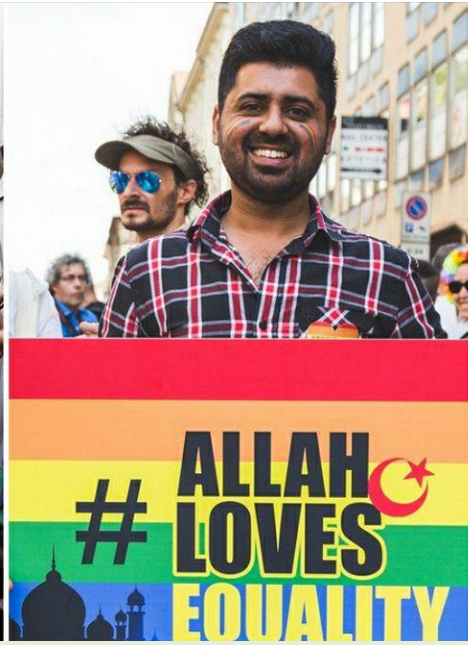©Allah Loves Equality
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Islamic Law
and
Minorities

edited by

CARLO DE ANGELO and SERENA TOLINO

Contents

Obituary
In memory of Prof. Agostino Cilardo[†]

CARLO DE ANGELO, SERENA TOLINO

It was with great sadness that we learned of the passing of Professor Agostino Cilardo, who died on July 15, 2017, after a struggle with pancreatic cancer, while we were completing this special issue, which is dedicated to his memory. He leaves behind a wife and three children.

Prof. Cilardo was born in San Prisco, in the province of Caserta, on August 19, 1947. His interest in Arabic and in Islamic studies started quite early in his life. In fact, he already knew Arabic when he begun studies at the University of Naples "L'Orientale". In 1974 he obtained his first MA degree in Political Science, with a thesis on one of the topics that would occupy his entire academic career, the origins of Islamic Law. The thesis was published in 1990 as *Teorie sulle origini del diritto islamico* (Theories on the Origins of Islamic Law, IPO – Istituto per l'Oriente "Carlo Alfonso Nallino", Rome). In 1981 he obtained a second degree in Islamic Studies from the same university with the thesis: *Il diritto di famiglia in Egitto*, published in English as "The Evolution of the Muslim Family Law in Egypt," in *Oriente Moderno*, 4-6 (1985): 67-124. Prof. Cilardo's intellectual curiosity and constant search for knowledge led him to pursue a four-year course of theology at the Higher Institute of Religious Sciences of Capua (Caserta), which he successfully completed in 1993.

He has become particularly well-known and appreciated for his research on the Islamic law of inheritance, with his comprehensive publications *Diritto ereditario islamico delle scuole giuridiche ismailita e imamita*, published in 1993, and *Diritto ereditario islamico delle scuole giuridiche sunnite (hanafita, malikita, shafi'ita e hanbalita) e delle scuole giuridiche zaydita, zahirita e ibadita*, published in 1994. In all, Prof. Cilardo published 7 books, 20 articles in academic magazines, 24 articles in congress proceedings, 16 book chapters, and 14 entries in various encyclopedias; he has also edited 14 volumes and written an introduction to a book, 3 review articles and 17 reviews.

Prof. Cilardo was an educator for more than forty years. At the beginning of his academic career he worked as a lecturer at the University of Bari and at the University of Naples "L'Orientale", teaching both Arabic language and Islamic law. In 1994 he was appointed Associate Professor of "Storia e Istituzioni del mondo musulmano" (History and Institutions of the Islamic World) and of "Diritto musulmano e dei Paesi islamici" (Islamic Law and Law of the Islamic Countries). In 2005 he became full Professor at the University of Naples "L'Orientale". During his time there his diligence and devotion to the institution earned him the post of Dean of the Faculty of Arabic and Islamic Studies, in 2006. He later became Coordinator of the PhD programme on 'Studies on the Near East and Maghreb:

Cultural Specificities and Intercultural Relations' and also of the PhD programme on "Asia, Africa and the Mediterranean."

It is at the University of Naples "L'Orientale" that we met him. He was our professor during our entire academic career. We attended hundreds of hours of his lessons, during which he instilled in us the love for Islamic Law.

Prof. Cilardo was Carlo's supervisor for both his MA and PhD thesis. Carlo felt particularly honoured when Prof. Cilardo chose him to be his assistant. They worked together for sixteen years; a unique experience from a personal, and professional/scientific point of view. To Carlo, Prof. Cilardo is not only the person who transmitted the passion for Islamic law, but also an example of correctness and intellectual honesty.

As regards Serena, Prof. Cilardo was her supervisor for her BA, MA, and PhD thesis. Serena still recalls when she asked him to supervise her BA thesis. Being overwhelmed with many BA and MA theses, he seemed reluctant to follow her research at the beginning. But he rapidly changed his mind when he saw how interested she was in Islamic Law.

In 2003 Prof. Cilardo became general Editor of *Studi Maġrebini*; in 2011 the general editor of the book series *Arab-Islamic Culture* (Edizioni Scientifiche Italiane, Naples); and in 2016 he was elected vice-president of the Union Européenne des Arabisants et Islamisants.

An expert in the Arabic language, he always encouraged his students to spend long periods of time in the Arab world because he considered mastering Arabic a priority for any scholar of Islamic Studies.

He spent extensive periods in different Arab countries, and especially in Egypt, where his mission was to trace materials difficult to access, for his work, a mission whose success was possible only because of his passion for Islamic law. Indeed, one of the things he used to remind us was how much digitalization has changed research, and how difficult it was for him to have access to original sources when he started studying Islamic law.

A lover of classical music and the opera, he was a supporter of intercultural exchanges between people of diverse cultures and of interreligious dialogue. His premature death did not allow him to conclude the impressive number of projects he was working on, projects to which he would have devoted all his time and efforts after his retirement, scheduled for November 2017.

We will miss him not only for his impressive knowledge, his love of knowledge in general and the love of Islamic Law he instilled in us, but also for his humanity, his discretion, and his honesty.

Introduction
Minorities as Subjects and Minorities as Producers of Islamic Law: Past and Present[*]

CARLO DE ANGELO (University of Naples "L'Orientale")
SERENA TOLINO (University of Hamburg)

1. Introduction: definitions of minority

The concept of 'minority' has proven to be a difficult one to define. Indeed, to quote Ulrike Barten, 'Decades of discussions have not led to a legally binding definition of the term "minority".'[1] Even when, in 1992, the United Nations adopted the 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', and even though a number of rights were guaranteed to minorities and to persons belonging to these minorities, a clear definition of 'minority' was never given. Similarly, a definition is not given in the *Framework Convention for the Protection of National Minorities* adopted in 1995 by the Council of Europe.[2]

Indeed, there have been different attempts in international law to define such a concept. The first attempt in this field was by Pablo de Azcárate, at that time director for the Minorities Questions Section at the League of Nations. In a study entitled *League of Nations and National Minorities – an Experiment*, de Azcárate proposed a definition of 'national minority' that, according to him, refer to 'a more or less considerable proportion of the citizens of a state who are of a different "nationality" from that of the majority'.[3] He went on to say that 'what in the last resort constitutes the distinctive and characteristic features of a national minority is the existence of a national consciousness, accompanied by linguistic and cultural differences'.[4] While the focus of this definition is clearly on national minorities, as the title of his study shows, it is interesting to note that de Azcárate mentions language and culture as distinctive elements that a national minority should have to distinguish itself, together with, obviously, a feeling of national consciousness. Language is also mentioned

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[*] Carlo De Angelo is the author of paragraph no. 2. Serena Tolino is the author of paragraphs nos. 1, 3 and 4. The conclusion has been written by both the authors. The Arabic transliteration system we used for this special dossier is ISO 233. Terms that are included in the Merriam Webster dictionary have been not transliterated. – We would like to thank Pat FitzGerald for her careful copy-editing of the special dossier.

[1] BARTEN 2015b: 162.

[2] COUNCIL OF EUROPE 1995.

[3] DE AZCÁRATE 1945: 3.

[4] Ibid.: 4.

in the definition that, some years later, would become the standard definition of minority for international law.

This definition was proposed in 1979 by Francesco Capotorti, at that time UN Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in relation to Art. 27 of the International Covenant on Civil and Political Rights (ICCPR),[5] which mentions ethnic, religious or linguistic minorities without defining them. According to Capotorti's definition, a minority is:

> A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[6]

This definition mentions linguistic characteristics, as does de Azcárate's. However, instead of cultural differences, here ethnic and religious characteristics are mentioned. Moreover, it is clearly mentioned that this group should constitute a 'numerically inferior group'. A similar definition was proposed few years later, in 1985, by Jules Deschênes, at the time head of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. He defined a minority as:

> A group of citizens of a state, constituting a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and law.[7]

The main difference with Capotorti's definition here is the reference to the 'collective will to survive', with the aim of achieving 'equality with the majority in fact and law'. Even though these three definitions are slightly different, they all agree on some aspects: the fact that a minority should be as such also from the numerical point of view, and the solidarity between its members.[8] It is also clearly stated, at least in Capotorti's and Deschênes's definitions, that to be a minority it should be in a 'non-dominant position': clearly, a minority in a dominant position would be not defined as a minority, but as an elite instead.

This is also the approach taken by sociologists. For example, in 1945 the American sociologist Louis Wirth defined a minority as:

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5 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

6 CAPOTORTI 1979: 96, par. 568.

7 DESCHÊNES 1985: 30.

8 Another issue that has often been discussed in the literature is whether membership of a minority is somehow automatic or is decided by choice, and whether a minority should have citizenship or not in order to be qualified as such. See BARTEN 2015a: 171 and EIDE 1999: 1.

a group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and unequal treatment and who therefore regard themselves as objects of collective discrimination.[9]

Wirth focused not so much on the fact that a minority should also be a numerical one, as this is not even mentioned, but more explicitly on the different possibilities that a minority has to have access to power. The people in question are singled out because of physical or cultural characteristics. The American sociologist Richard A. Schermerhorn speaks more generally of 'diversity', stating that:

> This analysis of minority groups begins with the observation that they are sub-forms of a wider classification which, for the sake of convenience, can be termed cultural subordinates. Such cultural subordinates are groups in any society set off from the rest of the population by the two dimensions of cultural distinctiveness on the one hand and some form of subjection on the other. The first is the dimension of diversity while the second is the dimension of power. These are quite disparate analytic elements since the first refers to internal qualities or characteristics while the second is wholly relational. Yet both categories are necessary to delimit the meaning of cultural subordinates.[10]

Even though several decades have passed since these attempts to define what constitutes a minority, a definitive definition is still missing. However, in the meantime research on minorities has proceeded in several directions and minority studies have become an independent field of study, especially with regard to ethnic minorities. Nevertheless, as both scholars and activists have demonstrated, the differentiation between a dominant group and a minority can be based not only on race and ethnicity, but also on other characteristics, like for example gender, religion, language, sexuality, wealth and health. In this special issue we decided to focus primarily on how Islamic law deals with religious and/or sexual minorities.

2. Muslim and non-Muslim minorities

The word minority is rendered in Arabic with the term *aqalliyya* (pl. *aqalliyyāt*), which derives from the root *qalla*; this root means 'to be or become little, small, few'. The terms *qilla* and *qalīl* also derive from *qalla*. *Qilla* is translated with the nouns 'smallness, paucity, scarceness', while *qalīl* (pl. *aqillā'* or *qilāl*) is rendered with the words 'small, few, scarce, scant', used as adjectives or indefinite pronouns. Some examples of the term *qalīl* used in this way are found in the Quran: '[…] And you will still observe deceit among them, except a few of them [*qalīlan*]' (V,13); 'And remember when you were few [*qalīlun*] and

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9 WIRTH 1945: 347.

10 SCHERMERHORN 1964: 238.

oppressed in the land […]' (VIII,26); '[…] And few [*qalīlun*] of My servants are grateful' (XXXIV,13).[11]

Generally, a minority is defined as such when its members constitute a small group of people who, on the level of culture, ethnicity, religion, language, etc., share the awareness of differentiating themselves from the majority of population of the state in which they live, and who express, implicitly or explicitly, the desire to preserve their distinctive traits. Compliance with the criteria of numerical inferiority and the possession of specific characteristics is not sufficient to attribute minority status to a community of individuals. To acquire minority status, in fact, it is necessary for this community to hold a non-dominant position.[12]

This general definition of minority seems to be accepted by some Muslim scholars.

Yūsuf al-Qaraḍāwī believed, for example, that 'minority' is to be understood by that group of people who live in a particular country and who differ from the majority of the population of the latter as regards religion (for example, Christian minorities in Syria, Egypt, Iraq, etc.), ethnicity (for example, Berbers in Algeria and in Morocco or Kurds in Iraq, Iran, Turkey and Syria), language (for example, the French-speaking minority in Canada), or the juridical school (*maḏhab*) to which it refers to, etc. The small number of members of this community is the reason why, in most cases, it is weak and consequently fails to oppose the majority that imposes choices on it that take into account only its peculiarities.[13]

Likewise, 'Abd al-Maǧīd al-Naǧǧār argued that the term minority refers to those small communities of individuals who do not share certain features of their identity with other members of the population to which they belong.[14]

In the same vein are the thoughts of Sulaymān Muḥammad Tūbūliyāk, according to whom a minority consists of a group of people who live within a state, a territory or a region, who differ from the majority of the other inhabitants by their culture, language or religion, and who make every effort to preserve these peculiarities, thus avoiding assimilation attempts made by the majority.[15]

The list of these authors should also include the name of Ṭaha Ǧābr al-'Alwānī who, not unlike his colleagues, argued that the meaning to be attributed to the term minority is that offered by international custom, that is a group or groups of citizens who differ from the majority of the population in their linguistic, religious and racial affiliation.[16]

'Abd al-Maǧīd al-Naǧǧār argued that by applying the general concept of minority to the followers of Allah it is possible to elaborate the definition of Muslim minority; this expression indicates that group of people who have accepted submission to Islam and who constitute, on a numerical level, the component minority of a society in which the majority do not profess the Islamic religion. However, this definition of Muslim minority raises some ques-

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11 The English translation of these verses is taken from *The Qur'ān – English Meanings*.

12 CAPOTORTI 1992: 107-108.

13 Al-QARAḌĀWĪ 2001: 20-24.

14 Al-NAǦǦĀR 2004: 202.

15 TŪBŪLIYĀK 1996: 28.

16 Al-'ALWĀNĪ 2004: 70.

tions: Is it possible to consider the Muslim minority as such if it has the power to apply Islamic law to all members of society? Can the definition of Muslim minority be applied to that group of Muslims who, although representing the majority of the population, do not hold power, which is instead managed by non-Muslims who apply non-Islamic laws to all members of society?

In order to answer these questions, it is necessary to consider that Islam has a characteristic that differentiates it from other religions. In fact, it claims that its rules govern every aspect of a Muslim's life, private and public. Consequently, compliance with these rules constitutes the fundamental criterion by which to evaluate the effective adherence of the Muslim to the dictates of his/her religion. The law that applies in the society in which the minority lives is therefore a fundamental component of the elaboration of the definition of the concept of Muslim minority. This last expression refers to that group of Muslims living in a society in which a non-Islamic legal system is applied by a non-Islamic governmental authority, or in which non-Islamic customs are in force. For this reason, it is possible to argue that Muslims who represent the majority of the population of a society in which there is no room for Islamic law should be considered a minority. Instead, the concept of Muslim minority is not applicable to that group of believers who, although constituting a small portion of the population, have the power to apply Islamic law in the society in which they live. In the same way, those Muslims who, despite constituting the majority of the population and having the power to apply, partially or totally, Islamic law voluntarily decide not to do so, cannot be considered a minority.[17]

According to Ṭūbūliyāk, the Muslim minority is represented by that group of people who differ from the majority of the population of the society in which they live because of the faith they profess and their desire to preserve it. From this last statement some scholars have inferred that Muslims are obliged to have an effective organization (to build mosques, to offer Arabic classes, to offer imam training courses, to appoint leaders, etc.); in fact, this organization is the only instrument by which they can safeguard their faith and their culture. In the absence of such organization, the minority loses the strength that comes from being composed of people who share the same characteristics, and turns into a multitude of individuals separated from each other who are destined, over time, to be assimilated by the majority.[18]

Al-Qaraḍāwī subdivides Muslims into two groups, depending on the countries (*awṭān*, sing. *waṭan*) in which they live. The first group includes all the followers of Allah who live in the *dār al-islām* (abode of Islam). By *dār al-islām* is meant the set of states in which the majority of the population is composed of Muslims who openly and publicly live their belonging to Islam, at least as regards everything related to the exercise of religious worship (the call to prayer, fasting, reciting the Quran aloud, the construction of mosques, the authorization to make pilgrimage, etc.), and personal status, the discipline of which is governed by the rules of Islamic law. The second group of Muslims is constituted by those believers who live outside the *dār al-islām*. This group is further divided into two categories, natives and immigrants. With the first category, al-Qaraḍāwī refers to those believers

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17 Al-Naǧǧār 2004: 203-204.

18 Ṭūbūliyāk 1996: 29.

who were born and raised in the non-Islamic countries where they live and where they constitute, in fact, a minority. The size of this minority varies from state to state: from one hundred and seventy million Muslims in India to the few millions of North American and Eastern European countries. The second category, that of immigrants, is composed of all those followers of Allah who have left the *dār al-islām* to emigrate to non-Islamic countries, looking for a job or for study reasons, etc., who have obtained a valid residence permit or, sometimes, citizenship, acquiring, in the latter case, the rights and duties that the relevant State assigns and imposes to all citizens. Consider, for example, the Maghrebians who migrated to France, the Turks who moved to Germany and the Muslims from Southeast Asia who settled in Britain.[19]

Mahmoud claimed that the expression Muslim minorities is used in relation to those followers of Allah who live in a non-Islamic country. In his opinion, among the various criteria that can be used as parameters to define an Islamic country, the most reliable is the numerical one: a state defines itself as Islamic when the inhabitants who profess Islam represent a quota higher than 50% of the population. Conversely, a state has a Muslim minority when the Muslims who live there represent less than 50% of the population.[20]

We can see that there are a number of opinions when arriving at the definition of minority, not only in international law but also among Muslim scholars. All in all, though, and especially considering the nature of this special issue, it seems obvious to us that religion plays a key role in the definition of a minority. Therefore, a part of this issue focuses on religious minorities as subjects of Islamic law. With this concept we refer on the one hand to non-Muslims living as minorities in the Muslim world, and on the other to Muslims living as minorities in non-Muslim countries.

As regards the first aspect, one of the first things that comes to mind is the special institution of the *ḏimma*. According to the classical theory, the people of the Book who live in territories ruled by Muslims enjoy a special protected status, the *ḏimma*, and in exchange for this protection they should pay a poll-tax, the so-called *ǧizya*. Paola Pɪᴢᴢᴏ's article looks at how this classical institution as been reinterpreted by contemporary scholars, focusing on the example of the so-called *wasaṭiyya* scholars, the self-defined 'moderate' or 'midstream' Islam. In her article, Paola Pizzo tackles how contemporary scholars belonging to this stream, like Yūsuf al-Qaraḍāwī, Ṭāriq al-Bišrī, Salīm al-ʿAwwā and Fahmī Huwaydī, discussed the issue of 'religious minorities' in relation to the modern state. In her article she shows how these scholars consider that the relationship between citizens and the state is nowadays based on the principle of a citizenship that is shared by all members of the society: in this sense, the concept of citizenship becomes a modern variation of the concept of the pact of the *ḏimma*.

The second aspect to be analysed is that of Muslims living in non-Muslim countries as a minority. According to Sʜᴀᴠɪᴛ, a plurality of minority Muslim groups exists in Europe. One such group is the Salafis. Shavit's paper focuses on the different strategies adopted in European Salafi discourse in an effort to disassociate *salafiyya* from al-Qaeda, ISIS and other Jihadi-Salafi movements. Shavit analyzes the diverse set of arguments invoked by

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19 Al-Qᴀʀᴀᴅāwī 2001: 15-20.

20 Mᴀʜᴍᴏᴜᴅ 1987: 39-40; Ṭūʙūʟɪʏāᴋ 1996: 29.

Salafis to defend their opposition to violent attacks on Western soil, including the religious duties to abide by contracts, respect Islamic rules of warfare and the regulations on initiating jihad and avoiding harming the interests of Muslims and of Islam in Europe.

Carlo DE ANGELO's article looks at the presence of Muslim minorities in the West from the viewpoint of Islamic rules elaborated by contemporary Muslim jurists who live or have lived in Islamic lands. It is possible to divide these *fuqahā'* into two main groups. The first main group consists of those jurists who have adopted an integrationist/ interactionist approach. In fact, they developed a set of rules that govern the conditions of Muslims living in non-Islamic contexts (*fiqh al-aqalliyyāt*), whose aim is to discipline the behaviour of Muslims so as to safeguard their identity, and to review the modes of relating to the non-Islamic State in which they live by encouraging them to develop a sense of belonging and respect for it. Such a development is, according to these jurists, an essential step towards ensuring that Muslims think of themselves and behave as active citizens of the countries in which they live. The second main group consists of those jurists who belong to the Salafi purist current. Because of their interpretation of *al-walā' wa'l-barā'* doctrine [loyalty (to Muslims) and dissociation (from non-Muslims)], they have adopted a separatist approach. Indeed, these *fuqahā'*, no differently from their colleagues who propose the integrationist/interactionist perspective, identify Western countries as places of moral and spiritual perdition, with the difference, however, that they, in contrast to the former, believe that Muslims should not live in them. In fact, some Muslims turn to the Permanent Committee for Scholarly Research and Fatwas, whose members belong to the Pietist current of the Salafi movement, to learn if the migration they have undertaken to Western countries can be considered licit (*ḥalāl*) or not, under Islamic law. Carlo De Angelo's analysis shows that, according to this Committee, a Muslim is obliged to reside exclusively in an Islamic territory (*dār al-islām*), and forbidden to migrate to the West, because it is considered the land of the disbelievers (*dār al-kufr*). However, the Committee has accepted some exceptions to this rule: for example, a Muslim is allowed to migrate to non-Islamic territories to spread the word of God (*da'wa*), to study or to work.

Nijmi EDRES analyses a case that is puzzling for different reasons: that of the Muslim Palestinian minority living in Israel. While *fiqh al-aqalliyāt* usually deals with Muslims migrating to Western countries, the Palestinian example is particularly fascinating, as it includes an indigenous population and not a migrating community. Moreover, in Israel sharia courts are allowed, even though Israel would be considered as belonging to the *dār al-ḥarb* from the classical perspective of Islamic law. However, notwithstanding their independence, these courts are under the control of the Israeli authorities (the qadis, for example, are nominated by the Knesset): this poses a question of legitimization. Moreover, any attempt to reinterpret Islamic law in this context would be perceived as a form of 'Israelization' of sharia and Muslim identity, notwithstanding the long tradition of *iǧtihād* in Islamic law.

3. Sexual minorities and Islamic law

The inclusion of sexual minorities in discussions on minorities is quite recent. As regards international law, as we have seen, the classical and standard definitions of the concept of minority do not take into account sexuality.

While it has been convincingly demonstrated that in many respects women can also be somehow considered a minority,[21] we decided to focus in this issue only on LGBTQI (lesbian, gay, bisexual, transsexual, queer and intersexual) people and Islamic law.

International law has hitherto largely neglected the issue of sexual orientation and gender identity.[22] This changed recently, in particular thanks to the work of activists and of the International Commission of Jurists.[23] The first official contribution to this debate was constituted by a joint meeting held by the Commission together with the International Service for Human Rights, which took place in November 2006 in Yogyakarta,[24] Indonesia. The most important result of this meeting was the publication of the *Yogyakarta Principles*, or *The Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, officially launched in Geneva in 2007.[25] The *Yogyakarta Principles* are not legally binding *per se* from the perspective of international law, as they do not constitute a covenant or a treaty. Rather, they are a set of principles on sexual orientation and gender identity that have been deduced from existing international covenants and treaties. Following the adoption of these principles, the International Commission of Jurists also initiated a series of studies, including a *Practitioners Guide on Sexual Orientation, Gender Identity and International Human Rights Law*, that, drawing on different sources of international law and jurisprudence and on comparative national law and practice, had the aim of clarifying

> the existing international legal framework to deal with abuses of certain rights on the grounds of sexual orientation and gender identity and illustrate how the legal arguments for human rights protection are properly developed and sustained.[26]

An interesting point for also including sexual minorities in the debate was brought up by Desmond Tutu, Nobel Peace Price Laureate in 1984 and an Anglican archbishop, who on occasion of the 2007 World Social Forum in Nairobi stated:

> To penalize someone because of their sexual orientation is like what used to happen to us; to be penalized for something which we could do nothing [about]—our eth-

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21 See for example MAYER HACKER 1951.

22 INTERNATIONAL COMMISSION OF JURISTS 2009: 3.

23 The Commission is an independent human rights non-governmental organization, with a central office in Geneva and sections in different countries. Established in 1952, it is constituted by internationally recognized jurists (senior judges, attorneys and academics) who work to ensure the respect for human rights.

24 INTERNATIONAL COMMISSION OF JURISTS 2009: 4.

25 Ibid.

26 Ibid.

nicity, our race. I would find it quite unacceptable to condemn, persecute a minority that has already been persecuted.[27]

This affirmation should be contextualized within the Anglican Church's on-going discussion on homosexuality. However, what is important for our purposes is that, including sexual orientation into the concept of minority, Desmond Tutu aimed at enlarging the status of protection that is nowadays internationally recognized for ethnic and racial minorities also to LGBTQI people.

This is why we believe that a discussion on minorities in Islamic law cannot but include sexual minorities. We are aware of the challenges that using categories such as sexual orientation or LGBTQI can pose when going 'beyond the West'. However, earlier research has shown the usefulness of these categories of analysis when looking at contemporary Arab-Islamic discourse.[28] In particular, the articles included in this part of the special issue analyse how contemporary Muslim jurists address homosexuality, transgenderism, transsexuality and, to a minor extent, intersexuality.

Serena TOLINO's discussion of transgenderism, transsexuality and sex-reassignment surgery in Islamic law, which also touches upon the issue of intersexuality, shows that sex-reassignment surgery is mostly regarded by Muslim jurists as permitted in cases of intersexuality but forbidden in case of transgenderism. If at first sight one might argue that in the first case what makes this surgery allowed is the fact that it is considered as a treatment for an illness while in the second case it is understood as a change in God's creation, the paper also shows that there is a more profound reason that animates both supporters and opposers of sex-reassignment surgery. Indeed, the discussion is driven by an essentialized perception of the sex/gender binary and the roles assigned to men and women. Sex-reassignment surgery is permitted only when it allows the sex/gender binary to work better, not when it aims at challenging it.

Bettina DENNERLEIN focuses on the neo-conservative discourse of the Egyptian scholar Yūsuf al-Qaraḍāwī to demonstrate how his discourse on homosexuality should be read in conjuction with his understanding of notions of marriage and the family. As Dennerlein demonstrates, Qarāḍāwī's discussion of homosexuality is interconnected with one of the pillars of his *wasaṭiyya* discourse, namely his approach to the Islamic family. Interestingly, even though the mononuclear family is a modern product of the national state, in Qarāḍāwī's discourse it is essentialised and becomes the typical and ideal Islamic family. This allows him to almost sacralise the family, and to subtract the debate on it, and the related debate on sexuality, from the realm of politics and from human-rights discourse, and to make it a proper object of religious discourse. Dennerlein's article also shows how, once a discourse on a 'proper' sexuality is constructed in religious terms, the space for a (secular) discussion on it from a human-rights perspective[29] is certainly reduced.

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27 VALENZA 2010.

28 The situation is different when using these modern categories in reference to the past. However, this is not only something that applies to Middle Eastern Studies. The a-historical application of the category 'homosexuality' before its 'invention' would be as problematic in reference to 'the West' as it is in reference to the Islamicate world. There is extensive literature on the topic. See for example SCHMITT 2001-2002; el-ROUAYHEB 2005; NAJMABADI 2006 and 2008; TOLINO 2014, particularly 74-78.

29 As it is, for example, in the Yogyakarta Principles.

Interestingly, both papers show how, while Muslim jurists were ready to embrace the definition of minority as elaborated in international law, they are not ready to do so when it comes to discussion of gender and/or sexuality.

4. Minorities as actors 'producing' law

We have seen how minorities have been and are subjects of Islamic law. However, minorities can also produce Islamic law: verdicts of the sharia courts in Israel, for example, are a clear example of how a minority (the Palestinian minority in Israel) can produce Islamic law. Also LGBTQI people who provide queer-friendly interpretations of Islamic law are actors who produce it in order to reconcile their religious with their sexual identity. To a certain extent, people living in non-Islamic countries asking for opinions on Islamic law are producing (or at least stimulating the production of) Islamic law. Antonella Straface, Edmund Hayes and Agostino Cilardo focus even more closely on minorities as productive legal actors. In particular, Straface and Hayes looking at how Shiʿi scholars have produced law, providing their own interpretations of a central aspect of Islamic ritual such as the 'pillars of Islam'.[30]

Antonella STRAFACE's paper focuses particularly on the 10th century's Ismaili *dāʿī* Abū Yaʿqūb al-Siǧistānī's approach to prayer, and especially on ritual ablution (*wuḍūʾ*) and cultic purity (*ṭahāra*), showing how these obligatory duties, whose performance al-Siǧistānī fully recognized and supported, are re-interpreted in an 'Ismaili' way, as concealing an inner (*bāṭin*) meaning that only an initiate could understand.

Edmund HAYES's chapter focuses on *zakāt* in the Twelver tradition, showing how tackling the Twelver conception of *zakāt*, and specifically looking at those who were entitled to collect, distribute, but also *receive zakāt*, can give us interesting insights to better understand the ideal characteristics of the Twelver community and the way it has maintained boundaries with other communities.

Finally, Agostino CILARDO's paper focuses on the divergences between the Twelvers and the remaining law schools on the lawfulness of the temporary marriage (*nikāḥ al-mutʿa*). The subject matter of his paper does not concern the legal polemics about *mutʿa*, rather it exclusively aims at highlighting the interpersonal relationships between the scholars involved, such as the most preeminent representatives of the Twelvers, namely Abū ʿAbd Allāh Ǧaʿfar al-Ṣādiq and Abū Ǧaʿfar, and their Ḥanafī opponents, namely Abū Ḥanīfa and his disciple Zufar.

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[30] The concept, in Arabic *arkān al-islām*, refers to five acts that are considered mandatory and that constitute the foundation of Islamic life. Sunni and Shiʿi Muslims, even though they do not always agree on the details, basically agree on their substance. They are the *šahāda*, or profession of faith, which consist in the declaration that there is only one God and that Muḥammad is his messenger; the *ṣalāt*, or ritual prayer, which refers to the five daily prayers that a Muslim is requested to do according to Sunna; the *zakāt* (literally purification), or alms-giving, which a Muslim should pay every year; the *ṣawm*, the fasting during the month of Ramadan; and the *ḥaǧǧ*, the pilgrimage to Mecca that every Muslim who can afford it should do at least once in his/her life.

5. Conclusion

As we have seen, the concept of minority is a debated one. The most accepted definitions of the term from the perspective of international law considers minority with a focus on the one hand on the numerical aspect (minority as 'a group numerically inferior to the rest of the population of a State')[31] and on the other on its position of non-dominance. However, only 'ethnic, religious or linguistic characteristics'[32] were mentioned. This definition also shares its fundamental characteristics with the definitions proposed by sociologists. More recent developments, as confirmed by the *Yogyakarta Principles*, seem to demonstrate that the legal protection guaranteed to religious, cultural, ethnic and racial minorities should also be extended to sexual minorities. As regards Islamic law, Muslim jurists defined a minority as that group of people who live in a particular country and who differ from the majority of the population of that country as regards religion, ethnicity, language, etc. This definition, though, does not include sexual minorities. It seems clear that traditionalist Muslim jurists were open to embracing the definition of minorities presented in international law. However, the inclusion of sexual minorities represents a step towards a different and less patriarchal vision of the society that, up to now, traditionalist Muslim jurists have not tackled. Certainly *iǧtihād* could open ways to do so. We shall see whether in the future jurists will take up the challenge.

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[31] CAPOTORTI 1979: 96, par. 568.

[32] Ibid.

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Non-Muslim Minorities in a *Wasaṭī* Perspective

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Abstract

Given the classical framework regulating the position of non-Muslims in Islamic States, this paper focuses on the evolution of the interpretations of those norms, following the thought of *wasaṭiyya* scholars. In contemporary Islamic thought, a balanced and moderate attitude is proposed by several authors as an attempt to oppose the extremist movements that claim to represent the true Islam. One of the areas in which the *wasaṭī* approach has found a way to express itself more effectively is in the status of minorities.

These thinkers consider that the birth of modern states has produced consequences in the application of the rules governing the relations between citizens of different religions. They have adopted a renewal in terminology that may prefigure a different application of classical Islamic rules.

Key words: *ḏimma*, *wasaṭiyya*, minorities' rights, Islamic law, *ahl al-kitāb*, Yūsuf al-Qaraḍāwī.

1. Introduction

Given the classical framework regulating the position of non-Muslims in Islamic States, this paper intends to focus mainly on the evolution of the interpretations of those norms, following the thought of modern scholars of the *wasaṭiyya* school.[1] We will try to present and define the main characteristics of the major thinkers who belong to this new modern trend in Islamic thought. This aspect seems to be interesting in a time in which new tendencies are emerging in regard to addressing questions related to the modern application of principles of classical Islamic Law connected to the treatment of non-Muslims in a Muslim society or State (i.e. *ḫilāfa*, *takfīr*, *ǧihād*, *ǧizya*, and so on). One can refer to the newly self-proclaimed 'Islamic State' and to its attitude towards Christian and Yazidi minorities in Iraq and Syria.

As for a definition of 'minority' in the Arab world, we refer to the threefold typology defined by Ma'oz and Sheffer[2] and used cautiously by Kymlicka and Pföstl:

   a. Arab but not Muslim (Arab Christian communities, Muslim sects other than Sunni);
   b. Muslim but not Arab (Turks, Amazighs, etc.);
   c. Groups that are neither Arab nor Muslim (Jews, Armenians, Assyrians, etc.).[3]

This definition, like all definitions, should be carefully taken into account, considering its rigid schematic and the fact that is does not take into consideration the change that has

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[1] For an overview on these scholars, see BAKER 2003.

[2] MA'OZ & SHEFFER 2002.

[3] KYMLICKA & PFÖSTL 2014: 2.

occurred over time in the self-perceptions of the different minority groups. Nevertheless, we agree with Kymlicka and Pföstl in affirming that speaking of a group acting as a 'minority' is something that needs to be explained and should not be taken for granted.[4]

Furthermore, it is also interesting to deal with the acceptance/refutation of the concept of 'minorities' by minority groups themselves. In fact, this category is often rejected by those who belong to a non-dominant group—in a quantitative or qualitative way—as it suggests and takes for granted a separation of the 'minority' group from the dominant community at a social, cultural, and political level.[5] Rather than stressing the opposition between majority/minority, some Christians in the Middle East insist on enacting a pact of citizenship that binds citizens regardless of their denominational affiliation.[6]

Our method in responding to these questions will start from an analysis of selected texts from *wasaṭī* thinkers exposing their reinterpretation of the classical norms on minorities in the context of a modern state. The approach will start from a philological perspective in order to retrace the terms used and their nuances in meaning. This philological and semantic analysis of the signifier and the signified will help to define whether a shift has occurred from the classical view on the position of non-Muslims minorities in an Islamic society to a new interpretation of their presence and role in a modern state, and if so, how it occurred. In this regard, it is helpful to recall Jacob Høigilt's approach in studying the rhetoric and ideology of two eminent Egyptian *wasaṭī* thinkers, Fahmī Huwaydī and Muḥammad ʿImāra, as he starts from the supposition that 'the *form* of a text is as important as its content'.[7]

Following his rhetorical analysis, Høigilt concludes that this movement fails in an attempt to appease the ideological tensions in Egypt, opposing the views that considered the *wasaṭiyya* as an open-minded movement that could solve the contrast between an 'extremist' interpretation of Islam and 'moderate' or secular currents, including sectarian tensions that have always agitated the country.[8]

However, by analysing texts and terminology used by the *wasaṭī* intellectuals, one may conclude, in a more positive way, that this approach has at least produced a noteworthy development in the attitude of the movement towards non-Muslim minorities in an Islamic society. This development could be measured in terms of a change in terminology that results in a change in the very conception of the people involved. Referring to Christians and Jews as 'ḏimmiyyūn' (protected subjects) or as 'citizens' implies an evolution of historic proportions in the Islamic attitude towards religious minorities. Such recognition, in the opinion of Christians, should be automatic in the case of a modern state that wishes to call itself democratic, and it should result in the adoption of tangible measures to make it effective.

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4   Ibid.

5   It is noteworthy that Islamist *wasaṭī* thinkers also refuse to use the term minority/majority in a quantitative way, and insist on a qualitative description: Muslim *versus* non-Muslim. See al-ʿAWWĀ 2006:19-20 and FURMAN 2000: 2-3.

6   There are some interesting observations on this point in SHARP 2012: 109-118. The analysis of some Arab Christian intellectuals goes in the same directions, like Samir Franjieh (interview with the author, January 2013), Tarek Mitri (interview with the author, September 2014), Sameh Fawzy (interview with the author, December 2014).

7   HØIGILT 2010: 252 (italics original).

8   Ibid.: 252 and 265. A comprehensive account of *wasaṭiyya* is presented in KAMALI 2015.

The sources considered for this analysis are a selection of texts chosen from some of the major representatives of the *wasaṭī* trend in modern Islamic thought, integrated with interviews in the field. In particular, we will refer to the scripts of Yūsuf al-Qaraḍāwī, with some remarks on the works of Fahmī Huwaydī, Ṭāriq al-Bišrī, and Muḥammad Salīm al-ʿAwwā. We will also refer to some recent publications and initiatives sponsored by al-Azhar and the Grand Imam there, Aḥmad al-Ṭayyib, aimed at evaluating a new approach in considering non-Muslim minorities (especially Copts) in the modern Egyptian state. In this overview, we will also take advantage of the methodology used by Shavit, who presented a study on the *wasaṭī* and *salafī* approaches to religious law regarding Muslim minorities in Western countries.[9] This paper, in turn, intends to focus on modern attempts to reform (or *taǧdīd*) Islamic political and religious thought regarding the *aḥkām al-ḏimma* without affecting the classical principles of the sharia.

2. *Wasaṭiyya:* a definition

The concept of *wasaṭiyya* has a Quranic origin in verse 2:143: 'Thus We appointed you a midmost nation.'[10] According to several exegetes, the cause of the revelation of this verse was the changing of the qibla from Jerusalem to Mecca, 'because the Kaʿba is the center of the world and its middle', said the renowned Persian theologian Faḫr al-Dīn al-Rāzī (d. 606/1209).[11] He explained the term as the 'just' and the 'good', all that is far from excess and exaggeration. According to the medieval exegete Ibn Kaṯīr (d. 774/1373) the meaning is '(just and best) nation'.[12]

The medieval Ḥanbalī scholar Ibn Taymiyya (d. 728/1328), according to Quran 2:143, considers Islam as the religion of the *via media*, or golden mean, compared to other religions or Islamic sects.[13] The *wasaṭiyya*, in its thinking, is a well-balanced position of the true Muslim community, that of the Sunna, in all aspects of religion. With prophets, they do not exaggerate as Christians do, nor maltreat them as Jews do.[14] Regarding religious precepts, ethics, and the question of God's attributes and acts, they also assume a moderate position.[15]

Thus the People of the Sunna become, by definition, the middle community. This notion also plays an important role in modern Islamic thinking.

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9   SHAVIT 2012.

10 The Quran is quoted from the English translation by A. J. ARBERRY, *The Koran: Interpreted*, Oxford: Oxford University Press, 1964 (first edition 1955).

11 Faḫr al-Dīn al-RĀZĪ, *al-Tafsīr al-kabīr*, IV: 106, quoted in TALBĪ 1996: 13.

12 <http://www.qtafsir.com/index.php?option=com_content&task=view&id=294#3> (accessed 30 September 2015).

13 See HOOVER 2007: 173-176.

14 See IBN TAYMIYYAH, *Pages Spirituelles*: 22-23; 30. Here p. 22.

15 Ibid.: 23, 30.

As Shavit points out, one could refer to *wasaṭiyya* in opposition to *salafiyya* as a liberal and flexible approach to Islamic law, while the latter is a rigid and strict one.[16] He suggests that the root of the *wasaṭī* approach could be traced back to the reform movement (*iṣlāḥ*) that started at the beginning of the 19th century in Egypt with Ǧamāl al-Dīn al-Afġānī (d. 1897), Muḥammad ʿAbduh (d. 1905) and Rašīd Riḍā (d. 1935). In the *Tafsīr al-Manār,* the fathers of *iṣlāḥ* affirm that the Islamic *umma* is an exemplary community that stands in the middle (*wasaṭ*) of two truths, a community in which 'God united two truths, the truth of spirit and the truth of body. It is a spiritual and a corporal community'.[17]

One might agree with this observation, considering that those intellectuals are remembered as points of reference in the thought of contemporary *wasaṭī* thinkers. Nevertheless, according to the Pakistani theologian and activist Mawdūdī (d. 1979),

> the word *ummatan wasaṭan* is so comprehensive in meaning that no English word can correctly convey its full sense. It is a righteous and noble community which does not go beyond proper limits, but follows the middle course and deals out justice evenly to the nations of the world as an impartial judge, and bases all its relations with other nations on truth and justice.[18]

In contemporary studies, the term *wasaṭī* has been translated differently, most of the time as 'moderate', 'centrist', sometimes 'golden mean'.[19] All these translations insist on the idea of balance, moderation, and distance from excesses.

In the language currently used in the media and in politics the concept of moderate, midstream, or centrist Islam (Islam *wasaṭī*) is emerging in opposition to the terrorism that claims to be for Islam. In the West, newspapers, opinion makers, and politicians are looking for an Islam that will dissociate itself from violent and sectarian attitudes. The term 'moderate' started to be used to define such an Islam, a procedure that implies, however, a definition *via negationis*: moderate Islam is all that is opposed to terrorism and fanaticism. In some Western languages, the corresponding term has a negative nuance of meaning that, if applied to religious faith, could imply a reduction of one's own religious convictions. However, as we have verified in this paragraph, a definition of the authentic Islamic *wasaṭiyya* is anything but a moderate or less intense approach to faith, religious practice, and respect of its theological and scriptural sources. On the contrary, a Muslim *wasaṭī* is a believer who follows the correct path indicated by the Quran and the main Muslim theologians.

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16 Shavit 2012: 419.

17 Quoted in Talbī 1996:16-17.

18 <http://www.searchtruth.com/tafsir/tafsir.php?chapter=2> (accessed on 30 September 2015).

19 See, for instance, referring to the Egyptian al-Wasat Party, Hatina 2005. The same author speaks of *wasaṭiyya* as 'centrist Islamic discourse'. See Hatina 2007, especially 138-157. See also Clarck 2006: 542. Jacob Høigilt refers to the *wasaṭiyya* as 'centrism', and defines it as 'an open-minded Islamist culture, willing to engage in open discussion with people who hold a different world-view'. See Høigilt 2010: 251, 254. Nathan J. Brown refers to *wasaṭiyya* as 'moderation or centralism […] often linked to calls for persuasion and dialog and against violence and what is perceived as extremism'. Brown 2012: 11-12. Polka refers to *wasaṭiyya* as 'centrist stream' or 'centrism', Polka 2003: 40-41. Islamic mainstream is the expression used in his important study of new Islamist thought by Baker 2003: 39-40. See also Baker 2005: 111.

Therefore, in Western as in Islamic political discourse, the idea of a 'moderate' Islam is gaining consensus as a reaction to the violent and ideological expression of contemporary militant groups claiming to represent the true Islamic interpretation.[20] Even in liberal or conservative Islamic circles, such as al-Azhar, an effort is being undertaken to show that the true face of Islam is a '*wasaṭī*' one, *i.e.* a moderate one.[21] Then, to be a '*wasaṭī*' Muslim is simply to follow Islam, *tout court*, in its true essence, according to a vision clearly opposed to that proposed by the terrorist groups of IS and others. In Baker's words, the contemporary *wasaṭiyya* is 'the motivating force of the broad and varied Islamic Renewal. […] The *wassatteyya* functions as a vital yet flexible midstream, a centrist river out of Islam'.[22]

However, al-Azhar is not the only Islamic circle pretending to represent the Islamic *juste milieu*. A prominent scholar, himself an Egyptian Azharite now based in Qaṭar, Yūsuf al-Qaraḍāwī (b. 1926), put the concept of *wasaṭiyya* at the centre of his vision of contemporary Islam, long before the appearance of IS terrorism, but opposed to that of militant Islamists.[23] He is considered to be the founder of the school of new Islamists. Al-Qaraḍāwī started to use this concept in the early 1960s as a 'method based on middle positioning (*tawassuṭ*) and moderation (*i'tidāl*), and distances itself from those who exaggerate and those who abbreviate, as well as from the rigorous and the indifferent'.[24] In his thought, a synonym of *wasaṭiyya* is equilibrium (*tawāzun*) between two opposites, such as the human and the divine, the spiritual and the material, and so on.[25] The realisation of this kind of balance is beyond human possibilities and it is a specific divine ability[26] and there is no wonder that one can find this balance in God's creation. First of all, it can be found in Islam. He continues his argument by describing the characteristics of Islamic moderation in all sectors, following the approach of Ibn Taymiyya.

His perspective, however, seems innovative when, as we shall see in the case of the attitude towards non-Muslims, he proposes a balance between classical rules and the conditions of the modern world.

In summary, in the next paragraphs we will focus on one of the aspects of *wasaṭiyya* scholars, their attitude towards the 'other', in this case the *ahl al-ḏimma*, regardless of the current debate about whether or not there exists a 'moderate' Islam opposed to a fanatical one.[27] And we will not use the term '*wasaṭiyya*' as just an opposite to political extremism, but will bear in mind all the Quranic and theological connotations of the term.

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20 See, for instance, Yusif 2015. The author is the Director of the International Institute of Wasatiyah, International Islamic University Malaysia.

21 During an international conference sponsored by al-Azhar in May 2010, the medieval theologian Abū al-Ḥasan al-Aš'arī (d. 936) was taken as an example and a champion of the moderate and balanced vision of Islam embodied by al-Azhar. See al-Azhar 2014.

22 See Baker 2015: 3.

23 See Gräf 2007: 9 and Gräf 2009.

24 Quoted ibid.: 218.

25 A summary of Yūsuf al-Qaraḍāwī's idea of *wasaṭiyya* is available online at <http://qaradawi.net/new/articles/6514-2015-09-03-06-45-10> (accessed on 30 September 2015). See also the exhaustive presentation in al-Ġannūšī 2003.

26 Ibid.

27 Another interesting field of application of the *wasaṭiyya* approach is represented by the *fiqh al-*

Moreover, it must be remembered that *wasaṭiyya* is not just a neutral word, but identifies a group or an innovative path on which some of the most eminent representatives of contemporary Islamic thought recognise themselves.[28] As Nathan J. Brown pointed out, *wasaṭiyya* indicates something beyond political moderation and has at least two connotations to be considered: the first implies a distance from extremism; the second is connected to interpretations of Islamic precepts more consistent and compatible within the context of modern societies.[29]

For all these reasons, in these pages we will avoid translating the term '*wasaṭī*', preferring to leave it in its original form with all its connotations.

3. Non-Muslims in *wasaṭiyya* texts

3.1 Yūsuf al-Qaraḍāwī

The first *wasaṭī* text that will be examined is an extract from a book written in 2004 by one of the prominent *wasaṭī* scholars, Yūsuf al-Qaraḍāwī.[30] Composed in a post-9/11 context, the book starts with a very important question: is it possible to change Islamic discourse? In that period, Islam started the new millennium facing one of the worst crises in its modern history when extremist and terroristic currents challenged the credibility of Islamic religious and political discourse, in the name of Islam. The need for change was shared in various Muslim circles all over the world. Yūsuf al-Qaraḍāwī tried to respond to this challenge by highlighting the necessity of reform that considers Islamic judicial and religious sources. For religious or Islamic discourse, he refers to the image of Islam offered to Muslims and everybody alike.[31] He continues by posing the question of whether Islamic discourse should be open to change over time or whether it must remain fixed. This part of his reflection is very interesting because, opposing a worldwide opinion that attributes a static quality to Islam, he argues that 'if religion with its fundamentals, all its creeds, devotions, morality, legal precepts, does not change, what changes is the ways in which we teach and call to it'.[32] Religious discourse changes on the basis of the time and place, but also on the basis of the interlocutors. Therefore, it is consequential that Islamic discourse will develop according to the changes that occur in a time of globalisation. It is worth noting that here he introduces a sort of self-criticism, for he affirms that Muslim scholars in the recent past used to speak as if they were only addressing a Muslim public. In ecclesiastical terms, we could say that it was a discourse *ad intra*, for an internal audience. Now the time has come,

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aqalliyyāt, i.e. the attempt to enhance a more modern approach to the Islamic legal system for Muslims living in non-Muslim states. For al-Qaraḍāwī's contribution to this evolution, see HASSAN 2013. – Cf. also EDRES' contribution in the present dossier, pp. 171 ff.

28 Rachel M. Scott spoke about *wasaṭiyya* intellectuals as points of reference for the reformist-minded members of the Muslim Brotherhood. See SCOTT 2012: 145-146.

29 BROWN 2012: 12.

30 al-QARAḌĀWĪ 2004.

31 Ibid.: 15.

32 Ibid.: 17.

al-Qaraḍāwī argues, in which others look and read what Islam says and who speaks in its name. Thus he seems to appeal to the impending responsibility Muslim scholars and preachers have for their teaching.

He continues his analysis giving a basis from the Quran and in the Sunna for the need for religious reform.[33] One of the examples of the application of this method in the renewal of Islamic discourse is devoted to Islamic-Christian relations. The religious reform he is looking for implies that the preacher should take into account the context in which he delivers his speech. It may be that he lives in a country in which, besides Muslims, Christians, and Jews, citizens live 'who share citizenship with Muslims'.[34] In this case, the preacher is invited not to use provocative tones in speeches; to avoid referring to Jews as 'usurpers and aggressors' or to Christians as 'haters and evil crusaders'.[35]

In this regard, al-Qaraḍāwī recommends the use of a new terminology that could result in a renewed religious discourse, in which a new vision of the world and the 'others' is more decisive. This attitude becomes part of the method in the religious reform that he intends to realise. In this regard, al-Qaraḍāwī offers two significant examples.

The new era of globalisation pushes Islam to abandon old linguistic structures in the relationships with the 'other'. The change suggested is not only a superficial one, limited to an appellation. In fact, he argues that it is no longer appropriate to address non-Muslim believers as '*kuffār*', 'unbelievers', or '*ahl al-ḏimma*', 'People of the Pact', even though their unbelief is recognised, especially in the case of *ahl al-kitāb*.[36] In this way he questions the whole concept of '*kufr*' and '*ḏimma*', with its legal ramifications. He justifies this choice on the basis of the interpretation of some Quranic verses and major commentaries, but he goes further here than he did in his previous book dedicated to the same topic.[37] Differently from the 1970s, when he freely used the term '*ahl al-ḏimma*', here he avoids it and proposes a new designation following the need for religious reform: '*muwāṭinūn*', 'citizens'. The term that substitutes '*ahl al-ḏimma*' is relevant as it attributes the same rights of citizenship enjoyed by Muslims to non-Muslims. He justifies the dismissal of the old designation on the grounds that Christians in the Middle East object to the term as they feel it is offensive. He argues that the term 'citizen' is a modern expression of the concept on which all Muslim scholars agree, the fact that *ahl al-ḏimma* are part of the *dār al-islām* and for this reason they bear the title of citizens, like their fellow Muslims.[38] This principle, in his thought, does not contradict any shariatic obligation and it is in line with the Sunna of the rightly guided caliphs.

In the same book he identifies fifteen areas in which religious reform should be put into effect, including a chapter on 'the safeguard of minorities' rights without marginalisation of

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33 Ibid.: 19-25.

34 It is interesting the stress on the fact that Muslims, Christians and Jews share the same quality of citizenship. Ibid.: 42.

35 Ibid.: 43.

36 This Quranic expression is admitted in his discourse.

37 al-QARAḌĀWĪ 1983: 9-42.

38 al-QARAḌĀWĪ 2004: 46.

the majority'.[39] In his teaching, religious minorities in the Arab and Islamic state should be safeguarded, their rights guaranteed, their existence defended, their religious personality and their places of worship preserved.[40] This is a major question in Islamic modern *iǧtihād*, he continues, and it is a sensitive issue on which the enemy of Islam relies in order to sow discord. If the change of terminology is clear, its consequences do not lead to a change in the characteristics of the state and society that remain linked to an Islamic *Weltanschauung*.

Indeed, Christians especially are invited to prefer an Islamic regime because it is based on religious and moral principles that are closer to Christian ethics and faith than the positive laws in force in Western countries. On the contrary, these countries, often dominated by secular or atheist regimes, relegate religion to a corner.[41] In a polemic with the Coptic intellectual George Isḥāq, he insisted on the fact that *ahl al-ḏimma* are: '*muwāṭinūna yantamūna ilà al-waṭan al-islāmī*',[42] 'citizens belonging to the Islamic nation'; that is to say that the recognition of their citizenship does not produce an effect on the essence of the state and its connection with the Islamic religion. As support for his thesis he gives the example of the famous Coptic politician Makram Obeid, who said: 'As for religion, I am Copt, as for the nation, I am Muslim.'[43] In this regard, he intends to highlight that Arab Christians in the Middle East own a cultural citizenship that connect them to Islamic identity.

We stressed the shift in language as an example of renewal in Islamic *wasaṭī* discourse. But one should remember that the author himself warns that the emphasis is on purposes and meanings and not on words and constructions. The essence of his thought does not contradict Islamic precepts that govern the relationship between Muslims and non-Muslims and the Islamic character of the state.

Although he does not want to deny the Islamic character of the state, at the same time he suggests ancient Islamic practices be reconsidered, as they were dictated by the conditions and situations of the past and are no longer justifiable. Among these, one can find the refusal to greet Christians or the custom of relegating them to walk along the margins of the streets, and other erroneous attitudes sponsored by narrow-minded Islamic preachers. On the contrary, he encourages the advancement of thought and the renewal of *iǧtihād*.[44]

3.2 Other representatives of the *wasaṭiyya* school

In the opinion of Egyptian historian and jurist Ṭāriq al-Bišrī (b. 1933), modern Islamic political thought has taken up the challenge of making an effort of interpretation (*iǧtihād*), using the principles of sharia to ensure full equality among citizens regardless of religious diversity.[45] At the same time, however, he admits that the Copts in Egypt believe that the Islamic sharia is incompatible with the principle of citizenship.[46] In the same essay, he tries

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39 Ibid.: 184-194.

40 Ibid.: 184.

41 Ibid.: 184-185.

42 Ibid.: 190.

43 Ibid.

44 Ibid.: 192-193.

45 al-Bɪšʀɪ 2011: 56.

46 Ibid.

to prove that Islamic law is familiar to and accepted by Christians, especially Copts, and he uses as an argument the example of a famous medieval Coptic intellectual, Ibn al-ʿAssāl (d. 663/1265), who, in his legal work, freely used terms belonging to the Islamic *fiqh*.[47] For example, referring to the canon law of the Coptic Orthodox Church, he often borrows terms and concepts from Islamic law, like *iǧmāʿ* (consensus) and *furūḍ* (religious duties).[48] Switching to modern history, he recalls several examples during the Napoleonic occupation and British rule in which the Egyptian notables, Muslims and Christians, refused to accept legal innovations that implied the separation between religion and state and preferred to maintain an Islamic-based legal system.[49] Turning to the contemporary age, Bišrī tries to show how the content of Art. 2 of the Egyptian Constitution (which establishes Islam as the state religion) is not in contradiction with the principle of citizen equality.

He states that the principle of equality between Muslims and non-Muslims among the People of the Book (those belonging to other religions are excluded from this argumentation) is widely accepted by Islamic *fiqh*, but that a problem remains about whether non-Muslims should have the possibility of accessing government positions that involve decision-making power.[50]

This new *iǧtihād* is based on the principle that management functions that were previously acquitted by individuals are now acquitted by collective institutions. In judicial and legislative institutions, for example, it is no longer the single judge or the single legislator who acts but a collective entity. Such entities were declared Islamic because they act within the framework of the Constitution (which in Art. 2 declares Islam as the state religion). These institutions remain Islamic even though the decisions are taken by Muslims and non-Muslims together. In this way, the principle of Islamic *fiqh* is safeguarded and the right of non-Muslims to participate in collective decision-making bodies is guaranteed.[51]

In this field, he continues, a new *iǧtihād fiqhī* is required that should take into consideration the principle of citizenship and political institutions that have emerged in society as a result of the national struggle led by Muslims and Christians together. This new effort of interpretation must comply with sharia law and, at the same time, with the reality of living together.[52]

The *wasaṭī* thinker Muḥammad Salīm al-ʿAwwā (b. 1942), lawyer and intellectual, insists on the fact that, with the end of Western colonialism and the birth of modern states, the pact of *ḏimma* between Muslims and non-Muslims has ended. As a consequence, ancient obligations on minorities, such as the payment of *ǧizya*, should fall under the general obligation imposed on all citizens of defending the nation and enrolling in military service.[53]

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47 Ibid.: 59.
48 Ibid.
49 Ibid.: 60-61.
50 Ibid.: 66.
51 Ibid.: 67.
52 Ibid.
53 See al-ʿAwwā 2006: 21-22.

In his argumentation, contemporary Islamic awakening, which started in Egypt in 1911, produced the substitution of the principle of *ḏimma* with that of citizenship, the principle of religious discrimination with that of equality.[54] He refers to this argumentation as '*iǧtihād fiqhī*', which follows the line of a well-established reformist thought expressed by Rašīd Riḍā (d. 1935) and continued by illustrious scholars, such as Maḥmūd Šaltūt (d. 1963), Muḥammad al-Ġazālī (d. 1996), and Yūsuf al-Qaraḍāwī (b. 1926).[55]

The journalist and political commentator Fahmī Huwaydī (b. 1937) affirms that the definition of *ahl al-ḏimma*, formerly used to identify 'others' belonging to non-Muslim faiths, needs to be revised.[56] He starts his argumentation by pointing out that placing this expression in the context of sharia is necessary as a first step. The term is mentioned twice in the Quran 9:8-10 referring to the tribe of Qurayš. Huwaydī follows the interpretation of Ibn Kaṯīr (d. 1373) and says that the pact referred to in these verses is that of Ḥudaybiyya, a treaty signed by Muḥammad and the tribe of Qurayš in 628. In the Hadith, the term is used to identify the 'others' with whom a pact was signed, according to pre-Islamic custom.[57] As for the method, Huwaydī states that:

> In the essay of evaluating the definition of *ahl al-ḏimma* and of the position of *ḏimmī* in contemporary Islamic society, we always need to bear in mind the difference between '*šarʿ*', that is, revealed by God, and transmitted to his envoy, and '*fiqh*', that is, elaborated by the experts on the basis of their beliefs about the condition of time and place. The judgment and distinction always belong to *šarʿī* text, as for the interpretation (*iǧtihād*) of the experts, we have only to find a guide in it, accepting or refusing it according to the interest (*maṣlaḥa*) imposed by the changes in time and place.[58]

In addressing this issue, he continues, all the Quranic verses in which the dignity and nobility of man is reaffirmed should be considered. After a careful examination of all the sacred texts, he affirms that claiming that non-Muslims cannot be considered as citizens has no basis in the sacred texts. On the contrary, they form, together with the Muslims, one national community (*umma wāḥida*).[59]

3.3   Competing for *wasaṭiyya*: promoting an authentic interpretation of Islam

As we have mentioned above, al-Azhar, the most influential institution in the Sunni Arab world, especially under the leadership of its current Grand Imam, Aḥmad al-Ṭayyib, started a process to be recognised as the representative of an authentic Islamic interpretation: that of the golden mean. In this regard, al-Azhar is threatening to do what Bettina Gräf described as the automatic identification of al-Qaraḍāwī with *wasaṭiyya* and *wasaṭiyya* with

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54 Ibid.: 14.

55 Ibid.: 22.

56 Huwaydī 1985: 110.

57 Ibid.: 111.

58 Ibid.: 112.

59 Ibid.: 116; 123.

al-Qaraḍāwī, a process started by the use he made of the new media in order to become a 'global mufti'.[60]

This goes along with the decline of the attempt to relaunch a unified global entity representing the various Islamic currents, both Sunni and Shiʿi, promoted since 2004 by al-Qaraḍāwī himself with the creation of the International Union of Muslim Scholars.

Of the various initiatives undertaken to promote a balanced vision of Islam, one worthy of mention is the conference held in December 2014 in Cairo, where a clear final appeal was made for the total alienation of Islam from violence and extremism, showing a particular sensitivity towards murderous attacks committed against non-Muslim minorities.[61] At this international conference the highest representatives of the Eastern Churches, including the Coptic Orthodox Patriarch Tawadros II and other patriarchs and bishops of all Christian denominations were present, alongside Muslim leaders representing all denominations (Sunni, Shiʿi, Ibāḍi) and geographical areas (Africa, Asia, Europe). The distinctive trait of the final document of the al-Azhar Conference consists in the very reaffirmation of the rights of non-Muslim minorities who have been living in the Middle East for thousands of years as citizens and not as tolerated guests. It is no coincidence that the document does not mention the Quranic category of *ahl al-ḏimma*. The aim of the document was to address both the militants of the IS and its supporters, and the majority of Muslims (Arab and non-Arab), of all denominations, in order to remove any claim to an Islamic legitimacy for the actions of the so-called 'Islamic State'. Therefore, its aim was to launch a twofold message to Muslims: Islam condemns violence and terrorism and, in addition, reaffirms that al-Azhar, with its *wasaṭī* attitude, is the principal point of reference for the community of believers. This second message is in line with the politics the current Grand Imam has pursued since the beginning of the Arab revolts in 2011: to restore the authority and independence it enjoyed before the Nasserist reform. In the declaration, verses from the Quran are not explicitly cited, nor are the prophetic traditions or any other sources in support of the condemnation of violence and terror. The aim of the document was to address all Muslims, regardless of their confession. In fact, it was signed by the Sunni, Shiʿi and Ibāḍi representatives. It also intended to send a clear message to Christian communities in the Middle East and reiterate the need for them to remain in their homelands alongside their Muslim compatriots. But, in a direct way, the signatories intend to press Islamic scholars to undertake a work of purification and renewal of religious discourse to correct the extremist proposal that attracts so many young Muslims. In summary, al-Azhar states that the ideology of extremist groups does not represent the true Islam, especially when it is directed against non-Muslim minorities. Religion has actually nothing to do with the actions of the various terrorist organisations.

As for the terminology introduced in the al-Azhar document, one can observe that there is no mention of traditional Quranic expressions (*ahl al-ḏimma*, *ahl al-kitāb*). When it mentions non-Muslims minorities, the text only uses the terms 'Christians': '*masīḥiyyūn*' and '*abnāʾ al-waṭan*', 'sons of the fatherland', people who belong to the same '*umma*'

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60 See GRÄF 2009: 224.

61 al-AZHAR 2015a.

alongside Muslim citizens.[62] The text also reaffirms that 'ruling in Islam is based on the values of justice, equality, and guaranteeing rights of citizenship for all citizens, regardless of their colour, race or religion. A regime that realises these principal human values is legitimate according to Islamic sources'.[63] One can note that this shift in terminology in addressing minorities issues had already emerged in several al-Azhar documents published after the 2001 Arab uprisings,[64] in which the classical denomination of *ahl al-ḏimma*, *ahl al-kitāb* are substituted by the term 'citizens'. According to the *wasaṭī* vision presented above, al-Azhar encourages the construction of a modern and democratic state in which citizenship is the basis of responsibility in society.[65]

4. Conclusions

The *wasaṭī* approach is an instrument that is being employed by some contemporary Muslim thinkers to open a process of reform and renewal within Islam, which would otherwise be extremely difficult to achieve. In this way, they try to reconcile and find a balance between the immutable principles of Islam that are fixed in legal and theological sources, and the evolution of modern societies. This approach starts from the premise that sacred texts are fixed and immutable, but their interpretation is not, as it can be renewed depending on historical conditions. The thinkers examined here emphasise the need for an *iǧtihād* and a renewal of religious discourse. The fields of application of this methodology may be manifold. One of the areas in which the *wasaṭī* approach has found a way to express itself more effectively is in the status of minorities. It has been applied in both senses: in the case of Muslim minorities in non-Muslim societies and in the case of non-Muslim minorities in Muslim-majority contexts. In the latter case, the *wasaṭī* thought initially operated a renewal in terminology that prefigures a shift or a different application of classical Islamic rules. Without denying the Islamic character of society, these thinkers consider that the birth of modern states has produced consequences in the field of application of the rules governing the relations between citizens of different religions. In modern societies, the relationship between citizens and the state is regulated on the basis of the principle of a shared citizenship regardless of confessional, ethnic, or racial affiliation. The principle of citizenship shared by all members of society, in a sense, makes the old covenant of *ḏimma*, which in the past regulated the relationships between the *ahl al-kitāb* and the Muslim state, obsolete. Duties and rights of citizenship, regardless of religious affiliation, are a modern variation of the pact of protection. However, it should once again be remembered that this premise does not necessarily lead to a change in the character of the state and to a separation between religious and secular spheres. The acceptance of the principle of citizenship does not re-

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62 Ibid.: 340-341.

63 Ibid.: 341.

64 English translations of two of the main documents are available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?ArtID=56424#.VgUM18vtlHw>; and <https://danutm.files.wordpress.com/20-12/04/al-azhar-document-for-basic-freedoms.pdf> (accessed 26 September 2015).

65 al-AZHAR 2015c.

quire the acceptance of a secular society in which religion is confined to private space. The public role of Islam is not denied. In the document of al-Azhar regarding the future of Egypt, for example, the aspiration to create a modern, civil, and democratic state is combined with the reaffirmation that Islam is the official religion and that Islamic principles are the main source of legislation. The same position is found in the thought of al-Qaraḍāwī, Fahmī Huwaydī, and other exponents of the *wasaṭī* trend.[66]

It is on this aporia that non-Muslim minorities base their criticism and accuse this trend of ambiguity. Legal emancipation, in fact, does not imply cultural assimilation or full political integration.[67] Furthermore, one should make an in-depth examination of what significance is given to the term '*muwāṭin*' itself. As Krämer points out, is it referred to as 'citizen' or just 'compatriot'?[68]

However, even within non-Muslim communities one can observe an oscillation between the nostalgia of the protection status and the claim for full rights of citizenship.

It is too early to assess the effects of this process of change in contemporary Islamic thought as it is still being subjected to new internal and external challenges. In fact, on the one hand, it has to deal with the process of globalisation and reaffirmation of identities, and, on the other, with the internal pressures imposed by the emergence of a violent interpretation of Islam that denies any room for diversity and otherness.

However, these shifts may leave room for cautious optimism, even in these dark times in Syria and Iraq, in regard to the possibility that a new trend of interpretation might develop and become stronger within Islamic political thought and thus lead to the creation of the premises for new practices and standards of coexistence between Muslims and non-Muslims in countries with Islamic majorities.

The *wasaṭī* approach applied to the status of non-Muslim communities could lead to a twofold conclusion. First, the *wasaṭiyya* school led by Yūsuf al-Qaraḍāwī is not the only current in modern Islamic thought to rely on Quranic verse 2:143 in order to propose a new attitude towards the challenges of modern societies. *Wasaṭiyya* is becoming a disputed territory to which not only a purely legal question of interpretation of sacred texts is related, but one that mainly involves the cultural leadership (spiritual and religious together) on contemporary Islamic thought. This problem is made even more dramatic by the internal crisis to Islam that has arisen with the emergence of contemporary Islamic extremism, from al-Qaeda to IS.

Secondly, the modern Islamic world is facing a conflict involving different instances pretending to represent a true Islamic *wasaṭī Weltanschauung* opposed to the extremist one proposed from al-Qaeda to IS. In this conflict for leadership, the issue of non-Muslim minorities and, in general, the place of 'otherness' in Islamic thought, is emerging as a question of major relevance for the present and future of Muslim communities in the East and in the West.

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66 See footnote 52 and Huwaydī 1990.

67 See Krämer 1995: 581.

68 Ibid.: 586-587.

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Fiqh al-aqalliyyāt in Israel: *Wasaṭiyya* and the Use of the Past by Muslim Judges

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Abstract

The context of the Muslim Palestinian minority in Israel poses important puzzles as for the application of the doctrine of *fiqh al-aqalliyyāt*. Despite this, the development of *fiqh al-aqalliyyāt* in the Israeli context provides important insights into the changes facing the Palestinian minority as well as into changing relations between Palestinians in Israel and the State of Israel as a whole. The first part of the article discusses the limitations of applying *fiqh al-aqalliyyāt* in the context of the Muslim community in Israel. The second part considers multiple references made by sharia court judges to *fiqh al-aqalliyyāt* and to the principles of *wasaṭiyya* as useful to find 'balancing' solutions to address the needs of the contemporary Muslim public and reject accusations of modernisation of Muslim law understood as 'Israelisation' of sharia and Muslim identity.

Key words: *fiqh al-aqalliyyāt*, Israel, Palestine, Israeli Arabs, Muslim minority, sharia courts, identity

1. Introduction

While Israel is far from an ideal model of coexistence amongst religious factions, Israel's judicial experience in terms of multiculturalism and religious accommodations is interesting and unique.[1] Moreover, research on Muslim jurisprudence in Israel provides an interesting opportunity to examine how Muslim judges and *fuqahāʾ* react to the challenges of a Western-oriented society. Israel's population includes more than 1.7 million Arabs, 84.5 per cent of whom are Muslims, representing 17.5 per cent of Israel's total population.[2] These people represent an indigenous minority. They possess religious and linguistic characteristics differing from those of the rest of the Israeli population and most of them show a sense of solidarity directed towards preserving their culture, traditions, religion and language, which they share with Palestinians in Gaza and the West Bank.[3]

At the outbreak of the 1948 war the Israeli system of jurisprudence incorporated sharia courts through the legal system adopted from the British Mandate. Thus, the Ottoman con-

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1 KARAYANNI 2009.

2 Israeli Central Bureau of Statistics, figures for 2016.

3 See the definition of minority proposed by Francesco Capotorti in 1977 in connection with Article 27 of the International Covenant on Civil and Political Rights. CAPOTORTI 1991: par. 568. As for defining 'indigenous peoples' see BARTEN 2015: 8-11.

fessional system was preserved as well as the Ottoman rules of procedure.[4] Today, sharia courts still have jurisdiction to decide on matters of personal status, family law and Muslim endowments[5] and they are granted exclusive jurisdiction on matters of Muslim marriage and divorce. Despite their power, sharia judges are facing a multitude of challenges. First, they are personally appointed by the President of Israel. So, a question arises: can we consider these qadis as legitimate jurists under Muslim religious law? A second provocative question arises if we consider the restrictions imposed by the Knesset on some matters of Islamic law such as unilateral divorce and polygamy. In doing so, the Knesset adopted procedural provisions and penal sanctions in preference to substantive provisions (which would have invalidated religious law). What this means in practical terms, for example, is that a husband who divorces his wife without her consent is liable for punishment.[6] Yet the law does not invalidate such a divorce, which is valid under sharia law. In this context, do qadis and religious functionaries have a duty to report contraventions to civil authorities? How should qadis react to these kinds of restrictions? Finally, but importantly, qadis have to face the pressure of social actors such as feminist movements and associations for women's rights that are challenging the jurisdiction of religious courts in favour of civil courts.

The article addresses these issues by looking at the development of *fiqh al-aqalliyyāt* (Jurisprudence for Muslim Minorities). In a recent article on *fiqh al-aqalliyyāt* in Israel, Mustafa and Agbaria have claimed that Israeli-Palestinian Muslims do not enjoy attempts towards integration and mediation through the doctrine of Jurisprudence of the Minorities. Looking at the role of academic institutions connected with the northern branch of the Israeli Islamic Movement and the Islamic Council for Religious Fatwas, they offer a valuable contribution to the debate, by arguing that the Israeli-Palestinian context poses a serious challenge to the development of this doctrine, and convincingly assert that it demands further theorisation.[7] Nevertheless, the article does not consider in depth the position of sharia judges, claiming that 'Islamic jurisprudence has remained faithful to old, rigid and hardline Islamic traditions' and is uncontextualised.[8] The reformist approach of Muslim judges in Israel has been highlighted, from different perspectives, by Abou Ramadan and Reiter. Yet they did not directly connect such a reformist approach with the doctrine of Jurisprudence of the Minorities. A recent publication by one of the main personalities among Muslim judges in Israel, qadi Iyad Zahalka (judge of the sharia court of West Jerusalem, the second most important sharia court in Israel, after the sharia Court of Appeal) demonstrates growing attention on the doctrine.

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[4] Nevertheless, there is a main difference between the Israeli system and the Ottoman one (the *millet* system): the Israeli system deals with Muslims as minority while the *millet* system functioned when Muslims represented the ruling majority. For more details, see KOZMA 2011.

[5] The majority of the *waqf* system has been confiscated by the state. See DUMPER 1994.

[6] Concerning unilateral divorce there is also a civil sanction: the husband who unilaterally divorces his wife has to pay her compensation. See ABOU RAMADAN 2006.

[7] MUSTAFA & AGBARIA 2016.

[8] Ibid.: 13.

Drawing from interviews collected in 2014 during fieldwork in Israel,[9] and on public declarations by sharia court judges such as Iyad Zahalka and Ahmad Natour (head of the sharia Court of Appeal between 1994 and 2013), I argue that this represents just the last attempt by Muslim judges towards the use of *fiqh al-aqalliyyāt* in their public discourse. Moreover, I claim that the doctrine is providing them with a useful framework to defend their authority and socio-political status inside Israel.

Relying on the complex scenario well described by Mustafa and Agbaria, the first part of the article discusses the particularities of the Israeli case and the limitations of applying *fiqh al-aqalliyyāt* in the context of the Muslim community in Israel. Going into greater detail, it focuses on the status of the Palestinian minority as an indigenous and national minority and not as a minority of Muslim immigrants. In the second part, it considers references made by sharia court judges to *fiqh al-aqalliyyāt* and to the principles of *wasaṭiyya* and *iǧtihād* (interpretation of Islamic law) to find 'balancing' solutions to address the needs of the contemporary Muslim public and, at the same time, to reject accusations of 'Israelisation' of sharia.

2. The doctrine of *fiqh al-aqalliyyāt* and the particularities of the Israeli case

When sheikh Ṭāhā Jābir al-ʿAlwānī (Taha Jabir al-Alwani) and sheikh Yūsuf al-Qaraḍāwī inaugurated the so-called *fiqh al-aqalliyyāt*[10] in the 1990s they were not thinking about Muslims in Israel. Yet this new field of Muslim jurisprudence has been introduced to meet the needs of Muslim immigrants in Europe and to respond to their religious legal questions about a better way to integrate in Western society without losing their faith and identity. Indeed, Israel differs from non-Muslim Western countries considered by the scholars of *fiqh al-aqalliyyāt* for at least three reasons. First, the existence of a sharia court system that holds wide (and sometimes exclusive) jurisdiction in matters of personal status and family law. Second, as pointed out by Mustafa and Agbaria, the difference in status between Palestinian-Israeli Muslims and Muslim immigrants in the West and finally, the presence of political Islamic movements that reject Muslim assimilation into Israel.[11]

At the outbreak of the 1948 war the Israeli system of jurisprudence incorporated sharia courts through the legal system adopted from the British Mandate. The Law and Administration Ordinance preserved the Mandatory legal system.[12] Thus, the confessional system already used during the Ottoman Empire (the *millet* system) was preserved, as well as the Ottoman rules of procedure. Today, the sharia court system in Israel comprises eight district courts (situated in the cities of Jerusalem, Jaffa, Be'er Sheva, Nazareth, Taibe, Baka al-Garbiyye, Acca and Haifa) and a sharia court of appeal (situated in Jerusalem). Sharia

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9 Fieldwork was conducted in Israel as part of the author's PhD research program at the University of Rome, "La Sapienza".

10 See FISHMAN 2006. See also al-QARAḌĀWĪ 2001.

11 MUSTAFA & AGBARIA 2016: 8-13.

12 "Law and Administration Ordinance 5708-1948".

courts still have jurisdiction to decide on matters of personal status, family law and Muslim endowments and maintain exclusive jurisdiction in matters of marriage and divorce for Muslims in Israel.

Nevertheless, the situation in which qadis serve is unique. Israel is a non-Muslim state surrounded by Arab-Muslim countries with which it maintains conflictual relations. Moreover, Palestinians in Israel represent a native national minority and not a minority of Muslim immigrants. As Mustafa points out, this poses serious puzzles to the application of the theory of *fiqh al-aqalliyyāt* in Israel. According to him, this difference in status influences spaces of socio-political negotiation:

> in this regard, there is a major difference between Israeli and European context in the extent to which the status of citizenship is perceived as a platform upon which socio-political claims are raised and negotiated. In Israel, it seems that terrain citizenship is more contested and there is no consensus on the 'rules of the game', as exists in large in European contexts.[13]

Muslim immigrants living in other Western countries engage with a hosting context trying to find a compromise between a new civic identity (citizenship)[14] and their native religious identity. In this context, socio-political claims are actively negotiated. In comparison, Palestinian Muslims in Israel are segregated into a socio-political space whose rules and borders are hardly negotiable.[15] For long time since the foundations of Israel, they have been subjected to a process of socio-political and cultural assimilation led from above.[16] Moreover, as Israel defines itself as a Jewish state,[17] the 'boundaries of the Israeli collective are determined in terms of membership in an ethno-national group rather than according to universal civil criteria'.[18] The complexity of this situation is furthermore increased as, contrary to what happens in Europe and the West, where Muslim immigrants are in search of integration, in the context of the Israeli-Palestinian conflict many Palestinian Muslims (especially those who identify with political Islamic movements, as we will argue later) oppose assimilation.[19] In this sense, possibilities of Muslim integration and negotiation of a new civic identity are deeply obstructed.

To better understand the features that make Israel a special case, especially this last point, it is useful to look back to its history. Indeed, today's Palestinian resistance to assimilation is strictly connected to the loss of consent towards sharia courts, the simultaneous

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13 In doing so, Mustafa claims that no independent local Palestinian version of *fiqh al-aqalliyyāt* developed in Israel. MUSTAFA 2013.

14 On the major controversies surrounding Islam and Muslims in Europe when it comes to secularism, women's rights, citizenship, and terrorism see O'BRIEN 2016.

15 MUSTAFA & AGBARIA 2016: 10.

16 See LUSTICK 1980.

17 See "Basic Law: the Knesset (Amendment No. 9, 1985)".

18 MUSTAFA 2013: 18.

19 See EDRES 2014.

rise of political Islamic movements and the need to recover a strong sense of national identity.[20]

During the 1948 war the Supreme Muslim Council collapsed, so, after the founding of the State of Israel, the Palestinian Muslim minority found itself without religious and political leaders.[21] After achieving Israeli citizenship in 1952, Palestinians living inside the Israeli borders were considered traitors by their compatriots living abroad or in the Occupied Territories. This feeling was so strong that, when in 1948 the neighbouring Arab countries closed their borders with Israel, many Israeli-Palestinians were prohibited from entering these territories.[22] This situation, coupled with 'Judeisation' of the state, which was followed by the Israeli government, caused trauma and a sense of identity loss amongst Israeli-Palestinians.[23] During the first decades after the foundation of Israel, the government put lot of effort into preventing the formation of a new Palestinian political front that would have gained an advantage from the strong link between Palestinian nationalism and Islam. To pursue this goal, in the 1950s and the 1960s restrictions were imposed to prevent the recovery of cultural, linguistic and religious elements threatened by sole contact with the 'close-secularist' Israeli environment.[24] A government blockade had been put on books and other cultural material coming from the neighbouring Arab countries in the 1950s.[25] In the same way, Islamic education was inhibited and put under tight control until the first half of the 1960s.[26] The blockade imposed on Islamic education until the end of the 1960s caused a setback in the turnover of Islamic judges and sharia court functionaries.[27]

During the British Mandate, the Supreme Muslim Council was granted the sole authority to appoint qadis in Palestine. After the collapse of the Supreme Muslim Council, no other specific body was authorised to appoint qadis. As argued by Alisa Rubin Peled, after 1948 'the issue of who had the authority to make qadi appointment was at the centre of the debate over the degree of autonomy to be granted to the Muslim community'.[28] In 1961, with the Qadi Law, the Knesset (the legislative branch of the Israeli government) established that Israeli qadis would be nominated by a special committee composed of nine members, only five of whom should be mandatory Muslims.[29] Qadis would be appointed by the President of Israel. The law bound the appointment to an oath of allegiance to the State of Israel, which was charged with the payment of sharia court judges. Qadis duty to pledge their allegiance to the President of the State of Israel (and to remain faithful to it) was consequential. As Rubin Peled underlines, qadis were less inclined to express their

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20 Zahalka 2016: loc. 4752-4782.

21 See Kupfershmidt 1987. See also al-Haj & Rosenfeld 1990; Landau 1969: 71-72; Bishara 2002.

22 D'aimmo 2009.

23 al-Haj 1995: 126; 151-152.

24 Peled 2001: 108-109

25 Ibid.

26 Ibid. See also al-Haj 1995.

27 Peled 2001: 122-127.

28 Ibid.: 59.

29 "Qāḍis Law, 5721-1961".

dissent against Israeli politics. In this context, qadis were selected more on the basis of their possible co-optation than on their expertise.[30]

This selection process caused a deep rift between sharia courts and the Palestinian Muslim population, which felt its interests badly represented by sharia court judges. Political Islamic movements subsequently filled this gap in leadership. In 1967, thanks to the re-opening of the borders with neighbouring territories, the Palestinian-Israeli Muslim Community reconnected with the High Muslim Council and with the religious officers and leaders who had escaped during the 1948 war. Moreover, new chances were given to Islamic education. Many young Israeli-Palestinians, willing to study in the educational Islamic institutions in the Occupied Territories and to participate in their activities, moved to the West Bank. Under these circumstances, between the end of the 1970s and the beginning of the 1980s, a group of young Palestinian lawyers coming from the Triangle moved to the West Bank to study in the major Islamic Palestinian Institutions (like the Islamic Colleges of Nablus and Hebron).[31] Under the leadership of one of them, ʿAbd Allāh Nimr Darwīš, they established the first cell of the Israeli Islamic Movement.

After 1983, popular support for the Movement grew rapidly. In 1989, the Movement decided to participate in local elections, and won in the city of Umm al-, in the Triangle.[32] In 1996, the Movement also gained support for the climb toward the 14th Knesset. Participation in Israel's political system caused a disagreement between the most radical side of the Movement (lead by the sheikhs Rāʾid Ṣalāḥ and Kamāl al-Ḫaṭīb, who refused political participation) and the moderate side (lead by Darwīš, who supported participation).[33] Thus, 1996 was a turning point in the history of the Movement, characterised on the one hand by the ascent to the Knesset of the moderate side, and on the other by a splitting of the Movement (between the moderate southern side and the radical northern one) and the subsequent decoupling of structures, activities and services.[34]

The programme of the Movement was one of the main factors in its political success. A 'return to Islam' was not the only purpose; the members focused their efforts on the creation of a wide net of charitable and educational associations that succeeded in filling, to an extent, the omissions and the derelictions of the state towards the Arab-Muslim minority.[35] The Islamic Movement also played an important role in the educational field. It promoted activities oriented to the recovery of religious traditions and knowledge of Arabic language and Palestinian history, disclosing awareness of the strong bond between Islam and Arab nationalism and a great ability to use it in order to gain social and political support. From 1990 up to the present, the number of associations linked with the Islamic Movement has

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[30] PELED 2001: 65-68.

[31] See MAKAROV 1997.

[32] ABURAIYA 1991: 1.

[33] ABURAIYA 2004. See also REKHESS 1996 and ISRAELI 1993.

[34] Knesset Member Masʿūd Ġanāyim (Masud Ghnaim, Islamic Movement) sees this point of the Islamic Movement's history as an absolutely positive step and talks about a complete 'decoupling' of services and activities. Personal interview with Masʿūd Ġanāyim, Saḫnīn-Israel, 17 March 2011. See EDRES 2011.

[35] MAKAROV 1997.

grown prominently. Today political Muslim movements hold the monopoly on faith practice regulation. Nevertheless, their strong commitment to Islam and Islamic education as a means to recover Palestinian nationalism and identity gradually reduced spaces of Palestinian Muslim negotiation within the Israeli context. In particular, the northern branch of the Israeli Islamic Movement totally rejects the Israeli version of integration.[36]

As Mustafa clearly resumes:

> Unsurprisingly, the vast majority of Palestinian political movements in Israel reject the Israeli version of integration, which denies them any recognition of their collective identity. In contrast to European contexts, in which the state version is challenged but not necessarily rejected, perceived as demanding amendment and transformation, but not completely renounced, the official Israeli version is fiercely opposed, especially by political Muslim movements.[37]

This particular context poses important puzzles for the development of *fiqh al-aqalliyyāt* as it is conceived by al-Qaraḍāwī, Ramadan and al-Alwani.

3. The reference to *fiqh al-aqalliyyāt* and to the principles of *wasaṭiyya* to address the needs of contemporary Muslim public and to reject accusations of 'Israelisation' of sharia law

At the core of the doctrine of *fiqh al-aqalliyyāt* stands a reformulation of the international order as it was seen by classical Islamic Jurists: a world divided into two distinct entities, *dār al-Islām* and *dār al-ḥarb* (land of war). Al-Qaraḍāwī, al-Alwani and Tariq Ramadan, the most important figures in the conceptualisation of *fiqh al-aqalliyyāt*, recognise that these labels no longer fit with contemporary reality. For this reason, they refresh the classical distinction between *dār al-Islām* and *dār al-ḥarb*, claiming that Western countries that were previously considered part of *dār al-ḥarb* should now be given different definitions. According to Tariq Ramadan*, dār al-ḥarb* should now be replaced with *dār al-šahāda*. With this term, Ramadan refers to places where Muslims are free to fulfil their religious practices, teach others about Islam and act according to Islamic law without interference.[38] Similarly, al-Alwani extends the definition of *dār al-Islām* to all territories where Muslims can freely adhere to their faith and practice it safely.[39] Finally, al-Qaraḍāwī considers all Western countries (with the sole exception of Israel, as we will see later) as *dār al-ʿahd*, land of the covenant.[40] In doing so, Ramadan, al-Alwani and al-Qaraḍāwī reformulated the

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36 The Israeli version of integration has been harshly criticised by Lustick, who identifies the three components of Israel's control system as segmentation, dependence and co-optation. See LUSTICK 1980.

37 MUSTAFA 2013: 18.

38 Ibid.: 13. For more details about the concept of 'Space of Testimony' see TAMPIO 2011: 619.

39 al-ALWANI 2003.

40 With regards to al-Qaraḍāwī's discussion about *dār al-Islām* and *dār al-ʿahd* see al-QARAḌĀWĪ 2009, especially vol. II: 865-918.

relationship between Muslims and the West, opening new spaces of dialogue and engagement for Muslims in non-Muslim countries.

This theoretical change does not only affect the ideological but also provides Muslims living in the West the necessary extenuating circumstance to resolve the contradiction between citizenship and sharia thus avoiding segregation.[41] This way, *fiqh al-aqalliyyāt* grants Muslims living in Europe and America the permission to reside in non-Muslim countries, to receive European citizenship and to take part in politics, joining and voting existing parties in the West even if they do not aim at the implementation of sharia.

In the portrayed picture, Israel stands in a very particular position. Indeed, it seems to be considered by Yūsuf al-Qaraḍāwī as the only place on Earth that deserves the label of '*dār al-ḥarb*'. What this means in practical terms is that Palestinian Muslims living in Israel cannot so easily take advantage of the principles of flexibility and openness conceived to facilitate the lives of Muslims in Europe and America. Furthermore, as highlighted by Polka with reference to Muslim participation in the Knesset, the 'balancing doctrine' does not apply in Israel:

> [al-Qaradawi] holds that Muslim participation in the Knesset should be rejected as such participation entails recognizing Israel's right to exist or its right to remain on stolen land. According to al-Qaradawi, participation in the Knesset is not an issue subject to the 'balancing doctrine', that is, a cost-benefit analysis. He defines Israel as a 'foreign entity' […] in the region, which imposed itself through the power of iron and fire, and it is considered a foreign organ in the Arab and Muslim body; as such, it is rejected by the organs.[42]

Quite obviously, this definition casts many doubts on the aforementioned nomination of sharia court qadis, who are personally appointed by the President of Israel. Conditional incorporation of sharia court judges into the Israeli system contributed to qadis' loss of credibility and consent amongst the Arab public itself. Nevertheless, contemporary qadis are claiming their legitimacy. According to Iyad Zahalka,[43] qadi of the sharia court of West Jerusalem and formerly responsible for the management of the Israeli sharia courts system, qadis appointed by the Israeli President are granted religious legitimacy. To sustain his statement Zahalka quotes the greatest scholars of the Ḥanafi School. Ibn ʿĀbidīn (d. 1252/ 1836), in particular, determines that qadis may be appointed by honest as well as tyrannical sultans, by Muslim as well as by non-Muslim ones.[44] Indeed, the same concept is highlight-

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41 POLKA 2013.

42 al-QARAḌĀWĪ, *Fatāwā muʿāṣira*, quoted by POLKA 2013: 49.

43 Zahalka's contribution with regards to *fiqh al-aqalliyyāt* is aknowledged by Mustafa and Agbaria as well. Yet, they consider him as a 'rare exception', disregarding the role of Zahalka as a leading figure in the Israeli Muslim legal framework. At the moment judge Zahalka serves as judge of the Shariʿa court of Jerusalem. He served as chief legal assistant to the president of the Shariʿa Court of Appeals and as chairperson of the Commission for Israeli Shariʿa Courts at Israel Bar Association. Moreover, he held political and academic positions. See MUSTAFA & AGBARIA 2016: 10-11.

44 ZAHALKA 2013: 82. Zahalka quotes here the famous work of IBN ʿĀBIDĪN, *Radd al-muḥtār ʿalà al-durr al-muḥtār*: 43.

ed by al-Indarpatī (d. 786/1381) in his *al-Fatāwā al-tātārḫāniyya* and also in *al-Fatāwā al-Hindiyya*.[45] In summary, as Zahalka assertively pointed out:

> According to *Al-Fatawa al-Hindiyyah*, 'a qadi is permitted to receive his appointment from the sultan whether he is upright or not […]. But he is permitted to accept the appointment from a wayward sultan if the sultan permits the qadi to adjudicate justly and does not adversely affect the trials brought before him by his intervention'. Thus, the appointment of a qadi does not require that the appointing sultan be of the Islamic faith. These quotations are also cited in modern religious legal literature, including *Al-Sultah al-Qada'iyyah wa-shakhsiyyat al-Qadi*, a volume by Muhammad 'Abd al-Rahman al-Bakr, and *Nizam al-Qada' fi al-Shari'ah al-Islamiyyah* by 'Abd al-Karim Zidan. All of these sources hold that Muslim qadis may be appointed by a non-Muslim authority.[46]

Moreover, qadis are referring to the principles of *fiqh al-aqalliyyāt* to defend their image and to gain popular support. Since 1995 the Israeli sharia court system has undergone a deep process of change. This process has been fostered by two factors: the competition with political Islamic movements and the pressure exercised by feminist organisations.[47] In 1995 a group of feminist organisations and associations for women's rights united in the 'Working group for personal status issues' to ask for revocation of the exclusive jurisdiction of sharia courts to decide on matters of personal status of Muslims in Israel. In November 2001, Amendment 5 to the Israeli Family Court Law cancelled sharia courts' exclusivity over the entire realm of personal law, excluding marriage and divorce. As a result, Muslims can now turn to either civil family courts or sharia courts to decide family matters such as child custody, alimony and property relations between spouses.[48] In order to counter the growing power of civil court jurisdiction, sharia courts are working hard to renew their image. On the one hand, they are reforming the sharia judicial system in order to make it more competitive and to address the needs of a modern public. On the other hand, they protect the image of sharia courts as the 'last stronghold' of Muslim Palestinian identity in Israel and as unique legitimate institution to decide on matters of Muslim personal status.[49] In this context, even the implicit reference to the principles of *fiqh al-aqalliyyāt* allows qadis to pursue both goals.

Israeli sharia judges refer to *fiqh al-aqalliyyāt*, and in particular to the doctrine of *wasaṭiyya* ('the Middle way', an ideological stream inspired by verse 2:143),[50] in several ways. In an article published in 2011 about compensation to unrelated live organ donors Ahmad Natour, main representative of the Israeli sharia court system and president of the High Muslim Court of Appeal between 1994 and 2013, makes explicit reference to al-

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45 See al-INDARPATĪ, *al-Fatāwà al-tātārḫāniyya* and BURHĀNPŪRĪ, *al-Fatāwā al-hindiyya*.

46 ZAHALKA 2013: 82-83.

47 ZAHALKA 2016: loc. 4752-5342.

48 One of the results of this process is 'forum shopping'. See SHAHAR 2013.

49 ZAHALKA 2013.

50 'Thus We appointed you a midmost nation.' The Quran is quoted from the English translation by A. J. ARBERRY.

Qaraḍāwī and to the doctrine of *wasaṭiyya* as a main source of inspiration for those who 'are looking for solutions that will be in harmony with the higher intentions of sharia and the benefit of the public'.[51] Moreover, Natour demonstrates that he is fully aware of the relation between the principles of public interest (*maṣlaḥa*) and necessity (*ḍarūra*) and the doctrine of *wasaṭiyya*:

> *Maslaha* (public benefit) and *darura* (necessity) principles were adopted as well, such as 'necessity makes lawful that which is prohibited', 'hardship calls for relief', and 'where it is inevitable, the lesser of the two harms should be done'. Such concepts, we should note, are heavily used in the *wasatiyya* discourse.[52]

This evidence is supported by explicit reference to al-Qaraḍāwī and, more implicitly, to al-Qaraḍāwī's 'balancing theory': 'the solution revolves around balancing the benefit on one hand and the extent of damage on the other hand'.[53] Here, these principles are used by the author to support the renewal and reform that Islamic law is undergoing in facing the challenges of modern science and, in particular, the possibility of organ transplantation. Moreover, they serve as theoretical instruments to reject the option of a possible compensation to unrelated live organ donors.[54]

Reference to the principles of *fiqh al-aqalliyyāt* also appears, even if in implicit ways, in leading sentences issued by the High Muslim Court of Appeal. Indeed, as stated by Iyad Zahalka:

> Sheikh Dr. Yusuf Abdallah al-Qaradawi is the most prominent contemporary Sunni Islamic jurist; his rulings are the most accepted by mainstream Muslims (*al-wasatiyya*) [the middle way]. When we examine the sharia courts in Israel in light of al-Qaraḍāwī's writings, especially his book *Al-ijtihad al-muʿasir* [Contemporary ijtihād], we find that Islamic law in our courts should be considered Islamic according to the generally accepted standards of Islamic law practiced through the Islamic world. Al-Qaradawi's works are not cited in the decisions of the shariʿa courts in Israel, but his fatwas are always in the background, serving as a reliable reference.[55]

After 1951, the Knesset passed various laws that stated the importance of gender equality as a main criterion for future legislation and judgment. This way, polygamy and male right to unilateral divorce have been banned and parameters of gender equality have been introduced in matters of succession, custody and guardianship. These laws directly referred to religious courts that are therefore subordinate to the jurisdiction of the Israeli Supreme Court. As argued by Aharon Layish, in the first decades after the foundation of the State of Israel, qadis maintained ambiguous and ambivalent positions.[56] They often opted for conservative positions towards issues clearly ruled by sharia law and explicitly mentioned in

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51 NATOUR & FISHMAN 2001: 1.

52 Ibid.: 3.

53 Ibid.

54 Ibid.: 6.

55 ZAHALKA 2012: 165.

56 LAYISH 2006.

the Quran. In sentences regarding *ṭalāq*, for example, qadis often decided to protect what was perceived as public interest (*maṣlaḥa*). Which is to say, in first place, that they uphold the basic rights (such as male right to unilateral divorce) granted by Islamic law. Even if the safeguard of the principles of sharia law served as a main objective, qadis also recognised the necessity to deal with Muslim interest in a non-Muslim context. That way, they discovered compromise solutions to help Muslim men wishing to divorce to escape the penal sanction provided for by Israeli law. As reported by qadi ʿAsaliyya:

> the husband has the right of *ṭalāq* and is therefore not bound to pay compensation to the wife except in the event that the wife does not wish to be divorced and the husband wants to bring her round with money in order to avoid punishment […].[57]

In this regard, coherence with the main principles of *fiqh al-aqalliyyāt* appears if we consider the expedients and the strategies implemented by qadis as a reaction to the restrictions imposed by Israeli law.

Yet after 1995, under the guidance of qadi Ahmad Natour, the Israeli sharia court system passed through a deep process of reform that resulted in a more liberal approach towards Muslim women's rights. This is particularly clear if we look at cases of alimony, custody and divorce for discordance and incompatibility (*nizāʿ wa-šiqāq*).[58] For the last two decades, qadis have acted towards increasing the husband's responsibility in choosing a suitable residence for his wife, a more clear definition of the parameters of *nušūz*, a reformed and modern procedure to define the amount of the wife's alimony, a better control over alimony payment on the part of the husband, the definition of the limits of *nizāʿ wa-šiqāq*, the increase of control over arbitrators and more possibilities for women to maintain custody of their children even beyond the limits imposed by Islamic law.[59] Tangible examples of this modernising attitude are represented by sentences 28/1999 and 187/1999 delivered by the High Muslim Court of Appeal. In these sentences, sharia judges consider it possible for Muslim women to maintain custody of their children even after a second marriage.[60] Sharia judges have justified this position by means of *iğtihād*, referring to a re-interpretation of hadith no. 2276 in the *Sunan* of Abū Dāwūd.[61] In particular, according to Natour, the comparative term '*aḥaqqu*' (who has *more* right) in the sentence 'you have more right to him as long as you do not remarry' would not implicate a definite and automatic revocation of the mother's right to custody.[62] Such reforms have been analysed in depth by Moussa Abou Ramadan, who argues that sharia courts adopted liberal values such as 'the well-being of the minor' and 'natural justice' from the rulings of the Israeli Supreme

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57 Ibid.: 145.

58 Reiter provides us an extensive description of the important role played by Natour in facilitating divorce in cases of discordance and incompatibility. See Reiter 2009: 13-38.

59 Ibid.

60 See Zahalka 2008: 147.

61 The Book of Divorce, Chapter 34/35, in: Abū Dāwūd, *Sunan*. With regards to child custody see also Abou Ramadan 2002-2003.

62 Conversation with Ahmad Natour, 12 March 2014, Hebrew University of Jerusalem. See Edres 2015.

Court, undertaking a process of 'Israelisation' of Muslim juridical practices.[63] This position is completely rejected by sharia judges, who assertively claim that these reforms are to be considered as *iğtihād*, so as the result of a process of reinterpretation of Islamic law from the inside.[64] As stated by Zahalka:

> renewal is typically performed via selective *ijtihad*, designed to revise customary law by adopting practices from other schools and other jurists, such as Shaykh Yusuf al-Qaradawi. This process is undertaken in order to adapt the shariʿah law to the spirit of the times […] The common thread linking the various issues of Muslim law on which the Court of Appeals has exhibited activism is not the adaptation of shariʿah law to Israeli law in the form of either 'Islamization' or 'Israelization' of shariʿah laws. Rather, this renewal effort is conducted by means of innovation stemming from shariʿah itself, drawing on the spirit of the times […] This innovation gives rise to a local form of practices of Muslim law that is legitimate and acceptable according to the tests prescribed by Muslim law, as noted in the aforementioned book by al-Qaradawi.[65]

Such a position has been further developed by Zahalka in a recent book, explicitly dealing with *fiqh al-aqalliyyāt*, where he describes the innovations introduced by sharia courts in the specific local Israeli context as the result of a methodology based on seven points: freedom from commitment to rule according to the Ḥanafi school; performance of selective *iğtihād*; acceptation of the principle of public interest *maṣlaḥa;* purposeful interpretation to extract the goals of the texts in primary sources according to the rules of *fiqh al-maqāṣid* (understanding sharia law as designed to achieve five objectives: preservation of religion, health, mental capacity, lineage and property); altering religious law according to shifting circumstances (linking the deferred dowry to the cost of living index due to frequent fluctuations in currency strength, as an example); acknowledging Muslims in Israel as a distinctive minority; respecting basic human rights and dignity.[66] Interestingly enough, point six is explained with the following consideration:

> in Israel, Muslims reside in a pluralistic and liberal society which promotes gender equality. Thus, to prevent women from turning away from religion and refraining from appealing to sharia courts, religious courts have endorsed liberalization of women's rights.[67]

Without entering here the debate about the 'Islamisation' or the 'Israelisation' of sharia law, we cannot ignore two basic issues. First, qadis are using the reference to *fiqh al-aqalliyyāt* to shape their own image in the Israeli context and, in particular, to protect their credibility as legitimate authorities for the Muslim Palestinian minority. Second, these

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63 See Abou Ramadan 2007 and Abou Ramadan 2002-2003.

64 Conversation with Ahmad Natour. See Edres 2015.

65 In this quotation, Zahalka refers to al-Qaraḍāwī's book *al-Iğtihād al-muʿāṣir bayna al-inḍibāṭ wa'l-infirāṭ.* See Zahalka 2013: 88-89.

66 Zahalka 2016.

67 Ibid.: loc. 4932.

reforms are taking place in a context of historical and socio-political transformation, characterised by the approval of 1995 Family Courts Law and its amendment in 2001 and by the pressure of Islamic and feminist movements. The fact that prominent qadis such as Iyad Zahalka recognise the crisis of the sharia court system in front of the Arab public in Israel and the recovery of a better image just after 1995 illustrates the influence of these contextual factors.[68] With this regard (even in the case of *iǧtihād*), it seems clear that we are dealing with a compromise solution or a balancing solution (to use the terms of *fiqh al-aqalliyyāt*) with the forces active in the Israeli system as a whole: Knesset, feminist movements, the Arab community, and the political Islamic movements.

4. Conclusions

The context of the Muslim Palestinian minority in Israel poses important puzzles for the application of the doctrine of *fiqh al-aqalliyyāt*. Indeed, as already noted by Mustafa and Agbaria, Israel differs from the non-Muslim Western countries considered by scholars of *fiqh al-aqalliyyāt* for at least three reasons. First, sharia court judges hold wide and sometimes exclusive jurisdiction in matters of personal status and family law. Second, there is a difference in status between the indigenous national Palestinian minority and the minorities of Muslim immigrants in the West. Third, the presence of political Islamic movements that are working to protect Muslim Palestinian national identity and that therefore reject Muslim assimilation into the Israeli context also generates important differences. Moreover, many scholars of *fiqh al-aqalliyyāt* consider Israel as a 'pariah' state, where al-Qaraḍāwī's 'balancing doctrine' is not applicable. Nevertheless, Israeli sharia judges claim their authority as legitimate guides of the Palestinian Muslim community and explicitly refer to the principles of *wasaṭiyya* and to al-Qaraḍāwī's writings as a reliable reference. In particular, they claim to look at al-Qaraḍāwī's book *al-Iǧtihād al-muʿāṣir* [*Contemporary iǧtihād*] as a source of inspiration. Sharia court judges in Israel demonstrate to be fully aware of the discourse developed around *fiqh al-aqalliyyāt* in Western countries. They understand that *fiqh al-aqalliyyāt* can provide a useful framework to defend their socio-political status in the Israeli context. Indeed, reference to *fiqh al-aqalliyyāt* allows them to reject accusations of 'Israelisation' of sharia law. That way, they defend their image as legitimate guides of the Muslim minority and regain the credibility they have lost over the last decades in favour of the Israeli Islamic Movement. At the same time, *fiqh al-aqalliyyāt* offers a useful framework for change. In this regard, qadis are facing the pressure of feminist movements and organisations developing practices of *iǧtihād*.

In light of the above, it is without a doubt that Israel is an interesting context for further investigation about the development of *fiqh al-aqalliyyāt*. The development of *fiqh al-aqalliyyāt* in Israel provides important insights into the changes facing the Palestinian minority as well as into changing relations between Palestinians in Israel and the State of Israel as a whole.

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68 ZAHALKA 2013: 79-94.

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Embattled Minority In-Between Minorities:
An Analysis of British and German Salafi Anti-Jihadi Campaigns *

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Abstract

Based on an analysis of 150 documents collected between 2012 and 2015 from bookstores, websites and YouTube channels operated by Salafi mosques and organisations in Britain and Germany, this article discusses the different strategies adopted in European Salafi discourse in an effort to disassociate *salafiyya* from al-Qaeda, ISIS and other Jihadi-Salafi movements. The article suggests that the target audience of these rebuttals are Western governments and publics, who suspect *salafiyya* to be a breeding-ground for terror, as well as mosque attendees, who are exposed to *jihadi-salafi* denunciations of Salafi anti-politics and anti-violence agendas. It introduces the diverse set of arguments invoked by Salafis to defend their opposition to violent attacks on Western soil, including the religious duties to abide by contracts, respect Islamic rules of warfare and the regulations on initiating jihad, avoid harming the interests of Muslims and of Islam in Europe, and oppose modern-day Khawarij of whom the Prophet Muḥammad warned.

Key words: Islam in Europe, *salafiyya*, *jihadi-salafiyya*, al-Qaeda, ISIS

1. Introduction

The term 'the Muslim minority in Europe', so commonplace today in popular and academic discourses, is reductionist and misleading. It postulates that for a majority of individuals of Muslim faith on the continent, the religious aspect of identity overrides all other aspects, including national, ethnic and socio-economic. This is not the case. It also postulates that the Muslims of Europe agree on a substantial enough body of religious doctrine and practice to render their analyses as a singular, coherent group instructive. This, too, is not the case. Rather than one 'Muslim minority', Europe is home to a variety of attitudes regarding the role of Islam in public and personal life, and to a variety of Muslim associations that fiercely debate core Islamic concepts and have demonstrated a greater tendency to split than to unite. True, with some exceptions, a majority of Muslims in Europe share the foundations of faith that all Muslims share. Also, a majority among Muslims in Europe shares a political interest in seeing their freedom of religion broadened, and their right not to be discriminated against protected. But in all other senses, there exists a plurality of minority Muslim groups.

One such group is the Salafis. Representing a tiny minority among Muslim populations in Europe,[1] and an approach to Islamic law and theology that most European Mus-

lims reject, the influence of their ideas is nevertheless greater due to their extensive influence in Islam-oriented bookstores and on the internet. The term *salafī* is used here in an empirical-descriptive way with no intention of passing judgment on the fraught issue of who is the 'real Salafi'. In contemporary Arabic, and particularly among Arabic-speaking Muslims in Europe, it defines groups that adhere to the teachings of Saudi Arabia's religious establishment and consider it a primary reference on theological and religio-juristic issues.

Since the 9/11 attacks, Salafis in Europe have faced a twofold challenge, exacerbated by subsequent attacks on European soil and, in recent years, by the voluntary migration of thousands of European Muslims to the ranks of ISIS. On the one hand, their authority has been undermined by Jihadi-Salafi groups who call for the application of violence as a political act against regimes in Muslim countries and in the West, and question the authority of scholars associated with the Saudi regime. On the other hand, they are challenged by European publics and policy makers (as well as by some rival Muslims) who do not recognise the difference between *salafiyya* and *jihadi-salafiyya*, or do, but suspect Salafi teachings to be a stepping stone to radicalisation. To sum up the gravity of the challenge, both the legal and religious legitimacies of European Salafis have been questioned, pressuring them to convince Western publics and policy makers that they do not support violence, and to convince their disciples that their rejection of violence is commensurate with the true meaning of Islam.

This article analyses strategies adopted by Salafi mosques and associations in Britain and Germany to disassociate from *jihadi-salafiyya* and assert the religious legitimacy of this disassociation. The first part is a brief introduction to Salafi doctrine, its particular views on Muslim minorities, and its differences with *jihadi-salafiyya*. The second part presents a comparative contextual discourse analysis of British and German Salafi texts that condemn *jihadi-salafī* organisations and, more specifically, violent attacks against Western societies. The analysis is based on a survey of British and German Salafi mosques' bookstores (including The Salafi Bookstore, Bradford; The Salafi Bookstore, Birmingham; and the bookstores of the Ibnu Taymeeyah Brixton Mosque; al-Nūr mosque, Berlin; al-Ṣaḥāba Mosque, Berlin; al-Raḥmān Mosque, Leipzig; and al-Muḥsinīn Mosque, Bonn), as well as a survey of British and German websites and YouTube channels associated with Salafi mosques and organisations between 2012 and 2015, and interviews with imams and attendees of Salafi mosques. In total, some 150 publications and posts pertaining to the views of 'true' *salafiyya* on violence were analysed.

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[1] In June 2015, the Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz) put the number of Salafis in Germany at around 7,500, i.e., around 0.2 percent of the total Muslim population. Bundesamt für Verfassungsschutz (Federal Office for the Protection of the Constitution), accessed 5 February 2016: <https://www.verfassungsschutz.de/de/arbeitsfelder/af-islamismus-und-islamistischer-terrorismus/was-ist-islamismus/salafistische-bestrebungen>. – Abū Ḥadīǧa ʿAbd al-Waḥīd, one of three imams of the Salafi Mosque of Birmingham, the heartland of English *salafiyya*, estimated in an interview with the author (10 October 2015) that 4,000 of the city's 200,000 Muslims are Salafis. In other Salafi concentrations in England their share of the population is even smaller.

2. *Salafiyya*: An Introduction

According to a tradition narrated by 'Abd Allāh b. 'Umar, the Prophet said: 'The best people are those living in my generation, and then those who will follow them, and then those who will follow the latter. Then there will come some people who will bear witness before taking oaths, and take oaths before bearing witness.' The tradition implies that the closer Muslims were to the days of the Prophet, the better their conduct was. It is the basis for a foundational point of consensus among Sunni jurists that the first three generations of Islam, known collectively as the pious ancestors (*salaf*), provide the example that Muslims should follow and, thus, are the ultimate reference for believers. Because of this consensus, different and contesting Islamic groups have sought to have their doctrines associated with the banner *salafiyya*. The great success of Saudi Arabia's Wahhabi religious establishment and its disciples abroad in doing so in recent decades owes much to the vast financial resources at the disposal of the world's leading oil producer. Contemporary Salafi works argue that their definition as 'Wahhabi', suggesting that they follow in the footsteps of an eighteenth-century scholar rather than those of the *salaf*, is an intentional insult on the part of those wishing to degrade them.[2]

Contemporary *salafiyya* considers itself heir to the legacies of Aḥmad b. Ḥanbal (d. 241/855), Taqī al-Dīn Ibn Taymiyya (d. 728/1328), his student Ibn Qayyim al-Ǧawziyya (d. 751/1350), and Muḥammad b. 'Abd al-Wahhāb (d. 1206/1792), founder of the Wahhabi doctrine. Its two dominant contemporary voices are the Saudis 'Abd al-'Azīz b. 'Abd Allāh b. Bāz (d. 1999/1420), the Kingdom's highest ranking cleric since the early 1970s (and its grand muftī since 1993), and his second-in-command, Muḥammad b. Ṣaliḥ al-'Uṯaymīn (d. 2001). Its highest authorities on jurisprudence are the Saudi Council of Senior Scholars (*Maǧlis Hay'at Kibār al-'Ulamā'*), established in 1971, and its subsidiary, The Permanent Committee for Scholarly Research and Fatwas (*al-Laǧna al-Dā'ima li'l-Buḥūṯ al-'Ilmiyya wa'l-Iftā'*). Most, but not all, prominent contemporary Salafis are Saudi-born.

Salafis consider themselves to be committed only to the teachings of the Quran and the Prophetic traditions and, thus, the emissaries of the beliefs and practices of the *salaf*. Central to their teachings are *tawḥīd* (the oneness of Allah) as the guiding principle of Islam, and the rejection of *širk* (associating partners with Allah)[3] and of *bidʿa* (unlawful innovation). While these are core beliefs for all Muslims, Salafis apply them in a way that delegitimises opposing theological and religio-juristic views, as well as emphasises the importance of individual piety and the undesirability of political involvement.[4] Salafis also

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2 IBN JIBREEN 2007: 200-202. On the Saudi rejection of the term *Wahhābiyya*: ARMANIOS 2003: 1-3.

3 Ibn Bāz explained the centrality of *tawḥīd* as follows: '[Islam's] reality is recognizing the oneness of Allah in His ownership, His control of affairs, and His actions. It is also singling Him out for worship and recognizing His uniqueness in His names and attributes. It is complying with His commands and accepting His law'. IBN BAAZ 2006: 12.

4 Ṣaliḥ al-Fawzān, a member of the Saudi Council of Senior Scholars and of the Permanent Committee, answered his rhetorical question about why Salafis 'always talk about *tawḥīd*' instead of discussing the plights of contemporary Muslims by insisting that in order to solve the problems Muslims face, it is essential 'to seek out the reasons that have led to the punishments afflicting the Muslims'. These reasons are the absence of *tawḥīd* from the lives of most Muslims, manifested in behaviours such as praying to religious figures as intercessors with Allah, and clinging to graves and tombs, as well as not praying,

emphasise that engagements with non-Muslims should be based on the principle of *al-walāʾ waʾl-barāʾ* (loyalty and disavowal); the latter implies avoiding the imitation of non-Muslims, as well as refraining from extending friendship or loyalty to them.[5] However, Salafis, including Ibn Bāz, have strictly prohibited violent attacks against non-Muslims and required that they be treated gently.[6]

The Salafi juristic approach is literalist, heavily drawing on the authority of the Prophetic traditions and restricting (while not rejecting altogether) the accommodation of religious laws to changing circumstances. Socially, Salafis preach for rigid gender segregation, require women to veil their faces for fear of *fitna* (temptation), strictly limit the roles of women in public spheres, and explicitly describe women as less intelligent than men.[7] They also discourage leisure activities and prohibit playing and listening to music.[8]

Salafis maintain an elitist mentality. Drawing on a Prophetic tradition according to which the nation will divide into 73 sects, of which only one will escape hellfire, they believe themselves to be the 'saved sect'.[9] First on their long list of rivals are Islamic political movements, especially those known in contemporary Arabic and in academic discourses as Jihadi-Salafi movements that blend the teachings of Sayyid Quṭb (executed 1966/ 1386, the Muslim Brothers theorist who broke from the mainstream of the movement by suggesting

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fasting, and giving charity as required. Only when *tawḥīd* is established will Muslims be triumphant once more. Al-FAWZAAN 2007: 4.

5   Al-FAWZĀN 2013. Ibn Bāz explained that 'loyalty and disavowal' means loving the believers and being their friend (or ally), while despising the infidels, spurning them and their religion. IBN BĀZ, n.d.: 174; IBN BAZ 1996: 24-25. The Permanent Committee for Scholary Research and Fatwas argued that infidels, including Jews and Christians, are the enemies of Allah and His Prophet and are doomed to hellfire. Al-Laǧna al-Dāʾima liʾl-Buḥūṯ waʾl-Iftāʾ n.d.: 16-20. An introduction by an England-based president of a Salafi organisation to a treatise on *al-walāʾ waʾl-barāʾ*, first published in 1997, explained that 'in the context of Islam, *al-walāʾ* is loyalty to Allah and whatever He is pleased with as well as friendship and closeness to the believers, whereas *al-barāʾ* is freeing oneself from that which is displeasing to Allāh and disowning the believers.' IBN MOHAR 1997: 4-5. For an overview of the development of this concept in Saudi Arabia: WAGEMAKERS 2012: 93-110; WAGEMAKERS 2008: 1-22; SHAVIT 2014: 67-88.

6   IBN BĀZ n.d.: 174-175.

7   To note one example, al-ʿUṯaymīn considered apologetics about Islam as a religion of equality to be a lie. Islam, he argued, believes in justice, not equality, and justice is based on treating equally those who are equal and differentiating between those who are different. Women are different from men, who are stronger, tougher, and have a better capacity for understanding matters. Therefore, different laws are applied to them. For example, the testimony of one man is equivalent to the testimonies of two women because, while there are some women who are wiser than a man, 'such women are not in the majority' and Islamic law is based on what is most common. Women's 'reason is often overtaken by their emotions, and this happens to women more often than it happens to men'. Quoted by al-MUNAJJID 2007: 57-67.

8   Salafis draw from Ibn Taymiyya's depiction of music as strengthening satanic states. IBN TAYMIYYAH 2005: 341. They hold that decisions that legitimise music deviate from the ways of the *salaf*, and those who promote them have no knowledge of Islam. See al-Laǧna al-Dāʾima liʾl-Buḥūṯ waʾl-Iftāʾ 2010: 277. The prohibition on music is strict. For example, Ibn Bāz ruled that it is only permissible to listen to radio programs that contain music if one turns down the volume when music is played. IBN BĀZ 1996: 324.

9   See the words of ʿAbd al-Wahhāb and al-Fawzān's contemporary discussion on them: ʿABDUL WAHHAB 2010: 79-82. See also IBN BAZ 2008: 43-54; MĀLIK IBN ĀDAM n.d.: 4-5, 24-5, 57-60.

in his book *Milestones* that any regime that does not apply Allah's laws exclusively is *ǧāhili* and should be fought against), with Wahhabi social norms and a global outlook and global aspirations.[10] Jihadi-Salafi groups include, most notably, al-Qaeda, a movement that sprang from Saudi Arabia and challenges the legitimacy of the House of Saʿūd, and ISIS. Both pose a direct threat to the survival of the House of Saʿūd. Thus, to effectively discredit their theological credibility is a primary political concern of the regime.

Since the 1970s, Salafis have produced a rich and distinct corpus of theoretical deliberations and fatwas on Muslim minorities. One foundation of their approach is that settlement in Western lands is undesirable, and can only be legitimised under specific circumstances and conditions. A primary justification is engagement in proselytising. Another foundation is that Muslim minorities are not entitled to any special concessions because of the unique hardships they encounter. This position is derived from the foundational Salafi view that Allah's laws are universal and should be interpreted and applied literally. Salafis hold that the duty to disavow applies also to majority non-Muslim societies, and thus encourage social isolation. These views differ from other conceptualisations on Muslims in the West, including those of the *wasaṭī* ('harmonising middle ground school') pragmatically-inclined Dublin-based European Council for Fatwa and Research, headed by the Qatar-based Egyptian jurist Yūsuf al-Qaraḍāwī.[11]

Since the 1990s, a Salafi presence has developed in European countries. Salafi organisations accept Salafi Saudi-based jurists and panels as a reference (*marǧiʿiyya*). They are led by imams who studied in Saudi Arabian universities or were inspired by graduates of these universities and endorse them. They publish and sell books, pamphlets, and sermons of Salafi scholars. With their thickly-bearded, traditionally-attired men and heavily veiled women, Salafi communities are easily recognisable, epitomising for some Europeans the 'non-integrated Muslim'.

There exist no pan-continental or even national-level Salafi panels or organisations that unite them. Rather, there are independently established mosques, associations, Islamic centres and publishers that function on a local level, often rivalling one another. Wiktorowicz's anatomy of the Salafi movement pointed to a split between the apolitical trend of 'purists' (who support the official line of the Saudi religious establishment, which opposes the involvement of religious scholars in politics—for obvious political motivations) and the 'politicos' who engage with politics as a means to generate socio-religious transformation.[12] As demonstrated by Hamid,[13] the conflict between the two trends contributed to divisions in English *salafiyya* in the 1990s, and, as observed by Wiedl, it also resonated in Germany.[14] The absence of unity among European Salafis is not, however, always the

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10 Hegghammer, who characterised Jihadi-Salafis as an extremist blending of the Wahhabi religious tradition and the Quṭbist Islamist trend and pointed to its internationalist orientation, traced the earliest origins of the term to an interview given in 1994 to the London-based jihadi magazine *al-Anṣār* by Ayman al-Ẓawāhirī, al-Qaeda's current leader and a former member of the Egyptian Quṭbist Islamic Jihad. HEGGHAMMER 2009: 251-255.

11 SHAVIT 2012.

12 WIKTOROWICZ 2006: 208.

13 HAMID 2008: 11.

14 WIEDL 2012: 14.

result of core ideological debates. Salafi literalism and their sense of being a 'saved sect' and the only authentic representatives of Islam encourage the transformation of petty debates and personal dislikes into fierce rivalries. This reality has also been recognised and lamented by Salafi scholars.[15] Notwithstanding these divisions, all Salafi organisations and leaders in Europe share an unequivocal resentment of Jihadi-Salafis.

Academic literature has extensively debated the extent to which the association of *salafiyya* with violent radicalisation, particularly among a minority of Muslim youths, is justified. A study published in 2007 by the New York Police Department (NYPD) analysed the backgrounds of terrorists involved in ten terror attacks in North America, Europe and Australia, and exposed a correlation between a period of engagement with Salafi literature and a later retreat from the radical environment and embrace of Jihadi arguments.[16] A study in Germany suggested that while there are some 2,600 mosques in the country, 36.7 percent of the 110 German Muslim jihadists whose biographies were studied and whose attendance of a specific mosque could be verified had been attendees of six Salafi mosques.[17] Rakic and Jurisic argued that through Saudi financing, Salafism incites fanaticism, intolerance and jihad, and urged European governments to address the challenge with greater firmness.[18] Wiktorowicz argued that violent tendencies inherent to the ideology of Salafis render their communities a breeding ground for terrorists, but nevertheless cautioned against neglecting to differentiate between non-violent *salafiyya* and *jihadi-salafiyya*.[19] Similarly, specifically addressing the German context, Logvinov noted the hate-speech of Salafis as a danger, but cautioned against not differentiating between Salafi variants.[20] Abdel-Latif further challenged the correlation between *salafiyya* and violence. She argued that while *jihadi-salafiyya* receives disproportionate attention, the majority of Salafis (which she defined in very broad terms) are not radical. She advised Western governments to engage in dialogue with the Salafi mainstream, as do governments in the Arab world.[21] In a similar vein, Lambert noted that many Salafis are at the forefront of the fight against terror and argued that their labelling as jihadi by security organisations is counter-productive.[22]

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15 See for example in Ar-RAYYIS 2010. His words of preaching lamented that 'many of the Salafi centers in Europe—after being places of knowledge, learning and study—change into places of differing, problems and argumentation among the Salafi themselves'. Al-Rayyis called European Salafis to change course and to realise that there are issues on which there can be differences of opinion, as well to appreciate that not every person with ties to Saudi Arabia is necessarily correct in what he says.

16 SILVER & BHATT 2007: 16-85.

17 HEERLEIN 2014: 169.

18 RAKIC & JURISIC 2012: 650-663.

19 WIKTOROWICZ 2001: 18–38.

20 LOGINOV 2012.

21 ABDEL-LATIF 2009: 69-86.

22 LAMBERT 2008: 31-35.

3. British and German Salafi anti-Jihadist Discourses

In interviews by the author with Salafi leaders in Germany and England, they stressed their commitment to swaying youth away from the path of violence, and the positive impact their activities have. At al-Muḥsinīn Mosque, Bonn, I was told that whenever a young attendee is getting the wrong ideas from the internet, he or she is taken to the imam, who explains them what true Islam is about. Muslims living in the West signed a contract with their state, and Muslims must abide by contracts. Thus violence is not an option for the true Muslim.[23] Nūr al-Dīn Abū ʿAbd Allāh, the imam of Daar us-Sunnah mosque in Shepherds Bush, London, said he resented the association of the terms *jihadi* and *salafī*. He noted that he was active in propagating in schools against al-Qaeda and the Islamic State, and that he believed Salafi preaching is the only cure against violent radicalisation, because it presents Muslims with true Islam.[24]

These views are systematically developed in Salafi texts. A survey of bookstores attached to Salafi mosques in Britain and Germany, as well as of internet websites and YouTube channels associated with Salafi organisations in both countries, revealed rich and anxious discourses aimed at affirming the distinction between Salafis and Jihadi-Salafis and convincing individual Muslims that joining the ranks of violent groups constitutes deviation from Islam. While both discourses are unequivocal in their utter opposition to violent attacks, the anti-Jihadi-Salafi discourse in Britain is far more prolific and organised than the German one, and presents a more diverse and religio-juristically developed body of arguments. It involves a plethora of books, articles, leaflets and audio and visual posts that are dedicated exclusively to this issue, whereas in Germany it is based largely on occasional sermons recorded and posted on YouTube.

The reason for this discrepancy is not that German Salafis are less motivated to condemn violence against Western targets. On the contrary, because *salafiyya* is defined by Germany's Federal Ministry of the Interior and the agency for the protection of the constitution (*Verfassungsschutz*) as a movement that challenges German democracy, and mosques labelled as Salafi are subsequently placed under surveillance, German Salafis are motivated to unequivocally condemn violence, and at times do so outlandishly. (One example is two posters hung on the windows of the Salafi al-Raḥmān mosque in Leipzig for all passers-by to see: 'Wir sind gegen Terror, Gewalt; Wir sind für Frieden, Dialog, Integration' – 'We are against terror, violence; we support peace, dialogue, integration').[25]

Two other explanations come to mind. First, whereas the English roots of *salafiyya* are traced to the early 1990s,[26] those of German *salafiyya* are traced to the early 2000s.[27] Salafis in Britain have more resources, and have, in general, independently published a far greater body of works than German Salafis have. Second, expressions of globalist

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23 Interview with one of the mosque leaders, who asked not to be identified, Bonn, 27 July 2013.

24 Interview with the author, London, 7 October 2015.

25 As documented by the author on 29 July 2013.

26 HAMID 2008: 10-11.

27 WIEDL 2012: 17.

political Islam, including those of the Muslim Brothers and Ḥizb al-Taḥrīr, who Saudi Salafis particularly seek to refute, are far less prominent among Muslims in Germany than they are in Britain. Thus, the German Salafi discourse is in general less preoccupied with the Salafi concept of individual piety and abstention from political meddling than the British.

There is an element of apologetics, directed towards non-Muslim majorities—especially their governments and law enforcement authorities—in both British and German Salafi preaching against violent activities. Salafi texts seek to separate their approach in the public mind from *jihadi-salafiyya* and, moreover, to establish their doctrine as the most effective means of combating radical tendencies, and, thus, an esteemed ally in the battle against radicalism. One example is a Salafi treatise that argued that to associate Salafi theologians with al-Qaeda is similar to arguing that Fidel Castro is an ardent supporter of democracy. *Salafiyya* and terror, it stated, are like oil and water.[28] Another treatise bemoaned the large amounts of money that are wasted by Britain on organisations and think tanks that promise to lead counter-radicalisation efforts but cannot deliver because of their paltry status among Muslim communities. It suggested that the only way to effectively appeal to the minds of those who support jihadi operations is to provide them with evidence based on the Quran and the Prophetic traditions and counter their claim for being the authentic representation of Islam with a more convincing one.[29]

Still, the primary target audience of Salafi anti-violence campaigns in Britain and Germany is Muslims living in the West, first and foremost the young and easily im-pressed, who are also the ones most likely to be exposed to Salafi sources. In making the case against al-Qaeda, ISIS and other Jihadi-Salafi organisations, Salafi preachers intro-duced an array of arguments that describes acts such as the 7/7 attacks on the London underground and Charlie Hebdo attacks as a breach of different Islamic norms, as acts that damaged the welfare of Muslims at large and the prospects of spreading Islam in the West, and a continuation of a historical legacy of deviation against which the Prophet Muḥammad warned. The unifying theme is authenticity: Salafis—adhering to a doctrine whose raison d'être and central source of appeal is its claim to adhere loyally to the teachings of the Prophet and his Companions—struggle to demonstrate that their rejec-tion of violence is the correct interpretation of Islam, whereas violent attacks by Muslim residents of Western countries represent a deviation that must be rejected not for fear of Western security apparatuses, but for fear of Allah. The following are the main argu-ments presented in this discourse.

Abiding by contracts

This argument emphasises the duty of Muslims living in the West to abide by the Islamic norm of respecting contracts. Visas given by Western countries, and citizenship in Western countries, are regarded as a breached contract if one actively joins the ranks of an enemy while still under the contract. The implication is that regardless of how one feels about the West, and regardless of whether one believes that violent attacks are beneficial to Muslim

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28 Al-Akhdar 2002: 10-11.

29 Mahdi 2010: 9-13.

causes, there are certain obligations all Muslims must abide by that render attacks, such as the 9/11, 7/7, Charlie Hebdo or Paris Attacks, prohibited acts. Thus, Muslims who refrain from joining the ranks of al-Qaeda, ISIS or independent groups exercise self-control and true devotion, not allowing emotions, even when running high, to overcome their duties to Allah.

The contractual argument is also invoked by rivals of *salafiyya*. For example, Aḥmad Ǧāballāh, a member of the European Council for Fatwa and Research, argued that even in cases when a non-Muslim country acts unjustly against others, including Muslims, Muslims in that country cannot betray their government because Islam prohibits the breaching of contracts.[30] However, whereas in the *wasaṭī* case this argument is invoked as part of a broader legitimisation of extending loyalty and friendship to non-Muslims (and as such, a refutation of the Salafi concept of 'loyalty and disavowal'), Salafis invoke it narrowly as a means of making the point that while 'disavowing' is part of the faith, it should by no means involve using violence.

One example is 'Words to the Muslim youth of Britain' by al-ʿUṯaymīn, published at least twice in the newsletter of a Bradford-based Salafi organisation as part of its anti-jihadi campaigns. Relying on a tradition according to which the Prophet said that whoever kills someone who is under an agreement will not smell the fragrance of paradise, al-ʿUṯaymīn stated that Muslims should respect the majority non-Muslim societies in which they reside, because

> The land in which you are living is such that there is an agreement between you and them. If this were not the case, they would have killed you or expelled you. So preserve this agreement, and do not prove treacherous to it, since treachery is a sign of the hypocrites, and it is not from the believers.[31]

The Salafi author ʿAbd al-Raḥmān Mahdī presented the contractual argument as a response to what he defined as the 'emotional arguments' invoked by Muslims in the West who commit violent acts. Emotional arguments include that the *kuffār* (infidels) have betrayed Muslims and, therefore, it is allowed to betray them; that British and American soldiers kill Muslims in Iraq and in Afghanistan, so it is allowed to kill them in their countries; and that the *kuffār* have acted treacherously towards the Muslims in Palestine and Somalia through their support of Israeli and Ethiopian aggressions respectively, so their blood is lawful to Muslims. According to Mahdī, none of the abovementioned grievances justify acts of violence. Unlike the emotional, misguided Muslim, the informed Muslim will recognise that respecting a covenant, i.e., visa or citizenship, to which he is a party, is a *farḍ ʿayn*—an

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30 ǦĀBALLĀH 2008: 264.

31 Al-ʿUṮAYMĪN 2007: 2; al-ʿUṮAYMĪN n.d.: 2. Compare with the words of a disciple of Ibn Bāz and al-ʿUṯaymīn, Ṣāliḥ al-Munaǧǧid (or al-Munajjid, as he uses in the English version of his website) who operates the Arabic and English 'Question and Answer' website. According to al-Munajjid, Muslims residing in non-Muslim societies must remember that it is 'obligatory upon a Muslim to honor treaties or agreements made with a non-Muslim party. If a Muslim has agreed to their conditions when seeking permission to enter their country (i.e., a visa) and has promised to adhere to that, then it is not permissible for him to commit mischief in their lands, to betray anyone, to steal, to kill or do any destructive actions and so on.' Al-MUNAJJID 2003: 70-71.

individual duty (similar to the duty to pray or fast, and unlike a communal duty, *farḍ kifāya*, from which one is exempted if it is performed by the community in a satisfactory manner). Thus, 'individual Muslims in non-Muslim states are required to fulfill their obligations as citizens or visitors, vis-à-vis their particular relationship with their non-Muslim authority, regardless of what occurs between it [the Western authority] and other parties of Muslims'.[32]

Regulating jihad

According to Salafi anti-jihadi preaching, Muslims in the West who join the ranks of al-Qaeda, ISIS and affiliated groups are also in breach of the Islamic norms that regulate the initiation of and participation in jihad. Like the contractual argument, this argument avoids the more sensitive question of whether acts by Western Muslims against Western targets are desirable by suggesting that they are religiously illegitimate regardless of their impact. Emphasising that 'ISIS are not Salafi', the 'Salafi English' group posted on YouTube the words of Rabīʿ b. Hādī al-Madḫalī, a former head of the Department of Sunna at the Islamic University of Medina, and a vocal opponent of political involvement by religious scholars. He stated that while Allah honoured the Muslim nation with jihad, jihad has guidelines, conditions and principles; it must be declared by the leaders of the nation, and not by individuals who create nothing but mayhem and disorder, calamity and corruption.[33]

Similarly, a leaflet published by the Birmingham-based Salafi Bookstore on the ways to combat ISIS and al-Qaeda noted that Muslims may participate in jihad only if war is declared by leaders and governments and *not* by 'individual citizens, or insurgents and pulpits, or through social media!' Hinting at the discrepancy between al-Qaeda's and ISIS's global ambitions and their limited military capabilities, the leaflet further established that a legitimate Muslim army that engages in jihad must have the necessary strength to fight or repel attacks and, if not, it is permitted to retreat or initiate peace treaties.[34]

Just warfare

Salafi anti-jihadi preaching states that Muslims must, at all times, respect the Islamic regulations on the conduct of warfare. This argument, too, suggests that regardless of their motivations and effects, the operational methods applied by al-Qaeda, ISIS and individuals who identify with them, whether in the Middle East or on European soil, are illegitimate because they breach clear instructions given by the Prophet that are valid at all times and in all circumstances.

For example, Ḥasan Dabbāġ, the imam of the Leipzig al-Raḥmān mosque, explained in a sermon posted on YouTube that Islam is a religion that rejects extremism and terrorism and forbids killing innocent people and 'committing bad acts'. He emphasised that he was making this point not because he was concerned about how Germans view Islam, but because this was what Muslim faith requires.[35] Abdul Adhim Kamouss, a charismatic

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32 MAHDI 2010: 48-49.

33 al-MADKHALI 2014.

34 *Combating 21ˢᵗ Century Violent Extremist Terrorism* n.d.

35 DABBAGH 2008.

Berlin-based Moroccan preacher and the subject of much media controversy in Germany over his alleged radicalism, described in great detail, seething with disgust and astonishment, beheadings and mass executions by ISIS, judging them to be repulsive atrocities that counter the spirit of Islam. He defined ISIS as a virus and a poisonous seed.[36] In another sermon he emphasised the importance of treating non-Muslims with respect and the sanctity of all human lives.[37] The above-mentioned leaflet by the Birmingham-based Salafi Bookstore stressed that Muslims who engage in jihad must not harm non-combatants, including 'women, children, monks, emissaries, teachers, nurses, doctors, aid workers and others',[38] whereas the aforementioned treatise by Mahdī emphasised that 'Islam unequivocally forbids the targeting of non-combatants during times of war or peace. An act of violence, suicidal or otherwise, against innocent or otherwise peaceful men, women and children is, simply, terrorism'. As part of his defence for his opinion, Mahdī cited the instance in which the Prophet once passed an idolatress who had fallen during a battle. He denounced her killing, insisting that the woman was not the one against who war was to be fought.[39]

The *maṣlaḥa* of Islam and Muslims

Another argument against *jihadi-salafi* acts is that they lead to the characterisation of Muslim citizens as a potential fifth column and raise alarm about Muslim organisations at large, and thus injure the public interest of Muslim communities and damage the ability to propagate Islam. In this context, violent attacks are presented as a *mafsada* (an action that is the opposite of *maṣlaḥa* in that it harms the fulfilment of one of the primary objectives of the sharia).

For example, in a 'warning against the extremists', published by a Bradford-based Salafi organisation in response to the 7/7 attacks, 'Abd al-Muḥsin al-'Ubaykān (a member of the Council of Senior Scholars and the Permanent Committee), argued that the attacks resulted in 'many negatives': they damaged coexistence between the British people and the Muslim minority in Britain, and have placed the latter in 'a difficult position and, perhaps, caused some aggravation. The least of them being that this has portrayed Muslims as a possible security threat.' Acts such as 7/7, argued al-'Ubaykān, damage the reputation that the Muslim minority in Britain has gained and the rights it has acquired, and those plotting acts of violence should be exposed and uprooted so as to allow the Muslim population to live in peace and spread true Islam.[40] In a similar vein, the leaflet published by the Salafi Bookstore in Birmingham on combating al-Qaeda and ISIS emphasised, based on verses 60:8-9,[41] that the Quran demands that Muslims deal justly and kindly with non-Muslims

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36 Kamouss 2014.

37 Ibid.

38 *Combating 21st Century Violent Extremist Terrorism* n.d.

39 Mahdi 2010: 35.

40 Al-Ubaykaan 2007: 3.

41 The verses state: 'Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes—from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly. Allah only forbids you from those who fight you because of religion and expel you from your homes and aid in your expulsion—forbids that you make allies of them. And whoever makes allies of them, then it is those who are the wrongdoers.' *The Quran* 1997.

who do not fight against them, and cautioned that modern-day 'extremist-Islamists' marred the beauty of Islam and turned 'countless people away from looking into the true message of the Prophet Muḥammad'. Based on this evaluation, the leaflet called on Muslims who learn about individuals who incite or plan 'terrorist acts such as suicide bombings, kidnapping or killing' to inform the authorities, regardless of whether said acts are to be perpetrated in Muslim or non-Muslim countries.[42]

Historical analogy

In 656/35, the third caliph, ʿUṯmān, was assassinated, and the Prophet's cousin, ʿAlī, took his place. The power struggle that ensued between Muʿāwiya, the governor of Syria and a relative of ʿUṯmān, and ʿAlī's supporters, reached a climax in Ṣiffīn in 657/37, when Muʿāwiya's supporters lifted spears with pages of the Quran and called for the dispute to be settled by a group of arbitrators. ʿAlī reluctantly accepted this proposition. Some of his supporters believed that he made a grave mistake, arguing that the Quran commands that they continue fighting. As a result, they split from his camp and came to be known as the Khawarij ('those who left', or 'the renegades'). They developed a political theology according to which only an individual recognised by consensus as the best of Muslims is a legitimate caliph, and continuously rebelled against the House of the Umayyads. Their political legacy challenges a broad agreement that developed in Sunni jurisprudence (and is especially highlighted by Salafis) that places harsh restrictions against launching armed rebellions against Muslim leaders, even sinning and failing ones.[43]

Salafi British and German preaching against Jihadi-Salafism draws a direct link between the Khawarij, the teachings of Sayyid Quṭb, Egyptian Jihadi groups that applied Quṭb's doctrine, and contemporary groups such as al-Qaeda and ISIS, which do not recognise any of the existing Muslim regimes as legitimate. The Khawarij, who were ultimately on the losing side of Islamic history, came to be broadly regarded as a deviant group, beyond the pale of legitimacy. The analogy between them and the modern enemies of *salafiyya* is intended to delegitimise them.

Examples vary, demonstrating the centrality of this analogy in the Salafi anti-jihadi discourse. A Berlin-based Salafi preacher, Aḥmad Abū 'l-Barā', drew a parallel between the Khawarij, whom the Prophet said would kill Muslims but spare the lives of idol-worshippers, and ISIS, who, according to al-Barā', do exactly that. He called on Muslims to heed the Prophet's warning against those who seem to follow the Quran and appear devout

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42 *Combating 21st Century Violent Extremist Terrorism* n.d.

43 Perhaps the best known articulation of this position was Abū Ḥāmid al-Ġazālī's (d. 505/1111). He held that without a ruler, order and stability are impossible, and thus a corrupt ruler, who came to power unlawfully, is preferable to anarchy. Gɪʙʙ 2001: 10-11. Another prominent example is Ibn Taymiyya (d. 728/1328), who believed that to rule a people is one of the most important religious duties, without which religion cannot exist. He held that the ruler, responsible for maintaining law and order and enabling the believers to perform their duties towards Allah, was to be entrusted with absolute powers, regardless of his character, the title he assumes, or how he came to power. Four centuries before Thomas Hobbes, he suggested that people's willingness to obey kings, regardless of whether they are religious or not, is a result of their understanding that it is the only way to secure their well-being. Iʙɴ Tᴀʏᴍɪʏʏᴀ n.d.: 161; al-Eɴᴀᴢʏ 2010: 13-15; Rᴀᴡᴀ̄s 1998, vol. 1: 285-300.

but, in fact, are not.[44] In his 'warning against the extremists', al-'Ubaykān relied on this analogy to argue that those responsible for violent attacks are actually worse than the original Khawarij because they had added to the sin of unjustified excommunication by 'violating their covenants and transgressing against the people of the book and other than them, who have agreements with the Muslims'.[45]

In January 2015, following the attacks on the staff of Charlie Hebdo in Paris, an English Salafi website dedicated to fighting extremism published the reaction of the Medina-based *da'wa* activist, 'Ubayd al-Ğābirī, who described the assassinations as acts of Khawarij, 'the scum, the savages and the anarchists'. Echoing the Salafi portrayal of the Muslim Brothers (Iḫwānī) as a group that leads Muslims astray, al-Ğābirī suggested that the attacks had been orchestrated by Iḫwānī activists who wished to injure the position of Salafis living in the West by provoking the resentment of the majority society. He advised Muslims residing in the West, specifically their imams, to 'openly announce [their] disavowal and innocence from this action and other actions of anarchy'. Invoking the aforementioned contractual argument, he emphasised that 'the people of the Sunna' living in Europe and America recognise that there is an agreement, a covenant, between them and their receiving lands that they must never violate.[46] A book disseminated by the same website detailed the history of the Khawarij and the Prophetic traditions anticipating and condemning them, and described al-Qaeda and ISIS as their modern reincarnation, noting that 'they do not serve the interests of Muslims, their governments, nations or lands'.[47] Mahdī stressed that just as the Khawarij were not considered a legitimate expression of pluralism in Islam, so al-Qaeda cannot be considered to be one. Emphasising that the Khawarij were 'derided for their deviation and self-amputation from the orthodox Muslim body', the author argued that it is just as right to oppose their 'modern-day incarnation'.[48] A leaflet distributed by the London Masjid Daar us Sunnah invoked several Prophetic traditions that warned against the future rise of the likes of the Khawarij, noting that the Prophet predicted that the Khawarij will be 'young of age' and 'foolish of mind' as indeed are those who join the imposter caliph, Abū Bakr al-Baġdādī, and his Islamic State.[49]

4. Conclusion

An array of arguments has been invoked by Salafis in Britain and in Germany as part of their efforts to refute the accusations that they cultivate radicalisation and to assert the religious legitimacy of their rejection of violence. These include the religious duties to abide by contracts; respect the Islamic rules of warfare and jihad; avoid harming the inter-

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44 ABŪ 'l-BARĀ' 2014.

45 Al-UBAYKAAN 2007: 3.

46 'A Scholarly Response to the Terrorism and Anarchy in Paris, France' 2015.

47 RAFIQ 2015: 72.

48 MAHDI 2007: 14-15.

49 Masjid Daar us Sunnah 2014.

ests of Muslims and of Islam in Europe; and oppose modern-day Khawarij against whom the Prophet Muḥammad warned.

Salafi anti-violence preaching has been directed at two audiences: Western governments and publics, whom Salafis aim to convince that salafiyya is not a security risk; and Muslims, whom they aim to convince that violence is not the way of the salaf. These teachings in no way constitute a break from the generally anti-liberal, pro-separateness Salafi agenda. What Salafis argue is that while Muslims in Europe should disavow non-Muslims, oppose liberal norms and reject integration, they must, at the same time, refrain from joining, or supporting, jihadi attacks against Western targets in any way.

Data as to the actual effect of anti-jihadi preaching are inconclusive and call for further research. Arguments for the positive influence exposure to Salafi doctrine has on some Muslims conflict with evidence for the relatively high levels of involvement of former attendees of Salafi communities in terror activities. A possible explanation is that Salafi views have a different effect on people in different situations. Salafi leaders are confident that their mosques are the most reliable firewall against violent radicalisation. But calls for restraint, voiced as part of a broader doctrine of intolerance, risk falling at times on deaf ears.

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Muslim Emigration to the West:
The Jurisprudence of the Saudi Permanent
Committee for Scholarly Research and Fatwas

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Abstract

Currently there are about 43 million Muslims in Europe, 20 million of whom are in the Western part of the continent. The birth of these pockets of Muslim groups is mainly due to migration, motivated essentially by economic reasons. For this reason, some Muslims turn to jurists (*fuqahā'*) to learn if the migration they intend to undertake or have already undertaken to Western countries can be considered licit (*ḥalāl*) or not, under the Islamic law. For an answer to this question, some Muslims consulted the Permanent Committee for Scholarly Research and Fatwas, whose members belong to the Pietist current of the Salafi movement. The objective of this article is to analyze all the fatwas passed by such a Committee in response to questions posed. My analysis has evidenced the fact that, according to this Committee, a Muslim is obliged to reside exclusively in an Islamic territory (*dār al-islām*), and forbidden to migrate to the West, due to the fact that it is considered land of the disbelievers (*dār al-kufr*). However, the Committee has accepted some exceptions to this rule: for example, a Muslim is allowed to migrate to non-Islamic territories to spread the word of God (*da'wa*), to study or to work.

Key words: Pietist Salafism, Emigration, *Dār al-islām*, *Dār al-kufr*, West, Saudi Permanent Committee for Scholarly Research and Fatwas

1. Introduction

The question I will try to answer in this article is the following: Is it possible for a Muslim to live in or migrate to a non-Islamic territory (e.g. the West)? The attempt here is to verify if the presence of millions of Muslims—who have chosen more or less to freely reside in Europe or in America—can be considered legal by Islamic law. In short, how does Islamic law consider their situation? Available literature has revealed that most of the studies carried out on this topic have focused on the doctrine elaborated by individual jurists or council of jurists[1] who tend to favour the case that recognizes the presence of Muslims in the West as a means of improving the spread of the Islam.[2] Instead, little attention has been paid to those jurists, mainly belonging to the Salafi movement, who are against the migration of Muslims to the West, in the belief that the consequence of such migration could lead to the widespread moral decadence of Muslims.

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[1] For example, one thinks of the European Council for Fatwa and Research; see, among others, CAEIRO 2011; LARSEN 2011; KHAN 2013; SHAVIT / ZAHALKA 2015.

[2] DE ANGELO 2011; DE ANGELO 2013a.

Although recent Salafi jurisprudence regarding Muslim minorities has been of great interest to some scholars,[3] it does not look like the research undertaken up to now has tackled the specific issue of the obligation of Muslims not to reside in the West that, according to the Pietist current of the Salafi movement,[4] looms over all Muslims: 'cette tendence demande aux fidèles musulmans de quitter l'Europe et l'Amerique du Nord pour des terres musulmanes'.[5] This form of separation proposed and desired by the Salafi *fuqahā'* comes from the doctrine of *al-walā' wa'l-barā'* [*loyalty* (to Muslims) and *disengagement* (from non-Muslims)], which constitutes one of the pillars of Salafism.[6] Different scholars have drawn attention to the consequences that this kind of doctrine can have on Muslims who reside in the West and adhere to this Salafi position, in terms of integration. Wagemakers, for example, affirms that 'in a Western context, *al-wala' wa-l-bara'* can be used as a bulwark against successful integration into society'.[7] Similarly, Selim holds that, these concepts of *walā'* and of *barā'* 'are deemed to be of crucial issue for Muslims living in non–Muslim countries since it has a profound impact on Muslim–non-Muslim relations'.[8] Bin Ali, is also of the same opinion, for which:

> Understanding modern Salafi conceptions of *Al-Wala' wal Bara'* is an urgent priority in the lives of Muslims today. This understanding is critical, as Muslim increasingly live as minority communities across the globe and the concept has implications for whether (and how) Muslims can live harmoniously with non-Muslims. The consequences of applying the modern Salafi concept of *Al-Wala' wal Bara'* are serious—it promotes a way of life insular and hostile towards non-Muslims. […] At the social level, *Al-Wala' wal Bara'* is characterised by a portrayal of non-Muslims as potential enemies, and un-Islamic practises as dangerous acts that could threaten the purity of Islam and *tawhid* (monotheism).[9]

An efficient explanation of the *al-walā' wa'l-barā'* doctrine is given by Selim:

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3   FARES HASSAN 2013: 19-35; SHAVIT 2015; OLSSON 2016: 108-190.

4   'S'attachant à corriger la croyance et les pratiques religieuses des musulmans, ce salafisme est convaincu que la seule solution aux problèmes de ces derniers réside dans […] la purification et l'éducation : purifier la religion des innovations entachant ses préceptes et ses dogmes pour revenir à la religion transmise par le Prophète ; éduque les musulmans pour qu'ils se conforment à cette religion et délaissent leurs mauvaises coutumes, tout autre solution (politique ou révolutionnaire) que les détourner du droit chemin. Il s'agit bien d'insuffler aux musulmans une coscience islamique par un retour à une pratique religieuse délivrée de tout ajout postérieur à la révélation coranique et à l'apostolat prophétique. La prédication permettra de créer un mouvement social aboutissant à une nouvelle organisation du monde qui accordera à l'islam la prééminence. Ce salafisme refuse tout engagement au nom de l'islam autre que religieux'. AMGHAR 2011: 36. On Salafism and the diverse currents that animates it, see, apart from the text just cited: ROY 2004: 145-178; WIKTOROWICZ 2006: 207-239; ROUGIER 2008; MEIJER 2009; MOUSALLI 2009.

5   AMGHAR 2011: 45.

6   CAMPANINI 2015: 40.

7   WAGEMAKERS 2009: 82.

8   ABDOU SELIM 2015: 77-78.

9   BIN ALI 2015: 2.

> On the basis of [...] scriptural proofs *Wala'* [...] means to love Allah and to exhaust every possible means to assist His religion; it is to love those who are obedient to Him and to come for their help. *Bara'* [...] is to struggle against the enemies of Allah. Interpreting the concepts of *Wala'* and *Bara'* [...] and putting them into practice constitutes an essential requirement of being a good Muslim. This implementation should be conducted by heart, in terms of love and hatred, and also the entire body in terms of drawing near to Muslims and steering clear of non-Muslims.[10]

The strong restrictions proposed by the Salafi jurists regarding the possibility of a believer travelling to the land of the disbelievers (*dār al-kufr*), *in primis* the West, can be directly traced to the doctrine of *al-walā' wa'l-barā'*: the act of a Muslim travelling to non-Islamic territories is considered a form of *walā'* which, for the mere fact of being to non-Muslims, is considered illicit; in fact all actions a Muslim does in exercising *walā'* must be exclusively to his coreligionists.[11]

What follows in this article analyzes the prohibition on Muslims to travel to the West, as elaborated by Salafi jurists. This analysis has been added to, and published in another article in 2013.[12] Unlike the latter work, whose aim was to examine the doctrine of individual jurists belonging to the Pietist current of Salafism, the current article aims at highlighting fatwas (*fatāwā*, sing. fatwa: non-binding opinion) passed by an organ made up of a group of persons, whose reference is the Salafi doctrine, that is the Permanent Committee for Scholarly Research and Fatwas, active in Saudi Arabia.[13] Opinions expressed by this Committee have been collected in the work entitled *Fatāwā al-laǧna al-dā'ima li'l-buḥūṯ al-'ilmiyya wa'l-iftā'* (from now *Fatāwā al-laǧna*), which is subdivided into different volumes[14] and has been my main reference for producing this article.

2. The Rule: Muslims must reside in Islamic countries

First, I shall try to identify to which category of territory the West (especially Europe and North America) belongs, in the opinion of the Committee, and then describe the consequences of such findings; that is, whether it is possible for a Muslim to reside in those parts of the world.

In order to achieve the main objective of this article, I shall first analyze the text with which the Laǧna responded to the question of what were the necessary conditions a territo-

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[10] ABDOU SELIM 2015: 88.

[11] FAWZÂN 2009: 323-324.

[12] DE ANGELO 2013b.

[13] In Arabic: al-Laǧna al-dā'ima li'l-buḥūṯ al-'ilmiyya wa'l-iftā'. From now onwards alternatively, Committee or Laǧna.

[14] The volumes from which the *fatāwā* were collected, were not published in the same year by the same editor. Some of the responses have been collected directly from the Committee's website, <http://www.alifta.com/Search/Fat-waNumSrchDisplay.aspx?languagename=ar&lang=ar>; after accessing the URL, you only need to insert the number of the fatwa, as indicated, every time, to bring up the text. All the responses were consulted in Arabic.

ry should have to be considered non-Islamic. In the answer given to this, n. 2635,[15] the Committee first of all provided a definition of what an Islamic territory (*dār al-islām*) is: all those countries (*bilād*, sing. *balad*) and territories (*diyār*, sing *dār*) in which the governing body exercises its authority in respect (*yuqīm*) of limits (*ḥudūd*, sing. *ḥadd*) imposed by Allah and following the sharia, in which the population (*raʿiyya*) are in the condition to fulfil (*taqūm*) the legal obligations of the Islamic law. Conversely, countries and territories considered non-Islamic are those whose governments (*ḥukkām*) and authorities (*sulṭān*) rule by violating (*lā yuqīm*) limits imposed by Allah and refuse to keep to the rules of Islam (*lā yaḥkumūn […] bi-ḥukm al-islām*). Furthermore, the Muslim who resides in this territory is denied the possibility of practising (*lā yaqwà*) the prescribed acts of his/her religious faith (*wāǧib ʿalayhi min šaʿāʾir al-islām*). Such a place is considered the territory of the disbelievers (*dār al-kufr*).[16] From such a definition, there seems to emerge the will of the Committee to link the Islamic character of a territory to the effective application of the laws as indicated by the sharia, as well as for believers who reside within, to practise the prescribed rites of the Islamic faith. On the contrary, the number of Muslims who reside in a certain territory seems not to be an important factor to determine the status of such a territory.[17] The Laǧna has stated that, they should be considered *dār al-kufr* even those countries (*bilād*), with majority of the population professing Islam, but governed by people who rule without following the divine revelation (*bi-ġayr mā anzal Allāh*),[18] and to people whose freedom of worship is not recognized.[19] Overall, it is possible to affirm that the criteria used by the Committee to define the status of a territory, does not differ from those adopted by Ḥanbali jurists.[20] According to these latter, it is to be considered *dār al-islām* any territory, which is under the authority of Muslims, in which Islamic rules are respected, and whose population is made up by a majority of Muslims.[21] Instead, the *dār al-kufr* is made up of those territories in which the rules applied are that of the disbelievers. It is not relevant if there are many Muslims living inside such a territory.[22] Based on the above

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15   *Fatāwā al-laǧna* 1998/1419, vol. 12: 51-54.

16   *Fatāwā al-laǧna* 1998/1419, vol. 12: 52.

17   This idea is shared even by some Salafi who are near the Pietist current, but do not disdain a jihadi approach. For example it is believed that al-Maqdisī, according to whom: 'this term [*dār al-kufr*] is applied to the abode if the rulings of the *kufr* are uppermost, even if the majority of its people are Muslims just as the term *dār al-islām* is applied upon the abode in which the laws of Islam are uppermost, even if the majority of its inhabitants are kuffar as long as they are submitting to the rule of Islam'. AL-MAQDISĪ, n.d.: 62. This text can be read at the following URL: <https://ia802605.us.archive.org/26/items/ThisIsOuraqidah-AbiMu-hammadAl-maqdisi/our_aqeedah.pdf>. For an examination of the thoughts of al-Maqdisī see WAGEMAKERS 2012.

18   According to the Committee, the authorities who operate under the conditions described above merit the term. Fatwa n. 7796, in <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar& lang =ar>.

19   *Fatāwā al-laǧna* 1998/1419, vol. 12: 52. However, the Committee has underlined that, Muslims who find themselves governed by a regime that does not apply the sharīʿa, cannot be considered disbelievers, as long as within the limits of their possibilities, they fulfil the obligations imposed by Allah. Fatwa n. 19378, in <http://www.alifta.com/Search/Fat-waNumSrchDisplay.aspx?languagename=ar&lang=ar>.

20   For the Ḥanbali juristic thinking on whether a Muslim must emigrate from non-Islamic land see GERTZ 2013.

21   al-ŠAHRĪ 2010: 89.

22   Ibid.: 119.

reasoning, it is possible to affirm that the West, especially Europe and America, are to be considered territories of the disbelievers.

The difference between *dār al-islām* and *dār al-kufr* as operated by the Committee serves to determine which territory can be chosen by the believer as their temporal or permanent residence. In fact, the distinctive characteristics of the *dār al-islām*, makes it an ideal place in which a Muslim is allowed to live (*la-hum an yaʿīšū fī-hā*).[23] It is for this reason that it is compulsory for the Muslim to reside in an Islamic country (*al-aṣl anna-hu yaǧibu ʿalā 'l-muslim an yuqīm fī bilād islāmiyya*)[24] even in cases in which their country of birth does not belong to them.[25] The *dār al-kufr*, on the other hand. represents—because of its particular characteristic—a territory from which the followers of Allah should migrate (*yaǧib ʿalā 'l-muslim an yuhāǧir min diyār al-kufr ilà diyār al-islām*)[26] and in which they should not settle, otherwise they would be committing an illicit act as agreed upon by the jurists (*al-iqāma fī bilād al-kuffār muḥarrama fī 'l-šarīʿa al-islāmiyya,[27] murtakib ḥarāmᵃⁿ bi'l-iǧmāʿ*). For the Committee such people will be subject to punishment and the wrath of God.[28] Indeed, Muslims who have adapted to the way of life of non-Islamic territories in which they live, or simply because they admire the type of life of the place, and decide not to leave the *dār al-kufr* even if they have the means to do so, will be considered sinners. The same status is reserved for believers who leave the *dār al-islām* for the land of the disbelievers without the real need to do so.[29]

It is interesting to note that the Committee never mentions an example of a country that can be considered Islamic territory, implying that this label can only be attributed to the country in which it is based, that is, Saudi Arabia.

The motive for forbidding people from settling in the *dār al-kufr* lies in the necessity to protect the Islamic faith and the morals of believers from being corrupted by the influence of the territory not governed by Muslims, and in which Islamic rules are not applied,[30] where Muslims end up subdued or repressed (*maktūbᵃⁿ aw muǧāmilᵃⁿ*).[31] For this reason,

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23 *Fatāwā al-laǧna* 1998/1419, vol. 12: 52.

24 *Fatāwā al-laǧna* 2003/1424, vol. 19: 348.

25 Fatwa n. 19581, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar& lang=ar>. In fact, in this response the Committee urges a believer born and bred in France to migrate to an Islamic state.

26 'It is in fact an obligation on the part of a Muslim to migrate from the territory of the disbelievers towards an Islamic territory.' *Fatāwā al-laǧna*, n.d., vol. 14: 475, fatwa n. 3859.

27 Fatwa n. 19581, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar& lang=ar>.

28 Fatwa n. 21676, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar& lang=ar>.

29 *Fatāwā al-laǧna* 1998/1419, vol. 12: 217. Those who help others to migrate abroad are not considered sinners. *Fatāwā al-laǧna*, n.d., vol. 15: 67-68.

30 'Limā fī'l-safar ilà bilād al-kufr min al-ḫaṭar alā al-ʿaqīda wa'l-dīn wa'l-aḫlāq'. *Fatāwā al-laǧna* 1998/1419, vol. 12: 58 (fatwa n. 19685). 'Muḥāfaẓa ʿalā dīnihi'. *Fatāwā al-laǧna*, n.d., vol. 14: 475 (fatwa n. 3859). 'Li-anna ḥukm fī tilka al-bilād ġayr islāmī'. (*Fatāwā al-laǧna al-dā'ima li'l-buḥūṯ al-ʿilmiyya wa'l-iftā'* 1998/1419, vol. 12: 217 (fatwa n. 1659).

31 *Fatāwā al-laǧna*, n.d., vol. 2: 45.

the Lağna, based on the verses 4:97-99[32] of the Quran, has clearly and repeatedly affirmed that all Muslims who reside among disbelievers (*kuffār* e *mušrikūn*) and cannot freely practise their religion, have the obligation (*wāğib*) to embark on a *hiğra* (migration),[33] that is, it is expected of them to leave the territory of the disbelievers (*dār al-kufr*) or the land of the polytheist (*dār al-širk*) for Islamic territories (*dār al-islām*),[34] as did Muslims of the first era. Indeed these early Muslims left Mecca in 622AD/1H, when it was still a pagan city (*dār al-kufr*),[35] for Medina (from Arabic *madīnat al-nabī*, 'city of the Prophet'),[36] which, after the oath of allegiance (*mubāyaʿa*) sworn by its inhabitants to the Prophet Muḥammad, had acquired the status of an Islamic territory (*dār al-islām*).[37] The specific order to migrate from Mecca to Medina was passed when the latter was first conquered by Muslims, thus making it a *dār al-islām*.[38] This type of repeal is validated by a prophetic tradition (*ḥadīṯ*, pl. *aḥādīṯ*) that says 'there is no migration after the conquest [of Mecca]' (*lā hiğra baʿd al-fatḥ*).[39] This hadith, which has been reported by all the *kutub al-sitta*, repeals only the specific obligation to migrate from Mecca to Medina, while the general order to leave non-Islamic territories in favour of Islamic territories remains intact: 'fa'l-ḥadīṯ ḫāṣṣ bi'l-hiğra min Makka; li-annahā ṣārat dār al-islām, wa-ammā al-hiğra min bilād al-kufr ilà bilād al-muslimīn fa-hiya bāqiya ilà qiyām al-sāʿa.'[40] The Muslim can even leave the territory of

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32 ʿ[97]Indeed, those whom the angels take [in death] while wronging themselves—[the angels] will say, "In what [condition] were you?" They will say, "We were oppressed in the land." They [the angels] will say, "Was not the earth of Allāh spacious [enough] for you to emigrate therein?" For those, their refuge is Hell—and evil it is as a destination. [98]Except for the oppressed among men, women, and children who cannot devise a plan nor are they directed to a way. [99]For those it is expected that Allāh will pardon them, and Allāh is ever Pardoning and Forgiving.' The English translation of these verses is taken from *The Qurʾān. English Meanings*. Unless otherwise specified, all the quotations from the Quran are taken from this edition. These verses have been analyzed by different Salafi pietists; see for all, AL-UṬAYMĪN 1991, vol. 2: 109-122.

33 The obligation to migrate has been clearly decreed by the Committee in the following fatwas: n. 7150 (*Fatāwā al-lağna* 1998/1419, vol. 12: 48), n. 19670 (ibid.: 57), n. 2635 (ibid.: 52), n. 3859 (*Fatāwā al-lağna*, n.d., vol. 14: 475).

34 The Arabic terms used to describe these types of migration are: 'al-ḫurūğ min balad al-kufr ilà balad al-islām', (*Fatāwā al-lağna* 1998/1419, vol. 12: 48, fatwa n. 7150); 'al-intiqāl min bilād al-širk ilà bilād al-islām', (ibid.: 50, fatwa n. 9501).

35 'Hiya dār kufr, wa ḏālika miṯl makka al-mukarrama qabl al-fatḥ.' *Fatāwā al-lağna* 1998/1419, vol. 12: 52, *fatwa* n. 2635.

36 Before the migration the city of Medina was known as Yaṯrib.

37 *Fatāwā al-lağna* 1998/1419, vol. 12: 50, fatwa n. 9501.

38 *Fatāwā al-lağna* 1998/1419, vol. 12: 52, fatwa n. 2635.

39 *Fatāwā al-lağna* 1998/1419, vol. 12: 49-50, fatwa n. 5413. To analyze the above-cited tradition, see, among others, AL-ʿAWĀYŠ 1984: 99-108.

40 *Fatāwā al-lağna* 1998/1419, vol. 12: 260, fatwa n. 18612. In this response the members of the Committee have also hinted at other motivations that can induce the believer to migrate from (*al-mufāra*) the territory in which he/she is, that is, to carry out a jihad (*bi-sabab al-ğihād*), or acquiring knowledge (*al-ḫurūğ fī ṭalab al-ʿilm*), and finally to protect the religion from sedition (*al-firār bi'l-dīn min al-fitna*). Regarding this last motivation, see also fatwa n. 7485 (*Fatāwā al-lağna* 1998/1419, vol. 12: 51). Regarding migration for the acquisition of knowledge, the Committee has observed that all Muslims are required (*wāğib*) to dedicate themselves to the study of their religion until they learn fully what Allah has imposed on them and what is forbidden to them. The importance of learning Islam is such that

the disbelievers where he/she is residing and move to another territory of non-believers, or of polytheists, as long as this destination is less harmful (*šarr*) and less dangerous (*ḫaṭar*) than the territory they are leaving. A concrete example of this type of migration can be found in the transfer of some Muslims—especially the weak—from Mecca to Abyssinia (in Arabic, *Ḥabaša*), ordered by Muhammed in 614.[41] In fact, the Muslims who were involved in this transfer had received better treatment because the King of Abyssinia had recognized their religion and offered them freedom of worship and of living according to the dictates of Islam (at least what was revealed at that time), things for which they were persecuted in Mecca.

3. Exceptions to the rule

As we have seen, if on one hand the Committee vividly exhorts believers to do their best in abandoning non-Islamic territories in which they find themselves,[42] on the other hand it does recognize an exception to the rule of the obligation of leaving the *dār al-kufr*, and that of migrating to it as well. In particular, those exempted from the *hiǧra* are believers who are not in a condition to enable them to perform it (economic problems, sickness, etc.). For this reason, Muslims are therefore justified in residing among disbelievers; however, it is the obligation of their coreligionists to help them (e.g. supporting them economically) to migrate to countries that are secure from a religious point of view.[43] An exception to the prohibition of migrating to a non-Islamic territory is acceptable in the case of a licit/legitimate justification (*musawwiǧ šarʿī*), to satisfy a need (*ḥāǧa*) or a necessity (*ḍarūra*). In the next sections, I analyze three specific cases for which the Committee has determined that it is possible to migrate to the *dār al-kufr*: to invite non-Muslims to Islam (*daʿwa*), in search of work, or for studies.[44]

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the believer is ordered to move to another country (*biʾl-safar min balad ilà balad*) in case there is no Muslim who can guide them in acquiring such knowledge in their country. *Fatāwā al-laǧna* 1998/1419, vol. 12: 85, fatwa n. 6575. On the obligation of the Muslim to know the basics of his religion, see also fatwa n. 8849 (*Fatāwā al-laǧna* 1998/1419, vol. 12: 89-90).

41 *Fatāwā al-laǧna* 1998/1419, vol. 12: 50-51, *fatwa* n. 9501. The migration from the city of Mecca to Abbissynia is often reffered to as the the "little *hiǧra*". Lo Jacono 2003: 12-14.

42 'Wa-ʿalayk biʾl-iǧtihād wa-baḏl al-asbāb allatī tuḫalliṣuka min al-baqāʾ fī bilād al-kuffār waʾl-intiqāl ilà bilād al-muslimīn' ('you are obliged to look for and to use all means to leave the land of the disbelievers and transfer to an Islamic State'), fatwa n. 19581, in <http://www.alifta.com/Search/FatwaNumSrchDisplay. aspx?languagename=ar&lang=ar>.

43 *Fatāwā al-laǧna*, n.d., vol. 14: 476, fatwa n. 3859.

44 Naturally, there are also other cases in which the Lagna recognizes the possibility of migrating. Undoubtedly, situations related to the necessity of having to travel to the West for medical treatment, regarding cures unavailable in Islamic countries are recognized. Fatwas n. 19581 and n. 20968, at <http://www. alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar&lang=ar>. Another case of necessity has been identified by the Committee in response, n. 21676, in which it affirms that it is licit for the Muslim to travel (*yaǧūz la-hu al-safar*) to the *dār al-kufr* (specifically in Italy) to meet his/her obligation of maintaining relations with his/her relatives (*ṣilat raḥim wāǧiba*). The lawfulness of this case is subject to the satisfaction of three conditions: the temporary residence in the territory of the disbelievers must not be a source of temptation; his/her right to openly manifest his/her religion must be guaranteed; finally, the

3.1 Migration aimed at *da'wa* (invitation to Islam)

Among the necessities accepted by the Committee as a valid motive for a Muslim to migrate to a non-Muslim territory is especially the *da'wa*, or the obligation of all Muslims to invite non-Muslims to Islam.[45] This is clearly declared in fatwa n. 2292, which says 'whoever finds themselves in the country of the disbelievers must leave, who is not there must not go there unless for necessity like for example to carry out the da'wa'.[46] Similarly in response n. 3895 it is stated that the Muslim is allowed to stay among the *kuffār*, when he/she in his/her function as a *dā'ī* (one who invites to Islam), believes he/she can influence the non-believers, convincing them to approach his/her religion.[47] Thus, for a Muslim to move to the *dār al-kufr* with the intention of spreading Islam does not make him/her a disbeliever.[48] In fact, spreading Islam in a country of disbelievers is considered a noble act (*al-'amal al-ğalīl*), and the physical efforts and economic means the Muslim sustains to carry out such an act is considered a sort of jihad, for he/she shall be rewarded.[49] Women must participate in this form of jihad as long as it does not distract them from their main duties, like taking care of the family. With the body duly covered, a woman can carry out the obligation of the *da'wa* within her family, talking to her husband, to female relatives, and to male relatives that she is forbidden to marry,[50] or outside her family environment, in this case talking only to women. In the eventuality her preaching activity requires travel, she has to seek permission from and must be accompanied by her husband, or alternatively must be accompanied by a relative with whom marriage is precluded.[51] Carrying out the *da'wa*, which accordingly can be done in public or in secret,[52] constitutes one of the necessities that justifies the verbal interaction between the *dā'ī* and the disbeliever, whether they are male or female.[53]

The Committee also, gives a number of indications to the preacher in order to make his actions fruitful. First of all the *dā'ī* must have appropriate knowledge of what he/she is preaching, i.e. Islam: a Muslim who lacks this prerequisite has no title to carry out the *da'wa*; the *dā'ī*'s behaviour must be consistent with what they preach; he/she must be ex-

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stay in the non-Islamic territory must be a period not exceeding the time needed to to meet the obligation for which it is admitted. Fatwa n. 21676, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar&lang=ar>.

45 Those destined to receive the *da'wa* in reality include Muslims who do not respect Islamic rules and those who do respect the rules, though they intend to fortify their faith. Regarding the first case, a practical example could be those Muslims who have been under a communist regime for a long time, and have ended up completely abandoning all religious practice. *Fatāwā al-laǧna* 1998/1419, vol. 12: 247-248, fatwa n. 3778 (on the Russians).

46 *Fatāwā al-laǧna* 2003, vol. 20: 380

47 *Fatāwā al-laǧna*, n.d., vol. 14: 476, fatwa n. 3859.

48 *Fatāwā al-laǧna*, n.d., vol. 2: 47, fatwa n. 9601.

49 *Fatāwā al-laǧna* 1998/1419, vol. 12: 260-261, fatwa n. 18612.

50 For example one thinks of the case of the convert, whose relatives remained disbelievers.

51 *Fatāwā al-laǧna* 1998/1419, vol. 12: 34-35; 249-250, *fatāwā* n. 9533 and n. 4996.

52 *Fatāwā al-laǧna*, n.d., vol. 11: 29, fatwa n. 21768.

53 Fatwa n. 19146, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar&lang= ar>.

tremely patient in this activity, and must be very gentle with the disbelievers they are dealing with; finally to attract the non-Muslim to Islam, he/she must start dealing with essential questions, like that of faith.[54]

The execution of the *da'wa* has the final objective of attracting the non-Muslim to voluntarily embrace Islam. After one has been converted in Europe, in certain cases, the conversion is attested by a written certificate issued by a mosque or an Islamic centre. Some Muslims stick to the predominant idea, which indicates that for a conversion to be valid it is sufficient to have the testimony of two Muslims who have witnessed the act of conversion. These Muslims will have asked the Committee to express its opinion on the necessity of issuing the aforementioned certificate. The Committee, after having clarified that a believer does not need any document to prove his/her faith before Allah, has also affirmed that the issuing of a certificate of conversion to Islam is undoubtedly a useful instrument in identifying one's religion, especially in cases in which a believer has problems proving he/she is a Muslim. In this regard, mention is made of the case in which a Muslim travels to and dies in a place where no one knows him/her. In such a case, the lack of knowledge of the faith of the deceased becomes a problem in handling the dead body as required by Islamic rules.[55]

3.2 Migration for the reason of work

The Committee was clearly asked if, for a Muslim in search of work, it was possible to travel (*al-safar*) to non-Islamic countries, in the West or the East, instead of the Islamic countries with restrictive immigration laws or lack of security. It responded positively, stating that as long as the believer can practise his/her religion openly (*yastaṭī' iẓhār dīni-hi*), and has no fear of temptation, it is left to him/her to evaluate the suitability or not of travelling to such a country.[56] This stance is reaffirmed in another fatwa (n. 9272) in which the Committee clearly states that, a Muslim is allowed (*ǧā'iz*) to work (*'amal*) in a country of disbelievers (*al-duwal al-kāfira*).[57] Similarly, in response n. 5488, the Laǧna declared that nothing forbids (*lā māni'*) a Muslim from working in a non-Islamic country (*dawla ġayr muslima*) as long as he/she does a work that does not imply disobedience to Allah (*laysa ma'ṣiyat Allāh*) or temptation to disobey.[58] In the jurisprudence of the Laǧna regarding this, there is some ambiguity; in fact, there are different responses in which it is against the migration to a *dār al-kufr* for economic reasons. In fatwa n. 19685, for example, the Committee has declared that a Muslim in search of work or means of sustenance must travel to Islamic countries (*bilād al-muslimīn*), instead of the country of the disbelievers, where their presence could generate negative influence on their faith, morals or closeness to their religion.[59] Similarly, in responding to the question of a believer who asked if he could resolve his precarious economic conditions by going to work in a foreign country, it

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54 *Fatāwā al-laǧna* 1998/1419, vol. 12: 245-257, fatwa n. 16024.

55 *Fatāwā al-laǧna*, n.d., vol. 3: 389, fatwa n. 7212.

56 *Fatwa* n. 6287, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar &lang=ar.>

57 *Fatāwā al-laǧna*, n.d., vol. 2: 75, fatwa n. 9272.

58 *Fatāwā al-laǧna*, n.d., vol. 14: 479, fatwa n. 5488.

59 *Fatāwā al-laǧna* 1998/1419, vol. 12: 58, fatwa n. 19685.

affirmed that migration in search of work is admissible as long as it is to an Islamic country (*al-bilād al-islāmiyya*).[60] Finally, in response n. 3859, the Laǧna has stated that a Muslim who has the means to be able to transfer to an Islamic country is not permitted to remain in the *dār al-kufr* for the reason of occupation regardless of the fact that he/she might be an employee of a fellow Muslim or a disbeliever.[61]

Therefore, even if with some areas of doubt, the Laǧna admits that the follower of Allah can move to the *dār al-kufr* where the majority of the population is made up of disbelievers for reasons of work, where he/she would most likely work for a non-Muslim, which is permissible in this case. From this point of view, the Committee has stated that nothing prevents a Muslim from being employed by a disbeliever, as long as the work he/she is asked to do is permissible (*mubāḥ*),[62] that is, compatible with the prescriptions of Islam,[63] and that he/she is guaranteed the freedom to practise Islam. From this point of view, fatwa n. 1832 is important, in which the Laǧna responds to a Muslim worker who asked if it was licit or not (*ḥalāl am ḥarām*) to receive payment (*kasb*) in Germany for work done, and declares that, by rule (*aṣl*) it is permitted (*ḥill*) to employ a worker and pay them after the job has been done. Indeed, in the reasoning of the Committee, what makes the pay legitimate or not does not depend on the religion of the employer but the nature of the work in question.[64] A Muslim, however, can receive payment only for a lawful work done,[65] regardless of whether the employer was a Muslim or non-Muslim,[66] and also irrespective of the employer being in the private or public sector (*al-aʿmāl al-ḥukūmiyya*).[67] The level of awareness of the Muslim as regarding the unlawful nature of the job decides the outcome of the compensation received for the work done. The payment can be kept in case of complete unawareness,[68] otherwise the Muslim will have to forgo that money, donating it to charity for example, and doing the same with whatever might have been bought with such money.[69] Notable too is response n. 4047, which has to do with the responsibility of the

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[60] *Fatāwā al-laǧna*, n.d., vol. 15: 76-77, fatwa n. 16221.

[61] *Fatāwā al-laǧna*, n.d., vol. 14: 475-476, fatwa n. 3859.

[62] Ibid.: 485-486, fatwa n. 15921.

[63] *Fatāwā al-laǧna* 2003/1424, vol. 19: 348, fatwa n. 5512.

[64] Instead, a Muslim cannot keep money he/she has found, in an Islamic country. He/she has to report such findings. If in case such findings happen in a non-Islamic country in conflict with Muslims, then he can keep such money found. Fatwa n. 5512, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar&lang=ar>.

[65] By analogy, a Muslim can receive pension payment that he/she has eventually matured during his/her working years only if the work was licit. The Committee made this expression regarding, for example, a Morroccan who received his pension from the French government, after having worked for a number of years in France. Fatwa n. 21534, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar&lang=ar>.

[66] *Fatāwā al-laǧna*, n.d., vol. 14: 477-478, 437-438, fatwa n. 1832 and n. 18871.

[67] Ibid.: 479, fatwa n. 5488.

[68] As it has been established by the Committee, in reference to, for example, a believer who had resigned from his job in a Saudi/Dutch bank, immediately after finding out the illicit nature of the job. *Fatāwā al-laǧna*, n.d., vol. 15: 50-51, fatwa n. 4331.

[69] The Laǧna has expressed itself in this sense, regarding, for example, the case of a Somali woman who lived in Sweden. She was working as a housekeeper with a Christian family, where she sometimes had to serve wine. *Fatāwā al-laǧna*, n.d., vol. 14: 484-485, fatwa n. 18909. The same verdict was also ex-

employer in recognizing the right of the Muslim worker to respect obligations imposed by their religion. In this case the Laǧna has declared that the Muslim is not allowed to work for a non-Muslim employer who does not allow them to carry out the daily prayers, or impedes them from praying at the prescribed times of day, and/or at the congregational prayer of Friday, a major prescribed prayer from which a Muslim cannot abstain, except in cases where it is legally admissible (such as in sickness or during travel etc.), which does not include the stay in the *dār al-kufr*. It is for this reason that the believer must leave their work knowing that Allah will compensate them by letting them find a better job.[70] In the same way, the Committee has also forbidden the Muslim woman to work in the West (*diyār al-ġarb*) if, for example, such a circumstance prevents her from respecting the rule of wearing the veil (*ḥiǧāb*),[71] or from carrying out her prayers at the prescribed times;[72] it has also forbidden her (*ġayr ǧā'iz*), if she works in non-Islamic countries (*al-duwal ġayr al-islāmiyya*), from working factories or offices in which all the employees work together (*iḫtilāṭ*), that is without the separation of male and female workers.[73] The Committee has confirmed this position in another fatwa, n. 19504, issued in response to a question regarding the conditions of an American Muslim woman (*muslima amrīkiyya*) who to support herself was compelled (*taḍṭarr*) to work in an environment where men and women worked together, and where she was compelled to remove her veil. To this woman, the Laǧna, after reminding her that a Muslim woman was not permitted to work in a mixed environment and that she was obliged to wear the *ḥiǧāb*, advised her to look for a lawful job (*mubāḥ*), in which there was nothing forbidden (*ḥarām*).[74]

There are many responses in which the Committee has expressed its opinion regarding the type of work it considers forbidden, and which therefore cannot be done by Muslims. It has, for example, declared unlawful all jobs regarding the production, sale and distribution of alcoholic beverages and pork. For this reason, two Muslims—one working as a cook in the United States of America and the other working in a factory in France—were ordered to leave their jobs because in both cases it had to do with pork.[75] Likewise, all jobs directly or indirectly related to banks whose operations are based on a system of profit are forbidden.[76]

In fatwa n. 19479 the Committee has held that the followers of Allah, be they male or female, cannot work in factories of disbelievers who produce arms, become part of their armies, or in general do any work that increases their military might. Engaging in such

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pressed regarding the case of a Muslim who had migrated to France, where he was running a bar in which he sold alcoholic beverages. Ibid.: 65-68, fatwa n. 4047.

70   Ibid.: 478, 467-468, n. 4047 and n. 9850; fatwa n. 18100, at <http://www.alifta.com/Search/FatwaNum SrchDisplay.aspx?languagename=ar&lang=ar>.

71   There are many responses in which the Committee has established the obligation for women to wear the veil. For all see *Fatāwā al-laǧna* 2003, vol. 17: 248-255, fatwa n. 5168. It is interesting to underline that, according to the Laǧna, a husband can ask for the break-up of the marriage if the wife refuses to wear a veil, even if she is a Christian. Ibid.: 108-109, fatwa 5089.

72   Ibid.: 235, fatwa n. 5512.

73   Ibid.: 232, fatwa n. 2768.

74   Ibid.: 231, fatwa n. 19504.

75   Ibid.: 287-288, fatwa n. 4047; *Fatāwā al-laǧna*, n.d., vol. 14: 421 (fatwa n. 6364), 436-437.

76   *Fatāwā al-laǧna*, n.d., vol. 15: 47-48 (fatwa n. 3546), 55-56 (fatwa n. 5317).

activities will amount to swearing allegiance to the *kuffār*, or supporting them, becoming one of them unawares.[77] For the Muslim, working in gay friendly hotels is also prohibited (*lā taǧūz*), otherwise one will be an accomplice to a forbidden act (*iṯm*) and a transgression (*'udwān*, in the sense of excess). This is how the Committee, with fatwa n. 11728, responded to a Muslim who was temporarily living in Holland where he worked as a cleaner in a hotel. After discovering the hotel was gay-friendly, he consulted the Laǧna to learn if he could continue doing the work, considering the difficulty of finding another job. The response was negative.[78]

The question of the connection between migration to find work and family relations has been the theme of many responses of the Committee, some of which I have analyzed.

When a male married believer travels abroad for a long period of time for reasons of work, he needs the permission of his wife. Otherwise it is considered a sin (*āṯim*) to have neglected his marital duties. However, it is not considered a sin (*āṯim*) when the Muslim departs with the blessings of his wife, or in pursuit of an objective that will benefit him and the family or the *umma*.[79] In some cases the Muslim who has passed a long period of time abroad for reasons of work, he has to ask for permission from his in-laws to enable his wife to join him. In some Islamic countries there is the habit (*'āda*) of including a provision (*dakk*) in the marriage agreement in which one agrees not to live far away from the bride's family. Questioned on this issue, the Committee responded that a Muslim husband cannot compel the parents of the wife to allow their daughter to leave; he can only try to convince them by explaining to them that living abroad for long periods of time necessitates the presence of his wife, and that her leaving will not cause her any moral or material damages.[80]

The Laǧna was also consulted for solution to a case involving a father who refused to allow his son to leave an Islamic country for Europe, with the objective of finding a job to support himself. The Committee recognized the difficulty in which the young man and his family found themselves, and the state of necessity that made migration lawful (*lā ḥarraǧa 'alā al-walad fī ḏalika li-ḍarūra*), even against the will of the parents. The immigrant son however, has to help his parents proportionally to his earnings, providing them with money (*māl*) or a carer (*ḫadim*).[81]

Some Muslims men living in Europe for work who were passing very long periods of time far away from their wives, therefore finding themselves unable to satisfy their sexual needs, consulted the Laǧna, asking if the extraordinary condition in which they find themselves could justify extramarital sexual relations, normally considered illegal. The Committee responded that it was absolutely forbidden to have such relations, even when a man was far away from the wife for many years. To find a solution to such a situation, he has to make the wife join him, and if this was not possible, to marry a second wife in that country,

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77 Fatwa n. 19479, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar&lang=ar>.

78 *Fatāwā al-laǧna*, n.d., vol. 14: 430-431, fatwa n. 11728.

79 *Fatāwā al-laǧna* 2003/1424, vol. 19: 338 (fatwa n. 606), 344 (fatwa n. 2301); 348 (fatwa n. 5512).

80 Ibid.: 346, fatwa n. 6159.

81 Fatwa n. 6582, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar&lang=ar>.

be she a Muslim, Jew or Christian. If this last solution is not possible, then the Muslim has no option but to live a life of chastity. A helpful tool in this regard is fasting, which is well known for its collateral effect of reducing sexual desire.[82]

The satisfaction of the sexual needs of the Muslim migrant worker has been dealt with in another response – n. 9387. The Committee was asked to express its opinion regarding the case of a man who, after a very long period of travel for professional reasons, came home for a two-day holiday and wanted to have sex with the wife, who was in her menstrual period or had just given birth. It responded that the situation in which the Muslim finds himself does not exempt him from respecting the prescribed rules of the case in question, alternatively he can have sex with the wife as long as there is no vaginal penetration. In fact, based on the Quranic verse 2:222,[83] vaginal penetration is not admitted until a definite end of bleeding, after which the woman will have to perform the necessary ablution to bring her back to a state of purity.[84]

3.3 Migration for reasons of studies

The Committee also made a declaration regarding the possibility of a Muslim traveling to the country of the disbelievers (*diyār al-kufr*) for the reason of studies, establishing that it should be permitted only in the case of effective necessity (*lā taḥull illā li'l-ḥāǧa*), and only if the level of devotion of the student is strong enough for them to withstand the dangers of being influenced negatively from a religious and moral point of view by their stay in the non-Islamic territory.[85] Regarding the type of study that makes it possible to reside in a non-Islamic country, in fatwa n. 2358[86] the Laǧna, responding to the question 'Is it possible to travel to the U.S.A for academic reasons?,[87] distinguished between religious knowledge and Arabic[88] (*al-ʿulūm al-dīniyya wa'l-arabiyya*) on one hand, and the profane or mundane (*al-ʿulūm al-dunyawiyya*) on the other hand. There is no need to travel to the country of the disbelievers (*al-duwal al-kāfira*) to learn the former, since this type of knowledge can be taught only by very qualified and trustworthy people (*ahl al-ṯiqāt al-ma'amūnīn*), of which the Islamic world is full (*wa ḏalika mutawaffir* […] *fī al-duwal al-islāmiyya*). Instead, regarding the acquisition of profane knowledge like medicine, engineering etc., the Laǧna admits it is lawful to travel to the *dār al-kufr*, including the United States, to pursue studies, as long as three conditions are met. The first of which is that it

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82   *Fatāwā al-laǧna* 2003, vol. 22: 22-23, fatwa n. 4765.

83   'And they ask you about menstruation. Say, "It is harm, so keep away from wives during menstruation. And do not approach them until they are pure. And when they have purified themselves, then come to them from where Allāh has ordained for you. Indeed, Allāh loves those who are constantly repentant and loves those who purify themselves."'

84   *Fatāwā al-laǧna* 2003, vol. 19: 287-288, fatwa n. 9387.

85   *Fatāwā al-laǧna* 2003, vol. 16: 220, fatwa n. 17813.

86   *Fatāwā al-laǧna* 1998/1419, vol. 12: 137-138.

87   In Arabic "Hal yaǧūz al-safar ilà bilād amrīkā li'l-dirasāt?".

88   The learning of languages other than Arabic, particularly those spoken by Christians (English, German etc.), is licit (*ǧā'iz*) only when it has the function of serving a religious need (*ḥāǧa al-dīniyya*), that is, inviting non-Muslims to Islam (*da'wa*), or of a profane need (*ḥāǧa al-dunyawiyya*), for example, for reasons of work; otherwise it is considered despicable (*makrūh*). *Fatāwā al-laǧna* 1998/1419, vol. 12: 133-134, fatwa n. 4967 and n. 8864

should be knowledge that the Muslim student cannot acquire in an Islamic country due to the lack of Muslim teachers able to teach the subject and the impossibility of importing foreign specialists to teach it. The necessity to meet the first demand—that is, courses offered in the Muslim's country of origin do not include the course for pursuit of which they are travelling to a non-Islamic state—has been dealt with by the Committee in another fatwa, n. 20968, with which it responds to a Saudi student who received a scholarship from an American university for a course that was also available in Islamic countries. The Laǧna denied this student the possibility of studying in the United States because it did not see the necessity of pursuing that course there as it was available in Islamic countries. Therefore migrating in this case was unjustified.[89] Meeting the second condition for which one can study abroad is related to the usefulness of the studies to the country of origin, as, for example, the creation of Muslim specialists in various fields that would free the Islamic countries from the necessity of having to bring in specialist disbelievers from abroad.[90] Finally, the third condition for the believer to meet before they can travel abroad is a high level of faith and strong belief in the Islamic culture that makes them immune to any possible influence and temptation that they might encounter during their study period in a non-Islamic country. Similarly, in another response, the Committee affirms that the student who for academic reasons is compelled to migrate to a non-Islamic state (*inna iḍṭarr li-ẓurūf aḥāṭat bi-hi* […] *ilà* […] *ṭalab al-'ilm fī bilād ġayr islāmiyya raḫḫaṣ la-hu*), has the obligation to perform the prescribed rituals (*waǧib 'alay-hi an yuḥāfaẓ 'alā ša'ā'ir dīn-hi*) and to respect Islamic morals, as well as meeting all the obligations of a Muslim.[91] It looks like the freedom to practise one's faith is the main prerequisite for a Muslim to reside in a *dār al-kufr*, regardless of what their motive is for being there. This principle has been repeated constantly by the Committee; for example in fatwa n. 2922, with which it responded to a Muslim resident in Great Britain who asked if it was unlawful to live in a country where one could not make a call to prayer (*aḏān*) at a high volume.[92] The Laǧna responded that a Muslim cannot reside in a country where they cannot openly practise their faith as prescribed, and that they have to abandon such a country for another in which their religious rights are guaranteed. This obligation to migrate is, however, valid for those believers who have the means to do so, and their refusal will amount to sinning.[93] The obligation of the believer to respect the prescribed acts of faith wherever they are is also mentioned by the Committee in response n. 2635, in which it is established that a Muslim is expected to

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[89] Fatwa n. 20968, at <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar&lang=ar>.

[90] In the name of such functionality the Committee admits that the student can remain abroad for reasons of study even if the course they are doing obliges them to study theories such as that of Darwin, which does not agree with the principles of Islam. *Fatāwā al-laǧna* 1998/1419, vol. 12: 139-140, fatwa n. 8152.

[91] *Fatāwā al-laǧna* 2003, vol. 19: 344, fatwa n. 2301.

[92] The Muslim must be permitted to make the call to prayer (*al-aḏān*) and also to make announcements regarding the beginning of prayer (*al-iqāma*) wherever they are, either in Islamic countries or *dār al-kufr*. *Fatāwā al-laǧna* undated, vol. 6: 55-56, fatwa n. 12260.

[93] *Fatāwā al-laǧna* 1998/1419, vol. 12: 54-55.

perform the Friday congregational prayer (*ṣalāt al-ǧum'a*) even while residing in the *dār al-kufr*.[94]

In many cases, Muslim students residing in non-Islamic countries for studies do not have the necessary means to sustain expenditure like tuition fees, acquisition of books and other study materials, feeding, housing etc. Hence they have to look for other sources of finance to meet expenditure. This finance however must be *sharī'a compliant*,[95] thus, it must conform to the rules of Islam. Consequently, donations or scholarships related to banks that operate on profit cannot be accepted.[96]

To avoid violating the rules of Islamic law is why many Muslim students in America are not allowed to take American medical insurance, indispensable for medical treatment and taking care of general medical expenditure. The Committee holds that such an insurance is similar to commercial insurance (*al-ta'mīn al-tiǧārī*) and is considered to contain excessive risk or a gamble (*al-ġarar al-fāḥiš wa'l-muqāmara*), which makes it unlawful.[97]

Like many other students, even Muslim students sometimes cannot afford the cost of housing alone and are therefore compelled to share accommodation with other students who might belong to other religious faiths or simply be atheists. This unpleasant situation has been the subject of clarification that some students put before the Laǧna, which stated that in general they should not stay with non-Muslims (*lā yaḥull la-ka an yuqīm ma'a ġayr al-muslimīn*); on the other hand, if this is not possible, the sharing of accommodation with a non-Muslim is allowed, as long as the Muslim student takes it upon themself to invite their housemate to Islam, both verbally and practically. For this reason they must maintain gentle behaviour to their housemate with the objective of winning them over by being gentle even when they offend Islam, and should accept and exchange invitations to eat together.[98] On the possibility of offering food to non-Muslims specifically, the Committee has clarified an important issue of Islamic law: 'The qualification of an action depends on the objective of that action, and vice versa.' To put it more clearly, if it is obligatory to achieve a certain objective, the action that leads to achieving that objective becomes obligatory too (*iḏā kānat al-ġāya wāǧiba waǧibt al-wasīla, iḏā kānat al-ġāya muḥarrama ḥarramt al-wasīla*). As mentioned above, to offer food to the non-Muslim is considered licit, because it has the intended objective of attracting someone to Islam (*da'wa*). Obviously the food

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[94] *Fatāwā al-laǧna* 1996, vol. 8: 186.

[95] From this point of view, it is interesting to note how the necessity for the Muslim student to finance their studies by taking a loan that conforms to Islamic rules (*sharī'a compliant*) has induced the British government to consult experts on Islamic finance to find an alternative solution to the traditional system of loans, an option that 'meets the needs of students who believed that a student loan was incompatible with their beliefs'. In this regard, it wanted 'to hear from Muslims about the acceptability of the finance product, since it is important that any sharia-compliant finance product is transparent, understandable and acceptable to the majority of students who might wish to apply for a finance of this type'. DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS, n.d.: 5.

[96] *Fatāwā al-laǧna* 1998/1419, vol. 12: 151-152, fatwa n. 16184.

[97] *Fatāwā al-laǧna*, n.d. vol. 15: 296-297 (fatwa n. 7723), 307-310 (fatwa n. 16048); <http://www.alifta.com/Fatawa/FatawaChapters.aspx?languagename=en&View=Page&PageID=392&PageNo=1&BookID=17>. On the possibilities of Muslims in the West to sign insurance contracts, see: ZARABOZO, n.d.

[98] Fatwa n. 14091 and n. 2165, in <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?language-name=ar&lang=ar>.

offered must be *ḥalāl*, and if it is in Ramadan the food must be offered during the hours it is permitted to eat.[99] Food is the theme of another question posed by some Muslim students in America, who asked the Committee if it was lawful to eat locally produced meat (*laḥm*, pl. *luḥum*). Basing on verse 5:5 of the Quran,[100] the Laǧna stated that according to the general rule, a Muslim can eat the meat of an animal slaughtered by Christians and Jews (People of the Books) as long as it is an animal which is lawful according to the *sharī'a* (camels, cows sheep, chicken etc.). On the contrary, the meat of an animal slaughtered by disbelievers (*kuffār*), for example pagans (*waṯaniyyīn*), by atheists (*man lā dīn lahum*) and communists (*šuyū'iyyīn*) cannot be eaten. Regardless of the general rule cited here by the Committee, it also advises against eating meat sold in the US, especially in cases in which the believer has doubts whether Islamic rules regarding slaughter have been applied.[101] In another response, however, the Laǧna has softened its position. It affirmed that it is forbidden to eat meat or cheese to which the fat or blood of pork has been added, as long as such addition is certain. Instead, in case of doubt such meat can be eaten.[102] The rule is that whatever food is to be considered licit can be eaten, until and unless there is concrete proof that there is something that renders it illicit.[103]

The Laǧna has also talked about the case in which a Muslim student's stay with a non-Muslim is not for economic reasons but for the sake of improving their skills in the language of the non-Muslim. The Committee was consulted on the issue of students residing with an American family regarding the immense advantage for the Muslim students in acquiring practical knowledge of the English language. It responded by saying that it is better for the Muslim to live with other Muslims, and stay as far away as possible from disbelievers regardless of their nationality, since this is the only way they can preserve their religion and morals. In fact proximity to non-Muslims is considered a source of temptation that can induce the Muslim to take the wrong path. It is for this reason that the Committee has established that it is unlawful for a Muslim to live in a family of disbelievers, especially when such a family contains women, because their limited sense of morals can become a serious temptation to the rectitude of the Muslim. Finally, practising the language is not enough of a necessity to justify cohabitation with the disbeliever.[104]

For Muslim students studying in Western countries, another fatwa was passed by the Committee—n. 21052—regarding the academic robes (*rūb*) worn in some European and American universities on graduation day, during the formal ceremony in which students

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99 *Fatāwā al-laǧna*, n.d., vol. 14: 474, fatwa n. 1850.

100 'This day [all] good foods have been made lawful, and the food of those who were given the Scripture is lawful for you and your food is lawful for them. And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you, when you have given them their due compensation, desiring chastity, not unlawful sexual intercourse or taking [secret] lovers. And whoever denies the faith—his work has become worthless, and he, in the Hereafter, will be among the losers.'

101 *Fatāwā al-laǧna* 2003, vol. 22: 411-412 (fatwa n. 19658), 417-418 (fatwa n. 18941), 451-452 (fatwa n. 21341). In another response (n. 3262), the Committee affirms that it is permitted to eat food offered by Christians as long as it is licit and its 'statute is known'. (*Fatāwā al-laǧna* undated, vol. 2: 75).

102 *Fatāwā al-laǧna* 2003, vol. 22: 117-118, fatwa n. 3448.

103 Ibid.: 399-400, fatwa n. 3262

104 *Fatāwā al-laǧna* 1998/1419, vol. 12: 139, fatwa n. 2358.

receive their diplomas or degrees. According to the Laǧna, such practice is unacceptable (*lā taǧūz*) because this robe worn by the students is considered typically Christian (*min albisat al-naṣārā*) and could end up violating the Islamic rule that forbids Muslims from imitating disbelievers (Christian, Jews, etc.).[105]

Conclusion

The analyses of the responses issued by the Committee confirm results arrived at by other sources.[106] For instance, according to Salafi Pietists, the Muslim has been forbidden from residing in a non-Islamic country. The consequent dangers of such an action are the undermining of their religion and morals. The possibility of residing in the territory of the disbelievers is allowed only in special cases, in which there is an effective necessity such as medical treatment, work, study etc. The stay in the *dār al-kufr* with the objective of meeting the demands mentioned above must, however, respect a series of rules such as the freedom to practise Islamic rituals, limiting contact with the disbelievers to only those occasions when trying to convert them to Islam (*da'wa*), without ever developing strong relations with them or criticizing them openly without offending.

All the above circumstances combine to explain why the tendency to isolate themselves can be seen among Muslim communities in the West who make reference to Salafi Pietist doctrine.

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[105] *Fatāwā* n. 21052, 1620, 2301, 2358, in <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar&lang=ar>. For some examples of actions carried out by the disbelievers, and which must not be imitated by Muslims, see response n. 4566, in <http://www.alifta.com/Search/FatwaNumSrchDisplay.aspx?languagename=ar&lang=ar>. For example, the Committee, considering the cold weather characteristic of British winters, has recognized the necessity for Muslims who reside in Great Britain to sometimes shorten their hair, to facilitate its easy washing and drying. However, the same possibility should not be granted to those Muslims who want to have short hair only for the reason of imitating the hairstyles of the local disbelievers. *Fatāwā al-laǧna* undated, vol. 5: 182, fatwa n. 2922.

[106] DE ANGELO 2013b.

— . 1998/1419. *Fatāwā al-laǧna al-dā'ima li'l-buḥūṯ al-'ilmiyya wa'l-iftā' al-dā'ima li'l-buḥūṯ al-'ilmiyya wa'l-iftā'*. Riyāḍ: Dār al-'Āṣima li'l-Našr wa'l-Tawzī', vol. 12.

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Transgenderism, Transsexuality and Sex-Reassignment Surgery in Contemporary Sunni Fatwas*

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Abstract

This paper analyses the contemporary Sunni discourse on transgenderism, transsexuality and sex-reassignment surgery (SRS), looking at contemporary fatwas by traditionalist jurists. After a terminological introduction to the semantic field of transsexuality and transgenderism in the international discourse and in the Arab world, the paper analyses the verses in the Quran and the relevant hadiths that are mentioned in the contemporary discussion, before examining what jurists say on the topic. The paper shows that sex-reassignment surgery is mostly regarded by Muslim jurists as permitted in cases of intersexuality, as it is considered a treatment to determine the sex of the person, but is usually considered forbidden in cases of transgenderism, as it is considered a change in God's creation. The paper finally argues that the discussion on SRS by Muslim traditionalist scholars is driven by an essentialised perception of the sex/gender binary and the roles assigned to men and women that is not only shared by those scholars who refuse SRS, but also by those who allow it.

Key words: transgenderism, transsexuality, SRS, Islamic law, gender dysphoria, gender identity disorder (GID).

1. Introduction

Over the last two decades, a number of works on sexual minorities and Islam have been published. Scholars have particularly focused on homoeroticism and/or homosexuality: some authors have written on queer-friendly hermeneutics and on the efforts of homosexual Muslims to reconcile their religion and sexuality;[1] others have focused on the emergence of LGBTQI (lesbian, gay, bisexual, transsexual, queer, intersexual) identities, in either the 'real'[2] or in the 'virtual' world.[3] If we restrict our attention to the legal sphere, a number of publications have been devoted to same-sex acts and/or homosexuality in Islamic Law.[4] For what goes under the 'modern' category of 'intersexuality', Peter Freimark has analysed

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1 See especially KUGLE 2003 and 2010; SHANNAHAN 2009; SHAH 2016.

2 See for example KUGLE 2013; MAKAREM 2011. For LGBTQI Muslims in Europe see, for example, YIP 2008; NAHAS 2003; HEKMA 2002.

3 See for example WALSH-HAINES 2012; MARCOTTE 2010; BROUWER 2004; COLLINS 2012; GORKEMLI 2012.

4 See SCHMITT 2001-2002; ADANG 2003; OMAR 2012; KUGLE & HUNT 2012; TOLINO 2013 and 2014.

the case of the hermaphrodite in Islamic and Jewish law,[5] Agostino Cilardo and Paula Sanders have discussed the doctrine on the hermaphrodite in classical Islamic law,[6] and Thomas Eich has discussed the case of the intersexual in contemporary Islamic law.[7] When looking at transsexuality, Roland Littlewood has discussed the case of the sworn virgins in northern Albania,[8] Unni Wikan has described transgender lives in Oman in the 70s,[9] Serena Nanda and Gayatri Reddi have described the lives of *hijras* in India,[10] and Afsaneh Najmabadi has written a history of transsexuality in Iran.[11]

Few articles addressed the issue of sex-reassignment surgery (from now on, SRS) on the legal level: Hammadi Redissi and Slah Eddine Ben Abid have discussed the refusal of the Court of Appeal of Tunis to change the civil status of a transgender person,[12] while Jakob Skovgaard-Petersen has analysed the case of Sayyid/Sally, an Egyptian transsexual and the problems she faced when she decided to change her sex.[13] The same case has also been analysed by Badouin Dupret as a case study of how moral principles are relevant to the judge's work in Egyptian jurisprudence.[14] Fe Dergi has analysed Turkish law in relation to SRS and its relevance in the field of sexual citizenship,[15] while Fawwāz Ṣāliḥ has worked on sex change in Syrian law.[16] More recently, in 2017, M. Alipour has published an article on Islamic law and SRS, using as a case study the fatwas of Khomeini[17] and Ṭanṭāwī on this topic.[18]

My aim in this article is to build on these contributions, and particularly on Alipour's work, and to incorporate into analysis a wider number of fatwas in order to reconstruct the discourse on transsexuality, transgenderism and SRS in the contemporary Sunni legal discourse. Through an analysis of these sources, I will show how even those fatwas that seem at first sight 'progressive' are based on inherently patriarchal and traditionalist arguments. In this sense, I build on Thomas Eich's interpretation of discourses on hymen repair (hymenorraphy) in Sunni Islamic law. Indeed, in an article on the Arabic internet debate around this topic, he demonstrated how both supporters and opponents of hymenorraphy base their discourses on the same patriarchal assumptions, namely the passivity of women

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5 FREIMARK 1970.

6 SANDERS 1991; CILARDO 1986.

7 EICH 2008.

8 LITTLEWOOD 2002.

9 WIKAN 1977.

10 NANDA 1999; REDDY 2006. See also KALRA & SHAH 2013.

11 NAJMABADI 2008 and 2014. On Iran see also BAHREINI 2008; JAVAHERI 2010.

12 REDISSI & BEN ABID 2013.

13 SKOVGAARD-PETERSEN 1997: 319-334.

14 DUPRET 2001; 2002; 2013.

15 KURTOĞLU 2009.

16 ṢĀLIḤ 2003.

17 The correct transliteration of the name should be Ḫomeinī. Because of his prominence and in order to ensure the recognisability of his name, in this paper I use the simplified and common-spread version Khomeini.

18 ALIPOUR 2017.

and the necessity to protect them (from violence for example, but also from cases of 'mistakes'). Hymen repair therefore 'is usually not seen as a means to fundamentally transform social structures, but rather a way of perpetuating them'.[19] The same can be said with reference to discourses on SRS, as we shall see.

This article is divided into three main parts: in the first part I discuss the concepts I will use in this article and the relevant Arabic terminology, in the second part I present what the sources of Islamic law, namely the Quran and the Sunna, say on the topic. In the third and last part of the article, I focus on the contents of the discussion on transsexuality, transgenderism and SRS in fatwas published by Sunni Muslim jurists from the 1980s to today.

2. Terminology: a short introduction to the semantic field of Transsexuality and Transgenderism

The terms 'transsexuality' and 'transgenderism' are two modern concepts that refer to instances of gender identity not matching assigned sex: simply put, they refer to biological males who do not recognise themselves as men and biological females who do not recognise themselves as women. While 'transsexuality' is most often used to refer to people who decide to undergo a SRS to 'pass' completely to the other sex, 'transgenderism' is a broader concept that is used for anyone with a gender identity different from his/her assigned sex.

The first authors to 'invent' a scientific category for people not feeling comfortable in their assigned sex were psychiatrists and sexologists from the late nineteenth century, during what Michel Foucault (d. 1984) called the 'psychiatrization of perverse pleasure',[20] to refer to this historical phase, in which any kind of sexual behaviour or identity that differed somehow from what was perceived as 'the norm' was scrutinised by psychiatrists. In 1886 the Austro-German psychiatrist Richard von Krafft-Ebing (d. 1902), mentioned in his *Psychopathia Sexualis*, one of the founding texts of modern sexology, what he called 'metamorphosis sexualis paranoica'.[21] A few years later, in 1910, the sexologist Magnus Hirschfeld (d. 1935) coined the term 'transvestite', which he applied to those people who desired to dress and live as much as possible as persons belonging to the other sex.[22] He also founded a clinic where, under his supervision, the first sex-change operations took place in the 1920s and the 1930s.[23]

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19 EICH 2010: 763.

20 FOUCAULT 1978: 105.

21 This short introduction to the term is based on STRYKER 2006: 1-17. The relevant passages from Richard von Krafft-Ebing's *Psychopathia Sexualis* can be found in STRYKER & WHITTLE (eds.) 2006: 19-27.

22 Selections from this work are also reported ibid.: 28-39.

23 In 1922 a bilateral orchidectomy was performed on the MtF (male to female) transsexual Rudolph/Dora Richter, followed in 1930 by a penectomy and a vaginoplasty. In 1930 also the MtF transsexual Einar Magnus Andreas Wegener/Lili Elbe started a series of surgeries that included the removal of testicles, the implant of ovaries, the removal of penis and scrotum, and finally a vaginoplasty and the transplant of a uterus, before she died from an infection she contracted after her last surgery. In 2000 David Ebershoff published a novel of her story (*The Danish Girl*), which was adapted into a film in 2016.

In 1949 the sexologist David O. Cauldwell (d. 1959) coined the term 'psychopathia transexualis' and used 'transsexual' to describe individuals who wished to live and appear as members of the other sex.[24] In 1966 the endocrinologist and sexologist Harry Benjamin, who claimed to have been the first to use the term 'transsexual' in a public lecture, published *The Transsexual Phenomenon*. According to him, it is preferable to use 'transsexual' instead of 'transvestite', as the second term only focuses on the desire to cross-dress, for him a symptom of a wider syndrome, transsexuality, that he considered the consequence of genetic and psychological disorders.[25]

Since then, there has been a long debate on what defines a transgender and/or a transsexual person. On the medical level, since the 1980s, gender identity disorder has been used as the diagnosis to refer to what a person experiences as a result of the difference between his/her perceived sex and the one he/she was assigned at birth. For example, the tenth edition of the *International Statistical Classification of Diseases and Related Health Problems* (ICD10), published by the World Health Organization in 1993 and last republished in 2016, includes under the category gender identity disorder 'transsexualism, dual-role transvestism, gender identity disorder of childhood, other gender identity disorders and unspecified Gender identity disorder'. Transsexualism is defined as:

> A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.[26]

This is different from dual-role transvestism, defined as:

> The wearing of clothes of the opposite sex for part of the individual's existence in order to enjoy the temporary experience of membership of the opposite sex, but without any desire for a more permanent sex change or associated surgical reassignment, and without sexual excitement accompanying the cross-dressing.[27]

The forthcoming edition of the ICD (ICD11), which is due to be published in 2018 and is currently available as a beta-version, speaks instead of 'gender incongruence':

> Gender incongruence is characterized by a marked and persistent incongruence between an individual's experienced gender and the assigned sex. Gender variant behaviour and preferences alone are not a basis for assigning the diagnoses in this group.[28]

The last edition of *The Diagnostic and Statistical Manual of Mental Disorders*, one of the standard manuals in psychiatry, published by the American Psychiatric Association, no

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24 The text is reported in STRYKER & WHITTLE (eds.) 2006: 40-44.

25 BENJAMIN 1954, reported in STRYKER & WHITTLE (eds.) 2006: 45-52.

26 WHO 1993, s.v. 'Gender identity disorder'.

27 Ibid.

28 WHO 2017, s.v. 'Gender incongruence'.

longer mentions gender identity disorder but, instead, gender dysphoria,[29] in order to stress that the disagreement between sex assigned at birth and gender identity is not pathological if it does not cause distress to the individual.

In both the popular and the scholarly discourse, starting from the 1980s, the term 'transsexual' has been gradually substituted by 'transgender', whose first use is attributed to the American transgender activist Virginia Prince (d. 2009), who used it to refer to someone who crosses the gender boundary on 'a full-time basis'.[30] With the publication in 1992 of the pamphlet *Transgender Liberation: A Movement Whose Time has Come*, by the transgender activist and author Leslie Feinberg (d. 2014),[31] the term 'transgender' became a large umbrella that refers to all those persons whose gender identity or gender expression do not match their biological sex, and who do not necessarily go through SRS (in this case, the term 'transsexual' is usually preferred).[32] This should not be interpreted as a definitive definition: indeed, different meanings have been assigned by different authors to the two concepts even in the same period. Though it is important to say, as Stryker and Aizura demonstrated, that since 1992 'transgender has experienced a meteoric rise in popularity compared to other familiar terms for describing gender nonconforming practices'.[33] This terminological and conceptual shift, as they noted, was the consequence of the 'sudden appearance of new possibilities for thinking about, talking about, encountering, and living transgender bodies and lives'.[34] This was made possible by a number of changes that occurred in the 1980s and 1990s, such as the alliances forged during the AIDS crisis, the change of perspective on gender and identity, the popularisation of the sex/gender binary and the establishment of constructionist theories in reference to sexuality and gender ideas.[35] It is also important to mention that transgenderism is independent from sexual orientation: transgender people can identify themselves as heterosexuals, homosexuals, bisexuals, asexuals or even refuse all these categorisations.

The Arabic terms for transgenderism are *al-taḥawwul al-ǧinsī* (sex change\transformation), *taḥawwul al-nawʿ al-iǧtimāʿī* (gender change\transformation), *taḥwīl al-ǧins* (sex change) or *taḥannuṯ* (see below). The first three terms are modern concepts. While the first two terms are mostly used by LGBTQI organisations, *taḥwīl al-ǧins* is used also by contemporary jurists to refer to either transgenderism/transsexuality or SRS. *Taḥannuṯ* is the only of these concepts which is used also in pre-modern time. The term comes from the root *ḫ-n-ṯ*, which the historian Everett Rowson explains as originally meaning 'to fold back the mouth of a waterskin for drinking',[36] and as being associated with the meaning of weakness and flaccidness.[37] We find this root also in the term *ḫunṯā*, which refers to her-

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29 AMERICAN PSYCHIATRIC ASSOCIATION 2016, s.v. 'Gender Dysphoria'.

30 STRYKER 2006: 4.

31 PIERCE 1992.

32 STRYKER 2006: 4.

33 Ibid.: 2.

34 STRYKER & AIZURA 2013: 1

35 Ibid.

36 ROWSON 1991: 672.

37 IBN FĀRIS al-QAZWĪNĪ, *Muǧmal al-luġa*, s.v. 'ḫ-n-ṯ'.

maphrodite (intersex),[38] and has been used by Muslim jurists to identify a person who is missing some organs of his/her prevalent sex or a person who has the sexual organs of the male and those of the female together. For example, the Ḥanbali jurist Ibn Qudāma (d. 620/1223) describes the *ḫuntā* as the individual who either does not have 'the penis (*ḏakar*) of the male and the vulva (*farǧ*) of the female', or has both 'the penis of the male and the vulva of the female'.[39] The lexicographer Ibn Manẓūr (d. 711/1312) defines the *ḫuntā* as 'the one that neither belongs to the male nor to the female'.[40] This term is particularly relevant also for our discussion on transsexuality and transgenderism. Indeed, when discussing SRS, Muslim jurists often deal with intersexuality and transgenderism together.

The term *muḫannaṯ* (pl. *muḫannaṯūn)*, which can be roughly translated as 'effeminate', is also found in pre-modern sources:[41] coming from the same root *ḫ-n-ṯ*, it is used to describe a man who resembles a woman in behaviour, posture, voice and dress. As we will see later, there is a hadith attributed to the prophet Muḥammad that mentions this term. The term *mutaraǧǧila* is the corresponding term in pre-modern Arabic to refer to a 'masculine woman'. Contemporary authors also use sometimes the term 'trans' to refer to transsexual or transgender people without differentiation.

The entire process of change from one sex to the other, which includes not only SRS but also psychological treatment, hormone therapy, legal sex designation, change of name and so on, is called 'transition'.[42] We focus here on the surgery itself. SRS is also an umbrella term, as it used to refer to any kind of surgical procedure (or procedures), that a transgender person undergoes in order to bring his/her physical appearance in line with the gender he/she identifies with. SRS includes in reality a number of different operations that can be carried out, according to the case, like chest reconstruction surgery, genitoplasty, penectomy, etc. Some of these surgeries can also be performed on intersex people, often during their infancy.[43] In order to undergo such surgery, a transgender person usually needs a diagnosis of gender dysphoria: i.e., a diagnosis that recognises that the person's assigned sex and gender do not match the person's gender identity.

In Arabic SRS is rendered as *taǧyīr al-ǧins* or *taḥwīl al-ǧins* (sex-change and sex-conversion, both used almost synonymously to refer to surgery where there is a sex-change

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38 The term 'hermaphrodite' is considered derogatory nowadays by many intersex people. For this reason, I will use either the Arabic word or the modern term, 'intersex'. I will keep the term 'hermaphrodite' only when it is used in English by the authors themselves.

39 IBN QUDĀMA, *al-Muġnī*, VI: 336.

40 IBN MANẒŪR, *Lisān al-ʿarab*, s.v. 'ḫ-n-ṯ'.

41 For a discussion on a *muḫannaṯ* in Sunna see the next paragraph. For a discussion on the role of *muḫannaṯūn* in early Islamic history see ROWSON 1991.

42 For example, the ICD 11 mentions that 'Gender Incongruence of Adolescence and Adulthood is characterised by a marked and persistent incongruence between an individual's experienced gender and the assigned sex, which often leads to a desire to 'transition', in order to live and be accepted as a person of the experienced gender, through hormonal treatment, surgery or other health care services to make the individual's body align, as much as desired and to the extent possible, with the experienced gender.' WHO 2017, s.v. 'Gender incongruence'.

43 In 2013 the United Nations Special Rapporteur on Torture, after a long awareness campaign by intersex individuals who were forcibly subjected to SRS during their infancy, condemned the use of non-consensual SRS. See MÉNDEZ 2013: 18-19.

from a 'complete' man to a 'complete' woman, or vice versa), and *taḥdīd al-ǧins* or *taṣḥīḥ al-ǧins* (sex-determination or sex-realignment, both used for surgery where there is not a complete sex-change but what is considered to be a 'correction' of the real sex, as happens in the case of intersex individuals).

3. Back to the sources: Quran and Sunna

If we consider transgenderism and transsexuality as modern categories, then clearly both the Quran and the Sunna do not mention anything that deals specifically with these concepts. However, there are a number of Quranic verses and hadiths that can be considered relevant for the subject of this article, and which are also often mentioned by modern jurists when dealing with these topics.

As regards the Quran, the verses mentioned are usually those that refer to the creation of the world 'in pairs'. For example, verses 42:49 ('To Allah belongs the dominion of the heavens and the earth; He creates what he wills. He gives to whom He wills female [children], and He gives to whom He wills males'),[44] and 53:45-46 ('And that He creates the two mates—the male and female—From a sperm-drop when it is emitted') are often mentioned, to demonstrate that God created two (and only two) sexes.

This understanding of the verses also has an impact on the situation of the *ḫunṯā*: if only two sexes have been created, then the *ḫunṯā* should not be intended as a third sex, but as a person who belongs to one of the two sexes.

However, if on the one hand these verses seem to support the existence of only two sexes, on the other hand verse 42:49 also mentions that God 'creates what he wills': this verse has also been interpreted as a way to demonstrate that, given God's omnipotence, He could create a third gender, if He wishes to do so, as the opposite would constitute a limitation of this omnipotence.[45]

Other Quranic verses often mentioned in discussions on SRS are verse 30:30 ('So direct your face toward the religion, inclining to truth. [Adhere to] the fiṭrah of Allah upon which He has created [all] people. No change should there be in the creation of Allah. That is the correct religion, but most of the people do not know') and verse 4:119: ('And I will mislead them, and I will arouse in them [sinful] desires, and I will command them so they will slit the ears of cattle, and I will command them so they will change the creation of Allah. And whoever takes Satan as an ally instead of Allah has certainly sustained a clear loss').

The majority of Quranic exegetes interpreted the verses on 'changing the creation of God' as a reference to God's religion, considering that God created all people as naturally inclined to the correct religion. However, others have interpreted these verses as referring to an alteration in the physical appearance of human beings and animals.[46] In this sense,

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44 For the English version of the Quran, I use here the Ṣaḥīḥ International.

45 ʿALLĀM 2011: 83-84 for example mentions this interpretation, even though he does not agree with it.

46 For example, in reference to Quran 30:30 both al-Ṭabarī and al-Qurṭubī mention the two interpretations, while al-Zamaḫšarī, al-Rāzī, al-Maḥallī and al-Suyūṭī only mention religion. In reference to Quran 4:119, al-Ṭabarī, al-Qurṭubī, al-Zamaḫšarī and al-Rāzī mention both options, while al-Maḥallī and al-Suyūṭī only mention religion.

these verses are also relevant for SRS, because it would be considered a change in what God created.

As regards the Sunna, one hadith in particular is usually mentioned in contemporary discussions on transgenderism, transsexuality and SRS. The hadith exists in three versions.[47] According to the first version, the prophet Muḥammad visited his wife Umm Salama while a *muḫannaṯ* was in her apartment. When the Prophet entered, the *muḫannaṯ* was describing a woman in detail to Umm Salama's brother, promising that he would have shown her to him if the Muslims had conquered the city of Ṭāʾif. Muḥammad realised that the *muḫannaṯ* was perfectly able to describe those features of a woman that could arouse erotic interest. Therefore, he banished him from Umm Salama's house and the entire city.[48] According to another version of the hadith, which does not give the general context of the story, the Prophet cursed effeminate men (*muḫannaṯūn*) and masculine women (*mutaraǧǧilāt*) and banished them.[49] The last version of the hadith only states that the Prophet cursed effeminate men and masculine women, without mentioning the context of the story.[50]

While many scholars refer to this hadith to demonstrate Muḥammad's aversion towards effeminate men and masculine women (which is also relevant in contemporary discussion on transgender and transsexual people), Scott Kugle claims that the hadith could also be interpreted in a more queer-friendly way: if we take into account the entire version of the story, then it is clear that Muḥammad banished only that single *muḫannaṯ*, and not for being 'effeminate' but for having described a woman to a man, using details that could arouse the erotic interest of another man. This demonstrated that he was not immune to feminine appeal, as was believed before, and for this reason could not attend the house of a wife of the Prophet, as he would constitute a danger to her respectability.[51]

4. Contemporary fatwas on transgenderism, transsexuality and SRS

According to Alipour, until the 1980s SRS was considered forbidden, while by the late 1980s something had changed, and it 'was legalised (made halal) in shariʾa (sic!) and/or in state law by the fatwas of Ayatollah Khomeini and Sheikh al-Tantawi in Iran and Egypt, respectively'.[52] Alipour uses these two examples to show how this kind of *iǧtihād*[53] can 'open up an Islamic debate concerning similar and related phenomena, such as homosexu-

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47 For a complete reconstruction of the different versions and of the complete *isnād* (chain of transmitters) of this hadith see KUGLE 2010: 93.

48 al-ʿASQALĀNĪ, *Fatḥ al-bārī*, IX: 449; MUSLIM, *Ṣaḥīḥ*, IV: 1715-1716; IBN MĀǦA, *Sunan*, II: 440; al-NASĀʾĪ, *Sunan*, VIII: 295; ABŪ DĀWŪD, *Sunan*, 534.

49 al-ʿASQALĀNĪ, *Fatḥ al-bārī*, XIII: 382; al-NASĀʾĪ, *Sunan*, VIII: 297-298.

50 al-ʿASQALĀNĪ, *Fatḥ al-bārī*, XIII: 381; IBN MĀǦA, *Sunan*, II: 441; al-TIRMIḎĪ, *al-Ǧāmiʿ al-kabīr*, IV: 487.

51 KUGLE 2010: 92-97.

52 ALIPOUR 2017: 91. It should be here mentioned that in some cases fatwas can be used as a source of positive law or to support a given position by actors involved in a court case.

53 The term refers to the 'effort' that a Muslim jurist undergoes in order to find a solution to a legal problem using his independent reasoning instead of following former jurists.

ality and bisexuality, aiming at improving Islamic tolerance toward these phenomena'.[54] While I agree on the possibilities that *iğtihād* can offer to open space of Islamic tolerance toward sexual diversity, I am not sure whether Khomeini's, and especially Ṭanṭāwī's, fatwas can really be considered emblematic of such an approach. On the contrary, I believe that both Khomeini and al-Ṭanṭāwī, as do all the traditionalist jurists I analyse in this article, start from the same pre-assumption, which is far from being 'progressive': they believe that God divided the world into two sex/genders, that each of them has specific roles and specific duties in the society, and that whatever may challenge this scheme is strongly forbidden. This is also the case with Khomeini's permission of SRS for transgender people. Even though I focus mostly on Sunni fatwas, Khomeini's approach should still be mentioned here, as it constitutes the first position on SRS by a Muslim jurist, at least to my knowledge.

The first time that Khomeini deals with this argument is in 1964.[55] He states that:

> it appears that it is not forbidden to change sex from a man to a woman and vice versa and that it is not forbidden for a *ḫunṯa* in order to be attached to one of the two sexes. Is it obligatory for a woman if she sees that she has inclinations similar to those of a man or some signs of masculinity or if a man sees in himself inclinations of the opposite sex or some of its signs? It seems that this is not obligatory if the person really belongs to that sex, but it is possible to change it to the opposite sex.[56]

The fatwa seems to permit SRS without making it obligatory for transgender people also, but remains somehow ambiguous. For this reason, Fereydoon/Maryam Mulkara (d. 2012), a MtF (male to female) transgender who wanted to clarify her case, managed in 1979 to meet Khomeini in person. She made clear to him that she did not have any physical 'ambiguity', that she was born as a 'complete' man, but that she still identified herself as a woman. After having consulted trusted doctors,[57] Khomeini granted her the permission to undergo SRS, and even offered her a chador.[58]

As Mulkara declared in an interview in 2004:

> Khomeini decided then that it was a religious obligation for me to have the sex change because a person needs a clear sexual identity in order to carry out their religious duties. He said that because of my feelings, I should observe all the rites specific to women, including the way they dress.[59]

There is nothing really 'progressive' in this fatwa. Khomeini did not intend to enter into discussion about the patriarchal structure of society: what he was doing was trying to make Mulkara fit into this structure, as the gift of the chador makes clear.

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54 ALIPOUR 2017: 91.

55 KHOMEINI, *Taḥrīr al-Wasīla*, II: 567-568.

56 Ibid.: 567 (my translation).

57 ALIPOUR 2017: 95.

58 NAJMABADI 2014: 156.

59 MCDOWALL & KHAN 2004. I would like to thank Carlo De Angelo for this reference.

Since then, in Iran SRS has been allowed for intersex and transgender people, but it is not compulsory: after having obtained a medical certificate, it is possible to live as a transgender person without necessarily going for surgery.[60] As Afsaneh Najmabadi wrote: 'legal and religious authorities know full well that many certified trans person do very little, beyond living transgender lives, once they obtain their certification: at most they may take hormones'.[61] For this reason, a complex system of 'filtering', to clearly distinguish homosexuals from transgenders has been created: though, as Najmabadi states, 'the very process of psychological filtering and jurisprudential demarcating, far from eliminating gays and lesbians (if that is indeed what the Iranian authorities had hoped), has paradoxically created new social spaces'.[62] If on the one hand this confirms the productivity of power in a Foucauldian sense, on the other hand the insistence of the judicial apparatus on clearly distinguishing between homosexuals (considered as deviants) and transgenders (considered as 'unfortunate creatures' and 'patients'),[63] is clear. Moreover, this also does not take into account the possibility that a person can be at the same time a transgender and a homosexual. Obviously, single people are able to navigate and negotiate with the law, but probably that is not what Khomeini's *iğtihād* aimed at. Moreover, as Najmabadi also notes, even though 'it was the overwhelming weight of Ayatollah Khomeini's fatwa that translated into law',[64] still a variety of opinions persist, notwithstanding the relevance and importance of Khomeini's fatwa:[65]

> When it comes to sex change, as with many other issues, there is no unanimity of opinion among Shi'i scholars who issue fatwas in Iran. All consider intersex surgeries permissible because they bring out 'the hidden genus' of the body. Some explicitly argue against non-intersex surgeries, while others express doubt about its permissibility or simply do not take a stand. Some have changed their opinion over the years on the permissibility of sex-reassignment surgery.[66]

The case of the *ḥunṯā*/intersex is always mentioned in fatwas on SRS, even when the request deals specifically with cases of transgenderism: most Muslim jurists discuss the two cases together, in order to compare the permissibility of SRS for a *ḥunṯā* and its prohibition for a transgender person.

Classical jurists tried to determine the 'real' sex of a *ḥunṯā* by looking at the urinary orifice. If he/she urinated from both urinary orifices, there were different opinions: according

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60 NAJMABADI 2014: 173. A translation of the fatwa can be found in ALIPOUR 2017: 96.

61 NAJMABADI 2014: 175.

62 Ibid.: 4.

63 Ibid.: 173; 299.

64 Ibid.: 174.

65 For example, ṢUBḤANĪ 1433 AH [2012]: 65, explicitly says that SRS, when the masculine or feminine sexual organs of the person are complete, is a crime that deserves punishment. Also MOBALLAĠĪ 1429 AH [2008], even though more cautious, seems not to accept SRS for cases that cannot be classified as *ḥunṯā*.

66 NAJMABADI 2014: 174. See also VAHEDI, ALIMARDANI, BEHROUZIH & ASLI 2017 for the debate between Iranian *'ulamā'* on this topic.

to some jurists, the sexual organ from which the urine came first should determine the sex of the hermaphrodite; for others, the orifice that stopped urinating last; for others the one from which the urine came more abundantly;[67] some Imami and Ismaili jurists even allowed *istiqsām*, a divinatory technique based on the use of arrows.[68] If the sex could not be determined from the urinary orifice, then jurists suggested waiting for the appearance of one of the so-called 'signs of puberty', which for men include the growing of a beard or moustache, spermatic emissions and/or the ability to penetrate a female and for women menstruation, pregnancy, the development of the breast, secretion of milk and/or the possibility of being penetrated.[69] The attraction of an ambiguous *ḫunṯā* towards men was considered a sign of its femininity, towards women a sign of masculinity.[70] If the sex of the *ḫunṯā* could not be clarified even after puberty, or if the *ḫunṯā* died before reaching puberty, then it was defined as a '*ḫunṯā muškil*', a problematic and ambiguous *ḫunṯā*, with a special legal status.[71] This category was not created so much in order to accommodate a 'third gender' per se, but more in order to accommodate a person whose real gender, which was either masculine or feminine, could not be discovered by jurists.

Nowadays, contemporary Muslim jurists are aware that the classical methods based on the urinary orifice to determine the sex of a *ḫunṯā* are antiquated.[72] They also often mention that there is a difference between the definition of the *ḫunṯā* in *fiqh* and in medicine: while Muslim jurists focused only on the external sexual organs, in modern medicine the external organs are only one of five factors that are considered when assigning the biological sex, which also include the number and type of sex chromosomes, the gonads (ovaries or testicles), hormones and, finally, internal reproductive anatomy. An intersex person in medicine is a person in whom these five characteristics are not either all typically male or all typically female. Moreover, while in classical *fiqh* the main distinction was between an unambiguous or an ambiguous (*muškil*) *ḫunṯā*, contemporary Muslim jurists believe that progress in modern medicine has solved this problem,[73] and that the distinction today should be between a 'real hermaphrodite' (who has both testicles and ovaries) and a 'pseudo-hermaphrodite' (*ḫunṯā kāḏib*), who is born with either ovaries or testicles but has external sexual characteristics that are different from those expected when looking at the gonads.[74]

Contemporary jurists are also aware that medical and scientific progress make it possible to determine the sex of a *ḫunṯā* via medical tests that include detailed examinations to

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67 CILARDO 1986: 129-134.

68 LO JACONO 1981.

69 CILARDO 1986: 133.

70 ʿALLĀM 2011: 90.

71 See CILARDO 1986 for more details.

72 ʿABD al-BARR 1992: 354-355.

73 Aḥmad states, for example, that the development of medicine definitively 'solved the problem of what is called the third gender'. AḤMAD 2011: 103

74 See, for example, ʿABD al-BARR 1992: 351-352, which mentions the term '*ḫunṯā*' in Arabic and 'True hermaphrodite' and 'Pseudo hermaphrodite' in English. Literally *ḫunṯā kāḏib* could be translated as 'the lying *ḫunṯā*', or 'the false *ḫunṯā*'.

verify the presence of testicles or ovaries, even if they are not visible externally,[75] and chromosome analysis to verify the person's chromosomic sex.[76] Moreover, they usually agree on the fact that medicine should be used to ascertain the 'real' sex of the *ḫunṯā*. Once there are no doubts on its 'real' sex, SRS is not only allowed on a *ḫunṯā*, but it is even recommended, as it is intended as a way to heal an illness, either removing a superfluous organ, or disclosing a hidden one, and not as a way to change the sex (and therefore God's creation). Sunni jurists published a number of fatwas on this topic, which all seem to agree on one basic point: SRS can be allowed only when it can be understood as a way to clarify a person's sex and to solve a gender and/or a sex ambiguity, but not when it is a proper 'sex-change'. In this sense, I would say that SRS can be accepted only as long as it represents the modern and somehow final answer to the definition of the 'problematic' sex of the *ḫunṯā*.

Interestingly, while scholars focused mostly on the fatwa issued in 1988 by Ṭanṭāwī, this fatwa has a precedent. Already in 1981 Ǧād al-Ḥaqq (d. 1996), at the time Grand Muftī of Egypt, had issued a fatwa on SRS in response to a request from the Malaysian Centre for Islamic Research, which is entitled 'Ǧirāḫat taḥwīl al-raǧul ilà imra'a wa-bi-'l-'aks ǧā'iza li-'l-ḍarūra' (The surgery to change a man into a woman and vice versa is allowed in case of necessity), which is almost identical to the one that Ṭanṭāwī would release in 1988.

Ǧād al-Ḥaqq starts mentioning a hadith transmitted by Usāma b. Šurayk, according to which God did not send any illness without sending also a cure for it. After this hadith, Ǧād al-Ḥaqq mentions another hadith according to which Muḥammad authorised 'Arfaǧah Ibn As'ad, who lost his nose during a battle and used a nose of silver, to substitute it with one of gold when the silver one started to smell of corruption, to demonstrate how something which is generally forbidden, in this case the use of a gold item on a man, can be allowed in case of necessity (*ḍarūra*).[77] Ǧād al-Ḥaqq then refers to the above mentioned hadith of the *muḫannaṯ* living with Umm Salama, and also states that according to Ibn Ḥaǧar al-'Asqalānī's (d. 852/1449) commentary on the *Ṣaḥīḥ* of al-Buḫārī, the *muḫannaṯ* who is so because of an innate disposition (*min aṣl ḫalqatihi*)[78] cannot be blamed, but has 'to abandon his softness and his flaccidness in walking and talking', even if gradually.[79] Ǧād al-Ḥaqq also mentions that according to the historian al-Ṭabarī (d. 310/923), if Muḥammad allowed the *muḫannaṯ* to live with his wife until he heard him giving a precise description of a woman, then he had no prejudice against *muḫannaṯūn*, nor did he blame them for being created as such.

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75 'ALLĀM 2011: 93-102; AḤMAD 2011: 61-62; 71-73.

76 In some cases, the presence of ovaries and testicles does not reflect the chromosome sex of the individual. There are a number of genetic disorders that can cause such a status like, for example, the XX male syndrome, where a male with testes has a XX karyotype, or the Klinefelter syndrome, where a male with testes has two or more X chromosomes.

77 This same hadith is used by Ǧād al-Ḥaqq himself and by other authors also to legitimise organ transplantation: in this case necessity allows the bypass of the prohibition on mutilating a corpse. See KRAWIETZ 1991: 180-182.

78 ǦĀD al-ḤAQQ 1981: 3502.

79 Ibid. (my translation).

Until this point, the fatwa seems to be referring to a *muḫannaṯ*, an effeminate. However, it then takes an unexpected turn and suddenly starts to deal with what would seem to be the intersex, even though the term *ḫunṯā* is never explicitly mentioned.

Indeed, Ǧād al-Ḥaqq states that a surgery

> to change a man into a woman, or a woman into a man, is allowed, if a trusted doctor concludes that there are innate causes in the body, i.e. hidden signs of femininity, or covered signs of masculinity, because the surgery would uncover organs which are hidden or concealed, treating an anomaly that cannot be treated in another way.[80]

On the other hand, SRS is not allowed when it is only based on a desire (*raġba*) to change sex, because this would be classified under the hadith according to which 'God blamed effeminate men and masculine women'.[81] He then concludes:

> a surgery to uncover organs of the masculinity or the femininity that are hidden is allowed and becomes even recommended because it should be considered a treatment, whenever suggested by trusted doctors. However, it is not licit in case it is only based on the desire to change the human being's sex from a woman to a man or from a man to a woman.[82]

In the late 1980s the discussion on SRS became particularly heated in Egypt. The discussion was triggered by the case of the trans Sayyid/Sally.[83] In 1982 Sayyid ʿAbd Allāh, a student of medicine at al-Azhar University, sought psychological treatment due to a bad depression. He was diagnosed with 'psychological hermaphroditism' (*al-ḫunūṯa al-nafsiyya*). After three years of psychological treatment, he was referred for SRS to a surgeon, ʿIzzat ʿAšam Allāh Ǧibrāʾīl. The surgeon asked the opinion of a second psychologist, who confirmed the diagnosis. At that point, Sayyid was treated with female hormones and on 28 January 1988 operated on in Cairo: his penis was removed, a new urinal orifice and an artificial vagina were created and he opted for the name 'Sally'. Sally applied for admission to the women's section of the Faculty of Medicine at al-Azhar. A special committee, set up by al-Azhar to examine the case, rejected her request. The Doctors' Syndicate, at that time dominated by conservative forces, also examined the case and came to the conclusion that the surgeon, the anaesthetist and the psychologists who approved the surgery committed a medical error, because they operated on Sayyid without there being a disorder, damaging him.

At that point, the Doctors' Syndicate asked for a fatwa from the Grand Muftī, at that time Sayyid Ṭanṭāwī. The fatwa he released is almost identical to Ǧād al-Ḥaqq's: it starts with the hadith reported by Usāma b. Šurayk,[84] then mentions both the necessity to treat

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80 Ibid.: 3503 (my translation).

81 Ibid.

82 Ibid. (my translation).

83 I am drawing for the summary of the facts on SKOVGAARD-PETERSEN 1997: 319-323.

84 Unfortunately, I was not able to obtain the original version of the fatwa from the archives of Dār al-Iftāʾ. I used instead a version that was printed in an article published on 5 September 2006 in the Saudi magazine *al-Riyāḍ*, devoted to SRS in Saudi Arabia. I also compared Ṭanṭāwī's fatwa with the English translation by Skovgaard-Petersen.

effeminate characteristics and al-Ṭabarī's interpretation of the hadith on the *muḫannaṯ* living with Umm Salama. From these hadiths, Ṭanṭāwī also concludes that if reliable doctors believe that there are innate causes in the body then SRS is allowed, while it is prohibited if it is only based on the desire (*raġba*) to change sex.

However, Ṭanṭāwī did not address the crucial issue: was a diagnosis of 'psychological hermaphroditism' enough to allow the surgery or not? Probably, the specific reference to the necessity of 'innate causes in the body' would deny this possibility. Nonetheless, the result of such ambiguity was that the fatwa was 'so vague that both parties cited it in support of their position'.[85] Al-Azhar took the case to court, asserting that the surgeon had inflicted a disorder on the patient. The public prosecutor appointed a special committee, who agreed on the fact that the procedure had been correct, but the Doctors' Syndicate did not accept the position and cancelled the surgeon's membership. At the end the surgeon was acquitted, and in November 1989 Sally finally obtained the certificate stating that she was a woman.[86] However, al-Azhar persisted in refusing to admit Sally to the women's section of the Faculty of Medicine to take her final exams. It was only after a ruling of the Administrative Court that al-Azhar's decision was revoked and Sally was allowed to take her final exams at any university.[87] Here the judicial system, and particularly the Administrative Court, was certainly creative: it not only recognised the change of sex after SRS, but it even intervened to protect Sally from the discrimination she was facing based on her sex and gender identity that made it impossible for her to complete her study curriculum.

Not only Ṭanṭāwī, but also other jurists dealt with Sally's case: ʿAṭiyya Ṣaqr (d. 2006),[88] at the time President of the Egyptian Supreme Council for Islamic Affairs, an institution founded in the 1960s within the Egyptian Ministry of *Awqāf* (religious endowments) with the aim of producing and publishing educational material related to Islam in Egypt, published a fatwa on the same case in *Minbar al-Islām*. In this fatwa, after having mentioned the importance of medicine, Ṣaqr states clearly that 'the mere feminine inclinations (*al-muyūl al-unṯawiyya*) that a man with complete sexual organs determining him as such can have, are psychological symptoms that do not change him into a real female'.[89] Ṣaqr also states that in the case of Sayyid/Sally, the SRS 'made him lose his male organ and did not uncover feminine organs: in this way the patient became neither a male nor a female. His feminine inclinations will not be realised through a lawful sexual intercourse. Islam does not approve such surgery, even with the consensus of the patient, and he himself committed a sin.'[90] Also in this case, as we see, SRS is only allowed as a way to 'disclose' the real sex, not as a way to allow transgender people to feel comfortable in their body.

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85 SKOVGAARD-PETERSEN 1997: 331.

86 Ibid.: 323.

87 Ibid.

88 He was a graduate of al-Azhar who worked as a consultant for a number of Egyptian institutions, including the Egyptian Ministry of *Awqāf*, al-Azhar's Islamic Research Academy, Dār al-Iftāʾ and the Egyptian Supreme Council for Islamic Affairs.

89 SAQR 1988: 134 (my translation).

90 Ibid. (my translation).

In the years between Ǧād al-Ḥaqq's fatwa in 1981 and Ṭanṭāwī's fatwa in 1988 SRS was discussed on another important occasion, with similar results. In 1984 the Third Conference of the Islamic Organization for Medical Sciences (IOMS)[91] took place in Istanbul. In this occasion, one of the topics that were discussed was cosmetic surgery. In a paper on this topic, Māǧid ʿAbd al-Maǧīd Ṭahbūb also discussed SRS (he specifically talks here about sex-change). He starts by stating that this surgery is routinely practised in the West, describes the procedure and then says that it is always accompanied by psychological treatment and hormone therapy. He then adds:

> These patients dislike their innate sex, for various reasons. Some of these reasons can be traced back to their early life and their incorrect growing up. There is no ambiguity regarding the determination of their sex, either apparently or not at the time of their birth, like in the cases of an incomplete ḫunṯā. Plenty of them carry out their role fully, they marry and procreate as they have been created by God. Later they experience a pressing feeling that had always been oppressed, i.e. abandoning their natural sex and living within the other.[92]

According to him, SRS in this case represents 'a kind of offence towards the will of God in determining the sex of the creature. If sodomy caused a direct punishment from God to eradicate them [the people of Lot],[93] the perversion here is a persistence in the sin.'[94]

Even though Ṭahbūb is a medical doctor and not a religious scholar, his intervention is relevant for this discussion, because it constitutes the basis of the official position on SRS of the Conference on Islamic Medical and Health Ethics, that took place in Cairo in 2004. This conference produced a number of documents, which were based on the findings of the previous conferences of the IOMS,[95] including 'The Arguments of Islamic Law Rulings on Recent Medical Issues: Based on the Recommendations of IOMS'. This document has a chapter on 'Sex Change Procedures for Normal People and Intersexes', where it is stated that: 'The seminar addressed the question of plastic surgery and concluded that the surgical procedures called sex change operations, performed to satisfy decadent desires, are absolutely forbidden. Meanwhile, operations aimed at determining the real sexual status of intersexes are permissible.'[96]

This is also the position that the Egyptian Medical Syndicate took in its new ethical guidelines, released in 2003. SRS is forbidden when it is intended as sex-change (taġyīr al-ǧins), and allowed when it constitutes a sex determination (taṣḥīḥ al-ǧins), provided that the surgery is approved by a special committee, and that hormonal analyses and chromo-

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91 The IOMS is 'an organization that brings together medical scientists and Islamic jurisconsults from across the world to address modern medical and health care issues from an Islamic perspective'. PADELA 2012: 35.

92 ṬAHBŪB 1995: 424 (my translation).

93 He is referring here to the people of Sodom who, according to the Quran, were destroyed by God because they were practicing sodomy. See especially Quran 7:80-84.

94 ṬAHBŪB 1995: 424 (my translation).

95 I would like to thank Thomas Eich for this information.

96 al-ʿAWAḌĪ & al-ĞINDĪ 2005: 345-346.

some mapping are carried out. Moreover, it is requested that the patient is under psychiatric and hormonal treatment for at least two years.[97]

In 2003 the prominent Egyptian scholar al-Qaraḍāwī discussed SRS in a fatwa entitled 'Taġyīr al-marʾa ilà al-raǧul' (The change of the woman into the man). This fatwa was solicited by a woman, who described herself as follows: 'I am a Muslim woman, I pray, I fast, I abide by the duties of God and I avoid what He forbade'.[98] She then added: 'My problem is that I do not feel my femininity, namely I do not feel being a female. Deeply inside me, I feel myself a man, not a woman.'[99] She then told her story: for a long time she refused to get engaged with a man, but she then agreed to marry under pressure from her family. However, the marriage soon ended in divorce. She added: 'Doctors established that my sexual system is that of a female, and that I am a complete female.' She wished to undergo SRS and asks al-Qaraḍāwī for his opinion.[100]

Al-Qaraḍāwī starts his fatwa by referring to different Quranic verses that he uses to demonstrate that everything has been created in pairs, that men and women have been created to live together, and that they should marry.[101] He then states that 'it sounds very strange that the sister takes such a position towards men, rejecting them, and that she feels deeply inside that she is a man, although specialised doctors have established that she is a full female and that her sexual system has no anomaly'.[102] He believes that 'there must be profound psychological reasons that necessitate to be investigated and treated by specialists'.[103]

He then refers to the hadith according to which God did not send any illness without sending a treatment for it, stating again that in this case the treatment should be psychological. According to him, SRS is only permitted when 'there are some signs of femininity in a person that in his real constitution is a man, whose organs, like his testicles or his penis, are hidden in his body, and whose signs of femininity are superficial'.[104] In this case surgery is allowed and even required. On the other hand, a complete change of sex is absolutely forbidden.[105]

Al-Qaraḍāwī also mentions that 'the first consequence of such a change is that it undoubtedly prevents procreation or even the hope of it. If we allow everyone to do so, then

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97 al-NIQĀBA al-ʿĀMMA li-AṬIBBĀʾ MIṢRʾ 2003: art. 43. In this case the operation is state-subsided. The committee consists of five members; two psychiatric specialists, one andrology specialist, one hereditary and chromosomal studies specialist and a member of the Al-Azhar Board. A number of operations have been approved since then, but recently they have been stopped due to the refusal of the appointed member of al-Azhar to take part to the meetings of the committee. For more details see ISLAM 2015. Though, it is still possible to undergo such surgeries privately in unofficial ways.

98 al-QARAḌĀWĪ 2003, III: 349 (my translation).

99 Ibid. (my translation).

100 Ibid. (my translation).

101 He specifically mentions Quran 36:36; 51:49; 7:189; 2:35; 16:72; 30:21 and 2:187.

102 al-QARAḌĀWĪ 2003: 350 (my translation).

103 Ibid. (my translation).

104 Ibid.: 351 (my translation).

105 Ibid.

procreation will be interrupted and humanity will come to an end.'[106] With this statement, al-Qaraḍāwī is preparing the field for the use of *sadd al-ḏarā'i'* (literally 'blocking the means'), a concept in Islamic law that is used to prevent or forbid something that will likely lead to a forbidden action. Indeed, he immediately also adds that one of the consequences of allowing SRS would be to make same sex marriages licit, which he considers 'one of the most strictly forbidden things in Islamic law'.[107]

At the end of his fatwa al-Qaraḍāwī also briefly mentions the case of Sally, and concludes that:

> God created the couple, the male and the female. He made each of them with their own complexion, and assigned to each of them a role/function in life, that he or she cannot cancel nor hinder. Among the greatest [of these roles] there are paternity and maternity. Whatever hinders paternity and maternity is illicit, because it is a deviation from the innate nature (*fiṭra*), a divergence from sharia, an escape from responsibility, and a moral perversion.[108]

His position shows that, for him, a person remains either male or female based on their sex at birth, and that any kind of SRS does not change this 'essential' nature. Moreover, it seems to imply a rebuttal of the legal principle of *istiḥāla.* According to this principle, once a prohibited substance changes its nature completely, then it can become licit. The acceptance of this principle, which never became dominant in Islamic jurisprudence, would probably make it possible that such a marriage could be valid, as the person effectively would have changed his/her sex via SRS.[109]

In 2006 ʿAbd al-Raḥmān b. Aḥmad al-Ǧarʿī published another fatwa on the argument, after his opinion was solicited by the friend of a woman who 'feels being a *ḫunṯā*, likes wearing masculine clothing, and wants to take steps toward transition, taking hormones and undergoing the surgery'.[110] The petitioner asks what the opinion of Islam is on that (*ra'y al-islām fī ḏālika*) and whether it is possible that God created a man in the body of a woman. Al-Ǧarʿī first of all clarifies: 'Do not say "what is the opinion of Islam on that", but say instead "how do you see this question?"'[111] After that, he makes a clear distinction between *taṣḥīḥ al-ǧins* and *taġyīr al-ǧins*: in the first case surgery is allowed, because it has the aim of treating a physical malformation. It constitutes a treatment, and not a change to God's creation or a resemblance of the other sex. On the contrary, *taġyīr al-ǧins* is forbidden (*muḥarram*), because it refers to 'the presence of males or females which have healthy organs and that can fulfil integrally their roles, marrying and procreating in the way God created them, but desire to undergo a surgery on healthy organs in order to convert to the

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106 Ibid.: 352. This is an argument that is also mentioned often in fatwas on homosexuality. See TOLINO 2013: 146-147 (my translation).

107 al-QARAḌĀWĪ 2003: 352 (my translation).

108 Ibid.: 353 (my translation).

109 Padela has shown how this principle has been used by the IOMS to allow the use of porcine-based vaccine. PADELA 2013. I would like to thank Thomas Eich for this suggestion.

110 al-ǦARʿĪ 2006: 37 (my translation).

111 Ibid.: 38 (my translation).

other sex'. He considers this a change in the creation of God and a resemblance of the other sex, which for him are forbidden.[112]

More recent interpretations do not change much the picture: Šawqi Ibrāhīm ʿAbd al-Karīm ʿAllām and Badīʿa ʿAlī Aḥmad, both of whom published in 2011 books devoted to the argument, concluded that if it is only the person's gender identity that does not match his/her biological sex, then SRS is forbidden and psychological treatment is instead recommended.[113] SRS is allowed in the case of the *ḫunṯa*, and it could be even considered a way of 'cooperating in righteousness and piety',[114] as requested by God, because it allows one to really distinguish the woman from the man. Even though they both agree on the permissibility of SRS in this case, there are still certain conditions that should be respected, that are strongly based on the so-called *qawāʿid al-fiqh* (the legal maxims of Islamic jurisprudence).[115] For example, the surgery should be allowed by sharia because the body belongs to God; the patient should be in need of it; the patient should give his/her authorisation; the surgeon should be familiar with the surgery from a theoretical and a practical perspective; doctors should be convinced of the success of the operation; it should constitute the lesser evil; it should be useful; it should not damage the patient; any damage that could happen to the patient should not be worse than the illness itself; the status of being a *ḫunṯa* should be clearly diagnosed; the surgery should be the only way to cure the patient; the surgery should really determine the sex of the *ḫunṯa* and the *ḫunṯa* should agree on being operated.[116]

5. Conclusions

In this paper I have presented the main arguments in the contemporary debate in Sunni Islamic Law on transsexuality, transgenderism and SRS. In order to situate this debate, in the first part of the article I introduced the terms transgenderism, transsexuality and SRS, and I then discussed the relevant terminology in Arabic. In the second part I analysed the most relevant Quranic verses and hadiths that are mentioned by contemporary jurists when dealing with these topics. In the third and last part of the article, I focused on the contemporary discussion on transsexuality, transgenderism and SRS in fatwas released by Muslim Sunni jurists from the 1980s until today.

The analysis of those fatwas showed a general consensus on the permissibility of SRS for intersex people, as it is considered a therapeutic treatment. On the contrary, SRS for people who only have a 'desire' to change their sex is strongly rejected by the great majori-

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112 Ibid. (my translation).

113 ʿALLĀM 2011: 175-176; AḤMAD 2011: 84.

114 Aḥmad is here referring to Quran 5:2 ('And cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty'). AḤMAD 2011: 85.

115 On maxims in Islamic law see KAMALI 2005.

116 AḤMAD 2011: 104-113. She mentions here that in some cases the *ḫunṯa* could be operated on against her will: for example, if a female pseudo-hermaphrodite uses a 'false' masculine status to obtain advantages or rights she would not have in her 'real' sex, or if this could cause sexual confusion and immorality. AḤMAD 2011: 113. ʿAllām's list is shorter and can be found in ʿALLĀM 2011: 118.

ty of Muslim jurists, at least in the Sunni context, as it is considered a way to change what God has created, which is a serious sin in Islamic law.

While some scholars have seen in some of these fatwas a possibility for a more queer-friendly *iğtihād* that could also include homosexuality, I tend to disagree with that: there are certainly possibilities in *iğtihād* to open spaces for tolerance for LGBTQI Muslims, but this is not something that Muslim traditionalist jurists have done at this point. Even the fatwa of Ṭanṭāwī, that Alipour considered somehow 'creative', is a remake of Ğād al-Ḥaqq's previous fatwa and made clear that a mere 'wish' to change sex is not enough to make SRS permissible.

Paradoxically, while intersex people try to problematise and fight SRS, especially when it is forcibly practiced on infants, on the opposite many transgender people fight to be allowed to 'pass' to the other sex also physically. Muslim jurists, instead, with the standing exception of Khomeini, allow SRS for intersex people and refuse it for transgender people. This is not surprising: if we put it extremely simply, for most traditionalist Muslim jurists a biological male is a man who, as such, should be attracted to women, and vice versa. Whatever goes beyond this scheme is prohibited and considered a sin. If SRS can confirm this pattern, allowing the intersex to 'function' better within this scheme, then it is permitted and even encouraged. If not, then it is considered a serious sin, a change in God's creation and a challenge to His will. Traditionalist Muslim jurists are not interested in changing the patriarchal structure of the society. As in discussions on hymen-repair,[117] both opponents and supporters of SRS start from the same pre-assumption: an essentialised vision of the sexes and the genders, which are organised in a rigid binary. This is the same assumption that drives Khomeini's fatwa: his permission to undergo SRS for a transgender person is based on his drive to confirm the gender binary, not to challenge it: there is nothing really 'progressive' in that, but only the will to make transgender people fit into a vision of society that only allows two (heterosexual) genders to exist.

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Sexual Rights and their Discontents:
Yūsuf al-Qaraḍāwī on Homosexuality and
the 'Islamic Family' *

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Abstract

Taking Yūsuf al-Qaraḍāwī as an example, this article suggests looking at neo-conservative Islamic discourse on homosexuality in connection with the enduring vehemence with which this discourse upholds religiously framed notions of marriage and the family while continuously making adaptations on questions of women's rights in order to accommodate political and societal change. In his writings, al-Qaraḍāwī systematically treats the topic of homosexuality in connection with the central theme of his programme of *wasaṭiyya* gravitating around the legitimate 'Islamic' family which actually proves to be a hybrid of national state sanctioned familism and a decontextualised ideal of sexual difference as an eternal 'cosmic' principle. While contributing itself to their politicisation, Islamic discourse constructs both family and sexuality as lying beyond the reach of (secular) politics. Naturalised and sacralised notions of marriage and sexuality thereby warrant a realm for religious authority to rise to legitimately speak in public. So far, research on homosexuality and Islam has largely focused on religious and juridical qualifications as well as on questions of categorisation. The main argument presented here is that the ideological zeal in Islamic discourse on the topic is always also more basically directed against any attempt at transferring the language of (secular) rights to issues of gender and sexuality.

Key words: heteronormativity, Islamic discourse, homosexuality, sexual rights, Islamic normativity.

1.   Introduction

Taking Yūsuf al-Qaraḍāwī as an example, this article suggests looking at neo-conservative Islamic discourse on homosexuality in connection with the enduring vehemence with which this discourse upholds religiously framed notions of marriage and the family while continuously making adaptations on questions of women's rights in order to accommodate political and societal change. Given al-Qaraḍāwī's ideological proximity to the Egyptian Muslim Brotherhood and his local influence up to 2011, I will contextualise his positions mainly with reference to Egyptian politics of gender and women's rights. So far, research on homosexuality and Islam has largely focused on religious and juridical qualifications as

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well as on questions of categorisation.[1] Complementing this research, the main argument presented here is that the ideological zeal in Islamic discourse on the topic is always also more basically directed against any attempt at transferring the language of (secular) rights to issues of gender and sexuality.

In Egypt, as in other countries of the Arab region, the by now hegemonic understanding of the family as the basic unit of state and society and as the core institution of a nationally defined and planned 'reproductive arena',[2] constitutes the object of conflicting interpretations and ideologies.[3] Since independence, authoritarian regimes have made political use of women's and gender issues, putting competing oppositional forces against each other—among others, in the case of women's rights movements and Islamic forces. On the institutional level, Islamic Personal Status Law as it has evolved in Egypt since the 1920s has enshrined the hegemony of religious normativity over the private sphere in the framework of the modern secular nation state. At the same time, since the turn of the 19th to the 20th century Islamic reformist discourse has not only contributed to the more general trend of institutionalising marriage, it has also been crucial in sexualising marriage, with sexuality being conceived of as a natural human condition in need of moral as well sanitary regulation.[4] The fusion of religion with naturalised notions of marriage and heteronormative sexuality that has thus emerged until today serves as a powerful tool for articulating Islamic opposition to women's human rights inside the family or, more recently, opposition to 'gender feminism'.[5] At the same time, it precludes any accommodation with and even more so any form of recognition of sexual orientation as a basis for rights claims—independently of more explicitly homophobic attitudes and the question whether homosexuality is interpreted as inherently natural or as a question of choice. A telling symptom of the complex dynamics at stake here is the position expressed by the influential Egyptian intellectual, Muḥammad ʿImāra, a crucial figure for guiding the reception of modernist Islamic thought in the Arab-speaking world, on radical feminism leading to the propagation of homosexuality.[6]

The issues of homosexuality and of homophobia in Muslim societies are most of the time discussed in relation to the growing visibility of transnational LGBTQIA (Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual) activism. Often, contemporary repressive attitudes in the region are seen to contrast with supposedly more fluid premodern cultures of sexuality.[7] An important line of research therefore concentrates on the

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1 See for example the meticulous study of contemporary debates on homosexuality and Islam in TOLINO 2014; TOLINO 2016.

2 CONNELL 2005: 71.

3 On the widely shared hegemonic or 'national family' in the Arab World see HASSO 2011.

4 On ideological familism and the institutionalisation of marriage in modern Egypt, see CUNO 2015 and KHOULOUSSY 2010. On the fusion of Islamic arguments with contemporary European evolutionary theories see EL SHAKRY 2015. On efforts at regulating sexuality and reproduction, see ALI 2002 and EL SHAKRY 2007. On notions of sexuality as such, see MASSAD 2007.

5 On this issue, see a recent statement by Hiba Raʾūf ʿIzzat on the internet platform islamonline.net from 30 April 2013: <https://islamonline.net/3796> (accessed 28 June 2017).

6 For a short extract from a TV appearance with English subtitles see <http://www.memritv.org/clip/en/967.htm>.

7 See BAUER 2013. See also BAUER 2011.

introduction and evolution of modern notions of sexual perversion and homosexuality as deviating from normalised heterosexuality.[8] Another major research focus is on emerging marginal or non-normative sexual identities at the intersection of local socio-cultural vocabularies and the language of international gay rights activism.[9] In this literature, Islamism and/or conservative Islam are seen to be key factors, while the political stakes involved are less discussed. What do conservative Islamic forces do when they define social problems in terms of moral decadence, the break-up of gender norms and, more particularly, the break-up of sexual mores? And why are heteronormative marriage and the family so central to any definition of an authentically Islamic as well as natural order to be protected against current perils of disintegration and cultural Westernisation?

The reading of al-Qaraḍāwī suggested here attempts to show how naturalised and sacralised notions of marriage and sexuality are linked to the political history of the region as well as to the intellectual trajectories of modern and contemporary Islamic thought. It combines approaches from sexuality studies with women's and gender studies. In a first section, I briefly discuss relevant research on homosexuality in the MENA (Middle East and North Africa) region. A second section, containing the core of the argument, starts by looking more closely at marriage and sexuality as strategic sites for gendered as well as gendering processes of state and nation building in the Arab region since the late 19th century. The creation of Islamic Personal Status Law is a case in point here, instituting the interlocking of the private-public divide with the definition of a sphere for Islamic law to make its 'public appearance through state law'.[10] This situation turns the family into an anchor point for politicising Islam with the help of the family and vice versa while rhetorically de-politicising both. At the same time, the idea of the conjugal family as a realm of personal liberty and autonomy has allowed for the blending of liberal ideas with Islamic moral standards.[11] The last part of the paper presents a close reading of selected texts by al-Qaraḍāwī in order to illustrate how the firm separation of sexuality from rights—be it individual or collective (i.e. minority) rights based on gender or sexual orientation/identity—operates in Islamic discourse. It will be argued that al-Qaraḍāwī's programmatically anti-homosexual stance serves to protect the family and sexuality from secular notions of rights on the one hand and from liberal Muslim critique on the other.

2. Framing Homosexuality and Islam

Research on sexuality in Arabic-Islamic societies began as part of academic Orientalism. A typical case in point is Georges Henry Bousquet's *L'éthique sexuelle de l'Islam*, published in 1953. Bousquet's general focus was Islam's assumed lack of concern for marriage as a stable moral and social institution. From the start, the author stresses the difference between 'our' understanding of marriage and Islam:

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8 NAJMABADI 2005; EL ROUAYHEB 2005; ZE'EVI 2006.

9 AHMED-GHOSH 2012; HABIB 2010; KUGLE 2010; MURRAY & ROSCOE 1997; RAHMAN 2014.

10 ASAD 2003: 231.

11 MCLARNEY 2015: esp. 33-102.

> Le 'mariage' en langue arabe, se dit *nikâh',* c'est-à-dire 'coït'. Sans attacher à ces sortes d'arguments philologiques plus d'importance qu'ils n'en ont, il faut prononcer que cela donne bien l'essentiel de la conception islamique de cette institution. Nous continuerons à user du terme 'mariage', mais je me demande s'il n'yaurait pas intérêt à conserver le mot arabe comme terme technique pour désigner une chose qui, certes, a des rapports avec notre mariage, mais aussi en diffère considérablement.[12]

Since the 1970s, connected to the critique of both Orientalism and emerging conservative religious forces in the region, scholars from the Arab region have suggested novel readings of Islamic literary as well as normative sources on gender, the body and sexuality.[13] Notwithstanding significant differences between them in terms of discipline, sources and methodology, they were all concerned with demonstrating the richness and diversity of Islamic representations of sexuality in contrast to Western traditions as well as in contrast to contemporary conservative trends in Islam. More recently, Thomas Bauer has further developed this line of thought applying the concept of a 'culture of ambiguity' to premodern Islamic history in general.[14]

Since the 1990s, sexuality studies have gained new impetus from developments in gay and lesbian studies as well as from queer theory. Homosexuality now became a major topic—leading for the first time to an area studies version of the constructivism vs essentialism debate.[15] Over the last two and a half decades, an impressively rich scientific literature has developed that historicises and contextualises same-sex sexuality and desire in different regional and periodical settings mainly based on literary and normative sources as well as on Islamicate science (i.e. philosophy, astronomy, medicine etc.). Researching the entangled history of modern representations of sexual desire in the Arab world, Joseph Massad has provided important new insights into major shifts in how secular as well as Islamic intellectuals conceived of sexuality as a natural phenomenon and a psychological fact.[16] Massad, as others, puts major emphasis on the contemporary emergence of gay or queer identities connected to transnational gender activism and its effects in the region. He pushes his critique of what he calls the Gay International to completely deprecate it—which in turn has raised strong opposition, not least from activist quarters in the Arab region.[17] Other studies contextualise the different strategies and forms of activism employed on the ground to critically examine and assess their impact.[18] Sahar Amer programmatically pleads for recognising the hybridity and interculturality of Arab LGBTQIA communities and identities:

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12 Bousquet 1953: 79.

13 Important works to be mentioned in this context are Mernissi 1975; Bouhdiba 1975; Chebel 1984, as well as Malti-Douglas 1991.

14 Bauer 2011.

15 For a very helpful overview of relevant debates see Tolino 2014.

16 Massad 2007: esp. 51-159.

17 See the reaction of a founding member of *Helem* to an interview with Joseph Massad on the website ResetDOC: <http://www.resetdoc.org/story/00000001542> (last visited 26 December 2017).

18 See, for example, Nadine Naber's and Zeina Zaatari's analysis of feminist and LGBTQ activism during the Israeli invasion of Lebanon in 2006. Naber & Zaatari 2014.

> The question that I am raising here is not whether naming should take place (I strongly believe that it must), or even whether Western discourses on sexuality are relevant to the Arab world (I firmly believe that they are relevant). Rather, what I interrogate is the almost exclusive reliance by Arab activists on Western terminology and Western paradigms of same-sex sexuality. What I object to are the kinds of names that are selected by Arab gay activists to speak about homosexuality, and how these names fail to empower and delay much-needed social change in Arab societies today. By adopting foreign terms and gender categories that mimic Western sexual politics and by dressing sexual preference in foreign linguistic garb, Arab gay activists unwittingly end up supporting a culture of shame that ultimately undermines Arab identity and leads to the further isolation of Arab gays and lesbians from their own socio-historical and literary traditions.[19]

In the quarrel over specifying sexually defined identities and subjectivities, Amer suggests engaging with the necessarily hyphenated character of Arab LGBTQIA communities that are both anchored in local traditions and 'interdependent with global realities'.[20]

The focus on cultural and intellectual history as well as on questions of identity and subjectivity in research on homosexuality can be seen to supplement Middle East women's and gender studies that privilege structural factors determining gender relations such as law, politics, and the state as well as socially constructed forms of agency.[21] In reverse, studies on homosexuality seem to sometimes underestimate the role played by secular regimes and state law. In her introduction to a special issue of the *Journal of Lesbian Studies* on the topic of 'Lesbians, Sexuality and Islam', Huma Ahmed-Ghosh writes:

> For Muslim communities, especially in recent decades, the politicization of 'conservative' Islam has *pointedly* impacted same-sex relationships through the imposition of strict 'Islamic' moral codes. By labeling alternative sexualities as 'deviant', oft quoted verses (mentioned in these articles) from the Quran have been used to legitimize these fatwas and policing of people's sexuality.[22]

The author further argues that 'sexuality was historically viewed as "fluid", with rare public strictures'.[23] Today, on the contrary, 'we are seeing harsh laws dictated by conservative Islamic regimes and courts challenging this sexual fluidity and replacing it with harsher sentences to ensure heterosexual conformity'.[24] Likewise, Muslim gay activists, when engaging with the critique of religious conservatism in the name of liberal or progressive Islam likewise contribute to putting Islam at the center of the debate on homophobia.[25] In what follows, I suggest looking more closely at the historical, legal and po-

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19 AMER 2012: 387ff.

20 Ibid.: 391.

21 For a concise and well documented overview see CHARRAD 2011; see also DENNERLEIN 2016.

22 AHMED-GHOSH 2012: 377.

23 Ibid.: 387.

24 Ibid.

25 See for example KUGLE 2010 and 2014.

litical underpinnings of Islamic framings of heteronormativity and their impact on arguments about homosexuality.

3. Family and sexuality in Islamic Personal Status Law

Since the late 19th century, the realm of law comprising marriage, the family and inheritance started to be conceived as Personal Status Law, subsequently rendered in Arabic as *aḥwāl šaḫṣiyya*.[26] During a first phase, Personal Status Law in Egypt as elsewhere in the region stayed relatively free from direct Europeanisation. Until the first half of the 20th century, legal change was implemented most of the time by way of procedural laws and the introduction of basic formal requirements for registering marriages. Yet, at the same time, the definition of marriage and the family was fundamentally transformed in religious reformist as well as in liberal nationalist discourse. Companionship between the spouses and mutual solidarity came to be considered basic elements of marriage as the basis of a stable and healthy family.[27] One of the major functions of the new family was the production of self-regulated and well-educated children as valuable future members of the national community. The conceptual shift that elevated the conjugal family to an essentially national and civilisational concern enhanced the role of women as wives and mothers. Female education, domesticity and the cultivation of women's inner qualities now became a chief apprehension of—male as well as female—proponents of social and moral reform.[28] Giving birth and raising children was considered a publicly relevant matter that necessitated new measures of control and discipline.[29] Very much in line with contemporary European ideas, motherhood and female domesticity were interpreted as the fulfillment of women's natural temperament. In addition to endeavors that aimed at the 'policing of families',[30] the modern conjugal family was turned into a privileged site of affective bonds of love and intimacy that were legally recognised, socially accepted as well as morally and culturally valued. Targeted educational and health campaigns, the media as well as popular culture more generally concurred to establish the conjugal family in opposition to 'traditional' or 'informal' familial settings not only as a normative model but also as desirable and conducive to happiness.[31]

Islamic Personal Status Law constituted an intrinsic part of processes of state building and nation building. In response to colonial modernity, women and the family became important sites for the defense of national as well as religious authenticity. The modern

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26 CUNO 2015: esp. 164 ff.; DENNERLEIN 1998.

27 For medical and biopolitical discourses on the family in inter-war Egypt see EL SHAKRY 2007: esp. 165-194.

28 See for example AHMED 1992; BARON 1994; BADRAN 1995.

29 EL SHAKRY 1998.

30 DONZELOT 2005.

31 ABU-LUGHOD 2005; ALI 2002; HASSO 2011; KHOULOUSSY 2010; KREIL 2011. Equally, the Arab Human Development Report of 2009 continuously refers to the 'good' family as opposed to the rather dysfunctional 'traditional' or 'patriarchal' family (for the complete text of the report see: <http://www.arab-hdr.org/contents/index.aspx?rid=5>).

family opened up new possibilities for negotiating political loyalties and identities.[32] In public debates as well as in legal discourse—again very much echoing European ideas—marriage and the family were increasingly seen to be natural as well as sacred phenomena lying beyond the reach of secular law and policy making.[33] During the inter-war period, Egyptian jurists and legislators started to classify *aḥwāl šaḥṣiyya* as comprising the 'natural qualities' of human beings according to the separate 'system' (Ar. *niẓām*) of the family.[34] At the same time, Personal Status Law actually did transform gender relations. The strictly hierarchical relationship between the sexes sanctioned by traditional Islamic jurisprudence (*fiqh*) was reinterpreted to be tuned in to national concerns of socio-biological reproduction as well as to notions of moral and social progress.[35] In contrast to modern Islamic Personal Status Law, traditional Islamic law had conceived of marriage as a strictly private bilateral or synallagmatic contract (*muʿāwaḍa*). According to its technically legal definition in Sunni *fiqh*, the effect of a validly-contracted marriage was to establish legitimate sexual relations between a man and a free woman (as opposed to a female slave) thus safeguarding legitimate off-spring and controlling the transmission of wealth. Upon marriage, the husband acquired the exclusive right to sexual intercourse with his wife and to control of her person, whereas she acquired property of the dowry and the right to marital maintenance.[36] In principle, the dissolution of marriage was just as much a purely private act as its contracting. This is especially true for the unilateral dissolution of marriage on the husband's initiative, or repudiation (*ṭalāq*).

This perception clearly differs from the nationalist-reformist reformulation of marriage and the conjugal family. Supported by state-sanctioned ideological and legal familism, the institutionalisation of Islamic Personal Status Law in the framework of the modern secular state created a specific institutional formula linking the realm of the private or personal sphere to religious authority.

> It is because the legal formation of the family gives the concept of individual morality its own 'private' locus that the *shariʿa* can now be spoken of as 'the law of personal status'—*qanun al-ahwal al-shakhsiyya*. In this way, it becomes the expression of a secular formula, defining a place in which 'religion' is allowed to make its public appearance through state law. And the family as concept, word, and organizational unit acquires new salience.[37]

Islamic Personal Status Law institutionally and programmatically fused religion, gender and the family.[38] The issues of 'woman' and 'family' became sacralised as a result of the political construction of both, the secular (or the non-religious) and the religious 'as dis-

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32 BOOTH 1998. See also CHARRAD 2001; JOSEPH 2000; KANDIYOTI 1991.

33 For quite similar interpretations of family law in the context of the early Federal Republic of Germany see WESEL 1998: 72.

34 KAŠBŪR 1993: 5 ff.

35 CUNO 2015: 77-122; EL SHAKRY 2007: 165 ff.

36 For a comprehensive study of the historico-legal context of traditional Islamic conceptions of marriage and sexuality see ALI 2006; ALI 2008.

37 ASAD 2003: 231.

38 For a comparative perspective on this phenomenon see CADY & FESSENDEN 2013b: 3-24.

crete conceptual categories' enmeshed with the highly gendered separation of public and private spheres.[39] '"The woman" and "the family" were the last domain left to the religious, over which they were in principle free to rule'.[40] At the same time, 'woman' and 'family' were turned into sites of ideological competition.

> Confining *shariʿa* to domestic matters politicized the family both as a sphere of intimate, affective relations and as a repository of group identity of which religious affiliation was a defining legal and moral characteristic. (…) Languages of privacy that entered the legal discourse around personal status matters concurrently with the limiting of the *shariʿa*'s jurisdiction served to create 'the family' both as a private space and one which was central to political order.[41]

While for secular women's rights activists, Personal Status Law turned out to be difficult to directly challenge due to its being linked to the realm of religion, religious forces politicised the family turning it into a model for a liberated as well as Islamic social and political order.[42] Based on her study on female voices of the religious awakening in Egypt since the 1970s, Ellen McLarney shows how the Egyptian Islamic intellectual and activist Hiba Raʾūf ʿIzzat by claiming a political role for women inside the family, questions both the depoliticisation of the family as well as the privatisation of religion.[43] Only more recently, resulting from the institutionalisation of human rights since the beginning of the new millennium, secular women's rights activists in Egypt as elsewhere in the Arab region have gained new grounds for criticising Personal Status Law while at the same time risking more than ever to be considered allies of authoritarian regimes and international donors.[44]

4. Yūsuf al-Qaraḍāwī and his interlocutors

Yūsuf al-Qaraḍāwī, who was born in 1926 in a provincial town in Egypt and lives in Qatar since the 1960s, can be considered a paradigmatic example of contemporary moderate conservative Islamic thought.[45] Having been trained at al-Azhar University in Cairo, al-Qaraḍāwī represents a more particularly scholarly type of religious authority. This distinguishes him from Islamic intellectuals with a secular educational background.[46] Al-Qaraḍāwī's special ideological brand is best expressed in his own definition of a 'middle

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39 BADRAN 2013: 106.

40 Ibid.: 107.

41 BIER 2011: 104.

42 For the secular women's rights movement up through the 1990es see AL-ALI 2009: 154 ff., 165 ff.

43 MCLARNEY 2015: 219-253.

44 See FARAG 2017.

45 See also Zaman's assessment of al-Qaraḍāwī. ZAMAN 2012: 18 ff.

46 For a densely documented presentation of his biography and his writings with particular focus on the analysis of his opinion on apostasy see KRÄMER 2006. For a comprehensive study of his online presence see GRÄF 2010. For a study of his contribution to an Islamic law for Muslim minorities in the West see ALBRECHT 2010. For a selection of current research on this figure see also GRÄF & SKOVGAARD-PETERSON 2009. For an informative general overview see SOAGE 2008.

way' or *wasaṭiyya* Islam[47] demarcated from radical or extremist Islamist positions on the one hand, liberal or pro-Western ones on the other hand. Since the first publication in 1960 of his now classic book *al-Ḥalāl wa'l-ḥarām fī 'l-islām* (The Lawful and the Prohibited in Islam), meanwhile reprinted several times and translated into numerous languages, al-Qaraḍāwī stands for a clearly defined program of Islamic legal guidance in all aspects of everyday life. He claims authority for himself to interpret and adapt an all-encompassing framework of Islamic normativity based on the recognised canonical sources and established methods of interpretation in order to provide guidance for an Islamic conduct of life in accordance with contemporary needs. He bases this claim on his profound knowledge of Islamic law (*fiqh*) as well as his acquaintance with the complexities of present-day life. Key terms in this context are the notions of realism or pragmatism (*wāqiʿiyya*, *maydāniyya*) as well as of alleviation (*taysīr*) he uses to describe the basic nature of Islamic law.[48] Al-Qaraḍāwī's political opinions on Islam and democracy are considered ambivalent— particularly when it comes to sensitive issues like apostasy or the political rights of women and non-Muslims under Islamic law.[49] Nevertheless, al-Qaraḍāwī's role as a reference for radical Islamist groups who started to distance themselves from the use of violence since the 1990s and especially his rapid and unambiguous condemnation of the terrorist attacks of September 11, 2001, earned al-Qaraḍāwī the reputation of being a moderate.

In spite of his biographical links and ideological closeness to al-Azhar University in Cairo on the one hand, to the Egyptian Muslim Brotherhood on the other hand, and in spite of his prominent role in several international Islamic organisations, al-Qaraḍāwī stages himself primarily as an independent and self-sufficient religious authority.[50] Al-Qaraḍāwī's public visibility and his presumed influence are mainly based on the abundant number of his writings as well as his statements and fatwas that are widely distributed via the internet on *islamonline.net* or *qaradawi.net*. In addition, al-Qaraḍāwī used to be a frequent guest on television—especially on *Al Jazeera*, where he was regularly invited to the program *al-Šarīʿa wa'l-ḥayāh* (Sharia and Life) during the years 1996 to 2013.[51]

As far as the topics of gender, the family and sexuality are concerned, al-Qaraḍāwī on first view holds rather conventional conservative positions such as those aptly summarised by Yvonne Haddad in her study on Islamist literature on women up to the 1990s:

> This literature tends to project women as endowed with a special mystique of domesticity interpreted as an essential part of God's plan for humanity, a religious duty. (…) The home is the domain of women; the man is her protector.[52]

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47 For more details on this concept see Paola PIZZO's contribution in this special dossier, pp. 156 ff.

48 See KRÄMER 2006: 197-200.

49 See KRÄMER 2006 and 2011, as well as EUBEN & ZAMAN 2009b.

50 KRÄMER 2006: 193. Among others, al-Qaraḍāwī is a member of the *Fiqh*-Council of the Muslim World League (MWL) based in Mecca, President of the European Council for Fatwa and Research (ECFR) based in Dublin and founding president of the International Union of Muslim Scholars (IUMS) based in Qatar.

51 For an archive of the emissions of this program since 1998 see the program's website, <http://www.aljazeera.net/program/religionandlife>.

52 HADDAD 1998: 5.

Qaraḍāwī wholly endorses the modern notion of the conjugal family as the basic unit of society and the state.[53] In his early book *The Lawful and the Prohibited in Islam* mentioned above, al-Qaraḍāwī defines gender primarily as being based on marriage and the family.

> Qaraḍāwī's approach in this publication is pretty straightforward: he has written a traditionalist text that emphasizes women's obligation to safeguard social morality through circumspect demeanor in public and obedient behavior in their male-dominated families.[54]

However, over the years, having had to accept certain adaptations in women's roles to accommodate ongoing socio-economic and political changes—like female salaried work, the increase of female headed households or the political participation of women not least in Islamic parties—al-Qaraḍāwī all the more strictly upholds gender hierarchy or *qiwāma* (male superiority justified with reference to Quran 4:34)[55] and the complementarity of the sexes as expressions of sacredly as well as naturally ordained principles detached from its traditionally patriarchal context of support and protection.[56] For this purpose, heteronormative conjugal generativity is foregrounded as a gendering trope that immunises marriage and the family against secular as well as liberal Muslim critique.

A telling illustration of this is a booklet by al-Qaraḍāwī on the topic of 'The family as wished-for by Islam' (*al-Usra kamā yurīduhā al-islām*) published in 2005.[57] This booklet is based on two papers delivered by al-Qaraḍāwī at the 2004 *Doha International Conference on the Family* that has been organised on the occasion of the tenth anniversary of the UN year of the family.[58] The Doha Conference can be considered a forum of religious and other conservative forces that focus on the 'defense' or 'protection' of the family in opposition to transnational feminist activism and the institutionalisation of transnational women's rights in the aftermath of the Cairo Conference on Population and Development (1994) and the following UN-Conferences on women that took place in Beijing (1995) and New York (2000). It is concomitant with a broader strategy involving US based organisations such as the *World Family Policy Center* or the *Family Research Council* who refer to article 16 paragraph three of the Universal Declaration of Human Rights that guarantees protection of the family as the 'natural and fundamental group unity of society' in order to claim the

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53 On the overlap between Islamist and more liberal notions of the conjugal family see ABU-LUGHOD 1998b.

54 STOWASSER 2009: 185.

55 Quran 4:34 in English translation by Marmaduke PICKTHAL (from 1930): 'Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah hath guarded. As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them. Lo! Allah is ever High, Exalted, Great'.

56 See for example al-QARAḌĀWĪ 2004.

57 al-QARAḌĀWĪ 2005.

58 Ibid.: 6. For the official website see <http://www.difi.org.qa/annual-conference/doha-international-conference-on-the-family/doha-international-conference-on-the-family> (accessed 28 June 2017).

respect of 'family values' as a human right.[59] The same language of international human rights allows al-Qaraḍāwī to claim Islam's particularities (ḫaṣāʾiṣ) as compared to other 'religions of the book' which, according to him, all share the same basic concern for marriage and the family as 'sacred' institutions[60]—an idea completely absent from traditional Islamic law. Al-Qaraḍāwī particularly mentions repudiation and polygyny as examples of Islam's specificity. He thereby simultaneously positions himself against a longstanding tradition of inner-Muslim critique of these legal institutes. Similar arguments are employed when criticising secular women's rights from an Islamic point of view. Thus, a declaration issued in 2013 by the *International Union of Islamic Scholars* (*al-Ittiḥād al-ʿālamī li-ʿulamāʾ al-muslimīn*) headed by al-Qaraḍāwī on the topic of The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and UN declarations against violence against women, claims recognition of the principle of gender complementarity in Islamic family law (as opposed to gender equality) in the name of 'religious diversity' (*al-tanawwuʿ al-dīnī*).[61] The declaration therefor objects to interpreting legitimate gender differences as conducive to (illegitimate) violence against women. As a consequence of this attitude, for instance, the concept of marital rape as a criminal offense is axiomatically rejected.

While constantly referring to Islamic normativity, the model of marriage and the family propagated by al-Qaraḍāwī is actually very much modelled after the hegemonic national conjugal family briefly outlined above. Marriage and the family are considered by al-Qaraḍāwī the basic unit of state and society providing for the moral, the social as well as the biological reproduction of humankind altogether—having children being declared one of the most important aims of marriage. Al-Qaraḍāwī considers the protection of the family a religious and a social duty of husband and wife as well as of society at large.[62] He even declares marriage to be 'sacred'.[63] Besides unfounded divorce, major threats to marriage and the family are subsumed by al-Qaraḍāwī under the notion of 'libertarianism' (*ibāḥiy-ya*).[64] This means the following: unregulated abortion, illicit sexual intercourse, extramarital children or unmarried mothers, nudism, transnational conventions protecting reproductive and sexual rights and finally, as the most dangerous, homosexuality.[65] Al-Qaraḍāwī mentions as particularly perilous the public lobbying for the recognition of homosexuality (or sexual deviance, *šuḏūḏ*) and the publicising of homosexual marriage and homosexual families.

According to al-Qaraḍāwī, the spread of homosexuality not only causes epidemics and moral disease, but it also leads to the final extinction of the human species. Generativity

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59 BOB 2012: esp. 53-56. See article 16, paragraph 3, Universal Declaration of Human Rights: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

60 al-QARAḌĀWĪ 2005: 5-7.

61 For the complete text of this declaration see <http://iumsonline.org/ar/aboutar/nt-lnhd/s72> (accessed 28 June 2017).

62 al-QARAḌĀWĪ 2005: 38.

63 Ibid.: 5.

64 Ibid.: 38-46.

65 For his explanations on sexual deviance (*šuḏūḏ*) see al-QARAḌĀWĪ 2005: 46-50.

actually lies at the core of al-Qaraḍāwī's argument. It serves to establish an inextricable link between gender, nature and religion based on essentialised notions of sexual difference as a manifestation of eternal principles. Sexual difference is portrayed by al-Qaraḍāwī as a cosmic norm and a divinely ordered state of affairs.[66] Sexual reproduction is taken as a proof to the fixed natural as well as divine condition of men and women. By linking the heteronormative conjugal family to both 'nature' and 'religion', this definition of sexual difference allows al-Qaraḍāwī to claim a privileged voice for Islam in current public debates on the 'crisis of the family'.[67]

In addition to constituting a hierarchical system of complementary rights and duties with clearly defined social functions, marriage and the family are also portrayed as leading to personal completion. When addressing his readers, al-Qaraḍāwī interpellates the contemporary Muslim as someone who looks for happiness and personal fulfilment in accordance with Islamic legal guidance. In order to properly function, according to al-Qaraḍāwī, the family has to be based upon companionate marriage.[68] Marriage and the family are portrayed as a refuge for clearly defined and personally rewarding gender identities with motherhood and fatherhood constituting the most gratifying tasks in life.[69] Al-Qaraḍāwī idiosyncratically and out of any context quotes the famous line written by the Egyptian nationalist poet Ḥāfiẓ Ibrāhīm (d. 1932) praising the mother as 'a school' (*madrasa*) whose education would lead to the education of the (whole) nation (*ša'b*).[70] According to al-Qaraḍāwī, children have to be considered a divine gift. He underlines the social and moral merit of legitimate descent (*nasab*) based on marriage in contrast to the tragic fate of unmarried mothers and illegitimate children.[71] Last but not least, al-Qaraḍāwī accepts the idea of a natural sexual drive or instinct (*ġarīza*) that needs to be channeled through marriage. Accordingly, he considers sexual fulfillment for men as well as women in the framework of marriage legitimate—even though, he adds, marriage involves not just the body but 'the whole human being'.[72]

According to al-Qaraḍāwī, the true believer expects more from marriage than simply sexual satisfaction. To live as true believers, he stresses, both men and women need to be instructed on Islamic principles and precepts.[73] They should thus be enabled to live up to their being responsible for their own conduct. The accountable Muslim subject is an important component of al-Qaraḍāwī's definition of marriage and the family. He insists that men and women should freely choose their partner after having seen him or her and after having talked to him or her in order to make sure that they match on the social, the educational, the moral and the psychic levels.[74] This leads al-Qaraḍāwī to criticise backward

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66 Ibid.: 9.

67 On the notion of family in crisis discourse see HASSO 2011: esp. 61-98.

68 al-QARAḌĀWĪ 2005: 9-13.

69 Ibid.: 51 ff.

70 al-QARAḌĀWĪ 2005: 77.

71 On unmarried mothers see Ibid.: 62 ff.

72 Ibid.: 11ff.

73 Ibid.: 5; 10.

74 Ibid.: 14-27.

'traditions' that do not allow women to choose or even to see her partner prior to the conclusion of marriage. According to al-Qaraḍāwī, women should be the 'masters of themselves'.[75] The modern Muslim subject addressed by al-Qaraḍāwī appears to be very much a 'properly gendered moral person',[76] invested with will and virtue rather than simply externally controlled.[77]

Al-Qaraḍāwī's model of the 'Islamic' family fuses the basic characteristics of the modern national Egyptian family as defined by the secular state with foundationalist references to Islamic normativity as well as to naturalised notions of sexual difference. This fusion also allows for partial adaptations over time especially with view to women's salaried work and access to political participation.[78] Here, the rhetoric of naturalisation and sacralisation of gender can be seen to relieve the family's hierarchical structure from delivering the moral and material rewards of the 'patriarchal bargain'.[79] As a consequence, male superiority is immunised against historicising critique.

This last point also needs to be seen as being linked to the author's opposition to competing interpretations of Islamic law, especially different versions of Islamic feminism—even if this term as such is contested in Arab countries.[80] Not surprisingly, al-Qaraḍāwī strictly refuses female—as opposed to male—readings of Islamic sources in the name of the all-embracing project of '*insāniyya islāmiyya*' (or Islamic humanism). During an emission of the program *al-Šarīʿa wa'l-Ḥayāh* broadcasted by Al Jazeera TV on June 15, 2008 on the topic of "Women in the noble Koran", al-Qaraḍāwī does not only oppose initiatives like the UNESCO conferences on Islamic feminism but categorically dismisses any idea of identity based *tafsīr* or *iǧtihād* altogether.[81] According to him, only formal scholarly credentials (and especially the necessary linguistic capacity) qualify for authorised interpretations of religious texts. In order to promote his own brand of *wasaṭiyya* in the highly competitive field of mediated transnational Islam, al-Qaraḍāwī not only dismisses Islamic Feminism during the emission but also other positions labelled by him 'extremist'—notably those who declare women's voice as *ʿawra* and request the complete exclusion of women from the public sphere.

When it comes to reproductive and sexual rights, al-Qaraḍāwī, again in line with official Egyptian politics, has equally made selective concessions—concerning for example certain cases of abortion, contraception or in vitro fertilisation. However, in these cases, he

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75 Ibid.: 25.

76 With these words, Janice Boddy's describes the motivation of women for supporting female genital cutting in colonial Sudan. Boddy 2007: 288.

77 There is a strong parallel here to early reformist writings on gender segregation and veiling from Qāsim Amīn in his *Taḥrīr al-Marʾa* first published in 1899 (Amīn n.d.: esp. 69-119).

78 See for example al-Qaraḍāwī 2004. For an inner-Islamic critical appraisal of the development of al-Qaraḍāwī's thought on women's rights see ʿIzzat 1999.

79 This concept has been developed by Deniz Kandiyoti in order to explain the active support of patriarchal structures by women. See Kandiyoti 1988.

80 There exist an increasing number of studies on the topic that cannot be mentioned here in their entirety. For an overview of the history of Islamic Feminism see Moghadam 2002 and Latte Abdallah 2010. For international activities deployed in this field see Badran 2013. For a critical feminist appraisal viewed from the Arab region see Qarāmī 2012.

81 See <http://www.aljazeera.net/programs/religionandlife/2008/6/18/> (accessed 28 June 2017).

all the more firmly defends what he defines as the core value of Islam, i.e. heteronormative marriage and the family. This is particularly clear from his position on female genital mutilation or, in his own words, female genital cutting (ḫitān al-ināṯ) as expressed in a booklet on the topic published in 2007.[82] The background to this publication was once more an international conference organised in 2006 at al-Azhar under the auspices of the Egyptian Minister of Religious Affairs, Maḥmūd Ḥamdī Zaqzūq, entitled 'Towards Abolishing the Violation of the Female Body' (Naḥwa ḫaẓr intihāk ǧasad al-mar'a). The conference was intended to back recent legal amendments on this highly contested issue that had been politicised since the 1990s.[83] In his booklet, al-Qaraḍāwī actually makes only slight concessions compared to earlier statements on the topic. Far from approving legal prohibition he concedes that, from an Islamic legal perspective, there are no irrefutable objections to prohibiting female genital cutting—even if he himself declares other methods like conscious rising more commendable for encouraging change. More importantly, al-Qaraḍāwī persistently frames the problem of female genital cutting as one of sexual morals and public health—thus deliberately omitting rights based approaches. He bases his arguments on Islamic law, more particularly on the notion of 'public interest' (maṣlaḥa 'āmma) to raise questions of health and social change.

Al-Qaraḍāwī's treatment of homosexuality, or, in his words, sexual deviance (šuḏūḏ), follows the same overall logic of sacralising and naturalising the conjugal generativity. Anti-homosexual arguments further help to categorically separate the sphere of intimacy and sexuality confined to the legitimate Islamic family from the realm of secular legal rights. At the same time, arguments about homosexuality are again intrinsically linked to questions of religious authority. Condemning šuḏūḏ, al-Qaraḍāwī simultaneously defends his pretense to controlling the interpretation Islamic law. Already the definition of homosexuality raises theological questions and hence possibly opens new spaces for competing forms of inner-Muslim politicisation of gender and sexuality. Al-Qaraḍāwī therefore categorically objects to any kind of accommodation of homosexuality based on (liberal) religious or biological determinism.

In an article analyzing al-Qaraḍāwī's view on homosexuality, Scott Kugle and Stephen Hunt argue that Islamic 'neo-traditionalist' homophobia is actually the expression of a perceived crisis of Muslim masculinity—with non-heterosexuality being seen as a threat to masculine identity and authority.[84] According to Kugle and Hunt, al-Qaraḍāwī defines homosexuality as sinful desire of individual Muslims and as a perversion that is part of a threat against Islam and social order inspired by the West. In equating the innate disposition to believe in God (enshrined in the semantics of the Arabic word fiṭra) with an inborn heterosexual orientation, al-Qaraḍāwī, according to the authors, at least implicitly equates

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[82] al-QARAḌĀWĪ 2007. In transnational feminist circles, the wording of *Female Genital Mutilation* (FGM) or *Female Genital Cutting* (FGC) is contested (see for example MERRY 2009: esp. 127 ff.). While Egyptian women's rights activists and state led campaigns usually employ FGM, official documents and Islamic legal scholars use FGC or *ḫitān*. For the respective debates and campaigns in Egypt see TOLINO 2010.

[83] For the background to this see TOLINO 2010. For women's rights activism in this field see Al-ALI 2000.

[84] KUGLE & HUNT 2012.

homosexuality with unbelief. As far as Islamic tradition is concerned, the authors rightly stress that, contrary to the existing sources, al-Qaraḍāwī states that the sharia is clear and univocal, excluding from discussion any of the documented differences in opinion let alone alternative contemporary readings of sacred sources. At the same time, according to the authors, al-Qaraḍāwī 'misunderstands and distorts' the basic concept of 'sexual orientation'—thus referring to a term employed by Muslim gay activists who claim theological recognition for their sexual inclination.[85] The source Kugle and Hunt are analyzing is again an emission of the TV program *al-Šarīʿa wa'l-ḥayāh* broadcasted on Al Jazeera on June 7, 2006, under the title of 'Innate human nature' (*fiṭra*).[86] As usual, it is the host of the program, ʿAbd al-Ṣamad Nāṣir, who introduces the key terms for discussing the topic alternately labeled in Arabic as homosexuality (*miṯliyya*) or deviance (*šuḏūḏ*). These terms are: *fiṭra*, Islam, Islamic law, human rights as well as relevant psychological classification.

In general, during the emission, al-Qaraḍāwī advances rather predictable neo-conservative positions on the topic. He repeatedly states that innate human nature (*fiṭra*) as such is heterosexual and that therefore there cannot subsist any truly natural inclination or predisposition for being attracted to persons of the same sex. Al-Qaraḍāwī continuously slips from the Quranic terminology of *fiṭra* to the notion of nature *tout court* (*ṭabīʿa*) with the familiar biologistic connotations attached to it when he refers, for instance, to the make-up of the reproductive apparatus (*ǧihāz tanāsulī*) of men and women as a proof to the binary gender order and heterosexual attraction as fundamentals of human existence. According to al-Qaraḍāwī, homosexuality does not only contradict innate human nature but also jeopardises the common interest (*maṣlaḥa*). Acceptance of homosexuality in al-Qaraḍāwī's view inevitably leads to decadence and finally to the extinction of mankind altogether. Asked about the Islamic legal sanction for homosexuality, al-Qaraḍāwī classifies it as illicit sexual intercourse (*zinā*)—irrespective of the complexities of classificatory systems in traditional Islamic law.[87] Given the differences between the Sunni schools of law with regard to the concrete form and degree of punishment, al-Qaraḍāwī nevertheless recommends to dispense with mildness when choosing from them. Without further explication he asserts that female homosexuality (*siḥāq*) is to be punished less harsh than male homosexuality (*liwāṭ*).[88] Concerning homosexuals who repent and seek to overcome their 'degenerate' sexual inclination, al-Qaraḍāwī suggests offering help and assures his listeners of the clemency of 'us Muslims'. On the other hand, he insists on the especially reprehensible character of publicly exposing or propagating same-sex-relationships.

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85 Ibid.: 278.

86 See <http://www.aljazeera.net/programs/religionandlife/2006/6/7/> (accessed 28 June 2017).

87 On differences in the treatment of homosexual acts in traditional law see for example Alı 2006: 73 ff. On contemporary *fatāwā* see Tolino 2016.

88 Literally *siḥāq* refers only to the same-sex act between women (tribadism), while *liwāṭ* literally refers to the anal intercourse, but from the context it seems that al-Qaraḍāwī is referring not only to the sexual act.

5. Conclusions

Given the central role played by marriage and heteronormative generativity in foundationalist arguments for and competition over religious authority, there is no room in al-Qaraḍāwī's version of neo-conservative Islamic discourse for conceiving of and recognising sexual rights. In his writings, al-Qaraḍāwī systematically treats the topic of homosexuality in connection with the central theme of his program of *wasaṭiyya* gravitating around the legitimate 'Islamic' family which actually proves to be a hybrid of national state sanctioned familism and a decontextualised ideal of sexual difference as an eternal 'cosmic' principle. Actually, while contributing itself to their politicisation, Islamic discourse constructs both family and sexuality as lying beyond the reach of (secular) politics. Naturalised and sacralised notions of marriage and sexuality thereby warrant a legitimate realm for religious authority to rise to legitimately speak in public. At the same time, Islamic discourse continuously and variously reconfigures the functionality of marriage and the family in reaction to changing social and political demands.

The opinions expressed by al-Qaraḍāwī in each of the cases discussed above, in spite of their adaptive pragmatism, all converge to foster the empowerment of religion to publicly claim authority over the realm of the private sphere, intimacy and sexuality. Seen from this angle, neo-conservative anti-homosexual attitudes are not necessarily and certainly not solely incited by transnational LGBTQI activism in the region nor are they exclusively targeted at activist groups or individuals. Rather, there exists a specific historico-political context that generates particular forms of ideological investment of the heteronormative conjugal family. At the same time, al-Qaraḍāwī's attitude on homosexuality as formulated during the respective TV emission analyzed above is not completely incompatible with what Kecia Ali has described as a 'don't ask, don't tell' policy of more compliant Islamic positions.[89] These kinds of connected yet shifting ideological fault lines do not allow for easy generalisations on Islam and homosexuality.

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89 ALI 2006: esp. 85-95.

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Ritual Ablution and Cultic Purity in an Ismaili Context: The Siǧistānian View

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Abstract

The paper, which is a continuation of my previous research on the Siǧistānian view of the pillars of Islam, aims at analysing the interpretation of ritual ablution (*wuḍū'*) and cultic purity (*ṭahāra*) according to the tenth-century Ismaili *dāʿī* Abū Yaʿqūb al-Siǧistānī. In the last of his works, the *Kitāb al-iftiḫār* (*The Book of the Boast*), this outstanding Ismaili missionary also devoted attention to the Islamic ritual prescriptions. These obligatory duties, whose performance al-Siǧistānī fully recognised, conceal an inner meaning that can be unveiled through the tradition of the *ta'wīl*, the esoteric interpretation that, according to the Ismaili doctrine, allows the *mu'min* to achieve his salvation.

Key words: Ismailism, pillars of Islam, ritual ablution and cultic purity, *ta'wīl*

1. Introduction

The Ismailis represent the second largest Shiʿi community after the Iṯnāʿašariyya (the Twelvers) and, although they have greatly contributed to the developing of Islamic thought, their long history was almost unknown and not adequately understood until recent times.

Often persecuted, in particular outside their territories, the Ismailis were compelled to resort to the *taqiyya*, the precautionary dissimulation of true religious belief, especially in times of danger; this principle was also conceived by the Ismailis as the duty of observing secrecy (*kitmān*) on the doctrine and on the identity of the imam. The central position of this issue in the Ismaili doctrine is linked to the role assigned to the imam, who is the only one able to apply the spiritual exegesis (*ta'wīl*) to the Quran, thus assuring the gaining of Truth. This is why the role of the imam was considered absolutely 'necessary'.

This Truth, which is disguised in rites and prescriptions of the official religion and which is not available to those outside the Ismaili community (the exoteric people, *ahl al-ẓāhir*) nor to the *ǧuhhāl* (those who ignore the inner meaning of the Revelation), must remain hidden until the *qiyāma*, that is the manifestation of the unveiled Truth through the Qā'im; in waiting for this event, the Quranic prescriptions remain in force.

So, despite the common belief of the majority who, based on anti-Ismaili writings of polemicists and heresiographers (notably those of Aḫū Muḥsin, al-Baġdādī, Ibn Ḥazm and al-Ġazālī), condemned the Ismailis as heretics, the Ismailis recognised, at least formally, that full value should be given to the obligatory duties prescribed by the sharia, including, especially, the pillars of Islam. On the other hand, these duties symbolise a Truth, one and unchangeable, that no *mu'min* should disregard.

Starting from this premise, the tenth-century Ismaili *dāʿī* (missionary) Abū Yaʿqūb al-Siğistānī wrote, towards the end of his life, the *Book of the Boast*, in which he gave an overall picture of the Ismaili teachings so as 'to boast' (hence, the title of the treatise) about the merits of the Ismailis, who were considered to obey the Quran to the letter as well as to the spirit.

2. Abū Yaʿqūb al-Siğistānī: his life and works

The biographical details of Abū Yaʿqūb al-Siğistānī (d. after 361/971) are very scarce and uncertain since he was compelled, like his predecessors, to perform his function of *dāʿī*[1] clandestinely. From Sistān, where he was born, al-Siğistānī moved to Rayy where he succeeded Abū Ḥātim al-Rāzī (d. 324/934?) in directing the *daʿwa* (the 'propaganda').[2] The date of his death is uncertain too; from a clear allusion contained in the *Kitāb al-iftiḫār*[3] he was probably still alive in 360/971, a hypothesis that seems to be plausible since, according to some sources, al-Siğistānī was killed when Ḫurasān came under control of Maḥmūd of Ġazna in 392/1002. Thanks to his works,[4] modern scholars have been able to reconstruct the first developments of philosophical Ismailism, although the details of its origins remain somewhat unclear.[5]

Al-Siğistānī represents, after Abū Ḥātim al-Rāzī and Muḥammad b. Aḥmad al-Nasafī (d. 334/943), the last of the Ismaili *duʿāt* (missionaries) of early generations, who were

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1 Lit. 'the one who summons', the Ismaili *dāʿī* was charged with the spreading of the Ismaili teachings (*daʿwa*) and with the recruiting of neophytes and their initiation into the secrets of the doctrines; moreover he was responsible for the oath of loyalty to the imam that every recruit must swear. As for the spreading of the Ismaili teachings, it was carried on through a highly sophisticated system of propaganda, which aimed to win followers to the imam. For an outline of the figure of the *dāʿī* and the organisation of the *daʿwa* see DAFTARY 1993; TAJDDIN SADIK ALI 2006; HALM 1996, esp. ch.1.

2 Information on the real functioning of the *daʿwa* is rather scarce, because in most cases the Ismailis were compelled to operate clandestinely, notably in regions outside the Fatimid dominion. As Farhad Daftary pointed out: 'the *daʿwa* organization and its hierarchy of ranks (*ḥudūd*) alluded to in various Ismaili text of the Fatimid period seem to have applied to an idealised or utopian situation when the Ismaili imam would rule the entire world, and not to any actual system'. DAFTARY 1998: 97.

3 See footnote 15.

4 Besides the *Kitāb al-iftiḫār*, al-Siğistānī also wrote *Kitāb al-mawāzin*, *Kitāb iṯbāt al-nubuwwa*, *Kitāb al-yanābīʿ*, *Kašf al-maḥğūb*, *Kitāb al-maqālīd al-malakūtiyya* and the *Kitāb al-nuṣra fī šarḥ mā qālahu al-šayḫ al-Ḥamīd fī Kitāb al-maḥṣūl*. This last-mentioned work was written in response to Abū Ḥātim al-Rāzī, with whom he came into conflict with regard to some issues related to the duration of the prophetic cycles, in particular with the duration of the sixth era, the era of Islam.

5 The complexity of the studies on Ismailism is mainly due to the esoteric nature of its doctrine but also to the lack of primary sources, especially those antecedent to the Fatimid era (4th/10th century), a period that is supported by documentary evidence. The difficulty in gaining access to primary sources makes the reconstruction of Ismaili historical and doctrinal evolution very complicated. Notwithstanding, during the last decades, the studies of the most authoritative scholars (such as Ismail Poonawala, Wilferd Madelung, Heinz Halm, Paul E. Walker, Azim A. Nanji, Farhad Daftary and Daniel De Smet, to quote the most recent generation of researchers) have greatly contributed in clarifying many aspects of Ismaili doctrine. For bibliographical details on Ismaili studies see DAFTARY 2004.

charged with political and doctrinal activities. On the doctrinal level, he can be considered a pioneer of philosophical Ismailism because he provided a relevant contribution to the shaping of a doctrine that Islamicised Neoplatonism.[6]

On the political level, al-Siǧistānī became a high-ranking *dāʿī* of Fatimid propaganda. This important function of control implies that he acknowledged, despite his originally belonging to Qarmatism,[7] the Fatimid *aʾimma* as legitimate representatives of the Qāʾim (lit. he who will rise),[8] probably in a formal way or, at least, until the Qāʾim's advent. This involves that, in waiting for his return, the Islamic sharia remained in force. Hence al-Siǧistānī recognised the full value of the obligatory performance of the Islamic rituals and prescription, first of all the pillars of Islam; at the same time, he supported a doctrine that considered rituals, prohibition and commandments the shell (*qišr*) that conceals and safeguards the Truth hidden in the Revelation.

In this regard, it is worth noting that Ismailism has its doctrine grounded in the immanent duality in all of the features of the reality, including the Scripture. This involves that the Word of God has two aspects, one manifest (*ẓāhir*) and the other hidden (*bāṭin*): the first can be attained through the *tanzīl*, the second through the *taʾwīl*. This spiritual exegesis, which can be performed only by the imam, is the only way to unveil the Truth that lies disguised in rites and prescriptions of the official religion: in other words, according to Ismaili teaching, the formal performance of the cultic practices is not sufficient to gain salvation.

This soteriological purpose can be achieved only through the understanding of the true meaning of what God prescribed in Revelation, as highlighted by al-Siǧistānī who, in the last of his works, the *Kitāb al-iftiḫār* (*The Book of the Boast*), interpreted esoterically the *arkān al-islām*, to which he devoted the last chapters of his treatise.

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[6] In particular, al-Siǧistānī established a cosmology in which God was conceived as totally transcendent Unlike the Neoplatonic cosmology, in the Siǧistānian system, God, because of His transcendence, did not emanate spontaneously but immediately created ex-nihilo (*abdaʿa*) the Intellect (also called the 'first originated', *al-mubdaʿ al-awwal*). The Intellect, in its turn, emanated (*inbaʿaṯa*) the Soul, who produced (*inbaǧasa*, lit. to gush out) Nature, from which Matter and Form came forth. The mixing of both was responsible for physical beings. For details on the Siǧistānian cosmology see WALKER 1993 and 1996.

[7] A branch of the pre-Fatimid Ismailism, this revolutionary movement of social reform and justice, which was based on a system of gradual initiation, carried on its doctrine in strict secrecy. Although its origin is obscure, scholars agree that the movement began its activity in southern Iraq in the second half of 3th/9th century, when its partisans, led by Ḥamdān (the eponym of the group), founded a *dār al-hiǧra* east of Kūfa in 277/890. Sweeping through the Muslim world from the 3th/9th to the 6th/12th century, the Qarmatians established an independent State in Baḥrayn in 286/899, that is, after the split of Salamiyya, which brought about the formation of the Fatimids and the Qarmatians. The reason for the schism was related to the idea of the imamate, that the Qarmatians considered an intellectual characteristic to which every Muslim can aspire rather than an inherited privilege for the chosen few.

[8] This 'messianic' saviour, called also *mahdī* (the rightly guided one), was charged, during the 'period of concealment' (*dawr al-satr*), with the soteriological function of restoring justice and true religion. For an outline of the role of this important figure for Ismailism, see DAFTARY 2010; TUCKER 2008.

3. *Wuḍūʾ* and *ṭahāra* in the *Kitāb al-iftiḥār*

The *Kitāb al-iftiḥār*,[9] probably written in 361/971, is an important primary source in the absence of other and earlier Ismaili works; moreover, it can be considered an epitome of Ismaili teachings, which al-Siğistānī expounded in a systematic way, a very unusual behaviour for an Ismaili author as Ismailis were usually compelled to spread the doctrine with great caution.

Al-Siğistānī explicitly maintained that the necessity for defending the Ismaili community from the accusation of professing doctrines in contrast to the true beliefs of faith induced him to provide the basic tenets of Ismaili creed so as to 'boast' the merits of the Ismailis who, unlike their opponents, obey the Word of God to the letter (*ẓāhir*) and the spirit (*bāṭin*), as the interpretation of the ritual practices, such as the pillars of Islam, shows.

The discussion of this issue was intended to prove that the pillars must be understood symbolically: as a matter of fact, al-Siğistānī explained that, according to the Ismaili interpretation, prayer must be interpreted as the calling to the *daʿwa* and to its spiritual and religious ranks,[10] fasting involves the duty of observing secrecy about the imam's identity and Ismaili teachings, almsgiving must be interpreted as the duty to bestow knowledge on those who do not possess it and pilgrimage represents obedience to the imam, who is considered the house of God (*Kaʿbat Allāh*).

The analysis of the pillars begins with ritual ablution (*wuḍūʾ*) and cultic purity (*ṭahāra*), which is the topic of the present study,[11] since they are considered 'the first of the acts prescribed by the Islamic law' (*awwal aʿmāl al-šarīʿa*).

Chapter 13 of the treatise concerns 'the understanding of ablution and ritual purity' (*fī maʿrifat al-wuḍūʾ waʾl-ṭahāra*). At the beginning of the discussion al-Siğistānī addresses the exoteric people (*ahl al-ẓāhir*) in a polemical tone, because, according to him, they perform mechanically the cultic practices prescribed by Revelation without understanding their true sense, that is, their esoteric meaning.

So, if ablution (*wuḍūʾ*) on the exoteric level is the cleansing (*baraʾa*) of any kind of impurity, from the esoteric point of view it must be understood as the disavowal of those who did not recognise the necessity for the imam and the imamate. Those 'renegades', who seized legitimate power, are considered by al-Siğistānī to be just like other material impurities from which true believer must purify. On the other hand, cultic purity (*ṭahāra*) is the metaphorical image of heart's purity, which is indispensable to achieve the supreme goal, that is, the knowledge of Truth.

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9   The *Kitāb al-iftiḥār* (hereafter *Iftiḥār*) was edited twice. Firstly, Muṣṭafā Ġālib published the *Kitāb al-iftiḥār* (Beirut 1980) in an incomplete version in which he omitted the offensive passages of condemnation of the Ismailis' opponents. Later, Ismail Poonawala published a new edition of the treatise (Beirut 2000), which he supported with a comprehensive introduction and commentary. In the following analysis, I shall refer to both versions. Translations of the passages quoted are mine.

10   Ismaili 'propaganda' (*daʿwa*) provided for two kinds of hierarchies, heavenly and earthly, each of them divided in five ranks (*ḥudūd*). For details see below, p. 273 f.

11   This paper is a continuation of my previous research on the Siğistānian interpretation of the pillars of islam, in particular on prayer, almsgiving and fasting. For details see STRAFACE 2016a; 2016b; 2017.

In performing *wuḍū'* and *ṭahāra*, water plays a fundamental role, because cleanliness from impurities can be achieved only through it. According to the Ismaili interpretation, water too must be understood metaphorically: since the disavowal and denial of the imam are the worst of the impurities, as mentioned earlier, the only 'water' that can cleanse one from this kind of impurity is knowledge (*'ilm*). So, if water makes the *muslim* gain the cleanliness indispensable to perform prayer, knowledge allows the *mu'min* to achieve his salvation. Through knowledge the believer purifies his heart from doubts (*šukūk*) and quarrels (*iḫtilāfāt*) that prevent the achievement of certainty (*yaqīn*) and truth (*ḥaqīqa*).[12]

In order to legitimise the esoteric interpretation of cultic purity and water, al-Siǧistānī refers to the following Quranic verse:

> Remember He covered you with a sort of drowsiness, to give you calm as from Himself, and He caused rain to descend on you from heaven, to clean you therewith, to remove from you the stain of Satan, to strengthen your hearts, and to plant your feet firmly therewith.[13]

According to the literal interpretation, this verse alludes to the battle of Badr, a key struggle in the early period of Islam that ended in favour of Muḥammad, thanks to divine intervention.[14]

In al-Siǧistānī's view, this verse must be interpreted esoterically because the true meaning of this revelation goes beyond the importance of an historical event from which later generations do not learn (*ḥikma*) anything, 'since it occurred 350 years ago'.[15] Moreover, if the water quoted in this passage must be understood literally why, al-Siǧistānī asks, did God relate it to the 'stain of Satan, the strength of the hearts and the planting feet firmly'? Hence, al-Siǧistānī concludes, the verse must be interpreted metaphorically, as follows: God gave believers knowledge (= rain, *mā'*) by means of His messenger (= 'from heaven', *min al-samā'*) so as 'to destroy the quarrels of the adversaries who changed religion and corrupted it through their illations (*ārā'*) and conjectures (*qiyās*)'.[16] In this way, the hearts of believers should be freed from doubt (*šakk*) and ambiguity (*šubha*) because their intellects, strengthened by knowledge, should gain a foothold (= 'to plant feet firmly', *yuṯabbit bihi 'l-aqdām*), 'out of any feeling of uncertainty (*rayb*) and ambiguity'.[17]

This implies that only knowledge can remove any form of ignorance, doubt, uncertainty and ambiguity because, in unveiling Truth that is hidden in the revealed Scripture, it assures certainty and salvation. This is why knowledge is connected with the imam who, being its repository, is charged with the soteriological purpose of the Ismaili teachings.

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12 See al-Siǧistānī 1980: 111; 2000: 232.

13 Quran 8:11. For the Quranic translation see Ali 2001.

14 On the authority of some versions, Muslims encamped on a dry, sandy and unstable terrain that God makes stable by making rain descend on it, so as to facilitate them in the struggle with their opponents.

15 See al-Siǧistānī 1980: 111, 22; 2000: 233, 8-9. This biographical detail, explicitly mentioned by the author, helps to determine when al-Siǧistānī wrote his treatise, that is, between 360/971 and 364/974 (since the battle of Badr occurred in 2/624).

16 See al-Siǧistānī 1980: 112,16-18; 2000: 234,10-11.

17 al-Siǧistānī 1980: 111,21; 2000: 235,1-2.

As regards the drowsiness (*nuʿās*) quoted at the beginning of the aforementioned verse, al-Siǧistānī interprets it as the *bāṭinī*/hidden aspect of Revelation (just as the wakefulness is the *ẓāhirī*/manifest aspect of Scripture), the knowledge of which is 'a safety and a protection from the Torment, that is, doubt and confusion (*ḥayra*)'[18] for believers.

The spiritual value of water and ablution is also restated in another Quranic verse: '[…] And Allah only wishes to remove all abomination from you, ye members of the Family, and to make you pure and spotless.'[19] According to the esoteric interpretation, this quotation acknowledges the 'pure and spotless' condition only in the *Ahl al-bayt*,[20] that is, the *a'imma*, laying emphasis on such a fundamental issue of the Ismaili creed that teaches the status of infallibility and impeccability (*ʿiṣma*) not only for the messenger of God but also for the imam. This condition of purity is achieved only through a spiritual water (knowledge) that has nothing to do with the natural water of wells and springs,[21] as maintained in the Quran, that quotes: '[…] and We send down pure water from the sky, that with it We may give life to a dead land, and slake the thirst of things We have created,— cattle and men in great numbers.'[22]

This verse, according to al-Siǧistānī, implies that God revealed through His messenger (= 'from the sky') the knowledge (= 'pure water') that will remove (= 'give life') the impurity of ignorance (= 'a dead land'). This knowledge will be granted only to those who deserve it, that is, the *a'imma* and the *lawāḥiq* (Adjuncts), represented in the verse as 'thirst of things […],—cattle and men in great numbers'. This is a further confirmation, according to al-Siǧistānī, that the water here mentioned is not that of the natural springs that is destined, on the contrary, for all the creatures and not the chosen few.

Al-Siǧistānī also applies the tradition of *ta'wīl* to the body that is purified during ablution; as a matter of fact, its parts, which are washed during this ritual practice, represent the ranks (*ḥudūd*) of the Ismaili hierarchy.

As previously hinted at, Ismaili propaganda provided for two kinds of hierarchies: heavenly and earthly. The heavenly hierarchy, echoing Neoplatonic doctrines, included five ranks, namely: the Intellect (established by God through His divine command *kun*, 'be!'), the Soul (emanated by the Intellect) and three hypostases, namely *al-Ǧadd*, *al-Fatḥ* and *al-Ḥayāl* (which perform a noetic function).[23] The earthly order provided five ranks too, namely: (1) the Prophet, called also 'Speaking' (*Nāṭiq*) because he was in charge of the revelation (*tanzīl*) of God's Word, (2) the 'Foundation' (*Asās*), known also as 'Silent' (*Ṣāmit*) because he safeguarded the concealed meaning of the divine Word, and (3) the

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18 al-SIǦISTĀNĪ 1980: 112,10-11; 2000: 234,4.

19 Quran 33:33.

20 Lit. 'People of the House', this statement refers to the family of the prophet Muḥammad, although in the course of time a debate arose on the people who belong to it. In shiʿi Islam the 'People of the House' consist of the *Ahl al-kisāʾ*, or the 'People of the Mantle' (that is the Prophet, his cousin and brother in law, ʿAlī, his daughter Fāṭima and his nephews, al-Ḥasan and al-Ḥusayn) and their progeny of *a'imma* who, being sinless and infallible, were qualified to perform the spiritual function they were charged with.

21 See al-SIǦISTĀNĪ 1980: 112,23; 113,1; 2000: 235,5-6.

22 Quran 25:48-49.

23 For details see DE SMET 2012.

Imam, the Prophet's delegate, who keeps the secret of the esoteric interpretation (*ta'wīl*) of the Scriptures in every generation, and preserves it. This triad was followed by the 'Adjunct' (*Lāḥiq*), the imam's delegate, and the 'Wing' (*Ǧanāḥ*), his assistant. The control of the Ismaili community and the recruiting of neophytes were carried on by a series of missionaries (*duʿāt*) and licentiates (*maʾḏūn*). The hierarchical structure of the terrestrial system, which reproduced the superior-celestial order on earth, aimed at ensuring support for the community, not just material, so as to assure the community its salvation.

According to al-Siǧistānī, body's limbs, which are purified by water during ablution, are related to the aforementioned ranks. So, the right hand is put in relation to 'the teacher who guides to the right path' (*al-hādī al-muʿallim*), the left hand is connected with 'the one who searches for knowledge' (*al-ṭālib al-murtād*) and the nostrils that inhale water during ablution are related to the Lord of Time (*ṣāḥib al-zamān*), who grants the Adjuncts (*lawāḥiq*) his inspiration (*taʾyīd*). Al-Siǧistānī explains these correspondences in the following way:

> Since the seeker (*al-murtād al-bāḥit*) the features of his religion cannot do without a guide who leads him on the right path and shows him what he intended to know of it (*sc.* religion), the right hand provided evidence of the teacher who guides to the right path, the left hand [provided] evidence of the seeker who investigates and the water that passes between them, so as the one [hand] cleans the other, [provided] evidence of the knowledge that passes between them (*sc.* teacher and pupil) at the moment of disclosure (*waqt al-mufātaḥa*).[24] […]. After having washed the hands, the one who performs ritual ablution begins to rinse, that is to put water in the mouth, and the mouth is the locker of tongue and the tongue is the instrument of talking and of what the faculty of speech expresses. […]. After having rinsed the mouth, the one who performs ritual ablution inhales, that is, puts water in the nostrils[25] through which fresh air passes. This is why we said that the learned man (*ʿālim*), who benefits from the Lord of his isle [i.e. *al-ḥuǧǧa*][26] must relate his

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24 See al-SIǦISTĀNĪ 1980: 111, 16-19; 112,23-113-1; 2000: 236, 6-10.

25 Here al-Siǧistānī seems to evoke al-Qāḍī al-Nuʿmān (363/974). Regarded as the founder of the Ismaili-Fatimid jurisprudence, al-Qāḍī al-Nuʿmān was also the most authoritative representative in the field of the *ta'wīl*, to which he devoted the *Ta'wīl al-Daʿāʾim*, the esoteric compendium to his masterpiece *Daʿāʾim al-Islām*. In discussing the esoteric interpretation of the *ṭahāra*, he related the mouth to the imam and understood rinsing the mouth and inhaling water through the nostrils as the acknowledgment of the imam and of his 'proof' (*ḥuǧǧa*). See al-QĀḌĪ al-NUʿMĀN, *Ta'wīl al-Daʿāʾim*, cit. in al-SIǦISTĀNĪ 2000: 417. For details on his concept of *bāṭin* see SHAH 2005. For his contribution to the Ismaili jurisprudence see FYZEE 1934; POONAWALA 1974; POONAWALA 1977: 48-68; POONAWALA 1996; CILARDO 2012. For an outline of al-Qāḍī al-Nuʿman's view on the pillars of Islam see also HALM 1996: 370-374.

26 Lit. 'proof', this term indicated originally prophets and *a'imma*, who were considered the proofs of God on earth. Later, the term *ḥuǧǧa* was assigned to chief representative of the imam who was charged with the control of a specific region, called 'isle', *ǧazīra*. Since the Ismailis were scattered in a wide geographical area, they provided for an elaborated system of control so as to manage and spread their propaganda widely, especially in the territories outside Fatimid provinces, where the *daʿwa* was directed in utmost secrecy. This is why the Ismaili world was divided into 12 'islands' (*ǧazāʾir*, sg. *ǧazīra*), each of them under the control of a 'proof' (*ḥuǧǧa*), who was assisted by several subordinate *duʿāt* of a variety of ranks.

knowledge to the Lord [i.e. the Imam] of Time who, thanks to the subtleness of his soul, 'inhales' the inspiration through which the Adjuncts, who are under him in rank, will have [enough] strength to receive it (*sc.* knowledge) in a common spiritual [way]. So the right hand, the mouth, the nostrils and the water put in them [are] among the customary practices of ritual ablution, although they [must be related] to those we named among the learned appointed men, each of them is above the other in rank.[27]

Therefore, al-Siǧistānī maintains that the body needs water to remove its impurities so as to let the *muslim* perform the exoteric ablution; in the same way, the believer, *mu'min*, whose search for knowledge is compared to the search for water by one who is thirsty,[28] needs God's messenger and imam, who are charged with the delivery of knowledge, in order to eliminate ignorance and unbelief so as to perform the esoteric ablution.

It is worth noting that this knowledge cannot be achieved by the common man because it does not derive from senses but it was inspired by God in the eminent (*waǧīh*) persons of prophets. This is why, according to al-Siǧistānī, washing the face (*waǧh*) in ritual ablution must be understood as obedience to the messenger of God, as quoted in the following passage:

> Washing the face is the first of the religious duties of ritual ablution, hence we related it to the obedience towards the messenger […]. So, we do not commit sin if we mention our messenger when we wash the face, because we think that the obedience to him is a religious duty, just like the religious duty of washing the face during ritual ablution. Is not the face the manifest [aspect] so as to distinguish a man from another? Similarly, the messenger is the virtuous chief known in his era, because he is the prominent personality of his community (*waǧh ummatihī*) and [the word] *waǧīh* (i.e. eminent) derives from *waǧh* (face). And God, be His mention exalted, called the Messiah, peace be upon him, eminent when He said: ' […] held in honour in this world and in the Hereafter and of (the company of) those nearest to Allah'.[29]

Hence, the true believer must obey the messenger, who is the mouthpiece of God's word, as well as the imam, who is charged with the custody of Truth.

The religious duty to obey both, messenger and imam, is represented during ritual ablution in washing the face and the hands; according to al-Siǧistānī's interpretation the true believer washes first his face and secondly his hands because he must first acknowledge God's messenger and then his legatee.

As mentioned earlier, Ismailism recognises a double interpretation of the Scripture, one exoteric (manifest, *ẓāhir*) that pertains to the messenger, and the other esoteric (hidden, *bāṭin*), which pertains to the imam. Both aspects, which are not antithetical, are represented

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27 al-SIǦISTĀNĪ 1980: 114,1-7; 2000: 236,15-16; 237,3-9.

28 The relation between water and knowledge is evoked by the term *murtād*, which al-Siǧistānī uses to define who searches for knowledge, because the verb *irtāda* also indicates a place where food and water abound. See FREYTAG 1975, II: 208b, s.v. *rāda*.

29 al-SIǦISTĀNĪ 1980: 114,7-15; 2000: 237,10; 238,1. For the Qur'anic quotation, see 3:45.

during the rite of ablution in the believer's clothes and hands, which symbolise the laws of Scripture and their hidden Truth respectively.

> When the one who performs ritual ablution finishes washing the face, that corresponds to the obedience towards the messenger, he begins to wash the hands that corresponds to the obedience of the believer to the legatee (*waṣiyy*),[30] who comes after the messenger, the prayer of God on him and on his family, because it is inevitable that the messenger appointed a legatee to his community so as to preserve his religion. And the hands are covered by the clothes because the call to Truth (*daʿwa*) of this legatee is hidden and concealed in the laws, which are the visible clothes [that cover] the hands.[31]

In order to perform ritual ablution in the correct way, the true believer must massage his head with water and then wash his feet. In al-Siǧistānī's view, since the head is the seat of the senses to which the Soul is linked: '(God) ordered to pour water on head and to massage it from top to bottom [so as to provide evidence of] the acknowledgment of the noble level (*martaba*) of the Soul by he who performs ritual ablution'. [32]

As for the feet, their being wiped and washed during the ritual ablution is considered as a deed of submission to the highest rank of the spiritual hierarchy, that is, the Intellect, as the following passage shows:

> The feet were put in correspondence with the Intellect, that must be acknowledged through the wiping (*masḥ*) and the washing (*ġusl*) of the feet, and this means that, although the Intellect is far from being achieved with regards to its essence, those who understand (*ʿuqalāʾ*) must obey it, lead up to what it has imposed and abstain from what is opposite to it. Hence, massage (*masḥ*) is associated to the acknowledgment of it (*sc.* the Intellect) from those who possess the lowest ranks while washing (*ġusl*) is connected with the obedience towards it (*sc.* the Intellect) from those who are endued with understanding (*ulū al-nuhā*).[33]

In this way, according to al-Siǧistānī, the true believer, through the washing of the head and of the feet, recognises the superiority of the Intellect and the Soul, the spiritual 'archetypes' who have their counterpart in the messenger and his legatee, who are the religious 'archetypes'.[34]

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30 As regards the relationship between the hand and the imam, it is worth noting that in the pre-Fatimid period the imam's delegate, who was charged with the control of the *ǧazīra*, was named *yad*, that is, 'hand'. See DAFTARY 1998: 98.

31 al-SIǦISTĀNĪ 1980: 114,16-19; 2000: 238,2-6.

32 al-SIǦISTĀNĪ 1980: 115,8-9; 2000: 239,2-3.

33 al-SIǦISTĀNĪ 1980: 115,13-16; 2000: 239,6-10. As for the expression *ulū al-nuhā* see Quran 20:54.

34 Both archetypes, spiritual and religious, are considered by al-Siǧistānī as the 'four roots of Truth', which al-Siǧistānī represented in the *Kitāb al-Yanābīʿ* through the image of a cross. At the top of the vertical line there is the Intellect and at the bottom, which is planted in the ground, there is the Foundation, while on the horizontal line al-Siǧistānī put the Soul to the left and the Speaking-prophet to the right. See al-SIǦISTĀNĪ, *Kitāb al-Yanābīʿ*, 75-76. Each root is charged with a peculiar function: so, the Intellect is responsible for the inspiration (*taʾyīd*) that enables the Foundation to interpret esoterically (*taʾwīl*) Scripture, on the other hand the Soul is responsible for the composition (*tarkīb*) of the physical

4. Conclusions

This paper, which is a continuation of my previous research on the Siǧistānian view of the pillars of Islam, has focused attention on the interpretation of cultic purity and ritual ablution that Abū Yaʿqūb al-Siǧistānī gave in the *Kitāb al-iftiḫār*, an apologia written to reply polemically to the Ismailis' opponents. Despite the exhaustive exegetical literature on the Sunni interpretation on *wuḍūʾ* and *ṭahāra*,[35] the present study has analysed the issue in the Ismaili context, focusing on al-Siǧistānī who, in summarising the basic tenets of Ismaili doctrine in his last work, provided an overview of Ismaili teachings during the more developed phase of their evolution.

As the analysis of some excerpts of the *Iftiḫār* has demonstrated, according to al-Siǧistānī the true meaning of ablution and cultic purity must be understood as the disavowal of the legitimate *aʾimma* from those who seized legal power. In al-Siǧistānī's view, this denial is considered the worst of the impurities that must be removed through an act of purification and ablution, both of them to be interpreted metaphorically.

The first step of this ritual requires the achievement of purification through symbolic water, namely knowledge that allows the unveiling of Truth so as to achieve the true understanding of Revelation. As for ablution, its ritual is a symbolic way to acknowledge the religious as well as the normative world,[36] the double hierarchy that represents a basic feature of the Siǧistānian system.

Through ritual ablution and cultic purity, the true believer obeys the imam and acknowledges the necessity for him and for the imamate. This backbone of the Ismaili creed is also represented by the ritual of massage and washing the believer's body,[37] which

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elements into material beings, this is why it is put in relation with the Speaking-prophet who is charged with the composition (*taʾlīf*) of God's Word in Scripture and laws. For a detailed discussion see WALKER 1996: esp. ch. 2.

35 For details on the exegesis of *ṭahāra* in Sunni context see, among the others, NAGUIB 2007; KATZ 2002: 75 ff. As for the state of the studies on this issue and on the interaction of theoretical and lived Islam in ritual and purity laws, see GAUVAIN 2005. I would like to express my gratitude to the anonymous referees who gave me these bibliographical details.

36 Religious world (*ʿālam al-dīn*) is the world created during the historical cycles of prophecy and religion, while normative world (*ʿālam al-waḍʿ*) is the domain of law, which gives religious world a 'moral' direction.

37 In the *Kitāb šaǧarat al-yaqīn*, a treatise of problematic authorship and date, the human body represents the three parts into which the universe can be divided; as a matter of fact, the head, the torso and the feet are related to the spiritual, the physical and the material world, respectively. In stressing that physical and material worlds cannot do without the spiritual world, the author maintains that: 'There is no evidence that man can exist without head [on the contrary he can exist without a foot], similarly there is no evidence that the two worlds, physical and material, can exist without spiritual world. The first thing of the unborn baby that comes out in the material world is the head, and this provides evidence that the first thing that God, be exalted His mention, installed (*abdaʿa*) was the spiritual world […] and the last thing of the unborn baby that comes out in the material world are his feet and this provides evidence that material world derives from the spiritual world through the mediation of the physical world.' ʿABDĀN (attributed to), *Kitāb šaǧarat al-yaqīn*, 66-67. Although not explicitly stated, it seems that the two extremities of the human body, namely the head and feet, can be also connected to the two aspects of the Revelation, that is, *ẓāhir* and *bāṭin*, which, in their turn, are the distinctive qualities of *tanzīl* and *taʾwīl*.

symbolises the religious hierarchy (*al-ḥudūd al-ǧismāniyya*) and its spiritual counterpart (*al-ḥudūd al-rūḥāniyya*).

These two hierarchies, linked together through a system of symmetric correspondences, assure the 'reductio ad Unum' (*ta'wīl*) to which Ismailism aspires.

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Alms and the Man: Fiscal Sectarianism in the Legal Statements of the Shiʻi Imams

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Abstract

The sociological dimensions of the development of a sectarian orientation in early Imami Shiʻism have remained sparsely explored since Marshall Hodgson posed the question 'How did the early Shia become sectarian?' in 1955. This article explores Imamic hadith statements on the canonical ritual payment of *zakāt/ṣadaqa* as a way of tracking the crystallisation of communitarian boundaries. It argues that the Shiʻi Imams, especially Imam Bāqir, fit into a common Muslim discourse regarding the payment of *zakāt*, for example in the case of an unjust Imam. However, the hadiths of the Imam Ṣādiq show a pivot towards the more clearly differentiated Shiʻi juristic positions of the Occultation period. Imamic statements on *zakāt*, therefore, must be seen as neither identical to Sunni positions, nor to classical Twelver Shiʻi formulations, but rather as dynamic responses to developing circumstances. In using Imamic hadiths to track early Shiʻi doctrine, this article also suggests directions for the development of a methodology for using hadiths to track historical developments, a venture which has barely begun. In dealing with the Shiʻi Hadith corpus, the author calls for an epistemological scepticism, coupled with a methodological positivism, assuming that while Imamic hadiths may merely act as mouthpieces for later doctrinal positions, it is also very possible that they do originate in the circles of the Imams to whom they are ascribed, and should be analysed as such in order to track chronological developments in the Hadith corpus.

Keywords: Minorities, sectarianism, Shia, Shiʻism, Hadith, Islamic law, *zakāt, ṣadaqa*, alms, taxation, charity, group identity

1. Searching for the origins of Imami Shiʻi sectarianism

'How did the early Shia become sectarian?' It is a question famously posed in 1955 by Marshall Hodgson in an article of that name,[1] but one which Hodgson only partially answers. Hodgson approaches the question as an intellectual historian, and primarily from the perspective of the doctrine of the Imamate, using the terminology and source material provided by the heresiographers. Given that his question was about the process of sect-formation, however, and therefore an essentially *sociological* question, it is appropriate also to investigate the institutional framework for the establishment of the Imami Shia as a distinct group. Since Hodgson, the study of early Shiʻism has continued to be overwhelmingly doctrinal in its focus.[2] In this article, I will make a step towards bridging the gap between early Shiʻi intellectual and sociological history[3] by interrogating the social effects

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[1] HODGSON 1955.

[2] Notable recent exceptions to this include HAIDER 2011 and HAIDER 2009; ASATRYAN 2014.

[3] I use the term 'sociological history' in conscious distinction from 'social history'. While 'social history' tends to designate the history of normal people in societies, rather than just the history of elites,

of the legal rulings of the Imams. These legal rulings certainly were part of an intellectual discourse between scholars; however, I will use them to cast light upon the origins of the development of the Imami Shia community structures—in particular the development of distinctive practices for the collection of the alms tax (*zakāt*).

Within the current issue's discussion of Islamic Law and minorities, it must be stressed that, in fact, the Islamic law pertaining to minorities finds its first origins at a time when the now-minorities were majorities, while the Muslim Arab elites were themselves still a minority amongst the conquered lands.[4] Nonetheless, Sunni law, at least, may be seen as representing the perspectives of a more or less dominant, hegemonic position associated with the ruling political and intellectual elites of Islamic society. In contrast, the substance of Shiʿi positive law based on the statements (hadiths or *aḫbār*) ascribed to the Imams increasingly developed with a self-consciously minoritarian, sectarian perspective: a *self-defining* minority, that is.[5] The distinct sectarian identity that is visible in the classical system of Imami Shiʿi law,[6] however, was a work in progress that emerged gradually over several generations. This process is poorly understood, largely because of the difficulty of finding good sources for early Imami Shiʿi social and political history.[7] Indeed, the study of group identity and group definition in early Muslim sects as a whole is hampered by the fact that the heresiographical nature of many of the earliest sources does not provide us with a firm basis for distinguishing between a real group whose members would have recognised each other in the world, and a theoretical construct produced by a scholarly desire to systematise the available information into elegant heresiographical categories.[8]

In what follows, I aim to show that one way of going beyond the heresiographical definition of a group is to 'follow the money'. The Shiʿi conception of who should collect, distribute and receive the Islamic canonical alms taxes provides us with a conceptual framework that helps us understand the ideal structural characteristics of the community and the way it maintained boundaries with other communities. In particular, the distinctions about to whom one should pay *zakāt* must be understood as functioning clearly to mark affiliation and loyalty to a particular group and leader, in a way that the more fluid realm of doctrinal belief cannot. I will focus on two particular questions in the Shiʿi law of *zakāt* that

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'sociological history' is concerned with the theories and structures upon which society is based. In this article, I aim to elucidate not just the narratives of Shiʿi history, but rather the structural dynamics of the Shiʿi community, insofar as these structures can be reclaimed.

4   BULLIET 1979. Formal hadith collection efforts were well under way during the lives of these Imams, though the great *muṣannaf* and *ṣaḥīḥ* hadith collections of the 9th and 10th centuries, were compiled after this point had been reached. See BROWN 2009: 18–34.

5   For an overview of the sectarian perspective in early Shiʿi sources, see KOHLBERG 1988 and KOHLBERG 1985; DAKAKE 2007.

6   By 'classical' in the context of Imami Shiʿi law, I refer to the foundational texts of the Occultation era, before the Safavids, especially the 11th-14th centuries, when the foundational doctrines of the sect had stabilised, and the use of both hadith and rational *uṣūli* methodologies had been widely accepted.

7   Many of the most important figures in the Imami community are ignored as insignificant by non-Shiʿi historians and biographers. Even the Imami Imams are the subject of scanty discussion in the major historical chronicles and biographical dictionaries.

8   This includes the desire to sort messy realities to conform with the hadiths of about 72 or 73 sects. See VAN ESS 2003: 216; HAIDER 2007: 368.

are pertinent to the task of determining the nature and expression of the commitment made to one's community: first, whether one should allow *zakāt* to be collected by an unjust Imam; and, second, if one distributes it oneself, how communitarian boundaries shape the practice of this ritual giving.[9]

2. Methodology

The evidence I analyse below is centred on the statements of the Shi'i Imams Abū Ǧa'far Muḥammad al-Bāqir (d. 117/735, 114/732-733, or 118/736) and Abū 'Abd Allāh Ǧa'far al-Ṣādiq (d. 148/765) regarding the Islamic canonical tax known as *ṣadaqa* or *zakāt*. Many of their statements regard the precise quantities and timing of the payment of *ṣadaqa/zakāt*, and many replicate what one can find in Sunni hadith collections. I focus on those statements that present distinctive information on the relationship between giver, collector and recipient of *zakāt*. The richest vein of material I have found is in the chapters of *zakāt* and the chapters on *ḫums* in the earliest large Twelver hadith compilations, of Kulaynī and Ibn Bābūyah, both of whom were active in the 4th/10th century, and thereby represent some of the earliest extant texts that contain substantial numbers of fiscal hadiths.[10] I will suggest that there are some indications that reports in the Hadith corpus as it pertains to *zakāt* do appear to reflect intellectual developments dating from the time of the Imams. At the very

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9   Ritual militates against a stable definition, and a practice like *zakāt* clearly has an instrumental or 'rational' function, as well as being a ritual expression of commitment, fulfilling a soteriological and purificatory function. As Edmund Leach suggests, even though 'no useful distinction may be made between ritual acts and customary acts but that in discussion of ritual we are concerned with aspects of behaviour that are expressive (aesthetic) rather than instrumental (technical). Ritual action, thus conceived serves to express the status of the actor vis-à-vis his environment, both physical and social'. See LEACH 2000: 173. This framework for the way in which sacred and the economic meet (in contrast to Durkheim's more complete separation of the sacred and the profane) provides a framework for our understanding of the ritual nature of the act of giving *zakāt*. Shi'i alms/tax-giving practices communicate a commitment to a particular Imam, and thereby membership in a particular community. In addition to having a mundane 'rational function'– the social redistribution of wealth—they also have a soteriological function of guaranteeing the legitimacy of prayer, and enabling the believer to attain paradise. While *zakāt* may be considered an instrumental financial institution that has the effect of redistributing wealth in the community of the faithful, it is also one element of a larger ritual, material and aesthetic complex that ties the believers to the Imam. The giving of money to the Imam is often portrayed as part of a pilgrimage sequence that sometimes includes the hajj as well as a pilgrimage to the house of the Imam. Reports describing visits to the Imam or his agents often involve payment of money, but they also describe the circulation of gifts in the opposite direction, from the Imams to their followers, including written blessings and ritual objects like funerary shrouds and funerary balm. I have called this system, the 'sacred economy' of the Imamate, as a way of uniting both the ritual-sacral aspect with the instrumental aspect of the redistribution of wealth. See HAYES 2015. This, however, deals with a later period, and it will require further research to understand when the different elements of this sacred economy might first have been established. For one of the numerous examples where bringing money to the Imam is seen as part of the hajj pilgrimage, see IBN BĀBŪYAH, *Kamāl al-dīn*, 516-17.

10   I surveyed most of the major early Imami hadith compilations and *tafsīr*s from the 8th to the 11th centuries, before confining my study to these two collections, which contained the most important hadiths for this topic. Among the non-Imami sources, I surveyed the following: al-NU'MĀN, *Da'ā'im al-Islām*; Imām al-HĀDĪ ILÀ 'L-ḤAQQ YAḤYĀ b. al-Ḥusayn, *Kitāb al-aḥkām fī 'l-ḥalāl wa 'l-ḥarām*.

least we can say that the Imams' statements do not easily conform to the mainstream opinion of later Imami jurists that *zakāt* should only be paid to the true Imam, and should not be paid to non-Shi'is.[11] As such, I will approach the Imami Imams' statements on *ṣadaqa/ zakāt* on their own terms, rather than attempting to align them with later Imami doctrine.

Our understanding of the dynamics of the formation of the Shi'i Hadith corpus has advanced tremendously in the past few decades, but much detailed work remains necessary to understand the processes of formation, transformation, reproduction and preservation that lead to the form and content of the hadith collections as we have them today.[12] While legal hadiths do not tend to display the same tendency to fit suspiciously into narrative tropes as historical *aḫbār*,[13] they were clearly formed and developed in response to ongoing debates over legal and political frameworks for correct ritual practice. My work is partly informed by the Schachtian understanding that hadith reports often reflect later disputes rather than the ideas of the people to whom they were ascribed. However, though I work with an epistemological scepticism, at our current stage of analysis of the Shi'i Hadith corpus[14] I deem it necessary to introduce a certain methodological positivism. Thus, I work with the assumption that the hadiths ascribed to certain Shi'i Imams might indeed originate with those Imams, or men in their circle. While this may prove to be an operational fiction, it will provide a methodology to help us begin to understand the internal dynamics of the Shi'i Hadith corpus.[15]

3. Shi'i *zakāt* law

Hitherto, scholarship on Shi'i *zakāt* law (and indeed Shi'i *fiqh* in general) has been focused on juristic discourses of the Occultation era, especially from the 5th/11th century onwards.[16] Thus, the nature of the individual contributions of the Imams, or, for that matter, of the late-Imamic and early-Occultation era jurists, is very poorly understood. While much work remains to be done to understand the legacy of these men, we can summarise by saying that Bāqir and Ṣādiq were widely seen as wise, pious, knowledgeable men from a prestigious 'Alid lineage who became the focus of intensive Shi'i piety and mobilisation, probably

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11 KOHLBERG 1985: 101; ZYSOW, 'Zakāt', *EI²*.

12 Key works of scholarship that contribute to our developing framework for understanding early Shi'i hadiths are the many works of Etan Kohlberg, many of which are collected in KOHLBERG 1991; MODARRESSI 2003; and the work of Robert Gleave, especially GLEAVE 2001; NEWMAN 2000; HAIDER 2011; the works of Hassan Ansari, including ANSARI 2013.

13 Noted especially in NOTH & CONRAD 1994.

14 Shi'i hadith is substantially different from Sunni hadith. In contrast to the Prophetic hadiths that are so central to Sunni law, Imami Shi'i hadiths are most often ascribed to the Imams of the second/eighth and third/ninth century, placing them right in the era of hadith compilation. This, and other distinctive factors, require that a comprehensive framework for understanding and working with shi'i hadiths should be developed.

15 This methodology is partly informed by Robert Gleave's analysis of Imamic hadiths, for example in GLEAVE 2010.

16 CALDER 1981; ZYSOW, 'Zakāt', *EI²*; GLEAVE, 'Khums', *EI²*; MODARRESSI 1983.

during their lifetimes but certainly in the generations to follow.[17] *Ṣadaqa/zakāt* refers to a kind of taxation or alms[18] that was required of every Muslim of means as part of her membership in the Muslim community, along with the *ṣalāt* prayer and other duties. The origins of *ṣadaqa/zakāt,* like many institutions rooted in the earliest phases of the Islamic community, are murky,[19] and by the time of Bāqir and Ṣādiq, a juristic enterprise was under way to impose order on the *ad hoc* revenue-generation mechanisms that had emerged during the first century and a half of the Islamic community. A distinction is often made in later juristic literature between *ṣadaqa* as referring to voluntary charitable gifts to the needy, and *zakāt* as referring to the obligatory payments incumbent on every Muslim of means,[20] but this distinction is usually not visible in the hadiths themselves, where *ṣadaqa* is the dominant term for both forms. There is also a distinction between *zakāt*, which is due every year, based on capital wealth and/or income, and the obligatory *zakāt al-fiṭr*, which is distributed at the end of Ramadan. In addition, the early juristic sources exhibit confusion over the categorisation of the agricultural tithe (*ʿušr*), which was sometimes considered as *zakāt*, and sometimes categorised under *ḫarāǧ*.[21] When dealing with the short telegraphic Imamic statements, which are shorn of context and recompiled in hadith works, we often cannot tell exactly which kind of subcategory of *zakāt/ṣadaqa* we are dealing with. In these statements, as in other examples of early juristic writing and hadith, *ṣadaqa* and *zakāt* are usually used synonymously, or at least with a great deal of semantic overlap. *Ṣadaqa* is the term most often used in hadith reports, while *zakāt* tends to be used as the rubric under which these hadith reports were compiled, reflecting the ongoing process of systematisation of terminology. The rubrication of these chapters provides ambivalent testimony, as it often seems to conflate, under the rubric of *zakāt* or *ḫums*, hadiths from very different contexts in order actively to construct a particular view of Imamic practice. Thus, though I draw largely upon the chapters on *zakāt* or *ḫums*, I do not treat them as essentially belonging to those chapters.

Ṣadaqa and *zakāt* should be seen within a broader ecosystem of other Islamic canonical revenue categories such as *ʿušr*, *ḫarāǧ*, *ḫums*, *ǧizya*, and *waqf*, which are also characterised by a greater or lesser terminological ambiguity, and often overlap with each other.[22] In the Shiʿi context, it is helpful to compare the developing discourse on *zakāt* with the *ḫums*, both of which came to be understood as scriptural categories of Islamic canonical tax or alms, the payment of which indicates one's commitment to a particular leader or govern-

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17 See, for example, HODGSON 1955; HODGSON, 'D̲j̲aʿfar al-Ṣādiḳ', *EI²*; KOHLBERG, 'Muḥammad b. ʿAlī Zayn al-ʿĀbidīn, Abū D̲j̲aʿfar, called al-Bāḳir', *EI²*.

18 There is no clear distinction made in the early sources between autonomously-distributed, voluntary 'alms' and mandatory, governmentally-collected 'tax', other than what can be inferred through context; both 'tax' and 'alms' will be used in the course of this article, depending on whether the context suggests that it was collected by the Imam/caliph or his appointees, or distributed autonomously by the individual. However, context is often not a clear guide.

19 The best guide to the perplexing variety in the earliest usage of *ṣadaqa/zakāt* is BASHEAR 1993.

20 ZYSOW, 'Zakāt', *EI²*.

21 SATO, 'ʿUshr', *EI²*.

22 See, for example, HENNIGAN 2014 on the terminological confusion between *waqf*, *ṣadaqa*, and other categories.

mental structure. The major difference between these in the Shiʿi context came to be the fact that while the Imam was not allowed to use the ṣadaqa/zakāt for himself, due to the fact that he belonged to the *ahl al-bayt*,[23] the ḫums, on the other hand, came to be viewed as the Imam's personal prerogative.[24]

4. *Zakāt* and Imamate: The fiscal claims of the Imami Shiʿi Imams

As is well known, sect-formation in Islam was set in motion by the very first conflicts that followed the death of Muḥammad and developed in the generations to come. The Umayyad rulers began to develop an imperial style, a body of bureaucratic and legal practices and rulings, and an ideology of religiously legitimated rule. Meanwhile, a varied set of movements developed oppositional ideologies, tracing their opposition back to the example of ʿAlī's conflict with the Umayyads, and holding out hope that one of his descendants or family members would recreate a rule of justice they felt to be lacking. However, the early Shia were not a homogenous movement, but rather a collection of diverse responses to the legacy of ʿAlī and the prophet's family.[25] It is hard to know when and to what extent the Shiʿi group identities came to be expressed in recognisably communitarian elements such as geographical separation, divergent beliefs, and separate ritual practices. Dakake has argued that, from the lifetime of ʿAlī, his followers' support has had a theological content, most especially the idea of *walāya* as a binding charismatic contract, which formed the foundation for later developments in Shiʿi thought.[26] It is likely that very soon, pre-existing tribal and local identities came to be woven into new 'Shiʿi' expressions of communal identity and ritual practice. Najam Haider notes that, in relation to second/eighth century Kufa, Shiʿi life was deeply textured by its embodiment in particular locales, and particular ritual practices, such as ways of praying, which marked the Shiʿi practitioners apart from their neighbours.[27] Shiʿi community identities, therefore, were not imposed purely from above by Imams and elites. Much of what came to be constituent of 'Shiʿi identity' would have emerged from the grass roots, and some of this would have been pseudonymously placed into the mouths of the Imams to add to its authority.

The crystallisation of systematic theories of the Imamate, produced by intellectual elites among both Shia and non-Shia, was significant, however. The Imami Shiʿi theory of Imamate first appears to have crystallised in the second/eighth century, in the circle of Ǧaʿfar al-

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23 Who was and was not able to receive *zakāt* depends on the definition of the phrase *ahl al-bayt*, who, it was agreed, were not allowed to receive the *zakāt/ṣadaqa*. The interpretation of *ahl al-bayt* developed gradually, and its meaning has come to range from just the prophet's wives, to encompass the entire tribe of Hāšim (for example for Abū Ḥanīfa and al-Šāfiʿī). See GOLDZIHER, VAN ARENDONK & TRITTON, 'Ahl al-bayt', *EI²*.

24 On the early development of the Imami ḫums, see MODARRESSI 1993: 12-18. For later developments, see CALDER 1982. Neither of these, however, presents the final word on the early development of ḫums.

25 For the diversity and fragmentation of the early Shia, see VAN ESS 1991, I: 272-274.

26 DAKAKE 2007.

27 HAIDER 2009.

Ṣādiq,[28] in opposition to the developing Umayyad ideology and theology of rule,[29] and in gradually clearer distinction from other Shi'i schools of thought. Hodgson has argued that the creation of a stable Imami Imamate, predicated on father-to-son transmission and explicit designation, allowed for generation-to-generation consolidation.[30] The establishment of the Imams' revenue-collection protocols must be seen as a part of the broader institutional and conceptual foundation of the Imami Imamate.

While the Imami Imams have typically been seen as 'quietist', compared to the more 'activist' Zaydi Shia, the Imami legal hadiths on *ḫums* and *zakāt* problematise this assumption. As we shall see below, Imami legal hadiths suggest that the Imams ordered the Shia to pay *zakāt* to them or their functionaries, in preference to the functionaries of the Caliph. What was the creation of the Imami Shi'i financial system meant to achieve? The creation of a state within a state? Preparation for future rebellion? Certainly, some sources indicate that 'Abbasids perceived Imami revenue collection as a threat, prompting the persecution of the Imam's followers.[31] Part of the problem here is that we have few sources for understanding the actual practice of *zakāt* collection, whether by the caliphal government or among oppositional groups, though Petra Sijpesteijn has made an important contribution through her work on the Egyptian papyri and their evidence for governmental collection of *ṣadaqa*.[32]

5. The fiscal claims of the Imami Shi'i Imams

At some point, probably during the mid to late second/eighth century, the Imams began to assert their right to collect Islamic canonical revenues.[33] A motley system of gifts and contributions to the Imams probably already existed. These were supplemented and explained by an increasingly systematic set of canonical dues, which were established by associating them with existing Quranic categories of canonical alms taxes, the payment of which marked one's commitment to an Imam.[34] These categories also paralleled Umayyad governmental efforts to legitimise their revenue collection, resulting in an implicit conflict. While we cannot be sure of the exact timeline of historical development of the Imami revenue collection system, one historical circumstance stands out as a *terminus ante quem* for the existence of substantial Imami Shi'i institutions of revenue collection. Upon the death of Ṣādiq's son, the seventh Imam, Abū 'l-Ḥasan Mūsā al-Kāẓim, in 183/799, a group of

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28 See MADELUNG, 'Hishām b. al-Ḥakam', *EI²*.

29 CRONE & HINDS 1986, especially pp. 24-57.

30 HODGSON 1955.

31 See, for example Rašīd's distrust of Mūsā al-Kāẓim, due to the rumour that he 'was receiving donations from all corners of the earth'. KOHLBERG, 'Mūsā al-Kāẓim', *EI²*.

32 See SIJPESTEIJN 2013.

33 I deliberately use this vague wording because it is not clear in what form the Imams first justified their collection of monies from their followers.

34 For a discussion of the different kinds of semi-canonical payments made to the Imams, see HAYES 2015: 86-105.

Kāẓim's agents rejected his successor, claiming that Kāẓim had gone into Occultation, and they then refused to hand over to his successor the apparently large amounts of money they had collected in Kāẓim's name.[35] This provides clear proof that at least by the time of Kāẓim there was a substantial amount of money being collected in the name of the Imam. The collection of these large sums from the community would have required some form of doctrinal-theoretical justification—either developed pre-emptively, or, more likely developed *ex post facto*. The Imamic statements on the Islamic canonical taxes (especially *zakāt* and *ḫums*) were a part of this conceptual backdrop for the development of community funding mechanisms. This is not to say that all of these categories of revenue would have been treated the same once collected. On the contrary, the rules regarding the use of *zakāt* and *ḫums* are distinguished, for example, by the fact that no part of the *zakāt* could be used by the Imam for his own purposes, unlike the *ḫums*, due to the fact that the *zakāt* donations were conceived as carrying away the impurity from the donors, something which the *ahl al-bayt* could not accept due to their pure lineage.[36]

While many of the statements of Bāqir and Ṣādiq are difficult to contextualise historically, we may assume that Kāẓim's revenue-collection system did not emerge without any precedent. We can find suggestive material in statements like the following, in which Ṣādiq is depicted as justifying his collection of *zakāt*, or some similar tax, perhaps in the face of a sceptical community:

> Ibn Bukayr reported: I heard Abū 'Abd Allāh [Ṣādiq] (AS) say, '[If] I take a *dirham* from one of you, and even though I am one of the wealthiest people in Medina, in doing so I wish nothing else than that you should be purified (*tuṭhirū*)'.[37]

While this does not explicitly mention *ṣadaqa* or *zakāt*, the apologetic tone suggests that the Imam may be defending an *innovation* he has made in collecting money from his followers, who do not all consider it to be fully warranted. The context suggests the ritual function of purifying the donors that is associated with the payment of *ṣadaqa* and *zakāt*, based on the Quranic usage.[38] If Ṣādiq were indeed claiming the *zakāt*, then this would seem to imply a direct challenge to the caliphal prerogative of collection of the canonical Islamic revenues.[39] While this statement is not clearly datable, the apologetic tone suggests that it derives from a period in which payment of canonical dues to the Imam was not a self-evident duty, but something that had to be established through statements ascribed to the Imam.

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35 BUYUKKARA 2000.

36 ZYSOW, 'Zakāt', *EI²*.

37 KULAYNĪ, *al-Kāfī*, II: 44. Note that all translations in this article are my own, unless otherwise stated.

38 Quran 9:103. In the Imami context, the *ḫums* is also said to have a purificatory role, though it is not said to contain the dregs of impurity that prevents *zakāt* from being used by the *ahl al-bayt*. KULAYNĪ, *al-Kāfī*, I: 546.

39 Modarressi also refers to reports in which the 'Abbasid caliph Manṣūr is said to have complained that Ṣādiq was receiving *zakāt*, and even *ḫarāğ* land taxes from his followers. MODARRESSI 1993: 13.

6. Payment of canonical taxes to an unjust Imam

One of the matters of controversy among early jurists was the extent to which imperfect governmental authorities could be entrusted with the weighty duty of collecting and distributing a believer's *ṣadaqa/zakāt*. Towards the end of the Umayyad period, the piety-minded juristic movement (which formed the immediate intellectual context for the legal statements of Bāqir and Ṣādiq) was often hostile, or at least ambivalent, towards Umayyad power, hence Hodgson's reference to the intellectual pioneers of the time as part of a 'pious opposition'.[40] Though the extent of the participation of the scholars in a 'pious opposition' has been recently challenged by Steven Judd,[41] we can still use the phrase to apply to the common cause made against the Umayyads by many pious scholars (albeit not all) amongst the Shia and proto-Sunnis. This ambivalence towards Umayyad power prompted the question of whether it was legitimate to pay *zakāt* taxes to an unjust ruler, a question perhaps exacerbated by innovations in the conception and practice of these taxes.[42] The divergent responses to this question crystallised into the positions espoused by classical jurists, some of whom counselled a maximalist acceptance of governmental tax and the legitimacy of those who collected it, others a minimalist approach. Zaydis, for example, tended to stress the Imam as the only legitimate collector and distributor of the alms taxes, while at the other end of the spectrum, Ḥanbalīs tended to recommend that believers should distribute the alms tax personally, whenever possible.[43] If the ruler were corrupt, then this would complicate matters, and though the Sunnis were generally more tolerant about a corrupt Imam than the purist Shia, some Sunnis still did not allow payment of the canonical taxes to a corrupt or unjust collector.[44] The classical Shiʿi position, for example as given by Ṭūsī in his *Ḫilāf*, is that an unjust or sinning Imam is a contradiction in terms because the Imam is incapable of error (*maʿṣūm*), and that payment of *zakāt* could only be legitimate if it reached its legitimate recipients.[45] However, this position represents a classical, crystallised and systematised Shiʿi law, rather than the position of the Imami Shiʿi Imams, whose statements on this topic give a more ambivalent, shifting picture than Ṭūsī would have us believe.[46] In fact, the Imamic hadiths show evidence of having been formed in dialogue

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[40] For the piety-minded opposition to Umayyad rule, see HODGSON 1974, I: 241-279. See also the historical framework provided by SCHACHT 1964.

[41] Steven Judd has provided a salutary critique of the oversimplified image that, 'the ʿAbbaasids were religious; the Umayyads were not', and that Hodgson's idea of the 'piety-minded opposition' to the Umayyads implied that the scholarship of the hadith scholars and legal scholars under the Marwanids was 'inherently subversive, if not openly revolutionary'. JUDD 2014: 5.

[42] For possible evidence of such governmental innovation, see SIJPESTEIJN 2013: 195.

[43] The different positions on this question are summarised by ZYSOW, 'Zakāt', *EI²*.

[44] See Māwardī, quoted by CALDER 1981: 474, and below.

[45] According to Ṭūsī, both al-Šāfiʿī, and Ibn Ḥanbal and most of the hadith folk believed that the sinning (*fisq*) of a Caliph did not invalidate their Imamate, while many of the jurists, including some of the companions of al-Šāfiʿī believed that sinning would invalidate an Imamate, presumably thereby making the payment of *zakāt* to him impossible. Al-Ṭūsī, *Ḫilāf*, II: 32-33.

[46] And more complicated than what is suggested by Kohlberg's comment, based on his reading of Kulaynī's *Kāfī* and Ṭūsī's *Niyāha*, that 'Both *zakāt al-māl* [...] and *zakāt al-fiṭra* [...] may only be distributed

with the broader spectrum of juristic opinions amongst the pious opposition. As we shall see, the hadiths of Imams Bāqir and Ṣādiq are also contradictory in significant ways.

The statements of the Shiʿi Imams are, in fact, comparable in several ways to the discourse in early Sunni texts. Key questions include whom should one pay *zakāt* to; whether *zakāt* counts if it is extracted by a ruler coercively; whether and under what circumstances the individual should distribute taxes autonomously; and which kinds of people constitute legitimate or preferable recipients for *zakāt*. While the Shia may have objected to Umayyad power, in some statements, the Shiʿi Imams clearly state that the canonical taxes taken by the rulers are legitimately counted towards a Muslim's ritual duty. Several Imamic hadiths make the point that *zakāt* and other taxes taken through coercion by the authorities are to be counted as fulfilling one's obligation to pay the canonical taxes. These tend to deal with the 'visible' property that can be ill concealed from tax collectors: livestock, the produce of agriculture and mines.[47] In one such report, Ṣādiq is depicted as saying that, given the option, it is preferable not to pay *zakāt* to the Umayyad-era caliphal authorities:

> Abū ʿAbd Allāh [Ṣādiq] (AS) said regarding *zakāt*: 'Whatever Banū Umayya takes from you, that is counted [towards your *zakāt*], but do not give them anything if you are able, for [one's] property will not last in this case if you pay *zakāt* twice (? – *fa-inna ʾl-māl lā yabqā ʿalā hāḏā in tuzakkīhi marratayn*)'.[48]

Ultimately, despite the preferred principle of avoidance of the caliphal taxman, believers are given a pragmatic dispensation from having to pay *zakāt* twice in the case of coercive collection of taxes, apparently in order to avoid the unnecessary diminution of capital. It is interesting to note the specifically Umayyad context, which locates this statement in a particular political landscape of the pious opposition to the Umayyads. This Umayyad context and the tolerant attitude to governmental collection suggest that this may well be an early opinion, contrasting to later, more intransigent Imami juristic opinions.

The position ascribed to Ṣādiq may be compared with that of his fellow Medinan, Mālik b. Anas (d. 179/795) as reported by the Māliki Saḥnūn (d. 240/855), who recalls a question to Mālik about the case of Ḫāriǧites who conquer a land and usurp the *ṣadaqāt* and the *ḫarāǧ*.[49] Mālik is quoted as responding, 'I do not see that it should be taken from them a second time'.[50] Mālik's case deals with the rule of the Ḫāriǧites instead of the Umayyads,[51] but the legal question is the same: do canonical taxes collected by an illegitimate authority under coercion still count for the fulfilment of the believer's ritual duties? While Mālik and

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among Imāmīs'. See KOHLBERG 1985: 101.

47 KULAYNĪ, *al-Kāfī*, III: 543-544; IBN BĀBŪYAH, *Faqīh*, II: 42; 3:543. These deal with overlapping taxation categories, including *zakāt*, *ḫarāǧ* and *ʿušr*, the distinction between which was a topic of disagreement between early jurists. See SATO, ''Ushr', *EI²*.

48 KULAYNĪ, *al-Kāfī*, III: 543.

49 Saḥnūn continues to invoke other authorities to back up Mālik, also adding the consideration of tolls and taxes on 'bridges and roads', SAḤNŪN, *al-Mudawwana al-Kubrā*, I: 285.

50 Ibid.

51 The passage from Ṭūsī's *ḫilāf* cited above similarly deals with a usurping (*mutaġallib*) ruler. ṬŪSĪ, *Ḫilāf*, II: 32-33.

Ṣādiq may not see eye-to-eye on the identity of the Imam, they do, in this case, appear to have the same position on this question.

Thus, we may say that, in conformity with an early Sunni Medinan juristic opinion on the subject, some Imamic statements indicate that payment of *zakāt* to illegitimate ruling Imams is to be tolerated, if not celebrated. This is in contrast with the classical position expressed by Ṭūsī in which the canonical taxes paid to an illegitimate Imam are, by definition, illegitimate themselves.[52] However, within the corpus of Imamic statements on *zakāt*, we do also have statements that are intolerant to the payment of *zakāt* to an unjust Imam. The most extreme statement regarding the payment of *zakāt* not only denies that any *zakāt* paid to an unjust Imam could be legitimate, but furthermore, it demands that all back taxes should be repaid:

> From Zurāra and Bukayr and al-Faḍīl and Muḥammad b. Muslim and Burayd al-ʿIǧlī from Abū Ǧaʿfar [al-Bāqir] and Abū ʿAbd Allāh [al-Ṣādiq] they spoke regarding a man who belongs to one of those heresies (*ahwāʾ*); the Ḥarūriyya [i.e. Ḫāriǧites], the Murǧiʾa or the ʿUṯmāniyya or the Qadariyya, then repents and knows this affair [the Imamate], and amends his opinion: should he repeat every prayer he prayed or fast or *zakāt* or *ḥaǧǧ*? Is it not incumbent upon him to repeat some of that? [The Imam] said, 'He need not repeat any of that except the *zakāt*, which he must pay, because he gave the *zakāt* to someone other than its proper recipients, for its proper recipients are only the *ahl al-walāya* [i.e. the Shia]'.[53]

This decision is based on a piece of juristic reasoning based on the fact that prayer, hajj and fasting do not have a recipient, and therefore pertain only to the performer, but *zakāt* has recipients in the world, and therefore is invalidated if it is paid to the wrong person, and assuming here that the Imam and his functionaries are the only ones with the requisite justice to make sure the *zakāt* reaches its correct recipients. When invalidated, the purificatory function of payment remains unfulfilled. While this is intellectually consistent, its consequences for social group dynamics are liable to be extreme, as it sets an exceptionally a high bar for conversion of one's allegiance to the Imam,[54] and suggests the ritual impurity of those whose allegiance is to another Imam. Even so, in itself, repaying *zakāt* that has been misappropriated is not unknown in Sunni jurisprudence. As Calder notes, in the case of a corrupt tax-collector (*ʿāmil*):

> Māwardi acknowledged that if the ultimate distribution was unjust (not in accord with the law) the individual should not in fact pay his *zakāt* to the *ʿāmil* but should hide it, or, if it was taken willy nilly, should repeat the *zakāt* in order to gain reward.[55]

The big difference between Māwardī's position and the Imams' is that the Imams explicitly invoke sectarian theological criteria rather than injustice or corruption. This position may

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52 Ibid.

53 Kulaynī, *al-Kāfī*, III: 545.

54 Dakake suggests that this would have been an unrealistic expectation. Dakake 2007: 248.

55 Calder 1981: 474.

allow for attenuation according to circumstance,[56] but nevertheless we may note that Bāqir and particularly Ṣādiq appear to move the Shiʿi discourse on canonical taxes towards what will become a formal division between confessional groups, establishing matters of belief as determinants of ritual practice, and therefore also powerful determinants of social boundaries. The ritual implications extend beyond *zakāt* itself, for it was understood that unless *zakāt* was paid in its proper place, prayer would be invalidated.[57] From the perspective of dating it is interesting to note that the rather specific 'heretical' groups mentioned here are early sects, though they continue to survive in the heresiographical imagination,[58] and therefore might easily be a later construction of groups known to have been active in the Umayyad period.

We are faced with a problem when we compare this latter report of Bāqir and Ṣādiq, which is intolerant to mispaid *zakāt*, with the previous Imamic report, which is more tolerant of, albeit not encouraging towards, payment to the Umayyads. What is the explanation for this clear divergence? It is possible that it was generated later, as we might be led to suspect from the fact that the more intolerant attitude conforms more closely to the more hermetic sectarian divisions of the classical Shiʿi jurists? One possibility, then, is that the apparently more tolerant opinion is earlier, before the crystallisation of sectarian positions. Another explanation may relate to the precise context implied. In the latter report from Bāqir and Ṣādiq the context is subtly different, as it does not refer to faithful Shia who pay *zakāt* due to coercion (a context also applicable to the opinion ascribed to Mālik) but rather it refers to committed members of 'heretical' non-Shiʿi groups who later convert to follow the right Imam. Thus, the reason for the discrepancy may be due to an implicit distinction between payment to an unjust Imam by faithful Imamis for reasons of coercion, and payment to an unjust Imam by those who are fully committed to that unjust Imam. In the latter case, one's *zakāt* has not been legitimately paid, because one was living beyond the community of salvation, and therefore must be paid again.[59]

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56 This hadith is followed by one in which Ṣādiq states that if a man does his best to identify the appropriate recipient, but he cannot, then he need not pay his *zakāt* a second time, KULAYNĪ, *Kāfī*, III: 545.

57 Ibid.: 499; 506. The danger of non-payment of *zakāt* was no insignificant matter. Because of failure to properly perform *zakāt*, we are told, the majority of Muslims were destined for damnation. Ibid.: 497.

58 Ḥarūriyya is one of the names applied to the early Ḫāriǧites, whose successive uprisings posed a prominent threat to governmental authority in Iraq up until the end of the Umayyad period. See DELLA VIDA, 'Khāridjites', *EI²*. The word *murǧiʾa* did continue to be used by Shia both as a specific theological label and as a more general derogatory name for Sunnis into the ʿAbbasid period. See MADELUNG, 'Murdjiʾa', *EI²*. The ʿUthmāniyya did not continue to exist beyond the 4th/10th century, CRONE, 'ʿUthmāniyya', *EI²*. The Qadariyya, were an equally early movement, the precursors of the Muʿtazila in upholding human free-will, VAN ESS, 'Ḳadariyya', *EI²*.

59 This explanation is plausible, but it does not match the explicit reason given by the Imam: the *zakāt* has not reached its proper recipient, a reason which would presumably hold the same regardless of conviction or coercion.

7. Generational tension between Imamic opinions

One possible explanation for the internal contradictions between the Imamic statements is that there was a generational change in policy between the Imams as they responded to the great upheavals of their day: the uprisings and instability of the late Umayyad times followed by the regime change and suppression of the Shia under the ʿAbbasids. The existence of a generational change in Imamic opinion is, in fact, explicitly borne out within some of their hadiths. Ṣādiq appears in one statement as explicitly raising questions about his father's legal opinions, in the process of developing his own position on the subject:

Sulaymān b. Ḫālid said:

> I heard Abū ʿAbd Allāh [al-Ṣādiq] say, 'My father [Bāqir]'s companions came to him and asked him about [the taxes which] the Sultan takes, so he felt compassion for them (*fa-raqqa lahum*), though of course he knew that *zakāt* is not licit except for its proper recipients, and he ordered them to count it [as part of what they need to pay for *zakāt*] and by God! I continued to cogitate about them, and I said to him, "Oh father! If they listen to you, then not one of them will pay *zakāt*!" And he said, "Oh my son! [That is] a duty/tax (*ḥaqq*) that God prefers to make manifest (*ḥaqqun aḥabba 'llāhu an yuẓhirahu*)"'. [60]

This is a difficult passage, but it is clear that Bāqir is allowing his followers to count what the Sultan appropriates towards their canonical *zakāt*, even though the illegitimacy of the Caliph means that the *zakāt* might not go to its proper recipient. In this hadith there appears to be a tension between Ṣādiq's idealism and Bāqir's pragmatic dispensation to allow payment to the illegitimate Caliph to fulfil ritual requirements, regardless of its ultimate destination. In this sense Bāqir appears to fit into the framework of pragmatic tolerance that existed among Sunni jurists, while Ṣādiq seems to take a step closer towards the classical Imami opinion, which regards only payments to the true Imam, that is, the Shiʿi Imam, as legitimate. Can we read this as a generational shift? If so, it is not the only such hadith that suggests a generational shift.[61] While this does not clear up the problem of contradiction entirely (after all, the most intransigent statement requiring the payment of back taxes is ascribed to both Bāqir and Ṣādiq) it seems plausible that the contradictory nature of the Imamic law of *zakāt* may, in part, have been due to generational development in the policy between Bāqir and Ṣādiq, as they responded to changing circumstances. Tolerance towards caliphal collection seems to have been the Imamic norm, stemming from a pragmatism common also to some Sunnis, however, as later statements ascribed to Ṣādiq's son, Mūsā al-Kāẓim, also grant dispensations for his followers to pay *zakāt* to the caliphal agents under circumstances of coercion.[62] It seems likely then, that, in contrast to the general Imami Shiʿi doctrinal assertion of the universality, ahistoricity, and harmoniousness of the

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60 Kᴜʟᴀʏɴɪ, *al-Kāfī*, III: 543.

61 See, for example, Ṣādiq's gloss on the Quranic *ġanīma* verse (8:41), in which he appears to contrast his opinion with his father's. Kᴜʟᴀʏɴɪ, *al-Kāfī*, I: 544. It would be interesting to take a larger sample of hadiths on related topics to see if there are apparent generational differences between Bāqir and Ṣādiq that might indicate similar patterns.

62 Kᴜʟᴀʏɴɪ, *al-Kāfī*, III: 543-554; Iʙɴ Bāʙūʏᴀʜ, *Faqīh*, II: 42.

law of the Imams, instead, they responded to political circumstances to make judgements about the payment of taxes. This generated internal contradictions that were later glossed over by the Occultation era classical Twelver jurists.

8. Giving to the initiated

If an individual distributes the *zakāt* autonomously instead of giving it to the Imam for distribution this raises a further set of issues, in particular in determining an appropriate recipient. Though the classes of people eligible to receive *zakāt* were understood to have been explicitly designated in Quran 9:60, the religious affiliation of the recipients also came to be a consideration affecting the proper distribution of the *zakāt*. The Imamic had-iths imply the existence of inner and outer circles of religious legitimacy that were under-stood as separate categories. The hallowed inner circle consisted of the *ahl al-walāya*, Shi'i Muslims who recognised the rightful Imam. The next circle consisted of unknown Mus-lims, followed by non-Muslims, and in the outer darkness, to be avoided at all costs, were the vocal anti-Shi'i Muslims (the *nāṣibī*s), to whom *zakāt* was categorically denied.[63]

In the following report on the distribution of *zakāt* we are given a further sense of Ǧa'far al-Ṣādiq's shifting policy in defining who is a legitimate recipient of *zakāt*. In this report, the operative element is not the recipient's professed religious identity, but what the recipient 'knows', which may, perhaps, allude to sectarian affiliation, to one's spiritual ranking, or to some other criterion. Ǧa'far al-Ṣādiq is questioned by Zurāra about whether the Quranically-stipulated recipients should receive the *zakāt*, 'even if they do not know?' Ṣādiq responds as follows:

> The Imam gives to all of those because they concede obedience to him. And Zurāra said: 'And if they do not know!?' And [Ṣādiq] replied: 'Oh Zurāra, if those who know were given [the *ṣadaqa*], to the exclusion of those who do not know, then not enough proper recipients would be found for the alms. And we only give to the one who does not know in order to encourage him in faith, and make him firm in it. But as of today, you and your companions must not give to anyone but someone who knows. Whoever you find among those Muslims who is knowing, then give to him rather than the [ordinary] people (*nās*)'.[64]

This report is mysteriously elliptical. We cannot be exactly sure *what it is* that these people do not know. It might be the identity of the true Imam, thereby equating this report with the above-mentioned report, which refers to the people of *walāya*. In this case, 'those who do not know' might perhaps refer to Zaydi-style Shia who do not acknowledge the distinctive claim of the Fatimid lineage. Or it might refer to some kind of esoteric or initiatory knowledge that neophytes are excluded from, as in the Fatimid Ismaili,[65] Nuṣayri,[66] or

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63 See, for example, the test-case of the unknown beggar, KULAYNĪ, *al-Kāfī*, IV: 13. See also KOHLBERG 1985. Dakake has a similar model for envisaging the Shi'i community as an inner circle within the wider Muslim community. DAKAKE 2007: 241.

64 IBN BĀBŪYAH, *Faqīh*, II: 4-7.

65 See DAFTARY 1998: 92-93.

Druze models.[67] We see, however, that there are not enough of these initiates to act as recipients for the *ṣadaqa* of all the Shia. Ṣādiq indicates that Zurāra and his companions[68] are in a select circle advised to act in a particularly meticulous manner by distributing *ṣadaqa only* within the circle of initiates. This would also appear to adjust our understanding of what Dakake sees as an essentially non-hierarchical community in which charity is regulated according to membership in the Shiʿi community in its largest possible sense.[69] This kind of inward-looking fiscal practice, if carried through, would lead to a community with an internalising, insular sacred economy centred upon the figure of the Imam, and perhaps was the basis for the core of the intensely sectarian community that emerged over the course of the ʿAbbasid era.

9. Conclusion

In conclusion, the creation of a sectarian community is not just a matter of belief, but also the introduction of structures and protocols that crystallise and formalise boundaries. While we cannot pinpoint exactly the moment of genesis of the Imam-centred *zakāt* collection procedures in the Imami community, these statements of Bāqir and Ṣādiq clearly express a set of protocols that tend to separate their followers from the wider community, establishing a hierarchy of excellence and access to the Imam. Given the scanty sources, Imams' hadiths are among our best evidence for the origins of the insular Imami fiscal system: a system which became so very important at the time of the death of Kāẓim, and even more so upon the death of al-ʿAskarī, when it was the fiscal agents who announced the new era of the Occultation, and took quasi-Imamic authority upon themselves. There are three aspects which give us hope that what we are looking at reflects some historical reality: firstly, the Imamic hadiths diverge from classical Imami positions expressed in works of hadith and *fiqh* from the fourth/tenth century, and especially the fifth/eleventh century, being less intransigent, and closer to Sunni discourses, suggesting that they may well represent an earlier state of thinking and acting, in which Shiʿi discourse was less clearly demarcated from proto-Sunni and other schools of thought. Secondly, there are indications within the hadith reports themselves that the Imams recognised change between their opinions, suggesting that they were reacting to historical circumstances and the developing legal discourse. While we cannot clearly correlate these changes with particular historical events, it is significant that they appear to be engaged with the evolution of doctrine. They do not claim to express timeless truths, but suggest shifting realities that must be explained and justified. Thirdly, some of these hadith reports allude to the specific historical context of the Umayyad period, suggesting perhaps that the Imamic position on *zakāt* began to be

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66 See, for example, FRIEDMAN 2010: 115-118.

67 See HODGSON, 'Durūz', *EI²*.

68 Zurāra b. Aʿyan died in 150/767, placing him firmly during the lifetimes of Bāqir and Ṣādiq. For the biography of Zurāra, based on Naǧāšī and Kaššī, see SACHEDINA 1988: 42.

69 This stems from Dakake's reading of the phrase *ahl al-walāya*, with relation to the giving of charity. See DAKAKE 2007: 247-249.

articulated against the backdrop of political instability and opportunity towards the time of the fall of the Umayyad dynasty. If the development of the Imamic legal discourse on *ṣadaqa* is compared to that on *ḫums* and other revenue categories, and institutional mechanisms in the Imami community, we will be able to understand these processes more broadly, including the question of authenticity, and the generational developments.

The statements of the Imams during the second/eighth century begin to reflect, though not uniformly, a movement towards the creation of a distinct sectarian community; a community whose members are recommended to avoid paying the canonical Islamic taxes to the caliphal government, though not to the extent of active civil disobedience. Even when distributing the alms autonomously, the individual is not freed from considerations of communitarian affiliation. The autonomous payment of *zakāt* has two aspects that indicate the developing communitarian logic of an insular Imami sacred economy:[70] firstly, giving within the circle of Imamis is preferable to giving to non-Shia, non-Muslims, and especially to anti-Shiʿi Muslims. Secondly, even in payments to other Shia, there appears to be a categorical distinction between the initiated, 'those who know', and the uninitiated, 'those who do not know'. The context implied in the report suggests that a different set of rules apply to the inner clique of the Imams' supporters: Zurāra and his companions. This, then, perhaps suggests the context in which the creation of an insular sectarian fiscal regime was erected, not by Imamic decree to the entirety of the Shia[71] but by the gradual development of special protocols for those closest to the Imam. This group of like-minded men was motivated by the broader scripturalist turn that also characterised the development of early Sunnism,[72] but they set themselves apart by their pious attachment to the Imam, leading them to bind themselves by rules of greater strictness than their co-religionists in the broader society. This begs the question: did there continue to be an inner clique of initiates set apart from the wider group of followers of the Imams,[73] or did the ritual practices of those paradigmatic Shiʿi notables ultimately trickle down and extend to a greater Shiʿi community, including particularly strictly regulated habits with regard to the payment of canonical Islamic taxes?

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70 See above, footnote 11.

71 This, in any case, was very likely not a categorisation that had much meaning at this time of fluidity and rapidly changing group identities. On the lack of homogeneity of early Shiʿism, see VAN ESS 1991, I: 272-274.

72 By 'scripturalist turn' I refer to the general tendency in the second/eighth and third/ninth centuries to preserve, produce and transmit explicit, and increasingly written, texts in order to support existing practices and ideas, a tendency that gave rise to the great hadith collections, Quranic exegesis, and hadith-based *fiqh* works.

73 This possibility is interesting to consider with regard to Amir-Moezzi's largely theological-doctrinal conception of early Shiʿism as focused upon an esoteric core. See AMIR-MOEZZI 1994.

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A Dispute between Ḥanafis and Twelvers about *Mut'a* (First Half of 2nd c. AH)

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Abstract

Disputes between scholars of different backgrounds were usual in the first two centuries AH, which was the formative period of the Islamic system of law. At that time each geographical centre, mainly Mecca, Medina, Kūfa, Baṣra, and within each centre, each scholar, was proposing his own legal solution and was justifying it based on his own interpretation of the Quran and the Prophetic tradition. The *iḥtilāf* literature is rooted in that period. One of the controversial subjects concerns the lawfulness of the temporary marriage (*nikāḥ al-mut'a*), which was a matter of sharp divergences between a group of the Shia, the Twelvers, and the remaining law schools. The subject matter of this paper does not concern the legal polemics about *mut'a*, rather it exclusively aims to highlight the interpersonal relationships between the scholars involved. At my knowledge, I quote all sources regarding these personal relations. Only the Imami jurist al-Kulaynī reports three hadiths including disputes between the most preeminent representatives of the Twelvers, namely Abū 'Abd Allāh Ǧa'far al-Ṣādiq and Abū Ǧa'far, and their Ḥanafi opponents, namely Abū Ḥanīfa and his disciple Zufar. The first controversy was between Abū 'Abd Allāh and Abū Ḥanīfa; the second involved Abū Ǧa'far and Abū Ḥanīfa; the third one concerned Abū Ǧa'far and Zufar. The presentation of al-Kulaynī obviously sheds a good light on his school and its representatives and takes for granted the Imami legal justification of the doctrines he describes.

Key words: Ḥanafis, Twelvers, *mut'a*, interpersonal relationships

1. Introduction

Disputes between scholars of different backgrounds were usual in the first two centuries AH, which was the formative period of the Islamic system of law. At that time each geographical centre, mainly Mecca, Medina, Kūfa, Baṣra, and within each centre, each scholar was proposing his own legal solution and was justifying it based on his own interpretation of the Quran and the Prophetic tradition. The *iḥtilāf* literature is rooted in that period.

One of the controversial subjects concerns the lawfulness of the temporary marriage (*nikā al-mut'a*), which was a matter of sharp divergences between a group of the Shia, the Twelvers, and the remaining law schools. The Imami jurist al-Kulaynī (d. 328/939) reports three hadiths, including disputes between the most preeminent representatives of the Twelvers, namely Abū 'Abd Allāh Ǧa'far al-Ṣādiq and Abū Ǧa'far, and their Ḥanafi opponents, namely Abū Ḥanīfa and his disciple Zufar. The first controversy was between Abū 'Abd Allāh and Abū Ḥanīfa; the second involved Abū Ǧa'far and Abū Ḥanīfa; the third one concerned Abū Ǧa'far and Zufar. The presentation of al-Kulaynī obviously sheds a good light on his school and its representatives and takes for granted the Imami legal justification of the doctrines he describes. Thus, the Imami view should be integrated with the Ḥanafi standpoint.

2. Abū ʿAbd Allāh *vs.* Abū Ḥanīfa

> On the authority of ʿAlī b. Ibrāhīm, on the authority of his father, on the authority of Ibn Abī ʿUmayr, on the authority of ʿAlī b. al-Ḥasan b. Ribāṭ, on the authority of Ḥarīz, on the authority of ʿAbd al-Raḥmān b. Abī ʿAbd Allāh, who said that he heard Abū Ḥanīfa ask Imam Abū ʿAbd Allāh (Ǧaʿfar al-Ṣādiq) about *mutʿa*, and he replied, 'About which of the two *mutʿa*s are you asking?' He said, 'I have already asked you about the *mutʿa* of *ḥaǧǧ* [the enjoyment of the freedom of normal life after the pilgrim's state of ritual consecration], so inform me about the *mutʿa* of women. Is this a man's right?' He replied, 'Glory be to God! Have you not read in the book of God, *Since you enjoy them, give them their recompense* (Q 4:24)?' Abū Ḥanīfa said, 'By God, it is as I have never read that verse!'[1]

Abū ʿAbd Allāh Ǧaʿfar al-Ṣādiq ('the trustworthy') b. Muḥammad al-Bāqir b. ʿAlī Zayn al-ʿĀbidīn (d. 148/765), a contemporary of Abū Ḥanīfa, was born in Medina, where he continued to live. His historical role is relevant, because he was the last imam recognised by both Twelvers and Ismailis. Nevertheless, Ismailis do not follow his doctrine on *mutʿa*. Ǧaʿfar al-Ṣādiq was renowned as a great scholar by both Shiʿis and Sunnis. As a matter of fact, he is an essential point of reference of the Imami doctrine and he is also mentioned in the Sunni *isnād*s. A wide circle of scholars learnt hadiths from him and he had many disciples who specialised in different sciences. Abū Ḥanīfa, Mālik b. Anas, Muḥammad b. al-Ḥasan al-Šaybānī and Sufyān al-Ṯawrī are counted among those who attended his lessons in the field of *fiqh*.[2] Contemporary Imāmī scholars emphasise the role of Ǧaʿfar al-Ṣādiq and his relation with Sunni scholars, stressing that he 'was the original source of the sciences he inherited from his forefathers and from his grandfather, the great Prophet, who had caused the sources of knowledge and wisdom to gush out on earth'.[3] As a consequence, according to this view, Abū Ḥanīfa and Mālik b. Anas were proud on their joining the school of the Imam and attending his lessons. An episode[4] is indicative of the alleged preeminence of Ǧaʿfar al-Ṣādiq over Abū Ḥanīfa:

> Abū Ḥanīfa visited Imam Ǧaʿfar al-Ṣādiq, peace be on him, and said to him: 'I have seen your son, Mūsā, pray while the people were passing before him. He did not prevent them from that.' Abū ʿAbd Allāh (al-Ṣādiq), peace be on him, ordered his son to be brought before him. When he stood before him, he asked him: 'O My little son, Abū Ḥanīfa says that you pray and the people pass before you.' 'Yes, father,' replied Imam Mūsā, 'the One to Whom I pray is nearer to me than them; Allah, the Great and Almighty, says: "We are nearer to him than the jugular vein".' Imam al-Ṣādiq, peace be on him, was very delighted and glad when he heard these wonderful

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1 al-KULAYNĪ, *al-Uṣūl min al-kāfī*, V: 449-450, no. 6. This hadith is translated into English in CALDER, MOJADDEDI & RIPPIN (eds. and transl.) 2003: 55.

2 al-QARASHI 1970: 80; HODGSON. Many works are ascribed to Ǧaʿfar al-Ṣādiq; see SEZGIN 1967: 528-531, no. 7.

3 al-QARASHI 1970: 82-83.

4 Ibid.: 198. This episode is reported from al-MAǦLISĪ, *Biḥār al-Anwār*.

words of his son, so he rose for him, embraced him, and said to him: 'May my father and mother be your ransom, O he in whom secrets have been deposited!'

3. Abū Ǧaʿfar *vs.* Abū Ḥanīfa

'Alī Rafʿa said that Abū Ḥanīfa asked Abū Ǧaʿfar Muḥammad ibn al-Nuʿmān Ṣāḥib al-Ṭāq, 'What do you say, Abū Ǧaʿfar, concerning *mutʿa*? Do you consider it lawful?' He replied, 'Yes.' Abū Ḥanīfa then asked, 'What stops you from instructing your women to have *mutʿa*s on your authority?' Abū Ǧaʿfar answered him, 'Not all activities are desirable even if they should be lawful. People have different capacities and ranks, and they can increase their capacity. But what do you say, Abū Ḥanīfa, about (date) wine? Do you consider that lawful?' He answered, 'Yes.' Abū Ǧaʿfar countered, 'So what stops you from seating your women behind the liquor-stalls to drink on your authority?' Abū Ḥanīfa responded, 'It is one strike each, but your arrow has hit the mark! Abū Ǧaʿfar, the *āya* which is found in the *sūra* that opens with "The questioner asked" [i.e. Q 70] conveys the prohibition of *mutʿa* [Q 70:29-30],[5] and the tradition about the messenger of God abrogates the permission for *mutʿa*.' Abū Ǧaʿfar responded to him, 'Abū Ḥanīfa, the *sūra* that opens with "The questioner asked" is Meccan, while the verse about the *mutʿa* is Medinan, and your prophetic tradition is an unsound transmission.' Abū Ḥanīfa countered, 'The *āya* about inheritance also pronounces the abrogation of *mutʿa*.' Abū Ǧaʿfar responded, 'It is proven that there can be marriage without inheritance.' Abū Ḥanīfa asked, 'On what basis do you say this?' Abū Ǧaʿfar answered, 'If a Muslim man marries a Jewish or Christian woman and then dies, what do you say should happen?' Abū Ḥanīfa said, 'She does not inherit anything from him.' Abū Ǧaʿfar concluded, 'Therefore the possibility of marriage without inheritance has indeed been proven!' Then they parted company.[6]

The figure of Abū Ǧaʿfar is very complex, and the events of his life are narrated in both Shiʿi and Sunni sources. He was an Iraqi scholar, renowned as a theologian and jurist. His full name is Abū Ǧaʿfar Muḥammad b. ʿAlī b. al-Nuʿmān b. Abī Ṭarīfa al-Aḥwal al-Baǧalī al-Kūfī (d. 180/796), nicknamed *Ṣāḥib al-Ṭāq* or *Muʾmin al-Ṭāq* by the Shia (*ḫāṣṣa*) and *Šayṭān al-Ṭāq* by non-Shia (*ʿāmma*), counted among the *aṣḥāb* (companions) of Abū ʿAbd Allāh Ǧaʿfar al-Ṣādiq, highly praised as trustworthy, theologian, skillful, quick to respond.[7] The Sunni al-Ḏahabī (d. 748/1348)[8] qualifies him as belonging to the extreme Shia.

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5   'And those who guard their chastity except with their wives and the (captives) whom their right hands possess—for (then) they are not to be blamed'. An identical wording is reported in Q. 23:5-6: 'Who abstain from sex, except with those joined to them in the marriage bond, or (the captives) whom their right hands possess—for (in their case) they are free from blame'. For the English version of the Quran, I use here the Yusuf Ali translation.

6   al-KULAYNĪ, *al-Uṣūl min al-kāfī*, V: 450, no. 8. This hadith is translated into English in CALDER, MOJADDEDI & RIPPIN (eds. and transl.) 2003: 83-84, no. 8.

7   al-ṬŪSĪ, *al-Fihrist*, 131-132, no. 583.

8   al-ḎAHABĪ, *Siyar Aʿlām al-Nubalāʾ*, X: 553-554, no. 187.

Abū Ǧaʿfar's literary activity was intense. He wrote many books, mentioned in the primary sources, such as Ibn al-Nadīm (d. 385/995),[9] al-Naǧāšī (d. 450/1058),[10] al-Ṭūsī (d. 460/1067),[11] al-Ḏahabī,[12] but all of them are considered lost.[13] He was a skilful controversialist, especially on the issue of Imamate, about which he composed *Kitāb al-iḥtiǧāǧ fī imāmat amīr al-muʾminīn* (Evidence for the Imamate of the Commander of the Faithful), also entitled *Kitāb al-Imāma* (The Book of the Imamate), and *Kitāb al-radd ʿalā ʾl-Muʿtazila fī imāmat al-mafḍūl* (The Book of Refuting the Beliefs of the Muʿtazilites on the Imamate of the Less Excellent). He discussed theological and legal issues with his contemporaries, namely the doctrines of the Ḥawāriǧ, in his *Kitāb kalāmihi ʿalā ʾl-Ḥawāriǧ* (theological debates with the Ḥariǧites, containing his debates with them and their corrupt beliefs). But he notably debated with his compatriot Abū Ḥanīfa, as it is attested by his work *Kitāb Maǧālisihi maʿa Abī Ḥanīfa waʾl-Murǧiʾa* (debates with Abū Ḥanīfa and the Murǧiʾa).[14]

Abū Ǧaʿfar is mentioned several times by Western scholars, above all in the context of theology and philosophy.[15] He is also mentioned in connection with the controversies around the Imamate, since he was a staunch defender of this Shiʿi institution.[16]

The Shiʿi sources enhance the figure of Abū Ǧaʿfar and present him as one of the most beloved disciples of al-Ṣādiq. Al-Kaššī (d. 4th/10th c.)[17] reports a statement of Ǧaʿfar al-Ṣādiq, according to which four people were the most beloved to him, alive or dead: Barīd b. Muʿāwiya al-ʿIǧlī, Zurāra b. Aʿyan, Muḥammad b. Muslim and Abū Ǧaʿfar al-Aḥwal.

Al-Qarashi,[18] a contemporary Imami scholar, with some emphasis and with a clear apologetic intent, presents a broad picture of the eminent figure of Abū Ǧaʿfar. He states:

> With this subject matter we will end our talk about this unique, great man who struggled and combated for a long time in the way of Allah and defending the entity of Islam at the time when the ruling authorities pursued the reformers and severely punished the men of knowledge and thought, who spread the merits of Ahl al-Bayt, peace be on them.[19]

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9 IBN al-NADĪM, *The fihrist of al-Nadim*, I: 438.

10 al-NAǦĀŠĪ, *Kitāb al-riǧāl*, 228.

11 al-ṬŪSĪ, *al-Fihrist*, 131-132, no. 583.

12 al-ḎAHABĪ, *Siyar Aʿlām al-Nubalāʾ*, X: 553-554.

13 For a complete list of his works, see VAN ESS 1991-1997, V: 66.

14 The title is also *al-Munāẓara maʿa Abī Ḥanīfa*, a book on the debate with Abū Ḥanīfa. On the life, activities and doctrines of Abū Ǧaʿfar, see VAN ESS 1991-1997, I: 336-342; V: 66-68. See also al-MĀMAQĀNĪ, *Kitāb Tanqīḥ al-Maqāl fī aḥwāl al-riǧāl*, III: 160-163, who reports a summary of the information given by the previous scholars, such as Ibn al-Nadīm, al-Kaššī, al-Naǧāšī, al-Ṭūsī.

15 See, for instance, HOWARD 1990: 20; AMIR-MOEZZI 1994: 11, 180 (no. 275); AMIR-MOEZZI 2011: 222; HALPERIN 1995: 285 (no. 19); POONAWALA 2001: 110, 114 (no. 55), 115 (no. 59), 116; LEAMAN 2006; DAFTARY 1994: 88, 95; GIMARET, 'Shayṭān al-Ṭāḳ'. *EI²*.

16 See, for instance, SACHEDINA 1988: 84.

17 al-KAŠŠĪ, *Riǧāl al-Kaššī*, 164-169, no. 74.

18 al-QARASHI 1970: 551-557, no. 250.

19 Ibid.: 556.

Abū Ǧa'far is considered 'on top of Muslim religious scholars in his jurisprudence, his knowledge, and his defending the religion. However, the early historians mentioned nothing of his viewpoints and legacy except a little bit'.[20] Mu'min al-Ṭāq was formed at the school of al-Ṣādiq and specialized in Islamic philosophy and theology. When Imam al-Ṣādiq passed away, Mu'min al-Ṭāq devoted himself to the Imam Mūsā and took from him many sciences and much knowledge.[21] 'In addition to his specialization in this art, he was among the gifted poets, but he left poetry and practiced theology'.[22]

The Imami sources mention many debates between Abū Ǧa'far and his opponents, which—according to al-Qarashi—'are evidence for his skillfulness and his excellence over them. He was famous for his firm arguments, strong proofs and conclusions'.[23] Some of these controversies involved Abū Ḥanīfa, including their divergence on *mut'a*. Obviously, these episodes put in an unfavourable light Abū Ḥanīfa, while Abū Ǧa'far is presented as having a 'strong evidence, intense opposition, a quick answer, a keen idea, and a clever heart'. Moreover, 'he had with Abū Ḥanīfa other debates indicating his excellence over him and his ability to recall answers'.[24] Some episodes are reported in primary sources.

> Abū Ḥanīfa said to Mu'min al-Ṭāq: 'O Abū Ǧa'far, Ǧa'far b. Muḥammad has died! Your Imam has died!'
>
> Abū Ǧa'far answered: 'But your Imam is among "those who have been granted a respite (*min al-munẓarīn*) until the Day of Resurrection".'[25]
>
> One time [Abū Ǧa'far] met with Abū Ḥanīfa, who asked him: 'I have heard something about you, o People of Shia!' He replied: 'What is it?' [Abū Ḥanīfa] said: 'I have heard that when one of you dies, you break his left hand, so that he may be given his book in his right hand.' [Mu'min al-Ṭāq] replied: 'O Nu'mān, it is a lie fabricated against us. However, I have heard about you, o People of the Murǧi'a, that when one of you dies, you restrain a funnel in his back and pour a jar of water in it, so that he may not be thirsty on the Day of Resurrection.' Abū Ḥanīfa said: 'It is a lie fabricated against us and you.'[26]
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> One time [Abū Ḥanīfa] asked Mu'min al-Ṭāq: 'Do you believe in the return?' He answered: 'Yes.' Abū Ḥanīfa replied: 'Give me now one thousand dinars, so that I

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20 Ibid.: 551.

21 Ibid.: 552.

22 Ibid.: 553.

23 Ibid.

24 Ibid.

25 al-KAŠŠĪ, *Riǧāl al-Kaššī,* 166. This episode is also reported with variants by al-ṬABARSĪ, *Kitāb al-iḥtiǧāǧ 'alā ahl al-liǧāǧ*, 381: 'When Imam al-Ṣādiq passed away, Abū Ḥanīfa saw Mu'min al-Ṭāq and asked him: "Has your Imam died?" He answered: "Yes, but your Imam is among those who have been granted a respite until the Day of Resurrection."' The term *munẓarūn/munẓarīn* reminds the Quran: 'Then they will say: "Shall we be respited?"' (Q. 26:203); 'We send not the angels down except for just cause: if they came (to the ungodly), behold! no respite would they have!' (Q. 15:8); 'And neither heaven nor earth shed a tear over them: nor were they given a respite (again)' (Q. 44:29).

26 al-KAŠŠĪ, *Riǧāl al-Kaššī*, 168.

will give it back to you when we shall return.' Al-Ṭāqī said to Abū Ḥanīfa: 'Give me a warrantor that you will return as a man and not as a pig'.[27]

Another day Abū Ḥanīfa was walking with Mu'min al-Ṭāq in one of the paths in Kūfa when a man was yelling: 'Who will lead me to a lost child?' Mu'min al-Ṭāq said: 'As for the lost child, we did not see him, but if you are looking for a lost *šayḫ* then take this!' He meant Abū Ḥanīfa.[28]

4. Two doctrines in opposition

The first report, involving Ǧaʿfar al-Ṣādiq and Abū Ḥanīfa, makes Abū Ḥanīfa seem as if he were not able to fully understand the meaning of Q 4:24 ('Seeing that ye derive benefit from them give them their dowers (at least) as prescribed'). This seems quite unlikely, because the Ḥanafi school admitted at its beginning that this verse really refers to *mutʿa*, as stated by Ibn ʿAbbās. However, Ḥanafis also believed that Ibn ʿAbbās changed his mind before his death.[29]

The second report, concerning Abū Ǧaʿfar and Abū Ḥanīfa, falls more in detail into two opposite doctrines. The discourse evolves in the form of a cross-disputation, as a polemical match. One seeks to make his opponent fall in contradiction. In this way, to the statement of Abū Ǧaʿfar declaring lawful the *mutʿa* marriage, Abū Ḥanīfa provocatively replies to let his wives practise it. But Abū Ǧaʿfar immediately polemically counters to Abū Ḥanīfa to let his wives drink wine, because he believes drinking wine is lawful. So, the response of Abū Ǧaʿfar is a counter-argument, concerning a rule rejected by the Sunni schools, except the Ḥanafi school, and by the Shia as well. The Arabic term used in the report for wine is *nabīḏ*. The lawfulness of drinking *nabīḏ* was a disputed matter at that time. Some Prophetic traditions report that *nabīḏ* was among the drinks prepared by Muḥammad's wives and drunk by him. Nevertheless, only the Ḥanafi school allowed its use.[30]

Abū Ǧaʿfar and Abū Ḥanīfa then move on more merely legal arguments. The key question concerns the interpretation of Q 4:24. According Abū Ḥanīfa, Q 70:29-30 abrogates *mutʿa*. On the contrary, Abū Ǧaʿfar replies reminding him of the well-known principle of *nāsiḫ wa-mansūḫ*; i.e., the method of solving a discrepancy between verses indicating different regulations having recourse to the criterion based on the chronology of the revelation.[31] In this specific case, verses mentioned by Abū Ḥanīfa were revealed in Mecca, while Q 4:24 was revealed in Medina. According to the Twelvers, this implies that Q 4:24 has not been abrogated.

The later Ḥanafi doctrine, as attested by al-Saraḫsī (d. 483/1090),[32] changed the view of Abū Ḥanīfa, giving a different interpretation of Q 4:24. While Abū Ḥanīfa believes that

27 al-ṬABARSĪ, *Kitāb al-iḥtiǧāǧ ʿalā ahl al-liǧāǧ*, 381.

28 Ibid.

29 al-SARAḪSĪ, *Kitāb al-Mabsūṭ*, V: 152. See also IBN QUDĀMA, *al-Muġnī*, VII: 572.

30 See HEINE, 'Nabīdh', *EI²*; WENSINCK & SADAN, 'Khamr', *EI²*; SADAN, 'Mashrūbāt', *EI²*.

31 See BURTON, 'Naskh', *EI²*.

32 al-SARAḪSĪ, *Kitāb al-Mabsūṭ*, V: 153.

Q 4:24 actually refers to *mutʿa*, even if it was later abrogated, the reformed doctrine maintains that the sentence of this verse 'Seeing that ye derive benefit from them' refers to wives married to a permanent contract. According to this view, such interpretation is confirmed by the previous words of the same Quranic verse: 'provided ye seek (them in marriage) with gifts from your property,—desiring chastity' (*muḥsinīn*). Now the one who is chaste (*muḥsin*) is a man who wants to get married in a permanent way (*nākiḥ*).

Another Quranic argument presented by Abū Ḥanīfa to Abū Ǧaʿfar against the lawfulness of the *mutʿa* concerns the right of spouses to inherit from each other. Such right derives from a permanent marriage, but it is excluded in a *mutʿa* marriage. Abū Ḥanīfa was not so naïve as to not know that a Jewish/Christian woman does not inherit from her Muslim husband. He could reply to Abū Ǧaʿfar that a *mutʿa* contract and a permanent marriage between partners of different denomination represent two completely different cases. In fact, with reference to a permanent marriage, the impediment to inherit exists in the presence of a valid contract while, according to Abū Ḥanīfa, a *mutʿa* union absolutely excludes the right to inherit between partners, precisely because of the lack of a contract. In conclusion, this report extols the figure and the doctrine of Abū Ǧaʿfar and makes Abū Ḥanīfa look like a naïve.

Al-Saraḫsī[33] adds further proofs, based on the Quran and attested in the Hadith literature, against the lawfulness of the *mutʿa*. As a matter of fact, it is reported that ʿĀʾiša mentioned the Quranic verses 23:5-6 against *mutʿa*. Indeed, according to this view, the wording of this revelation implies that a woman married in *mutʿa* is neither a wife nor a slave. In fact, she cannot be considered a wife; firstly, because partners have no right to inherit from each other; secondly, a *mutʿa* contract does not require repudiation (*ṭalāq*); thirdly, a man cannot have recourse to the specific procedures of *ẓihār* (repudiation pronounced using the words: 'You are for me like the back of my mother') and *īlāʾ* (oath of abstinence). Q 23:5-6 clearly admits only marriage and concubinage. Moreover, according to Ibn Masʿūd (d. 32/652-3), a Companion of the Prophet and a reader of the Quran, *mutʿa* was abrogated by the verses on *ṭalāq*, *ʿidda* (period of waiting) and inheritance. In sum, al-Saraḫsī concludes that the Companions agree on the abrogation of the *mutʿa*.

The rejection of the *mutʿa* marriage by Abū Ḥanīfa was also based on Prophetic Sunna. In the report of al-Kulaynī, Abū Ḥanīfa simply stated that the Prophetic tradition abrogates *mutʿa*, while Abū Ǧaʿfar merely countered that the hadith Abū Ḥanīfa spoke of is atypical and refuted. But what are these Prophetic traditions? They are mentioned by al-Saraḫsī.[34] The first tradition concerns what Muḥammad b. al-Ḥanafiyya transmitted from ʿAlī b. Abī Ṭālib, that Allah and his Messenger forbade the *mutʿa* on the Day of Ḫaybar. The second tradition is the hadith of al-Rabīʿ b. Sabra, who said that the Messenger of Allah permitted *mutʿa* the Year of the Victory (*ʿām al-fatḥ*) for three days. Then people refrained from it. Thus, Ḥanafis admit that the Prophet made the *mutʿa* lawful for three days during a military expedition he carried out, when abstaining from sexual intercourse (*ʿuzūba*) became hard; then he prohibited it. We agree, al-Saraḫsī goes on, that it was licit (*mubāḥ*), and such rule remained established (*ṯābit*) until it was abrogated. In conclusion, al-Saraḫsī comments that

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33 Ibid.: 152.

34 Ibid.: 152-153.

absolute lawfulness is not confirmed, but only lawfulness for a short period of three days. After that, if a man utters: 'I get married to you for a month', and the woman answers: 'I give myself in marriage to you', this takes the form of a *mutʿa*, not a *nikāḥ*, even if the word *nikāḥ* is pronounced, because the Ḥanafis believe that a marriage contract does not admit a term. However, for the Ḥanafi school, a decisive proof against the lawfulness of the *mutʿa* is the statement of ʿUmar, who declared that if a man who had married a woman, setting a time limit to the contract, had been introduced to him, he would apply the punishment of stoning; if he knew he was dead, he would stone his grave.

The arguments of the Twelvers against the soundness of the proofs based on Prophetic hadiths are precise and detailed. Al-Ṭūsī[35] criticises the evidence of his opponents, stating, first of all, that all the traditions they mention are *aḫbār āḥād* (traditions or reports going back to one single authority).[36] Moreover, those traditions are contradictory because, according to the report of Ibn al-Ḥanafiyya from his father, *mutʿa* was prohibited on the Day of Ḫaybar, in contrast to what is reported by al-Rabīʿ b. Sabra, that such prohibition occurred in Mecca, the Year of the Victory. Al-Ṭūsī correctly stresses that there was a time lapse of about three years between the two episodes.

Al-Ṭūsī [37] also rejects the statement of his opponents that Ibn ʿAbbās changed his mind. In fact, the contrary is generally admitted and there is no evidence that he changed his doctrine. Lastly, against the decision of ʿUmar, al-Ṭūsī[38] argues that *mutʿa* was practiced at the time of the Prophet. Thus, it is a compulsory rule as a Prophetic Sunna; as such, it must be considered a canonical law (*šarʿ*) and a part of the religion (*dīn*).

5. Abū Ǧaʿfar *vs.* Zufar

Al-Kulaynī[39] reports a hadith referring the opposite doctrines of Abū Ǧaʿfar and Zufar:

> Muḥammad b. Yaḥyā, on the authority of Aḥmad b. Muḥammad, on the authority of ʿAlī b. al-Ḥakam, on the authority of Bašīr b. Ḥamza, on the authority of a man belonging to the Qurayš. He said: 'A very rich paternal cousin sent me this message: You are acquainted that many men have asked me in marriage, but I have never get married. I do not send you this proposal because I desire men, rather I knew that God made it lawful in His Book, and the Messenger of God made it explicit in His Sunna, but Zufar prohibited it. I want to obey God and His Messenger, and to disobey Zufar. Thus, marry me in a temporary marriage'. I answered her: 'Not before I went to Abū Ǧaʿfar and ask him advice.' Then, he added: I went to him and informed him. He answered: 'Do it! God bless your couple!'

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35 al-ṬŪSĪ, *al-Fihrist*, II: 394-395.

36 JUYNBOLL, 'Ḫabar al-Wāḥid', *EI²*.

37 al-ṬŪSĪ, *al-Fihrist*, II: 395.

38 Ibid.: 394.

39 al-KULAYNĪ, *Al-Uṣūl min al-kāfī*, V: 465, no. 1 (included in *Bāb al-nawādir*).

Abū 'l-Huḏayl Zufar b. al-Huḏayl b. Qays al-ʿAnbarī,[40] as pious as he was learned, died in Baṣra in 158/775. He remained with Abū Ḥanīfa more than twenty years. Thus he is one of the most eminent pupils of Abū Ḥanīfa's, at the same level as Abū Yūsuf and al-Šaybānī. He was the most notable among Abū Ḥanīfa's companions in the use of *qiyās*, but he was also learned about Hadith. In general, Zufar may be considered a strict juridically-minded man, rigidly adherent to a legal logic, averse to compromises and ethical considerations, an advocate of the purity of the Islamic principles, and a free-thinker, following sometimes an unlimited *iǧtihād* but not strictly bound to the discipline of his school.

Zufar maintained diverging doctrines from his school, notwithstanding the contrary advice of his master, Abū Ḥanīfa, to the extent that he was sometimes accused of having introduced *bidʿa* (innovation). He frequently distinguished himself from the mainstream of his school. Zufar's freedom and independence of thought also emerge in the solution he gives to the case of *mutʿa*. While the Ḥanafi school agrees on the unlawfulness of the *mutʿa* marriage in any case, Zufar believed that the *nikāḥ* is valid, while the condition, that is, the limitation in time, is null and void, because a marriage contract does not admit a term.[41] Zufar reasons that the general rule is that an unsound condition does not invalidate a contract. For instance, a contract under condition of drinking wine (*ḫamr*) is valid, but the condition is invalid; or a marriage contract under condition that the husband will repudiate his wife after a month is valid, while the condition is null and void. The same reasoning applies to a marriage contract stipulated fixing a term, that is, a *mutʿa* marriage.

As a reply to the arguments of Zufar, al-Saraḫsī—but it can be assumed that it was the reply to Zufar at his time—argues that fixing a time to a contract cannot be equated to a condition, because fixing a term in the *nikāḥ* undermines the very nature of the marriage. This is different, al-Saraḫsī goes on, from the condition to repudiate a wife after a month, because repudiation breaks off a marriage tie, which had previously been stipulated between partners, while a marriage bond just does not exist in the case of *mutʿa*.[42]

6. Conclusion

The pride of the Twelvers pretending a more correct interpretation of the sources is evident in all the Shiʿi works. One wonders whether this claim does have a sound foundation.

Certainly it seems that the interpretation of Q 4:24 given by the Twelvers is more consistent than the one by the Sunnis. It is no coincidence that Abū Ḥanīfa himself believed that it refers to *mutʿa*. Only later was it read by Ḥanafīs as concerning a permanent marriage. In general, Sunni arguments based on the Quran about the rejection of the *mutʿa* seem without a strong basis, first of all because a permanent marriage without a reciprocal right of the spouses to inherit from each other as a consequence of the difference of religion is lawful in Islam, as mentioned by Abū Ǧaʿfar. Secondly, two kinds of marriage (permanent and temporary marriages) can coexist, as they did in pagan times; thus, the evidence

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40 See CILARDO 2008.

41 See also IBN QUDĀMA, *al-Muġnī*, VII: 571.

42 al-SARAḪSĪ, *Kitāb al-Mabsūṭ*, V: 153.

against the *mut'a* exclusively based on absence of repudiation, waiting period, and right of inheritance does not have much sense. Finally, a decisive proof against the Sunni arguments is the principle of *al-nāsiḫ wa'l-mansūḫ*, recalled by Abū Ǧa'far, with reference to Q 4:24 and 70:29-30.

As regards the traditions too, the Imami arguments against their soundness seem more linear. Al-Ṭūsī correctly stresses a chronological discrepancy between the reports of 'Alī b. Abī Ṭālib, and al-Rabī' b. Sabra, pointing out then the inconsistency of the position of the Sunnis. As a matter of fact, on the one hand, Sunnis cannot deny that the practice of *mut'a* continued for some time after Muḥammad's death. But, on the other hand, what is more interesting is the proof they use in order to forbid *mut'a*, that is, a report on the authority of 'Alī, which seems nothing than an accusation to the Twelvers to not follow the doctrine of their fundamental reference. But the truth is that this practice was banned by the Caliph 'Umar. And this is the diriment reason for the Twelvers to invalidate a decision of a usurper who opposed them.

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