
 Gifts with and without legal effect (11 pp.)
 The return gift (14 pp.)
 The testamentary gift (*al-ruqba*) (1 p.)
 Proof of the gift (2 pp.)
 Giving alms (*al-ṣadaqa*) (3 pp.)
 The gift (*al-'atīyya*) (7 pp.)
 The gift of a sick man (7 pp.)
 Book: Sales and purchases (*al-buyū'*) (100 pp.)
 Forward purchase by proxy (*salam*) (16 pp.)
 Void purchase contracts (11 pp.)
 Conditional purchase contracts (15 pp.)
 Litigation concerning purchase contracts (10 pp.)
 The contractually agreed right to withdraw from a purchase (*khiyār al-shart*)
 (30 pp.)
 The right to withdraw that has not been agreed (*al-khiyār bi-ghayr shart*) (10
 pp.)

5 Source of the law/ method of deducing the law recognised by the Hanafite school, frequently employed to avert a more obvious analogy, cf. Part 1, 2.6 above.

- Resale with profit (*al-murābaḥa*) (13 pp.)
- Defects of the item purchased (39 pp.)
- Purchase contracts with *dhimmīs* (9 pp.)
- The sale of related persons (4 pp.)
- The sale of pregnant slaves (2 pp.)
- Manumitting (persons sold) (*al-istibrāʿ*) (14 pp.)
- Manumission when two sisters have been purchased (5 pp.)
- Further chapter concerning the right to withdraw (5 pp.)
- The purchase of palms with and without fruit (3 pp.)
- Damage sustained by the object of purchase at the hands of either the seller or the buyer before it changes hands (15 pp.)
- Increase or decrease of the object of purchase before it changes hands (6 pp.)
- The buyer taking possession with and without the seller's agreement (8 pp.)
- Book: The (monetary) exchange transaction (*al-ṣarf*) (88 pp.)
- The right to withdraw from an exchange transaction (2 pp.)
- The purchase of money made from base metal (*fulūs*⁶) (11 pp.)
- The loan and concomitant exchange (7 pp.)
- Providing a pledge for an exchange transaction (1 p.)
- The exchange transaction involving precious metals and the dust thereof (5 pp.)
- The exchange transaction concluded by a judge (2 pp.)
- The contract on working precious metals (2 p.)
- Theft of precious metals (4 pp.)
- The exchange transaction concerning deposits (2 pp.)
- The exchange transaction concerning weighable goods (2 pp.)
- The exchange transaction outside of territory under Islamic rule (4 pp.)
- The exchange transaction between the master and his slave (1 p.)
- Exchange transaction by proxy (7 pp.)
- Defect items in an exchange transaction (4 pp.)
- The compromise (decrease) in an exchange transaction (4 pp.)
- The exchange transaction during sickness (4 pp.)
- The contract regarding silver- or gold plating (*ʿamal al-tamwīn*) (14 pp.)
- Book: The pre-emptive right (*al-shufʿa*) (94 pp.)
- Proof in the context of the pre-emptive right (8 pp.)
- The concrete exercise of the right (4 pp.)
- The pre-emptive right as regards lands and waterways (9 pp.)
- The pre-emptive right regarding gifts (3 pp.)

6 Derived from the Byzantine bronze coin 'follis'.

- The pre-emptive right regarding purchase with conditional right to withdraw (3 pp.)
- Goods exempt from the pre-emptive right on the occasion of marriage and in other cases (5 pp.)
- The pre-emptive right in the business transactions of a sick man (4 pp.)
- Waiving the pre-emptive right (*taslīm al-shuḥḥā*) (7 pp.)
- The pre-emptive right of those leading an immoral life (*shuḥḥā ahl al-baghy*) (1 p.)
- Representation in cases involving pre-emptive right (8 pp.)
- The pre-emptive right among unbelievers (*shuḥḥā ahl al-kufr*) (7 pp.)
- The pre-emptive right in cases of compromise (3 pp.)
- The pre-emptive right regarding finds (1 p.)
- The pre-emptive right regarding buildings and others (8 pp.)
- Book: The apportionment of property (*al-qisma*) (72 pp.)
- The apportionment of real estate by means of buying out (parties involved) (2 pp.)
- Unequal apportionment of real estate without compensation (10 pp.)
- The apportionment of animals and goods (4 pp.)
- The right to withdraw in cases of apportionment (5 pp.)
- Carrying out the apportionment (8 pp.)
- Things that cannot be apportioned (5 pp.)
- The apportionment of a piece of real estate burdened with rights of way (5 pp.)
- The distribution of an inherited piece of real estate burdened with debts or a devise (6 pp.)
- 433 Maintaining a faulty apportionment (6 pp.)
- The apportionment at the hands of the executor among the legatees and heirs (5 pp.)
- Book: lease contracts (110 pp.)
- The contract for work and materials (19pp.)
- The occurrence of entitlement to wages (12 pp.)
- The broker (*al-simsār*) (2 pp.)
- Guarantee and suretyship for the entitlement to wages (3 pp.)
- Hiring a wet-nurse (12 pp.)
- The rent of premises (26 pp.)
- The rent of baths (5 pp.)
- Hiring herdsmen (6 pp.)
- Hiring movable goods (6 pp.)
- Hiring mounts (15 pp.)
- The binding effect of the rental contract (6 pp.)
- Proof in the context of rental contracts (3 pp.)

- The liability of the paid labourer (6 pp.)
 The rent of watermills (4 pp.)
 The rent (of pack camels on the way) to Mecca (5 pp.)
 The wages of paid labourers working in the house (2 pp.)
 Renting tents (7 pp.)
 The rent without legal effect (17 pp.)
 The rent for digging wells and ditches (4 pp.)
 The rent for erecting buildings (2 pp.)
 Hiring slaves to provide services and other things (6 pp.)
 The rent in the context of beating milk (*darb al-labān*) and other things (3 pp.)
 Book: The office of judge (*adab al-qāḍī*) (36 pp.)
 The judge writing to other judges⁷ (17 pp.)
 Book: Witness evidence (*al-shahāda*) (66 pp.)
 Affirmation by oath (*al-istiḥlāf*) (5 pp.)
 Exclusion from (giving) evidence (18 pp.)
 Counter-evidence (*al-shahāda 'alā l-shahāda*) (95 pp.)
 Women bearing witness (3 pp.)
 False witness (*shahādat al-zūr*) etc. (5 pp.)
 Evidence concerning descent etc. (9 pp.)
 The opponent's actions towards a witness (2 pp.)
 Evidence concerning purchase contracts (11 pp.)
 Quarrel between claimants (3 pp.)
 Contradictions in evidence given (6 pp.)
 Book: Retracting evidence (*al-rujū' an al-shahāda*) (47 pp.)
 Retracting evidence in cases of divorce and marriage (7 pp.)
 Further chapter on retracting evidence (9 pp.)
 Retracting evidence in connection with descent, clientage and inheritance (3 pp.)
 Retracting counter-evidence (3 pp.)
 Retracting evidence in cases of *ḥudūd*⁸ etc. (6 pp.)
 Further chapter on retracting evidence (2 pp.)
 Book: The lawsuit (*al-da'wā*) (156 pp.)
 The lawsuit concerning an inheritance (9 pp.)
 The evidence of protected persons (*dhimmīs*) concerning an inheritance (6 pp.)
 Contradictions concerning time and other issues in a lawsuit (10 pp.)

7 This concerns the question of whether, and in what cases, the deciding judge must preside personally at the hearing.

8 The *ḥudūd* refer to the penal law laid down in the Quran; cf. Part 1, 4.7.b above.

- The lawsuit concerning young animals (17 pp.)
 Evidence regarding birth and descent (5 pp.)
 414 Several persons laying claim to a plot (5 pp.)
 The lawsuit concerning walls and paths (10 pp.)
 Claiming an item giving different legal reasons (3 pp.)
 Claiming a child⁹ (21 pp.)
 The foundling (*al-laqīṭ*¹⁰), the slave and the unbeliever (18 pp.)
 Denying paternity of a child born of a slave woman and other things (5 pp.)
 The lawsuit brought by the seller (of a slave woman) and other things (3 pp.)
 The status of the children of a slave woman who has had several masters (5 pp.)
 The lawsuit brought concerning kinship (6 pp.)
 A sick man admitting paternity (3 pp.)
 The status of children of adultery and the legally effective marriage (8 pp.)
 Birth and bearing witness to it (10 pp.)
 Deception (concerning slave status) (18 pp.)
 Book: Acknowledgement (*al-iqrār*) (206 pp.)
 The acknowledgement of a debt by the partner in a *mufāwada*¹¹ (3 pp.)
 Acknowledging the rights of an unborn child (2 pp.)
 The right to withdraw in the context of acknowledgement (3 pp.)
 Acknowledging a loan (3 pp.)
 Acknowledging the figure of a debt in dirhams (3 pp.)
 Acknowledging a debt with ambiguous designation (6 pp.)
 Acknowledging a debt with reference to counterfeit money (*zuyūf*) (4 pp.)
 The realisation of an acknowledgement (10 pp.)
 Acknowledging a debt while sick¹² (7 pp.)
 The acknowledgement of a debt by the sick man with regards to heirs and
 others (7 pp.)
 The debts of a victim of wilful homicide (7 pp.)
 The acknowledgement of debts by the heir¹³ (7 pp.)
 Acknowledgement in the way of waiving the oath (3 pp.)
 Acknowledging debts with respect to items in joint ownership (8 pp.)
 Acknowledging a debt with respect to items not precisely specified (10 pp.)
 Acknowledging an acknowledgement undertaken during minority (3 pp.)

9 This refers to the prohibition against withdrawing a recognition of paternity.

10 This refers to persons not related by blood ties but received into the family being included in the provisions of inheritance law.

11 Corresponds on the whole to the general partnership.

12 This refers to possible circumvention of inheritance law.

13 This refers to the distribution of insolvent estate.

- Acknowledgement in the way of demand (3 pp.)
- Acknowledging the removal of an item from someone's possession, and exceptions (5 pp.)
- The acknowledgement with respect to something that is unknown or in doubt (11 pp.)
- The exception¹⁴ (11 pp.)
- Acknowledging a debt the sum of which is not specified (7 pp.)
- Acknowledging a specific debt, and then another one (3 pp.)
- The acknowledgement with respect to a sum of money paid by someone else (3 pp.)
- The acknowledgement with respect to demanding payment of asserted debts (6 pp.)
- The acknowledgement in the context of a limited partnership (*muḍāraba*) and of an (ordinary) partnership (*shirka*) (9 pp.)
- Acknowledging the non-existence of a debt etc. (5 pp.)
- Confessing criminal activities¹⁵ (1 p.)
- Concerning the acknowledgement (2 pp.)
- The acknowledgement of the executor and the trustee concerning the handling (of the items held in trust) (6 pp.)
- The acknowledgement in the context of a purchase contract concerning defective items (10 pp.)
- Acknowledging marriage and divorce (4 pp.)
- The acknowledgement of persons under legal disability (*al-mahjūr*) and of slaves (8 pp.)
- The oath¹⁶ and the acknowledgement of the status of a slave (9 pp.)
- Acknowledging that a marriage has been contracted (1 p.)
- The acknowledgement of a *mukātab* and a free man (2 pp.)
- Acknowledging the non-existence of claims against someone else (4 pp.)
- The acknowledgement in the context of manumission and a contract of redemption (3 pp.)
- The unbeliever's acknowledgement (3 pp.)
- The written acknowledgement (4 pp.)
- The acknowledgement with respect to rights to living beings (3 pp.)
- The alternative acknowledgement¹⁷ (1 p.)

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14 This refers to items excluded from the acknowledgement.

15 This refers to the payment of blood money (*diya*) as a consequence of the action.

16 This refers to the acknowledgement dependent on the oath sworn by the beneficiary.

17 This refers to the effectiveness of acknowledgements taking into account more than one entitled parties.

- The acknowledgement with respect to possessions of which the person acknowledging is a co-owner (3 pp.)
- The acknowledgement with respect to goods taken by others (2 pp.)
- Acknowledging one's own and other persons' shared debt (2 pp.)
- The acknowledgement when not in a state of (fatal) illness¹⁸ (4 pp.)
- The (creditor's) acknowledgement of having taken (what he is owed) 2 pp.)
- Book: Representation (159 pp.)
- Witness evidence in the context of representation (8 pp.)
- The judge's writing to the other judge concerning representation (4 pp.)
- Authorisation at the hands of an orphan's guardian (1 p.)
- Authorisation for property management, for collecting yields and for sales (8 pp.)
- Representation with respect to sale and purchase (29 pp.)
- Representation with respect to exchange transactions and to forward purchase (2 pp.)
- Representation in the context of enforcing a debt¹⁹ (11 pp.)
- Representation on the occasion of pledging goods (9 pp.)
- Representation on the occasion of the redemption of items held in trust or loaned (6 pp.)
- Representation in the context of a gift (4 pp.)
- Representation in the context of manumission and redemption contracts (9 pp.)
- Representation in the context of companies (*mudāraba* and *shirka*) (4 pp.)
- Items for which representation is not admissible (3 pp.)
- Authorisation by the *ma'dhūn* and the *mukātab* (10 pp.)
- Representation on the occasion of the marriage (9 pp.)
- Representation of the husband in one-sided divorce (*ṭalāq*) and when the marriage is dissolved by *khul'* (8 pp.)
- Representation in the context of rent, joint cultivation of lands (*muzāra'ā*) and cooperation (6 pp.)
- Representation if unbelievers are involved (7 pp.)
- Representation in the context of talion law (*dam*) and compromise settlements (10 pp.)
- Representation in the context of settlements (regarding the payment of blood money) in cases of head injuries (7 pp.)
- Granting someone power of representation (2 pp.)

18 This refers mainly to the acknowledgement during an incurable illness.

19 This refers to the personal nature of representation and avoiding legal confusion.

- Book: Providing a guarantee (*al-kafāla*) (161 pp.)
- Providing a guarantee under escrow²⁰ (14 pp.)
- Providing personal guarantees (*al-kafāla bi-l-nafs*) in connection with vicarious liability in litigation²¹ (10 pp.)
- Slaves and minors providing personal guarantees (17 pp.)
- Providing real (estate) collateral (*al-kafāla bi-l-māl*) (7 pp.)
- Several persons providing personal guarantees (13 pp.)
- Providing a guarantee on the understanding that the debtor will be free of the guaranteed demand (*al-aṣīl*) (5 pp.)
- Creating a guarantee for future demands (3 pp.)
- The bill of exchange or promissory note (3 pp.)
- The money order (*al-amr bi-naqd al-māl*) (4 pp.)
- The compromise settlement on the realisation of guarantees (10 pp.)
- Determining the maturity date of guarantee and bill of exchange (5 pp.)
- The order regarding liability benefiting a third party (3 pp.)
- Providing a guarantee in the context of a legal action (7 pp.)
- The person paying determining the amount (5 pp.)
- The assignor's claim that the guaranteed demand arises out of trade in alcohol or usury (3 pp.)
- Debtors' imprisonment (4 pp.)
- Being exempt from the guarantee, and the gift to the assignor (2 pp.)
- One of several assignors acknowledging the obligation²² (3 pp.)
- The guarantee being dispensed with without being settled or falling vacant²³ (5 pp.)
- The oath in the context of the guarantee²⁴ (2 pp.)
- Cases in which a guarantee is not appropriate (10 pp.)
- The judicial document concerning the guarantee²⁵ (3 pp.)
- Witness evidence and oath concerning the promissory note and guarantee transaction (7 pp.)

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20 This refers to the permissibility of fixing a date in case of default.

21 As to the function, this refers to the combination of an ordinary personal guarantee and a litigation guarantee.

22 This refers to issues of legal recourse among several assignors.

23 This refers to the effect disturbance in the secured contract will have on the hedging transaction.

24 This refers to the identity of an agreed liability (*ḍamān*) and the guarantee (*kafāla*).

25 This refers to the evidential value of investigations undertaken and documented elsewhere in a lawsuit.

- The guarantee towards several assignees in case the principal debt is not settled (2 pp.)
- The guarantee for particular items (6 pp.)
- Further chapter on the guarantee (8 pp.)
- Book: The compromise settlement (*al-ṣulh*) (112 pp.)
- The compromise settlement concerning real estate rights (*al-ʿuqār*) (9 pp.)
- The compromise settlement concerning the pre-emptive right (2 pp.)
- The void compromise settlement (6 pp.)
- Communal use of assets (*al-muhāyaʿa*) (9 pp.)
- The compromise settlement with the father, the executor and the heir (6 pp.)
- The compromise settlement concerning claims arising out of bequests (8 pp.)
- The compromise settlement concerning criminal actions²⁶ (17 pp.)
- Witness evidence in a compromise settlement (1 p.)
- The compromise settlement concerning a debt which is not defined as such (*dayn*) (7 pp.)
- The right to withdraw from a compromise settlement (4 pp.)
- The compromise settlement concerning a debt (9 pp.)
- The compromise settlement concerning forward purchase (13 pp.)
- The compromise settlement concerning claims arising from theft (*ghaṣb*) (6 pp.)
- The compromise settlement concerning claims arising from loan and safekeeping (3 pp.)
- The two impartial arbitrators (*al-ḥakamayn*)²⁷ (1 p.)
- Book: Pledging (*al-rahn*) (140 pp.)
- Cases of a lack of liability on the part of the pledgee (for the loss of the pledge) (9 pp.)
- Pledging by the executor and the father (6 pp.)
- Pledging living beings (12 pp.)
- Pledging silver for silver,²⁸ or according to weight and measure (11 pp.)
- Witness evidence on the occasion of pledging (10 pp.)
- Pledging by the *mukātab* and the slave²⁹ (16 ff.)
- Unbelievers involved in pledging (6 pp.)
- Pledging by a partner in a limited partnership or a *shirka* (4 pp.)
- Loans for the purpose of pledging (5 pp.)
- Pledging with several pledgees (4 pp.)

26 This refers to matters of talion law and blood money.

27 This refers to the effect of arbitration decisions and the subsequent judicial proceedings.

28 This refers to the identical monetary value.

29 This refers more generally to legal capability with reference to pledging.

- The killing of one pledge (the slave) by the other³⁰ (11 pp.)
- The pledger or pledgee being injured by the pledge (5 pp.)
- Other persons than the pledger or the pledgee being injured by the pledge (4 pp.)
- The injury of the pledge (3 pp.)
- Robbery of the pledge (7 pp.)
- The injury (of a third party) at the hands of the pledge during his tasks³¹ (9 pp.)
- Book: The limited partnership³² (*al-muḍārabā*) (170 pp.)
- Distributing a share of the profit among third parties (4 pp.)
- The limited partnership with items as deposit (6 pp.)
- The authority of the director (*muḍārib*) within the limited partnership (11 pp.)
- Sales and purchases undertaken by the director³³ (15 pp.)
- The director's reimbursement of expenses (*nafaqa*) (12 pp.)
- Resale with profit (*murābaḥa*) in a limited partnership (9 pp.)
- Sale undertaken by the director with subsequent purchase by himself at a lower price (3 pp.)
- Cooperation between the limited partner (who provides the capital) and the director (6 pp.)
- The disagreement between the partner and the director (10 pp.)
- Transferring (the limited partnership's) capital onto (another) limited partnership (7 pp.)
- Distributing (the profit) among the partner and the director (5 pp.)
- Manumission (of slaves who are part of the property deposited) at the hands of the director (10 pp.)
- Injury at the hands of a slave who is part of company property, and injury sustained by such a slave (5 pp.)
- Extent and limits of the director's authority (4 pp.)
- The limited partnership in which unbelievers are involved (7 pp.)
- Partnership interest (*shirka*) in a limited partnership (9 pp.)

30 This refers to the amount to which the criminal slave can be held liable as a pledge.

31 This concerns questions of redress and liability, if the pledge is abducted by someone else and a further party sustains damages due to the work performed by the pledge (e.g. digging a well, paving a path).

32 Defining this as a limited partnership has become customary; Bälz is, however, justified in pointing out that it is more similar to a silent partnership (Das internationale Vertragsrecht der islamischen Banken, WM 1999, 2443, 2444).

33 This refers to the respective authority in cases where there are several directors.

- The fatally ill director's acknowledgement with respect to the limited partnership³⁴ (6 pp.)
- The pre-emptive right in the context of the limited partnership (5 pp.)
- Contract clauses (*shurūt*) with respect to the limited partnership (4 pp.)
- Resale with profit between the director and the partner (5 pp.)
- The director's liability (2 pp.)
- Resale with profit between two limited partnerships (the same person being a partner in both of them) (6 pp.)
- Litigation between the director and the partner³⁵ (6 pp.)
- The loss of the partnership's assets before or after the transaction³⁶ (11 pp.)
- The partnership financing by way of credit at the request of the partner (8 pp.)
- Witness evidence in the context of the limited partnership (3 pp.)
- Book: The agricultural partnership (*muzāra'ā*)³⁷ (160 pp.)
- The *muzāra'ā* according to those who permit it (with profit shares of) half and a third (9 pp.)
- What the partner in a *muzāra'ā* (*muzāri'*) can prohibit/enforce after concluding an agreement (2 pp.)
- The *muzāra'ā* between co-owners of land (4 pp.)
- The *muzāra'ā* between landowner and agricultural worker with the provision that both contribute seeds (2 pp.)
- Agreeing how shares in the harvest are distributed in real terms to a shareholder (4 pp.)
- Contract clauses (*shurūt*) which render the *muzāra'ā* void, and clauses which do not have this effect (2 pp.)
- 418 Conditions of the contract determining the yield, ploughing the land and other matters (7 pp.)
- (Premature) termination (*'udr*) of the contract concerning the *muzāra'ā* and the demand (for fulfilling the terms) (12 pp.)
- (Premature) termination (*'udr*) of the contract concerning other agricultural cooperation (*mu'āmala*) (5 pp.)
- Options and limitations of single allocation to one of the partners (3 pp.)

34 This refers to the separation of the partnership's property from the private estate of the director.

35 This refers to the separation between the director's transactions on his own behalf, and that of others.

36 This refers to the question of whether the partner will have to contribute the lost amount again, in order to fulfil existing obligations.

37 This is a type of cooperation in which one partner provides the agricultural land and another carries out the actual farming.

- The contract concerning the *muzāraʿa* that includes alternative contractual clauses (*al-muzāraʿa ʿalā l-sharṭayn*) (6 pp.)
- Agreeing the labour to be performed by slaves or beasts (4 pp.)
- Involving others in order to perform the work agreed in the context of the *muzāraʿa* and the *shirka* (6 pp.)
- The partner in the first *muzāraʿa* (crop farmer) agreeing an additional *muzāraʿa* (4 pp.)
- The transfer of land from the crop farmer onto the landowner or the slave for the purpose of a *muzāraʿa* (3 pp.)
- Contract clauses rendering the *muzāraʿa* void (4 pp.)
- The *muzāraʿa* which also agrees agricultural cooperation (*muʿāmala*) elsewhere (2 pp.)
- Ambiguities in contracts concerning a *muzāraʿa*³⁸ (4 pp.)
- Disputes concerning individual clauses of the contract (10 pp.)
- The title (*ʿushr*) with respect to the *muzāraʿa* and other agricultural cooperation (*muʿāmala*) 95 pp.)
- Other agricultural cooperation (*muʿāmala*)³⁹ (4 pp.)
- Further chapter on the *muʿāmala* (3 pp.)
- Both co-owners or one of them using agricultural lands (9 pp.)
- The cooperation between the manager of the *muʿāmala* and another person (4 pp.)
- The *muzāraʿa* with an apostate (*murtadd*) (3 pp.)
- The *muzāraʿa* with the inhabitant of territory not under Islamic rule (*ḥarbī*) (3 pp.)
- The *muzāraʿa* with a minor and with a slave (4 pp.)
- The guarantee in the context of *muzāraʿa* and *muʿāmala* (2 pp.)
- The *muzāraʿa* and *muʿāmala* with the (fatally) ill person (10 pp.)
- Representation with respect to the *muzāraʿa* (7 pp.)
- Increase or decrease (of the share) in the *muzāraʿa* and the *muʿāmala* (1 p.)
- Marriage, compromise settlement concerning injuries, contractual divorce law, manumission and redemption contracts in the context of the *muzāraʿa* and *muʿāmala* (3 pp.)
- The work undertaken by the landowner, or the owner of the palms, in agreement with the person entrusted with carrying out the work, and without such an agreement (4 pp.)

38 This refers to the *essentialia negotii* that must be agreed for the contract to achieve legal validity.

39 The *muʿāmala* is always discussed using the example of the care and use of palm trees.

- Transferring (only) part of the (necessary) work to the person carrying out the work (6 pp.)
- Ignorance of the work the deceased worker carried out, and disputes over seeds and terms of the contract (3 pp.)
- muzāraʿa* and *muʿāmala* with respect to pledged goods (between pledger and pledgee) (2 pp.)
- Void terms of the contract, which result in the *muzāraʿa* becoming void, or remaining effective (1 p.)
- Book: Water rights (*al-shirb*) (42 pp.)
- Witness evidence in the context of water rights (9 pp.)
- The contractually agreed right to withdraw with respect to a contract on water rights (9 pp.)
- Book: Inebriating drinks (*al-ashriba*) (37 pp.)
- The *taʿzīr*⁴⁰ (3 pp.)
- 419 Book: Compulsion (*al-ikrāh*) (146 pp.)
- Things which Muslims⁴¹ are compelled to do by criminals⁴² (15 pp.)
- Being compelled to manumit slaves, to pronounce a divorce, and to enter into marriage (4 pp.)
- Things which (Muslims) are compelled to do to their own selves, or their own property (12 pp.)
- Compulsion to spend or accept property (4 pp.)
- On the compulsion to declare acknowledgement (2 pp.)
- On the compulsion to marriage, to accept *khulʿ*, to manumit slaves, and to compromise concerning blood money in case of intentional damage (3 pp.)
- The compulsion to commit fornication and aggravated highway robbery (*qatʿ*) (4 pp.)
- The compulsion to sell (a slave), where the buyer resells or manumits him (6 pp.)
- The compulsion to actions that will result in manumission, or divorce (5 pp.)
- The compulsion to take an oath or a vow (3 pp.)
- Compulsion at the hands of the Kharijites⁴³ (1 p.)
- Situations in which the person compelled will act against the compulsion (3 pp.)

40 This refers to the punishment for prohibited consumption of alcohol that is not covered by the Quranic provisions (cf. Part 1, 4.7.c above).

41 Mixed chapter containing descriptions of individual instances of compulsion in which it may be permissible to act contrary to the law.

42 *Lusūṣ*, 'robbers'. Non-Muslims are also mentioned as criminals.

43 As in the first chapter this refers to actions prohibited by religious laws.

- The compulsion to free a slave belonging to a third party (6 pp.)
- The compulsion to place something into escrow, and other matters (3 pp.)
- Disguised transactions/declarations not seriously intended (*al-taljija*) (4 pp.)
- Compulsion to conclude a contract (2 pp.)
- Actions the person under compulsion performs spontaneously and against the compulsion (3 pp.)
- Going beyond what one was compelled to do (3 pp.)
- The right to choose in the context of compulsion (8 pp.)
- Compulsion in matters which must be observed with regard to God (3 pp.)
- Compulsion in the context of authorisation (3 pp.)
- What is inescapable under compulsion, and what can be avoided (4 pp.)
- The *l'ān* declared under judicial compulsion due to invalid witness evidence (2 pp.)
- Restriction of legal competence (*al-ḥajr*) (28 pp.)
- Book: The adult slave with limited legal competence (*al-ma'dhūn al-kabīr*) (248 pp.)
- (...)
- Book: Blood money⁴⁴ (135 pp.)
- Witness evidence in the context of blood money (3 pp.)
- The collective oath (*al-qasāma*)⁴⁵ (16 pp.)
- Talion law (*al-qīṣaṣ*) (33 pp.)
- Refraining (*al-'afw*) from (invoking) talion law (11 pp.)
- Refrainment in the context of injury through negligence (*al-khaṭā'*)⁴⁶ (3 pp.)
- Representation in cases of (deliberate) bloodshed (9 pp.)
- Retracting a witness statement concerning homicide (5 pp.)
- Infractions (*jināyāt*)⁴⁷ committed by minors and feeble-minded persons (4 pp.)
- Infractions committed by riders⁴⁸ (5pp.)
- Drovers⁴⁹ (*al-nākhis*) (4 pp.)

44 This refers to payments to the injured party or his family to compensate for injuries sustained.

45 This refers to the oath taken by those paying the blood money, declaring to the family of the killed man that they did not kill him and do not know who his murderers are.

46 This refers to the distribution of the blood money after the death of the injured man.

47 This refers only to injury to the person, not to property; cf. the definition in al-Sarakhsī, *Kitāb al-mabsūṭ*, vol. 27, 84.

48 This refers to issues of liability with or without fault in cases of injury by a riding animal.

49 This refers to the drover's liability, also with respect to accompanying riding animals and riders.

- What happens in public spaces (*tarīq*) (3 pp.)
- The collapsing wall (*al-ḥā'iṭ al-mā'il*) (6 pp.)
- Accidents near wells (9 pp.)
- Accidents near canals (2 pp.)
- Accidents in mosques and markets (3 pp.)
- Infractions (through negligence) committed by a slave (20 pp.)
- 420 Infraction committed by a slave when digging a well⁵⁰ (6 pp.)
- Damages caused by sewers and drains (1 p.)
- Abduction of a slave who subsequently commits an infraction (10 pp.)
- Infraction committed by the *mukātab* (6 pp.)
- Infraction committed by a *mukātab* belonging to two masters (5 pp.)
- Infraction committed by the *mudabbar* (3 pp.)
- Infraction committed by a *mudabbar* belonging to two masters (3 pp.)
- Infraction committed by a *mukātab* through negligence (3 pp.)
- Book: Injuries to the person (*al-jināyāt*) (40 pp.)
- The person liable within a group paying blood money⁵¹ (*al-mu'āqil*) (19 pp.)
- Book: The bequest (*al-waṣāyā*) (158 pp.)
- The bequest with the purpose of financing the *ḥajj*⁵² (4 pp.)
- The bequest for the heir, the outsider (*aghṇabī*) and the murderer (6 pp.)
- The bequest concerning income and service (11 pp.)
- The bequest concerning the yield of agricultural land, orchards and gardens (5 pp.)
- The bequest concerning manumission (10 pp.)
- The manumission of a person (to be purchased by the executor) on behalf of the deceased (5 pp.)
- The executor and the bequest (17 pp.)
- Acknowledgement by the heir⁵³ (7 pp.)
- Acknowledgement by the heir with respect to the manumission of (bequeathed slaves) (2 pp.)
- The bequest concerning manumission in exchange for payment or services⁵⁴ (4 pp.)

50 This refers to the master's continuing liability after the manumission of the slave.

51 This refers to the question of which persons share the liability for infractions committed by a relative, and in what way they are liable.

52 The 'great' pilgrimage to Mecca, which the Quran makes incumbent on all believers who are able to accomplish it.

53 This refers to acknowledging the existence of a bequest.

54 This refers to how the third of the estate that is not burdened by bequests is to be determined.

- The bequest not accepted by the beneficiary (4 pp.)
- The bequest of the amount of a share in the inheritance (11 pp.)
- Taking into account items of property (*'ayn*) and demands (*dayn*) (when distributing the estate among heirs and legatees) (4 pp.)
- Lawsuits among heirs (5 pp.)
- The acknowledgement of a dying man, and his actions⁵⁵ (3 pp.)
- Witness evidence in the context of the bequest and other matters (4 pp.)
- The bequest with respect to the unborn child (of a slave-woman) (2 pp.)
- The exception (*al-istithnā'*)⁵⁶ (4 pp.)
- The bequest concerning a part (*juz'*) and portion (*sahm*) (3 pp.)
- The bequest on condition (3 pp.)
- The bequest of a minor and an heir (5 pp.)
- The bequest concerning a sixth of the plot of land surrounding the home⁵⁷ (2 pp.)
- The bequest exceeding a portion of the inheritance (13 pp.)
- Book: (Physical) items (*'ayn*) and demands (*dayn*) (123 pp.)
- The bequest exceeding the (free) third (7 pp.)
- The bequest concerning manumission in case one heir receives more property than the other (6 pp.)
- The bequest concerning manumission and making a concession (*al-muḥābāt*)⁵⁸ (3 pp.)
- The bequest concerning manumission in case of existing claims against an outsider (*ajnabī*) (9 pp.)
- The bequest of physical items of property (*'ayn*) in case of existing claims against heirs (31 pp.)
- Manumission during the master's (fatal) illness and its effect (12 pp.)
- The heir's acknowledgement that another heir exists, in case the latter confirms or denies this (28 pp.)
- The bequest to an heir to an amount that exceeds the (free) third with the agreement of other heirs (12 pp.)
- The bequest concerning certain items of property the value of which will increase or decrease after the testator's death (5 pp.)
- If the testator dies without (legal) heirs, and if he (before his death) acknowl-

55 This refers to the legal effectiveness of transactions and actions benefiting specific creditors/beneficiary.

56 This refers to how to denote the legacy by means of a collective term with an exception.

57 This refers to the scope of the principle of certainty in the context of bequests.

58 This refers to how the promise of manumission is treated under inheritance law. Also how the exchange agreement, partially free of charge, with a fatally ill testator is treated.

- edges a living heir or legatee (5 pp.)
 Book: The manumission (by a master) suffering from a fatal illness⁵⁹ (68 ff.)
 (...)
 Book: Deciding (*al-dawr*) (between paying blood money and handing over the guilty slave)⁶⁰ (45 pp.)
 Forgiveness and bequest⁶¹ (28 pp.)
 Book: Inheritance quotas (*al-farā'id*) (167 pp.)
 Offspring (11 pp.)
 Doubts arising concerning the offspring's right to inherit (2 pp.)
 Brothers and sisters (10 pp.)
 Lowering the inheritance quotas in case of shortage (*al-'awl*) (6 pp.)
 The grandmothers (10 pp.)
 The beneficiaries (*aṣḥāb al-mawārith*)⁶² (6 pp.)
 The grandfather's inheritance quota (14 pp.)
 Distributing the remainder (*al-radd*)⁶³ (7 pp.)
 The child from a marriage dissolved by *li'ān* (*walad al-mulā'ana*)⁶⁴ (3 pp.)
 Principles of distributing an inheritance (13 pp.)
 Half-siblings' on the mother's side title to inherit (*dhawī arḥām*) (12 pp.)
 The siblings of *dhawī arḥām*'s title to inherit (5 pp.)
 Concerning those related on both sides among brothers' daughters and sisters' children (1 p.)
 The title to inherit of paternal grandmothers (*'ammāt*) and maternal grandfathers and grandmothers (*akhwāl wa-khālāt*) (2 pp.)
 The title to inherit of paternal grandmothers' and maternal grandfathers' and grandmothers' offspring (3 pp.)
 Those who are not grandparents according to the law (*al-fāsīd min al-ajdād wa-l-jaddat*) (4 pp.)

59 This refers to the question of, for instance, how an existing debt can be offset against the bequeathed manumission, if the debt is lower or higher than the value of the slave.

60 This refers to the fact that if the injured party declined the blood money, this must be taken into account under inheritance law.

61 This refers to the relation between declining the blood money from the culpable slave and other bequests.

62 This refer to the status and relation of those entitled to fixed inheritance quotas (*aṣḥāb al-farā'id*) and the remaining relatives entitled to inherit (*'aṣaba*).

63 This refers to the distribution of the residuary estate once the quota heirs are satisfied and there are no residuary heirs.

64 This refers to the kinship relation between a child born of adultery and the father.

- Those who died together (*al-ḥaraqī wa-l-gharaqī*)⁶⁵ (3 pp.)
- Unbelievers' title to inherit (4 pp.)
- Sub-chapter: Zoroastrians' title to inherit (*al-mājūs*) (5 pp.)
- The patron–client relationship (*al-walā'*)⁶⁶ (5 pp.)
- Sub-chapter: Patron–client relationships among free persons (4 pp.)
- The title to inherit of those who have killed deliberately or through negligence (5 pp.)
- The title to inherit of the unborn child (*al-ḥaml*) (5 pp.)
- Sub-chapter: The title to inherit of a missing person (*al-mafqūd*) (1p.)
- Representation (*al-munāsakha*)⁶⁷ (5 pp.)
- One-sided divorce (*ṭalāq*) declared by a fatally ill man (2 pp.)
- Other doubts arising outside of the clientage of Zoroastrians (5 pp.)
- Legal issues concerning the daughters of sons, and sisters (2 pp.)
- Doubts arising concerning descent (1 p.)
- Concerning that which is impossible (1 p.)
- The acknowledgment in the context of descent (3 pp.)
- The gradual acknowledgment of several persons' title to inherit (17 pp.)
- The acknowledgment after the estate has been distributed (4 pp.)
- Book: The inheritance quotas of a hermaphrodite (*al-khunthā*) (12 pp.)
- Book: The hermaphrodite (12 pp.)
- Book: Calculating bequests (15 pp.)
- Book: The different opinions of Abū Ḥanīfa and Ibn Abī Laylā, may God have mercy on them both (40 pp.)
- Book: The terms (of a contract) (*al-shurūt*)
- Book: The legal stratagems (*al-ḥiyal*)⁶⁸ (7 pp.)
- Rent (5 pp.)
- Representation (3 pp.)
- The compromise settlement (9 pp.)
- Vows/oaths (7 pp.)
- Sale and purchase transactions (5 pp.)
- Affirmation by oath (*al-istiḥlāf*) (4 pp.)

65 This refers to the question of succession among those who are entitled to inherit from one another who have met their death together ('burned' or 'drowned' persons); the solution is found in a presumption of simultaneous death.

66 This refers to the title to inherit among persons in a patron–client relationship due to manumission of slaves, or affiliation of free men.

67 This refers to how graduated succession is dealt with.

68 This refers to taking external circumstances into account in which it is advisable to avoid formal requirements.

Book: Gainful employment (*al-kasb*)⁶⁹ (43 pp.)

Book: Milk kinship (foster kinship) (*al-riḍā'*)⁷⁰ (4 pp.)

Explanation of the prohibition of marriage due to descent (kinship) (3 pp.)

Explanation of the man's milk (*labān al-faḥl*)⁷¹ (11 pp.)

A marriage afflicted with doubt (*nikāh al-shubha*) (8 pp.)

69 This refers to the need for it, and the significance earnings have in religious law.

70 This refers to the legal consequences of being breastfed by the same nurse.

71 This refers to the prohibition of marriage between children of two wives of the same man, who each breastfed her own child.

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Glossary

The initial article 'al' is omitted for ease of reference. In the case of terms with more than one meaning the legal ones are listed; words from languages other than Arabic are listed with the respective language.

<i>āda</i> , pl. <i>ādāt</i>	custom (frequently used together with <i>urf</i> to mean 'customary law')
<i>adilla</i>	pl. of <i>dalīl</i>
<i>ʿafw</i>	forgiveness, waiving, exemption from punishment
<i>ʿahd</i>	agreement, contract
<i>aḥkāṃ</i>	pl. of <i>ḥukm</i>
<i>aḥkāṃ al-kufr</i>	'judgments of unbelief', derogatory for legal decisions by non-Muslims
<i>ahl al-dhimma</i>	people under protection (cf. <i>dhimmi</i>)
<i>ahl al-ḥadīth</i>	in the early period followers of a strict adherence to prophetic tradition (as opposed to the <i>ahl al-raʿy</i>)
<i>ahl al-ḥall wa-l-ʿaql</i>	'people of dissolving and binding'; in Sunni Islam those who appoint the ruler
<i>ahl al-kitāb</i>	non-Muslim followers of recognised religions that possess scripture
<i>ahl al-qurʾān wa-l-ʿilm</i>	religious scholars ('people of the Quran and of knowledge/enlightenment')
<i>ahl al-raʿy</i>	in the early period supporters of independent reasoning (in opposition to the <i>ahl al-ḥadīth</i>)
<i>akhdh khifyatan</i>	secret removal (one of the elements of the Quranic crime of <i>sariqa</i>)
<i>ālim</i>	sg. of <i>ulamāʾ</i>
<i>ʿamal</i>	practice, exercise; local custom, local customary law
<i>amān</i>	protected status, guarantee of protection (for non-Muslims who enter Muslim territory for a limited time only)
<i>ʿamd</i>	intention
<i>amūr</i> , pl. <i>umarāʾ</i>	commander, general, ruler (secular), 'emir'
<i>amīr al-umarāʾ</i>	'commander of the faithful', highest commander (title)
<i>āmm</i>	general, generic (complementary term to <i>khāṣṣ</i>)
<i>ʿaqd</i> , pl. <i>uqūd</i>	treaty, contract
<i>ʿaqila</i>	clan, extended family (who can claim blood money, or is held liable for it)
<i>ʿaql</i>	intellect, understanding (prerequisite for legal responsibility)

<i>‘āriya</i>	loan, loan agreement	
<i>asbāb al-nuzūl</i>	cause or reason for a specific revelation in the Quran	
<i>aṣḥāb al-farā’id</i>	quota heirs (with fixed shares in the inheritance)	
<i>aṣl</i> , sg. of <i>uṣūl</i>	specifically: the basis on which an analogy or other conclusion can be drawn	
<i>‘awl</i>	specifically: reduction in the inheritance quotas (if the total exceeds the estate; complementary term to <i>radd</i>)	
<i>awliyā’ al-dam</i>	representatives of the injured party in negotiations concerning killings or bodily injury (<i>qiṣāṣ</i>)	
<i>awqāf</i>	pl. of <i>waqf</i>	
<i>‘ayn</i>	specific obligation (complementary term to <i>dāyn</i>)	
<i>ba’dīyya</i>	relatives in the direct lines with title to inherit (complementary term to <i>kalāla</i>)	580
<i>baghy</i>	turmoil	
<i>bāliq ‘āqil</i>	of age and of sound mind (legally competent)	
<i>barā’ā aṣliyya</i>	free from obligations unless they are specifically imposed	
<i>baṣḥ</i> (Turk.)	‘bounty’, payment to the bride’s family	
<i>bāṭil</i>	without legal effect, void	
<i>bay’</i> , pl. <i>buyū’</i>	purchase, purchase agreement	
<i>bay’a</i>	homage (to the caliph)	
<i>bayt al-māl</i>	state treasury, exchequer, ‘house of money’	
<i>biḍ’a</i>	inadmissible deviation, innovation (does not always result in the action being without legal effect)	
<i>bulūgh</i>	physical maturity (prerequisite of coming of age, legal competence); cf. <i>rushd</i>	
<i>bulūgh bi-l-sinn</i>	presuming physical maturity due to age in years	
<i>dalāla</i> (abstract noun of <i>dalīl</i>)	evidentiary value, authenticity (cf. <i>qaṭ’ī al-dalāla</i> ; <i>ẓannī al-dalāla</i>)	
<i>dalīl</i>	norm, normative source; tool for deducing and interpreting norms; legal argument	
<i>dalīl qaṭ’ī</i>	unequivocal norm not requiring interpretation (complementary term to <i>dalīl ẓannī</i>)	
<i>dalīl ẓannī</i>	equivocal norm requiring interpretation (complementary term to <i>dalīl qaṭ’ī</i>)	
<i>ḍamān</i>	liability; compensation; guarantee	
<i>dār</i> , pl. <i>dūr</i> , <i>diyār</i>	dwelling; ‘house’, often used in the abstract sense as ‘territory’	
<i>dār al-‘ahd</i>	‘house of treaty’: territory not under Muslim rule with which an armistice or peace treaty has been concluded	
<i>dār al-ḥarb</i>	territory not under Muslim rule with which no armistice or peace treaty has been concluded	

<i>dār al-iftā'</i>	institution providing legal expert opinions
<i>dār al-Islām</i>	'house of Islam': territory under Muslim rule
<i>dār al-ṣulḥ</i>	= <i>dār al-'ahd</i>
<i>ḍarar</i>	damage (requiring compensation)
<i>ḍarība</i> , pl. <i>ḍarā'ib</i>	fee, payment; functionally frequently 'interest'
<i>ḍarūra</i>	necessity, emergency (to justify non-adherence to or cancellation of a norm)
<i>dawla</i>	dynasty, state
<i>dawla madaniyya</i>	"civil state" (based on relevant elements of secularity)
<i>dayn</i>	debt obligation, indeterminate obligation (in this respect complementary term to <i>'ayn</i>)
<i>dhawū al-arḥām</i>	related in a degree that rules out marriage
<i>dhimma</i>	protected status (cf. <i>dhimmī</i>)
<i>dhimmī</i>	protected person (non-Muslim inhabitant of Muslim territory who is a member of one of the recognised religions)
<i>dīn</i>	religion
<i>dīwān</i> , pl. <i>dawāwīn</i>	ledger; chancellery, archive; council
<i>dīwān al-mazālim</i>	court of appeal (cf. <i>mazālim</i>)
<i>dīya</i>	blood money, wergild, compensation payable for killing or injury in order to prevent vengeance (talion, <i>qiṣāṣ</i>)
<i>faqīh</i>	law scholar
<i>far'</i>	sg. of <i>furū'</i>
581 <i>farā'id</i> , sg. <i>farīda</i>	(fixed) share of an inheritance; sometimes used in place of 'inheritance law'
<i>farḍ</i>	duty, necessary action
<i>farḍ 'ayn</i>	personal duty
<i>farḍ kifāya</i>	duty incumbent on a sufficient number (if the sufficient number of obligated people has been reached, others are exempt)
<i>fāsid</i>	contestable (but effective otherwise)
<i>faskh</i>	objection, annulment
<i>fātiḥa</i>	the opening sura of the Quran (often recited to confirm an engagement)
<i>fatwā</i> , pl. <i>fatāwā</i> , <i>fatāwī</i>	expert opinion (by a qualified scholar, <i>mufti</i>)
<i>fetwa</i>	Turkish form of <i>fatwā</i>
<i>fiqh</i>	jurisprudence
<i>fiqh al-aqalliyāt</i>	'minority <i>fiqh</i> ', applicable where Muslims are in the minority
<i>fitna</i>	test, challenge; often refers to the internal wars after the split between Sunnis and Shi'ites
<i>fuqahā'</i>	pl. of <i>faqīh</i>

<i>furūʿ</i>	'branching out'; technical term for the application/implementa- tion of norms (complementary term to <i>uṣūl</i>)
<i>gharar</i>	speculation, high-risk transaction, aleatory transactions
<i>ghaṣb</i>	usurpation, unlawful removal
<i>ghayr mumayyiz</i>	not legally competent (complementary term to <i>mumayyiz</i>)
<i>ghayr nāfidh</i>	provisionally ineffective (not enforceable)
<i>ḥaḍāna</i>	care of the person
<i>ḥadd</i>	limit, boundary; sg. of <i>ḥudūd</i>
<i>ḥadīth</i>	hadith, tradition of the prophet Muhammad's words and deeds (cf. also <i>muḥaddith</i>)
<i>ḥāfiẓ</i>	highest police administrator (often synonymous with <i>ṣāḥib al-shurṭa</i> or <i>wālī al-aḥdāth</i>)
<i>ḥajj</i>	pilgrimage to Mecca in the month of <i>dhū-l-ḥijja</i> , one of the 'five pillars of Islam' (as opposed to the 'lesser pilgrimage' which may be undertaken at any time, 'umra)
<i>ḥakam</i>	mediator, arbitrator
<i>ḥākimiyyat Allāh</i>	rule, God's sovereignty (Islamist concept of government)
<i>ḥaqq</i> , pl. <i>ḥuqūq</i>	law, legal position; in the plural frequently: jurisprudence (modern)
<i>ḥarām</i>	prohibited (by religious law)
<i>ḥarbī</i>	hostile stranger without protection (cf. <i>dār al-ḥarb</i>)
<i>ḥawāla</i>	money order, 'promissory note' (a tool of cashless payments); similar to <i>suftaja</i>
<i>hiba</i>	(contract of) gift
<i>hidāya</i>	guidance
<i>ḥikma</i>	deeper meaning, purpose of a rule; in this respect synonymous with <i>maqāṣid</i>
<i>ḥīla</i> , pl. <i>ḥiyal</i>	legal stratagem (to avoid inopportune normative restrictions)
<i>ḥalf</i> , <i>ḥilf</i>	oath
<i>ḥirāba</i>	cf. <i>qatʿ al-ṭarīq</i>
<i>ḥirz</i>	safekeeping (precondition for the Quranic crime of <i>sariqa</i>)
<i>ḥirz bi-l-ḥāfiẓ</i>	personal safekeeping
<i>ḥirz bi-l-makān</i>	safekeeping in a (particular) place
<i>ḥisba</i>	market supervisors; town administration; right to <i>actio popu- laris</i> (in the interest of the community without being person- ally affected); cf. <i>muḥtasib</i>
<i>ḥiyal</i>	pl. of <i>ḥīla</i>
<i>ḥubs</i>	pious foundation, trust (used especially in North Africa, syn- onymous with <i>waqf</i>)
<i>hudna</i>	truce

<i>ḥudūd</i>	literally 'limits, boundaries'; law: the statutory crimes mentioned in the Quran)
<i>ḥukm</i>	norm, instruction; judgment; legal assessment
<i>ḥuqūq al-ādamiyīn</i>	'rights of the people', individual rights
<i>ḥuqūq al-'ibād</i>	as <i>ḥuqūq al-ādamiyīn</i>
<i>ḥuqūq Allāh</i>	'rights of God' (sometimes interpreted as rights of the community)
<i>'ibādāt</i>	actions, matters and rules concerning divine worship relating (primarily) to the relationship between God and man; opposite to <i>mu'āmalāt</i>
<i>ibāḥa aṣliyya</i>	fundamental permissibility (of all actions, unless they are forbidden)
<i>içtiḥat</i>	Turk. for <i>ijtihād</i>
<i>'idda</i>	period of waiting (for divorced or widowed women before they can remarry)
<i>iftā'</i>	everything relating to religious expert opinions (cf. <i>fatwā</i> , <i>muftī</i>)
<i>iḥrāz</i>	protection, preservation
<i>iḥtikār</i>	hoarding goods, abuse of monopoly positions in order to drive up prices
<i>iḥyā' al-mawāt</i>	reclamation of lands, which includes acquiring them
<i>ījāb</i>	offer (to agree a contract)
<i>ijāra</i>	rent, hire (of items and persons with the purpose of carrying out services or manufacturing)
<i>ijmā'</i>	consensus (decision) with binding force
<i>ijmā' ḍimnī</i>	implicit consensus
<i>ijmā' ṣarīḥ</i>	consensus reached unequivocally
<i>ijmā' sukūtī</i>	tacit consensus
<i>ijtihād</i>	independent reasoning (opposite <i>taqlīd</i>); cf. <i>mujtahid</i>
<i>ikhrāj</i>	removal (of stolen goods from safekeeping; element of the Quranic crime of <i>sariqa</i>)
<i>ikhtilāf al-madhāhib</i>	difference of opinion between the schools of law (who nevertheless recognise each other)
<i>ikhtilās</i>	fraud, misappropriation (as distinct from Quranic theft, <i>sariqa</i>)
<i>ilā'</i>	declaration of divorce by the husband by swearing to abstain from intercourse for at least four months
<i>'ilal</i>	pl. of <i>'illa</i>
583 <i>'illa</i>	<i>ratio legis</i> , actual concrete meaning and purpose of a legal norm (as distinct from the purpose beyond the norm, <i>ḥikma</i>)

<i>‘ilm</i>	knowledge, science, scholarship
<i>‘ilm al-ḥadīth</i>	science of tradition and transmission, hadith scholarship
<i>imām</i> , pl. <i>a‘imma</i>	leader of the community, prayer leader; in constitutional law ruler (frequently used synonymously with <i>khalīfā</i> , caliph); among the Shi‘ites the succession of rightful rulers)
<i>intihāb</i>	violent removal, robbery
<i>iqrār</i>	confession; acknowledgement; specifically of paternity
<i>iqṭā‘</i>	tax farming; official or military fief, frequently synonymous with <i>muqāṭa‘a</i> , <i>tīmār</i>
<i>irtidād</i>	cf. <i>ridda</i>
<i>isnād</i>	chain of transmitters of a hadith
<i>istikhlāf</i>	affirmation by oath
<i>istiḥsān</i>	‘considering (something) to be better’, preference for an interpretation (which usually goes against a possible conclusion by analogy)
<i>istiṣhāb</i>	continuation (of an established legal situation in the absence of later changes)
<i>istiṣlāḥ</i>	taking the universal good into consideration (when interpreting norms) (synonymous with <i>al-maṣāliḥ al-mursala</i>)
<i>istiṣnā‘</i>	contract for work and materials
<i>ī‘tirāf</i>	cf. <i>iqrār</i>
<i>itlāf</i>	damage to property
<i>jihād</i>	jihād, endeavour, effort; historically: war to increase the territory under Muslim rule and to defend against aggression
<i>jizya</i>	poll tax (payable by adult male Muslims)
<i>kafā‘a</i>	equality of status, equality of birth (with regard to marriage)
<i>kafāla</i>	fosterage, taking someone into the family (without consequences for their status; functional alternative of adoption – <i>tabannī</i> – which is prohibited); surety agreement; guarantee agreement
<i>kaffāra</i>	fine, as penalty for breach of religious rules
<i>kāfil</i>	transferee of fosterage
<i>kaḥil</i>	warrantor, assignor
<i>kāfir</i>	unbeliever; sometimes used to refer to all non-Muslims, sometimes only to those who are not members of the <i>ahl al-kitāb</i>
<i>kalāla</i>	relatives with title to inherit in the collateral line (complementary term to <i>ba‘ḍiyya</i>)
<i>kalām</i>	theology (also as opposed to <i>fiqh</i> , jurisprudence) (cf. also <i>mutakallim</i>)

<i>kātīb</i>	specifically: court scribe
<i>khabar al-wāḥid</i>	hadith transmitted only by a few authorities (synonymous with <i>sunmat al-āḥād</i>)
<i>khalīfa</i> , pl. <i>khulafāʾ</i>	caliph, successor, representative
<i>khalīfat Allāh</i>	God's representative (self-image of some caliphs)
<i>khalīfat rasūl Allāh</i>	representative/successor of God's messenger (i.e. Muhammad's, in his function as leader of the community)
<i>kharīṭa</i>	envelope (for documents)
<i>khāṣṣ</i>	special, specific (complementary term to <i>ʿamm</i>)
<i>khaṭaʾ</i>	mistake; legal: negligence
<i>khāʾtib</i>	fiancé
<i>khiṭba</i>	engagement
<i>khiyāna</i>	misappropriation
<i>khiyār, khiyār al-sharṭ</i>	right to withdraw
<i>khiyār al-ruʾyā</i>	purchase on approval/ 'to view'
<i>khiyār al-taʾyīn</i>	alternative obligation
<i>khulʿ</i>	the wife's right to seek a divorce in exchange for repaying the dower (traditionally only a contractual right, nowadays also lawful right in some countries)
<i>al-khulafāʾ al-rāshidūn</i>	the (four) 'rightly guided caliphs' (Muhammad's direct successors: Abū Bakr, ʿUmar, ʿUthmān, ʿAlī)
<i>khums</i>	a fifth, the fifth part (under Sunni law: of the spoils of war; under Shiʿite law: of all taxable goods)
<i>khuṭba</i>	Friday sermon
<i>kitāb</i>	document; book; chapter in a book
<i>kuffār</i>	pl. of <i>kāfir</i>
<i>kufr</i>	unbelief
<i>liʿān</i>	divorce by means of the husband swearing an oath that his wife committed adultery, and the wife's counter-oath
<i>luzūm</i>	binding legal effect
<i>madhhab</i> , pl. <i>madhāhib</i>	school (of law); opinion endorsed by a school
<i>madrasa</i> , pl. <i>madāris</i>	place of education, madrassa
<i>mafqūd</i>	missing, missing person
<i>maḥāḍir</i>	minutes, records
<i>mahjūr</i>	of limited legal capacity
<i>mahr</i>	dower (from the groom to the bride) (synonymous with <i>ṣadāq</i> in this specific sense)
<i>mahr al-mithl</i>	customary dower (if no amount has been set)
584 <i>mahr muʿajjal/muʿakhhār</i>	deferred (portion of the) dower (complementary term to <i>mahr muʿajjal/muqaddam</i>)

- mahr mu'ajjal/muqaddam* immediately payable (portion of the) dower (complementary term to *mahr mu'ajjal/mu'akhhkar*)
- mahr musammā* concrete, fixed dower
- majlis* literally: place where one sits; contract negotiation; trial; gathering
- majlis baladī* local/regional assembly of parliament
- majlis al-nawwāb* parliament
- majnūn* mentally ill; mentally ill person (i.e. not legally capable)
- makhṭūba* fiancée
- makrūh* disapproved of (seen as negative from the religious point of view, but not without legal effect)
- maks*, pl. *mukūs* unlawful charge, customs duty
- malik*, pl. *mulūk* king, ruler
- malik al-mulūk* 'king of kings' (title) (Pers. *Shāhānshāh*)
- mandūb* recommended, desired (seen as positive from the religious point of view, but not legally mandatory)
- manfa'a* use, right of use
- manqūl*, pl. *manqūlāt* movable item, good
- maqāṣid (al-sharī'a)*, sq. *maqṣad* purposes, fundamental aims of the sharia; in this sense synonymous with *ḥikma*
- marad al-mawt* fatal illness (which has consequences as regards the validity of legal transactions undertaken in this state)
- marja'e taqlīd* (Pers.-Ar.) in the Shi'a: highest and most respected scholar whose statements are accepted without any criticism
- al-maṣāliḥ al-mursala* taking the universal benefit into account (when interpreting norms) (synonymous with *istiṣlāḥ*)
- ma'ṣūya* rebellion, sin
- maṣlaḥa (ʿamma)* universal benefit, common good
- maṣlaḥa mulghāt* abrogated benefit (cannot be used as an argument)
- mansūkh* displaced, abrogated (norm); (complementary term to *nāsikh*)
- matn* contents, text of a hadith
- ma'tūh* feeble-minded (person); put on the same level as either the person with no legal capacity, or the person with limited legal capacity
- maẓālim* option to appeal against court or administrative rulings
- mehir* Turk. for *mahr*
- meşveret* (Turk.) cf. *şura*
- milk* property (right)
- misyār (marriage)* convenience marriage, "travellers' marriage" (granting only few rights for the bride)

- muḥaddith*, pl. *muḥaddithūna* hadith scholar, transmitter
- mu'āhada* synonym of *muwāda'a*
- mu'āmalāt* interpersonal relations, matters and regulations relating (primarily) to relations between persons in this world
- mubāḥ* permitted (with a neutral evaluation)
- mubāra'a* two-sided divorce (similar or equal to *khul'*)
- mudabbar* slave who has been promised that he will be manumitted after his master's death
- muḍāraba* silent partnership, 'limited partnership'
- muḍārib* director of a *muḍāraba*
- muḡāwaḡa* general partnership
- muḡtī* 'jurisconsult', 'consultant' (cf. *fatwā*) (complementary term to *mustaḡtī*)
- muḡāraba* cf. *qaṭ' al-ṭarīq*
- muḡkam* unambiguous, not requiring interpretation
- muḡṣan* married person of an age of criminal responsibility who commits the Quranic crime of fornication (*zinā*)
- muḡtasib* market overseer, head of the town's administration (synonymous with *walī al-ḡisba*)
- mujtahid* someone who interprets norms using his own reason (opposite to *muqallid*); cf. *ijtihād*
- 585 *mukallaḡ*, pl. *mukallaḡūna* mandatory, subject to a norm (cf. *taklīf*); of age, possessing legal capacity
- mukātab* partner in a redemption contract (slave)
- mukhtalīs* fraudster, embezzler (cf. *ikhtilās*)
- mukūs* pl. of *maks*
- mulk* property
- mumayyiz* (someone) of limited legal capacity (complementary term to *ḡhayr mumayyiz*); cf. *maḡjūr*
- munāsakha* representation (on behalf of a predeceased party in the context of inheritance law)
- muntaḡiḡ* legally contestable, challengeable
- muqallid* someone who adopts earlier opinions without any criticism (opposite of *mujtahid*); cf. *taqlīd*
- muqāṭa'a* cf. *iqṭa'*
- muqāyada* exchange (contract); cf. also *ṣarf*, currency exchange
- murābaḡa* purchase with transparent calculation of purchase price from the cost of acquisition
- murtadd* apostate
- musāḡāt* agricultural irrigation company

<i>musāwāt</i>	equal rights
<i>mushāraka</i>	cf. <i>sharika/shirka</i>
<i>mushāwara</i>	cf. <i>shūrā</i>
<i>mustaftī</i>	someone requesting (a <i>muftī</i> 's) expert opinion
<i>mustahabb</i>	cf. <i>mandūb</i>
<i>musta'mīn</i>	non-Muslim who has temporary protection for the time he spends in the territory under Muslim rule; cf. <i>amān</i>
<i>mut'a</i> , also <i>matā'</i>	payment to support the divorced wife
<i>mut'a</i> (marriage)	temporary marriage (Shi'ite)
<i>mutakallim</i> , pl. <i>mutakallimūn</i>	'theologian' cf. <i>kalām</i>
<i>muṭallaqa bā'in</i>	irrevocably divorced (repudiated) wife; cf. <i>ṭalāq</i>
<i>muṭallaqa raj'i</i>	revocably divorced (repudiated) wife; cf. <i>ṭalāq</i>
<i>mutawallī</i>	administrator of a trust or foundation
<i>muwāda'a</i>	compromise agreement, peace treaty
<i>muwaththiq</i>	notary (synonymous with <i>shurūṭī</i>)
<i>muzāra'a</i>	agricultural company
<i>nabsh</i>	grave robbery
<i>nafaqa</i>	maintenance (payment)
<i>nāfidh</i>	enforceable by law
<i>nafs</i> , pl. <i>nufūs</i>	soul; human being; frequently meaning 'body', physical integrity
<i>nā'ib</i> , pl. <i>nawwāb</i>	deputy; district judge (representative of the <i>qāḍī</i>); ruler's title in the Mughal Empire 'nabob'
<i>naskh</i>	displacement; abrogation (of norms by other norms) (sometimes referred to as <i>nāsikh wa-mansūkh</i>)
<i>nāsikh</i>	displacing; abrogating (norm); (complementary term to <i>mansūkh</i>)
<i>naṣṣ</i> , pl. <i>nuṣūṣ</i>	'text'; as a technical term usually the entirety of norms found in the Quran and the sunna, or also those norms whose substance is fixed for eternity
<i>nikāh</i>	marriage (synonymous with <i>zawāj</i>); contracting a marriage (synonymous with <i>tazwīj</i>)
<i>nikahnama</i> (Anglo-Indian)	marriage contract
<i>niṣāb</i>	minimum amount of stolen goods (prerequisite for the Quranic crime of <i>sariqa</i>)
<i>niyya</i>	intention, will (<i>forum internum</i>)
<i>niyāba</i>	representation
<i>niyāba 'amma</i>	public prosecution department
<i>nizām</i>	order; administrative regulation (functionally: law and in this sense synonymous with <i>qānūn</i>)

	<i>nujūz</i>	wife's unlawful rebellion (with negative legal consequences)
	<i>qabūl</i>	acceptance (of a contractual offer, <i>ijāb</i>)
586	<i>qadhf</i>	wrongful accusation of fornication, of illegal intercourse (Quranic crime)
	<i>qāḍī</i>	judge
	<i>qāḍī al-ʿaskar</i>	military judge
	<i>qāḍī l-quḍāt</i>	chief judge
	<i>qānūn</i> , pl. <i>qawānīn</i>	administrative regulation (functionally frequently used as 'law'; in this sense synonymous with <i>nizām</i>) (loan word after Gr. <i>kanon</i>)
	<i>qānūn-nāmeḥ</i>	(Ottoman Turk.) administrative regulation(s) (frequently used to mean law code)
	<i>qarḍ</i> , <i>qirāḍ</i>	(interest-free) credit
	<i>qaṭʿ al-ṭarīq</i>	(aggravated) highway robbery (Quranic crime) (synonymous with <i>ḥirāba</i> / <i>muḥārabā</i>)
	<i>qaṭʿī</i>	cf. <i>ḍalīl qaṭʿī</i>
	<i>qiṣāṣ</i>	retribution; talion law
	<i>qiyās</i>	conclusion by analogy and other types of conclusion such as <i>argumentum e contrario</i> (converse conclusion)
	<i>qiyās al-ʿaks</i>	usually: <i>argumentum e contrario</i> (converse conclusion)
	<i>quḍāt</i>	pl. of <i>qāḍī</i>
	<i>radʿ</i>	deterrent (synonymous with <i>zajr</i>)
	<i>radd</i>	specifically: increasing the inheritance quotas (until the estate is exhausted); (complementary term to <i>ʿawl</i>)
	<i>rahn</i>	pledge, pledging agreement
	<i>raʿy</i>	opinion, view; when used as a technical term: independent reasoning and deciding accordingly (cf. <i>ahl al-raʿy</i>)
	<i>ribā</i>	usurious interest; interest (controversial); usury
	<i>ribā al-faḍl</i>	usury through agreeing an excessive consideration (as opposed to an equivalent one)
	<i>ribā al-jāhiliyya</i>	usury according to pre-Islamic practice, 'bonus'
	<i>ribā al-nasīʾa</i>	interest-bearing credit (controversial); usurious credit
	<i>ridḍa</i>	apostasy from Islam
	<i>rugūʿ</i>	retracting (esp. evidence)
	<i>rushd</i>	discretion (prerequisite of majority and full legal capacity); cf. <i>bulūgh</i>
	<i>sabb al-nabī</i>	reviling the prophet (Muhammad) (sometimes regarded as apostasy)
	<i>ṣadāq</i>	dower (from the groom to the bride) (in this specific sense synonymous with <i>mahr</i>)

<i>ṣadaqa</i>	(voluntary) alms
<i>sadd al-dharāʿi</i> ^c	'blocking the means', the rule that everything that might lead to a prohibited action is also prohibited
<i>ṣaḥāba</i> , sg. <i>ṣaḥābī</i>	here: the companions of the prophet (Muhammad)
<i>ṣāḥib al-māl</i>	investor in a <i>muḍāraba</i>
<i>ṣāḥib al-shurṭa</i>	chief of police (frequently used synonymously with <i>wālī al-aḥdāth</i> or <i>ḥāfiẓ</i>)
<i>sahm</i>	portion; modern: share
<i>salam</i>	forward purchase
<i>ṣalāt</i>	ritual prayer (to be performed five times a day), one of the 'five pillars' of Islam
<i>ṣarf</i>	currency exchange (agreement)
<i>sariqa</i>	theft (Quranic crime)
<i>ṣawm</i>	fasting (in the month of Ramadan as one of the 'five pillars' of Islam)
<i>ṣeyh ül-Islām</i> (Turk.–Ar.)	highest-ranking Islamic scholar (position in the Ottoman Empire)
<i>shahāda</i>	witness statement; Islamic creed ('There is no God but God, and Muhammad is the messenger of God'), one of the 'five pillars' of Islam
<i>shāhānshāh</i> (Pers.)	'king of kings' (title) (Ar. <i>malik al-mulūk</i>)
<i>sharʿ man qablanā</i>	'laws of those who came before us'
<i>shārīʿ</i>	lawgiver (God)
<i>sharīʿa</i>	(sharia) in the broader interpretation all religious and legal norms of Islam as well as the principles and rules to deduce and interpret them; in the narrower interpretation particularly the Islamic norms of personal status, family and inheritance law, as well as Quranic criminal law and, in parts, the law relating to pious foundations and trusts
<i>sharika/shirka</i>	several persons having a stake in items or contracts; company (also called <i>mushāraka</i>) 587
<i>sharṭ</i>	condition, contractual clause; specific meaning: payment to the bride's family (Yemen)
<i>shibh al-ʿamd</i>	quasi-deliberate intent
<i>shirb</i>	(contracts concerning) water rights
<i>shirka, sharika</i>	general partnership
<i>shubha</i>	legal doubt (which rules out a norm being applied)
<i>shuḥʿa</i>	pre-emptive right
<i>shūrā</i>	council, consultation (synonymous with <i>mushāwara</i> , <i>mashwara</i>)

<i>shurb al-khamr</i>	consumption of wine or alcohol (Quranic crime)
<i>shurṭa</i> , pl. <i>shuraṭ</i>	police (authority); executive of the administration; the plural often used to mean 'police matters'
<i>shurūṭ</i> , sg. <i>sharṭ</i>	contract clauses, conditions; formulary
<i>shurūṭī</i>	notary (synonymous with <i>muwaththiq</i>)
<i>sijill</i> , pl. <i>sijillāt</i>	diploma, document, file, list
<i>simsār</i> (Ar.–Pers.)	commercial broker
<i>siyar</i>	specific meaning: (regulations of, literature on) law concerning foreigners and international law
<i>siyāsa</i>	administration (administrative competency of the ruler)
<i>siyāsa shar'īyya</i>	lawful administration
<i>suftaja</i>	cf. <i>hawāla</i>
<i>ṣulḥ</i>	compromise, compromise agreement
<i>sultān</i>	(secular) ruler
<i>sunna</i>	practice, custom; in religious law, a norm that can be traced back to Muhammad; the entirety of hadiths; something that is a recommended action from a religious point of view (with the same meaning Turk. <i>sünnet</i>)
<i>sunnat al-āḥād</i>	hadith transmitted only by individual traditionists (synonymous with <i>khābar al-wāhid</i>)
<i>sunna mashhūra</i>	a hadith transmitted by only few sources at first, but later by many
<i>sunna mutawātira</i>	a hadith transmitted by many authorities from the very first market
<i>sūq</i>	
<i>ṣura</i> (Turk.)	council, consultation (from Ar. <i>shūrā</i>) (synonymous with <i>meşveret</i>)
<i>tabannī</i>	adoption (prohibited); cf. <i>kafāla</i>
<i>tadākhul</i>	competition (between norms or rules)
<i>ta'dīb</i>	reform (of a criminal)
<i>tafsīr</i>	commentary, explanation of the Quran
<i>tafrīq</i>	judicial divorce at the request of the wife (synonymous with <i>taṭlīq</i>)
<i>taḥkīm</i>	arbitration
<i>takāful</i>	'vouching for one another'; functionally: insurance
<i>takfīr</i>	declaring someone an unbeliever, accusing someone of apostasy
<i>takhayyur</i>	'selection'; adopting the opinion of another school of law
<i>taklīf</i>	commissioning, charging, legal capacity (cf. <i>mukallaf</i>)
<i>ṭalāq</i>	repudiation, one-sided divorce by the husband (cf. <i>tafrīq</i> , <i>taṭlīq</i> regarding the wife)

- ṭalāq aḥsan* most reputable form of repudiation (single declaration and passage of the period of waiting without the declaration being revoked)
- ṭalāq al-tafwīḍ* delegating the right of repudiation to the wife (by contract)
- ṭalāq bāʿin* irrevocable repudiation (of the wife)
- ṭalāq bāʿin baynunā kubrā* 'greater' irrevocable repudiation (with the consequence that the divorced wife must enter into and dissolve another marriage before the repudiating husband can marry her again)
- ṭalāq bāʿin baynunā suḥrā* 'lesser' irrevocable repudiation (without the consequences entailed in the 'greater' repudiation, *ṭalāq bāʿin baynunā kubrā*) 588
- talaq-e tafweed* Anglo-Indian version of *ṭalāq al-tafwīḍ*
- ṭalāq ḥasan* recognised form of repudiation (repeated declaration at set times and passage of the period of waiting once the last declaration has remained unrevoked)
- ṭalāq rajʿī* revocable repudiation (of the wife)
- talfīq* conflation of the views of several schools of law into one new view
- taqādum* (statutory) limitation
- taqlīd* uncritical adoption (of earlier opinions); (opposite of *ijtihād*); cf. *muqallid*
- taṭlīq* judicial divorce at the request of the wife (synonymous with *tafrīq*)
- tawba* active repentance (may lead to exemption from punishment)
- taʿwīl* interpretation, exegesis
- tawlīj* (controversial) transfer of property onto children (in order to evade the consequences of statutory inheritance law)
- taʿzīr* penal law outside of Quranic crimes (*ḥudūd*)
- tazwīj* entering into a marriage (synonymous with *nikāh*)
- tijāra* commerce, trade
- tīmār* cf. *iqṭāʿ*
- triple talaq* (Anglo-Indian) triple declaration of divorce (according to the Hanafite view this leads to the marriage being irrevocably dissolved)
- ujra* rent, fee for certain contractual services
- ujrat al-mithl* customary rent, customary fee for certain contractual services (in the absence of relevant agreements)
- ʿulamāʾ* scholars; sometimes used to refer to both religious and law scholars, sometimes used as specific designation for religious scholars as opposed to law scholars (*fuqahāʾ*)

<i>ūlū</i> (gen. and acc. <i>ūlī</i>)	<i>al-amr</i>	those who give the orders, who are in charge
<i>umarāʾ</i>		pl. of <i>amīr</i>
<i>umma</i> , pl. <i>umam</i>		(the Muslim) community
<i>ʿuqūba</i> , pl. <i>ʿuqūbāt</i>		penalty (in the legal sense)
<i>ʿuqūd</i>		contracts, pl. of <i>ʿaqd</i>
<i>ʿurf</i>		custom, customary law
<i>ʿurfī marriage</i>		marriage concluded without adhering to the state's legal prerequisites
<i>ʿushr</i>		tithe
<i>uṣūl</i>		basics, foundations, normative basis (literally: 'roots')
<i>uṣūl al-fiqh</i>		doctrine of Islamic norms; norms and the tools for deducing and interpreting them
<i>velāyat-e faqīh</i> (Pers.-Ar.)		government by the law scholars
<i>wadʿa</i>		deposit (contract)
<i>wājib</i>		necessary action under religious law (often synonymous with <i>farḍ</i>)
<i>wakīl</i> , pl. <i>wukalāʾ</i>		deputy, representative
<i>al-walāʾ wa l-barāʾ</i>		"loyalty and disavowal", concept of defining Muslim loyalty being restricted to Muslims
<i>walāya</i>		guardianship (also <i>wilāya</i>)
<i>walī</i>		guardian
<i>wālī</i> , pl. <i>wulāt</i>		provincial governor, governor; manager of a charitable foundation (in this sense synonymous with <i>mutawallī</i>)
<i>wālī al-aḥdāth</i>		chief of police; frequently synonymous with <i>ṣāḥib al-shurṭa</i> or <i>ḥāfiẓ</i>
<i>wālī al-ḥisba</i>		market overseer, head of the town's administration (synonymous with <i>muḥtasib</i>)
<i>waqf</i> , pl. <i>awqāf</i>		foundation, trust
<i>wasatī</i>		middle-grounded (approach to reconcile the exigencies of Muslim faith with modern living conditions)
<i>waṣīyya</i>		will, legacy
<i>wathīqa</i> , pl. <i>wathāʾiq</i>		document, charter, diploma
<i>wazīr</i> , pl. <i>wuzarāʾ</i>		minister, chief of the administration; 'vizier'
589 <i>wikāla</i>		representation, authority, mandate
<i>wikāla ʿamma</i>		general authority, general mandate
<i>wilāya</i>		administrative district; guardianship (also <i>walāya</i>)
<i>wilāyat al-ijbār</i>		guardianship for concluding a forced marriage
<i>zajr</i>		deterrent (synonymous with <i>radʿ</i>)
<i>zakāt</i>		mandatory alms tax, duty incumbent on Muslims levied on certain items, one of the 'five pillars' of Islam

<i>zandaqa</i>	heresy
<i>ẓannī</i>	cf. <i>ḍalīl ẓannī</i>
<i>zawāj</i>	marriage (synonymous with <i>nikāḥ</i>)
<i>zawāj al-jabr</i>	forced marriage
<i>ẓihār</i>	divorce declared by the husband by means of comparing his wife to a relative whom he would be prohibited to marry
<i>zinā</i>	fornication, illicit intercourse (Quranic crime)

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