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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 *fuqahā'* 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.

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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.

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 *iğtihād* (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-'Alwānī (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

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

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

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 reopening 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

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

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-

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 ʿAbd al-Rahman al-Bakr, and *Nizam al-Qada' fi al-Shariʿah al-Islamiyyah* by ʿAbd 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-

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

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 *iǧtihād*, referring to a reinterpretation 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

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

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 *iğtihād*), 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-Iğtihād al-muʿāṣir* [*Contemporary iğtihād*] 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 *iğtihād*.

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.

68 ZAHALKA 2013: 79-94.

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