# Citizens of Islam
# The institutionalization and internationalization of Muslim legal debate

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## I

It may be rather sophisticated to ask whether we may trace, within the contemporary Islamic debate, the idea that Islam constitutes a specific form of citizenship which transcends traditional forms of national loyalties. This question presupposes that Islamic intellectuals involved in this discussion would address a State of Islam (not simply an Islamic State), and that the *sharīʿa* once codified in form of a constitution and in laws depending thereon would conceptualize such an Islamic nationality or citizenship. In fact, most scholars and intellectuals advocating an Islamic state do not postulate a state unity of the Muslim *umma,* but argue in favour of an Islamic communality in which there is an equilibrium of nation-state identity and Islam. With an international Islamic public emerging, however, the question of the legal identity of the *umma* has again been included in the agenda of the debates.

In my paper I would argue that in contemporary Muslim legal debates there is hardly any scope for a legal conceptualization of the Islamic *umma.* This is contrary to the growing inclination among Islamic radicals of various tendencies to fight for a State of Islam *(daulat al-islām)* which should be totally different from any existing nation-states in the Muslim world. Such a State of Islam should not be confounded with the conception of an Islamic state to which many an Islamic jurist would subscribe instantly. In many parts of the Islamic world radical isolationists regard their small organizations as an expression of the polity of Islam; subjects of such a polity should be all who are accepted as its members. In such a case Islam serves as a marker of identity which often equals "secular" markers of nation-state identity.

The transformation of nation-states in the Muslim world also raised the question of the political identity of what traditionally had been called the Islamic *umma.* In fact, the process of nation-state formation may be mirrored by the legal and intellectual debates on the identity of the

*umma*. As the nation-state required a clear legal frame, the Islamic *umma* also was seen as a legal concept.

During the 18th century, the concept of *umma* had been gradually secularized. The famous Indian scholar Muḥammad Aʿlā ath-Thānawī, who compiled a famous encyclopaedia of technical terms in about 1745, for instance defined the *umma* as an assembly of religion or time or place. He subordinated the religiously defined concept of *umma* under the general idea of *umma* and said that those *umam* to whom a prophet had been sent should be specifically called *ummat ad-daʿwā*.[1] Accordingly, ath-Thānawī perceived the Islamic *umma* as a cultural entity only, without any further political implications. In his definition of *imāma*, he stated that the *imāma* is the "general lordship in matters of religion"; an *imām* should fulfil the five traditional conditions (he must be of good character, intelligent, legally adult, male etc., i.e. he must be a fully responsible free Muslim)[2]; any further religious preconditions of the imamate are explicitly denied except for the capability of being a *mujtahid* in the field of *uṣūl* and *furūgh*. The *imām* does not even have to strive for recognition by the whole *umma*, but only by those who follow him.[3] Legally, the caliph is seen as the *imām* who does not have an *imām* "above him".[4]

The history of political terms of the 18th century has still to be investigated. Up to now only a few conclusions may be drawn from the evidence at our disposal. Some important work has already been done as regards the Ottoman empire[5], but in the case of the Arab provinces thereof, the independent Arab states Algeria and Morocco and Persia we must admit that we still do not know to what extent a new political language developed.

The secularist view of the Indian scholar ath-Thānawī reflects a situation in which the semantics of the *umma* and of the caliphate had

[1] Muḥammad Aʿlā ath-Thānawī, *Kashshāf iṣṭilāḥāt al-funūn*, Calcutta 1863, 1, p. 91.

[2] These, of course, were the common qualities of a *qāḍī*, too; see Abu l-Qāsim ʿAlī b. Muḥammad as-Simmānī (died 493/1100), *Rauḍat al-quḍāt wa-ṭarīq an-najāt*, ed. S. an-Nāhī, 1-4, Baghdad 1970-1974, 1, pp. 5 ss., for a textual discussion see Irene Schneider, *Das Bild des Richters in der "adab al-qāḍī"-Literatur*, Frankfurt a.M. 1990, pp. 230 ss.

[3] ath-Thānawī, 1, p. 92.

[4] Ibid., p. 441, cit. *Jāmiʿ ar-rumūz* of Shamsaddīn Muḥammad al-Kūhistānī (died around 950-962/1534-54) from Bukhara, see ʿAbdalḥayy al-Kattānī *Fihris al-fahāris*, 2:503, Cmt. to *Bidāyat al-mubtadi'* of the ḥanafite jurist ʿAlī b. Abī Bakr al-Farghānī al-Marghīnānī, died 593/1197.

[5] See e.g. Virginia H. Aksan, "Ottoman political writing 1768-1808", *IJMES* 25/1993, pp. 53-69.

dramatically changed. During the period of the large empires, the concept of *umma* had lost all political connotations in favour of the concept of *daula*. Whereas *daula* originally meaning a dynasty, now also comprised the idea of an economically unified territory, the *umma* was restricted to cultural identities. The extensive use of the Ottoman term *ummat-i Muḥammad* shows that from the 16th and 17th centuries on, the *umma* was identified with Islam as a whole and was antagonistically contrasted to the Christian West. In this conntext, *umma* may be best translated by the European term civilization; as in Europe, Muslim intellectuals considered "their" culture as the only true civilization; and they, of course, associated it with the tradition of Islam. Such a civilizationary concept of *umma* could not be interpreted legally. Law had helped to define the frontiers of the empires, and monarchs often sponsored efforts to unify Islamic law under the term of their respective power.[6] Civilizations, however, did not require a specific law, but a moral and aesthetic code which would define the frontiers of the native and the alien.

The "de-legalization" of the concept of *umma* reached a first peak in the 19th century as nation-states in the Middle East started to establish a specific citizenship or nationality and abrogated the traditional forms of sovereignty. On January 9th, 1869, the Ottoman government passed a new law on citizenship[7] which was an adaption of the French law no. 7 of February 11th, 1851, and in which Ottoman citizenship was based on *jus sanguinis* without reference to any religious identity. In fact, this law terminated the long process of secularization which had characterized the political development of the Ottoman Empire from the 18th century onwards. Likwise, the famous codification of the *sharīʿa (mejelle-yi aḥkām-i ʿadlīya)* as civil law promulgated in 1877 marked a further step in the process of secularization. The *sharīʿa* as modelled in the *mejelle* had to be used by secular tribunals whereas the *qāḍī* courts continued to judge according to the unwritten ḥanafite tradition.[8]

[6] For instance the famous *al-Fatāwā al-ʿĀlamgīrīya*, sponsored by the Mughal Emperor Aurangzīb ʿĀlamgīr (1067/1658-1118/1707).

[7] I do not want to make a distinction between the subject in a monarchy and a citizen in a republic as Bernhard Lewis, *The political language of Islam*, Chicago 1988, p. 63, did.

[8] Joseph Schacht, *An introduction to Islamic law*, Oxford 1965, pp. 92 s.

## II

In this context I do not want to discuss the civilian identity of the *sharīᶜa* from the time when public and private spheres were separated in the Muslim world. Obviously, however, the *sharīᶜa* continued to play an important role in the self-identification of certain groups of Muslim civilians who regarded the public as legally and ethically construed by norms of the *sharīᶜa*. They did not surpass the frontiers of the nation-state and consequently advocated what may be called a national *sharīᶜa*. In this respect, as Islamic terminology was still common, the word *umma* was conceived as a civil expression of state and society.

In so far as the Muḥammadan *umma (al-umma al-muḥammadīya,* or more often *ummat Muḥammad)* had ceased to constitute a legal concept, the term Muslim itself had also lost most of its legal and political implications. Being a Muslim now did not constitute a specific relation of the individual to the state, and consequently citizenship in any country was not determined by the fact of one's being a Muslim, but in most cases by *jus sanguinis*. In 18th century Egypt, for instance, the idea of being a subject *(tābiᶜ)* of a Mamluk prince was always associated with loyalty and not with the virtue of being a Muslim; true, every paladin of a Mamluk prince had to be a Muslim; being a Muslim, however, did not make a man (or a woman) a subject of a Mamluk. The Egyptian bourgeois who called themselves *abnā* (or *aulād) al-balad*[9] when acting politically derived their identity from the social stratification only; although being a Muslim was again a precondition of belonging to the bourgeoisie not every Muslim became a bourgeois. Here we see, that the Islamic identity did not condition the citizen's legal position within the royal or bourgeois order.

No wonder that *umma per se* now referred to the new nation-states and partly became synonymous with *milla;* with the predicate *muḥammadīya* added to it, however, the *umma* meant the unique civilization contrasted to "Christians", "barbarians" and other peoples who were not regarded as possessing a civilization of their own.

The antagonistic construction of the world, by which other cultures were excluded from the procedures of the self-identification, was equally

[9] In 18th century Arabic political writings, *balad* had a much higher prestige than during the 19th century. In fact, *balad* served to denote a political entity which later was called *waṭan;* thus, what in the late 19th century was called *muwāṭin* (citizen), replacing the earlier *ibn al-waṭan,* stood in a direct line with the 18th century term *ibn al-balad.*

common in the Muslim world and the Christian West. The further advanced process of secularization, however, did not allow this construction to take root in legal affairs. From the 19th century, at the latest, law in the Muslim world had been secularized from the Muḥammadiyan *umma* which continued to function as a world of symbolic references. This, of course, was a challenge to those Islamic intellectuals who regarded themselves as representing the idea of the Islamic *umma;* in a way, they continued to formulate the procedures whereby the Islamic *umma* continued to exist; they founded circles and clubs in which they debated the future of the Islamic *umma,* published Islamic journals, and even tried to establish institutions which would serve as organs representing the Islamic world.

The reformulation of the Islamic *umma* as a political body which would administer a unified Islamic law began in the early seventies of the nineteenth century. At first, the advocates of an Islamic *umma* rarely tried to mobilize law as a medium to reintegrate society. In 1884, Jamāladdīn al-Afghānī, for instance, raised the question of an Islamic citizenship.[10] ᶜAbdarraḥmān al-Kawākibī argued that the *sharīᶜa* should serve as a powerful instrument to provide the Islamic *umma* with a political identity and demanded a thorough re-evaluation of the legal tradition in order to accomodate the *sharīᶜa* to the whole Islamic *umma.*[11]

This, of course, was a purely fictitious debate, as hardly any Muslim jurist of the late 19th and early 20th century really had the ambition to inaugurate a transnational debate on the *sharīᶜa.* The jurists' public was still the nation-state; it was here that the jurists tried to preserve their social position by stressing the role of *sharīᶜa* law in the society.[12] As the secular courts very seldom acted in the traditional way of Islamic jurisprudence, the jurists focussed on *iftā'* as a means of broadcasting their

[10] Jamāladdīn al-Afghānī, "al-Jinsīya wa-d-diyāna al-islāmīya", *al-ᶜUrwa al-wuthqā,* Cairo ² 1958, pp. 9-12.

[11] ᶜAbdaraḥmān al-Kawākibī, *Umm al-qurā,* ed. Beirut ² 1402/1982, pp. 148 s.

[12] See for instance the work of the Egyptian Councillor of the Mixed Courts, Muḥammad Qadrī (1821-1888), and his codification of Ḥanafi law of family and inheritance (1875), of the law of property (p.h. 1891) and of the law of *waqf* (p.h. 1893; see Schacht, *Introduction,* p. 100 and ibid., n. 1); or the activities of ᶜAbdarrazzāq as-Sanhūrī, cf. E. H. Hill, "Islamic law as a source for the development of a comparative jurisprudence, the "modern science of codification": theory and practice in the life and work of ᶜAbd al-Razzāq Aḥmad al-Sanhūrī", in Aziz al-Azmeh (ed.), *Islamic law. Social and historical contexts,* London 1988, pp. 146-197.

legal opinions. They maintained that by *iftā'* they could describe what a true Muslim should be; the responsibility of executing a Mufti's ruling lay in the hands of the Muslims themselves irrespective of their nationality. Tradition, however, ensured that most *iftā'* activities were restricted to a specific audience: the public was mostly local, sometimes regional, seldom national and rarely transnational. Muḥammad ᶜAbduh's and Rashīd Riḍā's efforts to institutionalize and transnationalize *iftā'* through the famous journal *al-Manār* (1898-1935/39), in fact, had some influence in propagating a non-national Islamic way of life. Yet, they only reached a very small elite group in other Muslim countries (chiefly in Morocco, the Malayan principalities and Java).

As long as the Islamic *umma* was not repoliticized on a much broader level, there was no need for Muslim jurists to surpass the frontiers of the nation-state and debate the legal identity of the *umma*. The Islamic criticism of the national identity of existing states was only one of several impulses towards an internationalization of Muslim legal debates. Already in the late forties of the 20th century, the discussions of the possibility of unifying five Islamic traditions of law (Ḥanafite, Ḥanbalite, Mālikite, Shāfiᶜite and Jaᶜfarite), which the members of the Cairo-based *jamᶜīyat* (or *dār*) *at-taqrīb baina l-madhāhib* (founded in 1948) had inaugurated, showed that among a specific group of Muslim scholars there was a need to restore the authority of Islamic law (and hence their own authority) by calling for a transnational reformulation of Muslim jurisprudence.[13] Yet, the scholars involved in these discussions seldom pleaded for a transnational Islamic citizenship. Instead, they mostly wanted to clarify what in many constitutions of Muslim states had been stated, namely that one, or the source of, jurisdiction should be the *sharīᶜa*. In this context, the Rector of al-Azhar University, Maḥmūd Shaltūt (1893-1963, Rector since 1958) issued his famous fatwa concerning the recognition of the Jaᶜfarīya as the fifth accepted Islamic tradition of law and regarded it as a cornerstone for further investigations concerning the unification of Islamic law.[14] Many critics, mostly jurists, however agreed with Muḥammad Muḥammad Abū Zahra (1898-1974),who tried to separate the discussions on law from the politics of "approaching the Muslims

[13] See Werner Ende, "Sunniten und Schiiten im 20. Jahrhundert", *Saeculum* 36/1985, pp. 187-200, esp. pp. 198 ss.

[14] *Risālat al-islām*, 55-56/1963-64, pp. 14-16.

to each other". An Islamic rapprochement should be "the realization of the meaning of unity as laid down in the Koran and the *sunna.*"[15]

As many, or even most, Islamic jurists denied the possibility of a rapprochement of the traditions of law, they continued to abstain from a transnational Islamic debate on jurisprudence and consequently did not argue in favour of an Islamic citizenship however defined. The second impulse for a legal perception of the Islamic *umma* resulted from the Pakistani constitutional discussions of the late 1940's and 1950's. Only in Pakistan were the ideas stressed that "Muslim law is based on the conception of the unity of Islam"[16], and "a common acceptance of the law of Islam - and not ethnic, linguistic, or other similar bonds - is the proper basis for organizing the Muslim polity", in which "all Muslims, regardless of their ethnic or cultural backgrounds, have the same rights and obligations".[17] During the constitutional debates in Pakitan, the question was raised whether it is sufficient to be a Muslim in order to become a Pakistani.[18] The *muhājirūn* community in Pakistan for instance had come to an "Islamic polity" in which cultural and ethnic differentiation should be ranked second after Islam. This, of course, was only fictitious, as with regard to the Pakistani nationality the tradition of *jus sanguinis* continued to play an important role; only later did the *jus loci* allow the *muhājirūn* to acquire Pakistani nationality.

Furthermore, Muslim jurists did not concentrate on the question of citizenship; typically the preamble of the Constitution of 1956 affirmed that "sovereignty over the entire Universe belongs to Allah Almighty alone, and the authority to be exercized by the people of Pakistan within the limits prescribed by Him is a sacred trust."[19] The jurists of the Islamic Board, however, did not consider the legal identity of the *umma muḥammadīya,* or of "Islamistan" as the second Qā'id-i Aʿẓam Chaudhuri Bāqir az-Zamān had put it in 1949[20] but that of Pakistan.

Although Islamic transnational politics played an important role in creating an international Islamic public opinion, legal aspects of the

[15] Muḥammad Muḥammad Abū Zahra, *al-Mīrāth ʿinda l-jaʿfarīya,* Cairo n.d., p. 17.

[16] Muhammad Hamidullah, *Muslim conduct of state,* Lahore 1961, p. 175.

[17] Anwar Hussain Syed, *Pakistan. Islam, politics, and national solidarity,* New York 1982, p. 13.

[18] See Erwin I. J. Rosenthal, *Islam in the modern national state,* Cambridge 1965, pp. 125-153 and 181-281; Abu Aala Maududi, *The Islamic law and constitution,* Lahore (5th ed.) 1975.

[19] Cit. Aziz Ahmad, *Islamic modernism in India and Pakistan, 1857-1964,* London 1967,p. 243.

[20] *Oriente Moderno* 29/1949, p. 113, cit. *an-Naṣr* (Damascus), 11.10.1949.

reconstruction of the *umma* as a polity were rarely discussed. Contrary to many Islamic ideologists, most jurists accepted the structural diversity of Islamic law and the *Realpolitik* of nation-states. Eventually, they favoured an Islamic reformulation of existing constitutions; gradually, however, the idea of instituting a transnational Islamic law gained a foothold in the international Islamic public. In 1963, Taqīaddīn an-Nabhānī (1905-1978), the famous founder of the *Ḥizb at-taḥrīr al-islāmī* (founded in 1952), published his Prolegomenon to an Islamic constitution.[21] An-Nabhānī was a jurist from Haifa and had served as a judge at a local *sharī-ʿa* court in Haifa before going to Cairo to study at al-Azhar. His disputed affiliation to the Egyptian Muslim Brotherhood dated from that time. In his later writings, i.e. after 1952, he stressed a legal standpoint in dealing with political matters.[22] In his *muqaddima,* he included the following formulation under § 6:

> "The state imposes the Islamic law on all who carry the Islamic citizenship *(at-tābiʿīya al-islāmīya)* regardless of their being a Muslim or a non-Muslim with respect to the following:
> a. It imposes all Islamic rulings on the Muslims without exception.
> b. It passes over the non-Muslims in what they believe and whom they worship.
> c. The punishment for apostasy is executed upon apostates from Islam if they themselves are the apostates; if, however, they are children of apostates and born as non-Muslims, then they shall be treated like non-Muslims (...)"[23]

The constitution does not define any territory; the official language of the Islamic state shall be, however, Arabic.[24] Even if the subjects are not Arabs, the Arabic language should be used as official language.[25] Everyone is responsible for Islam; no "men of religion" are allowed.[26] *Ijtihād* is

[21] *Ḥizb at-taḥrīr al-islāmī, muqaddimat ad-dustūr au al-asbāb al-mūjiba lahū,* s.l. 1382/1963, 2nd ed. with corrections, s.l., saa.; I quote from the second ed. See David Commins, "Taqī al-Dīn al-Nabhānī and the Islamic Liberation Party", *The Muslim World* 81/1991, pp. 194-211.

[22] Of his earlier writings I mention *Inqādh Filasṭīn,* Damascus 1950; his first book published after the split from the Muslim Brotherhood was *Nizām al-islām,* Jerusalem 1953. Also from this year: *ad-Daula al-islāmīya; Mafāhīm ḥizb at-taḥrīr; Nizām al-ḥukm fi l-islām; at-Takattul al-ḥizbī; an-Nizām al-ijtimāʿī fil-islām* and *an-Nizām al-iqtiṣādī fi l-islām.* Later writings include: *al-Khilāfa* (s.a.); *at-Tafkīr* (s.a.); *ash-Shakhsīya al-islāmīya* (s.a.).

[23] *Ḥizb at-taḥrīr al-islamī, muqaddima,* pp. 26 s.

[24] Ibid., pp. 34 s.

[25] Ibid., p. 38.

[26] Ibid., p. 42.

regarded as a collective duty, and the *shāfiʿī* tradition of law should be accepted as the only basis for jurisdiction.[27] As the Constitution does not define a state territory, the nationhood should be construed through a person's membership of the *jamāʿa* which should be equivalent to "nation".[28] A country, or even a single person, may become "citizen of the Islamic nation" through *baiʿa,* by acknowledging "the president of the state" who "is the state"[29] as sovereign.[30]

## III

I quoted this example to show that within the reformulation of the Islamic *umma* as a polity, Islamic intellectuals tended to "ethnicize" Islam in order to define citizenship and nationality. Islamic law served as a marker of ethnicity. In a way, an-Nābhanī followed the Pakistani experience as here, Islam was also used to legitimize traditional ethnicity in order to define the Pakistani nationality. The Islamic Liberation Party, however, did not refer to a specific tradition of Muslim identity, because the party leaders wanted to construct a *jamāʿa* and not a tradition as a political *umma.*

Tradition has been used to define an Islamic nationality within Jugoslavia. In 1967, Tito declared that the Muslims of Bosnia-Herzegovina (and not including the Albanian Muslims of Kosovo, Turks, Muslim Serbs, Muslim Croats and Macedonian Muslims!) constitute a separate nationality.[31] Although Muslim nationality did not refer to a particular statehood, Islam as a marker of ethnicity was used to distinguish local and regional social and cultural traditions within Bosnia-Herzegovina.[32] In a way, this concept followed the *jus sanguinis.* The Jugoslavian case demonstrates that Islam as a national identity did not create an internationally recognized citizenship. After the independence of Bosnia-Herzegovina, however, tradition suddenly became political: although the new state at first tried to define citizenship on the ground of *jus soli,*

[27] Ibid., p. 45.

[28] Ibid., pp. 102 s.

[29] Ibid., p. 143.

[30] Ibid., pp. 132 s.

[31] For details see Alexandre Popovic, *L'Islam balkanique. Les musulmans du sud-est européen dans la période post-ottomane,* Berlin 1986, pp. 344 ss.

[32] One of the purposes was to rise to the proportion of Orthodox Serbs in Bosnia-Herzegovina.

the subsequent war enforced a demarcation along ethnic boundaries; evidently, Islam was more important as a marker than clear linguistic traditions, and reciprocally, the government of Bosnia-Herzegovina stressed Islam as a national identity. Citizenship, however, continued to be defined according to traditional concepts; although the public now spoke of "Moslems" who were fighting "the Serbs" or "the Croats", the state itself tried to avoid regarding Islam as a condition for citizenship.

In a totally different setting, namely in the USA, the idea of an Islamic citizenship had become popular already in the early 1930's. After the reorganizer of the Moorish movement, Wallace Fard Muhammad, had disappeared in Chicago in 1934, Elijah Muhammad (Elijah Poole, died 1975) assumed leadership and called the organization "Nation of Islam"; again ethnicity played an important role in identifying the underlying markers: the first was "being black", the second "being Muslim". Membership in the Nation of Islam became equal to citizenship. Some 100.000 members had to pay taxes (*ʿushr*) and were called to buy and work only in shops and enterprises belonging to the Nation of Islam. Consequently, the Nation of Islam should disregard all rights and obligations derived from American citizenship (in particular compulsory military service). Somehow, Elijah Muhammad used the *jus sanguinis* to separate an "alien" from a "citizen" and propagated the withdrawal from the White Devils' society.[33] After Wallace Deen Muhammad had dismantled his father's organization and reorganized it by "denationalizing the Nation of Islam", Abdul Hareem (Louis) Farrakhan, the successor to Malcolm X, restored the Nation of Islam in 1978 and reintroduced the concept of a political Black Muslim citizenship.[34]

In contrast to the conception of citizenship, which the Islamic Liberation Party had heralded, in the three cases of Pakistan, Bosnia-Herzegovina and USA, Islamic citizenship or nationality was nothing but a political idea, without any juridical implications. Consequently, an Islamic nationality was not enforced by law which would be a precondition for a Muslim to become a legal person; only through law could a legal relationship betwen the individual and the State have been esta-

[33] Louis E. Lomax, *When the word is given: a report on Elijah Muhammad, Malcolm X and the black Muslim world*, Berkeley, Cal. 1981.

[34] For further literature on the Nation of Islam see the respective entries in Clifton Brown, Ethel Williams, *Afro-American religious studies: a comprehensive bibliography*, New Jersey 1972, and *Howard University Bibliography of African and Afro-American religious studies*, Wilmington, Del. 1977.

blished. Without such a legal relationship, Islamic citizenship remains a fictitious conception which, nevertheless, has helped to create ethnicity in certain contexts. We may say that within the manifold radical Islamic movements, there is a growing tendency to accept Islam as a marker for ethnicity of a civil society. As long as the legal aspect of nationality or citizenship, however, is not incorporated, the Islamic citizenship is merely political. Finally, a political conception of Islamic citizenship did not help to repoliticize the *umma* on a transnational level; on the contrary, it tended to reduce the *umma* to a specific environment which is specified by ethnic markers other than Islam; as for the three cases cited above, we should mention as specific markers tradition, colour (not race), homeland and language.

## IV

From the 1960's on, Muslim jurists proposed a totally different approach towards a repoliticization of the *umma* containing all aspects of nationality. Seeing that the secular law had helped to determine national citizenship in the 19th and 20th centuries and that the conception of Islam had thereby been largely depoliticized, they promoted the *sharīʿa* as a means to re-establish a transnational Muslim identity which should be legal in international relations. They very simply argued that the *sharīʿa* constitutes the *umma*. As the *sharīʿa* is not codified and unified, the main task of Muslim jurists should be to call for at transnational legal debate in which they would lay down the preconditions for a political *umma*. This idea, of course, stood in sharp contrast to the national tradition which most Muslim jurists had accepted.[35]

Legal debates were a cornerstone of the self-image of Muslim law scholars. The conflict between the need for a consensus *(ijmāʿ)* and the allowance of disagreement *(ikhtilāf)* often determined the legal discourse. Nevertheless, in the course of history, tradition helped to counterbalance the alleged contradiction between the two basic concepts of jurisprudence. Under the condition of the nation-state, however, law

[35] The literature on the efforts to codify the *sharīʿa* is voluminous; see for instance the earlier works of E. Bussi in *Oriente Moderno* 20/1950, pp. 251-261, and A. Giannini in *Oriente Moderno* 11/1931, pp. 65-74, and of Abu Bakr Abd al-Salam B. Choaïb, "La codification de droit musulman", *Revue du monde musulman* 8/1909, pp. 446-456. For a contemporary view see e.g. ʿAbbās Ḥusnī Muḥammad, *al-Fiqh al-islāmī - āfāquhū wa-taṭawwuruhū*, Mecca 1402, pp. 234-249.

had to fulfil the task of integrating the society. Consequently, a unification of the *sharīᶜa* would enhance a total revision of the basics of Islamic jurisprudence, including the abolition of the accepted dichotomy of consensus and disagreement. No wonder only a few Muslim jurists favoured a transnational debate; eventually, most scholars feared a loss of influence within the national framework when turning to transnational positions. So, it was not the jurists themselves who initiated the transnational debate, but governments. In 1964, the Egyptian government realized a plan to establish an Academy of Islamic Research *(Majmaᶜ al-buḥūth al-islāmīya, MBI)* by inviting a selected group of Muslim scholars in order to unify the Islamic social and cultural code. They should act as the "highest authority" of Islamic research in general.[36] In reality, the *MBI* was an Egyptian organization, although eight of the 27 members of the Board were foreigners.[37] This implies that the *MBI*, like its Saudi Arabian rival, the Muslim World League *(Rābiṭat al-ᶜālam al-islāmī)*, founded in 1962, was used as a state instrument to promote foreign policy on a transnational level. But a review of the foreign members of the Board shows that one purpose of the *MBI* was to establish a broader consensus with regard to *iftā'*.[38]

Non-Egyptian Members of the *MBI*

| Name | Origin | Funktion | Year of Membership |
|---|---|---|---|
| Aḥmad ᶜAbdarraḥmān al-Amīn | Sudan | Grand Qadi | 1971 |
| ᶜAbdaljalī l Ḥasan | Malaysia | Jurist | 1972 |
| ᶜAbdallāh b. Kannūn | Morocco | Scholar from Tanger | 1964 |
| ᶜAbdarraḥmān Qalhūd | Libya | Mufti | 1964 |
| ᶜAlī ᶜAbdarraḥmān | Sudan | Minister for the Interior | 1964 |
| Isḥāq Mūsā al-Ḥusainī | Palestine | Scholar, Muslim Brotherhood | 1964 |
| Mālik b. Nabī | Algeria | Ministry for Higher Edūcation | 1971 |
| Muḥammad al-Bashīr al-Ibrāhīmī | Algeria | Scholar | 1964 |
| Muḥammad Shīt Khaṭṭāb | Irak | Former Minister | 1971 |
| Muḥammad al-Fāḍil b. ᶜĀshūr | Tunisia | Mufti | 1964 |
| Muḥammad al-Ḥabīb b. al-Khūja | Tunisia | Mufti | 1972 |
| Nadīm al-Jisr | Lebanon | Mufti | 1964 |
| Wāfiq al-Qassār | Lebanon | Jurist | 1964 |

[36] Reinhard Schulze, *Islamischer Internationalismus im 20. Jahrhundert*, Leiden 1990, pp. 153 s.

[37] The number was reduced to two in 1970; in 1972, there were seven foreigners among the 22 members, see Schulze, *Internationalismus*, p. 236 and sources cited there.

[38] Sources in Schulze, *Internationalismus*, pp. 237 s.

In addition, the *MBI,* depending on al-Azhar and the Ministry of *auqāf* was able to convince other jurists to co-operate at its conferences. The *MBI* tried to acquire a strong image as a legal authority by solemnly declaring the opening of the *bāb al-ijtihād* in 1964.[39]

In December 1973, the Secretary General of the Saudi Arabian Muslim World League, Muḥammad Ṣāliḥ al-Qazzāz (1902-1990) proposed the creation of a transnational Academy of Islamic Jurispludence *(al-majmaᶜ al-fiqhī al-islāmī).*[40] This announcement coincided with the growing readiness of the Muslim World League to integrate foreign Muslim cultural elites into its apparatus. In 1978, the League realized this proposal; seven members of the new Board of the Academy were Saudi Arabian subjects, thirteen were foreign jurists. According to its fundamental order, the Academy should

revitalize and spread the Islamic legal legacy,

stress the superiority of Islamic law, and

judge all "new questions" according to the *sharīᶜa* on the basis of Koran, Sunna, *ijmāᶜ* and *qiyās.*[41]

From 1978 to 1992, the Academy held 14 conferences during which manifold legal problems were discussed which may be summarized under the following headings:[42]

questions concerning rents, interests and banking in general,

questions concerning the use of *zakāt,*

questions concerning new technologies and medical methods,

questions concerning cultic and ritual problems.

Obviously, the League wanted to establish a transnational network of *iftā'* in order to unify the divergent opinions concerning actual legal problems. This implied that the Academy did not tackle classical problems of legal disagreement. Only in 1985 did it accept the idea of the opening of the *bāb al-ijtihād;* and it may be due to the great influence of the *wahhābī* scholars that the Academy reacted very late to the equivalent

[39] *Majallat rābiṭat alᶜālam al-islāmī* (Mecca, *MRAI)* 1, 1385/1964, 10, pp. 75 ss., reproducing an article by the al-Azhar official Nūr al-Ḥasan.

[40] *Akhbār alᶜālam al-islāmī* (Mecca,AAI), 357/17.12.1973, p. 11.

[41] *AAI* 283/29.6.1978, p. 10.

[42] For details see Reinhard Schulze, "Political law in contemporary Islam, as exemplified on the basis of Saudi-Arabian judicial opinions", *IJMES* (in preparation).

decision of the *MBI*.[43] Further activities expanding the field of jurisprudence were heavily dependent on the late Secretary General of the League, Muḥammad ʿAlī al-Ḥar(a)kān (1915-1983) who was, up to now, the only jurist at its top. He obviously wanted the League to become a transnational authority on Islamic law. Just before his death in June 1983, he was able to invite European Muslim scholars and jurists to Mecca to inaugurate a European Council of Islamic Jurisprudence.[44] Only a few days later, however, the Islamic Conference Organization (founded in 1969/1972) established an Academy of Jurisprudence of its own.[45] The task of the new Academy was to coordinate the activities of national institutions of Islamic jurisprudence.

The intensified legal debates which the *MBI* and the Islamic Jurisprudence Academy had initiated did not constitute a step toward a unification of Islamic law which would be a precondition for the legal framing of an Islamic citizenship. At al-Azhar, however, the idea of politicizing the conception of *umma* gained a much stronger foothold, when a subcommission of the Higher committee of the *MBI* following a suggestion made at the Eighth Conference of the *MBI* (October 1977) published a "plan for an Islamic Constitution" in autumn 1978.[46] One of several motives behind this proposal was to embed the discussions of the Egyptian constitution and, in particular, of the role of Islamic law in jurisdiction, in a broader context. Article 1 of the *MBI*-constitution stated, "that the Muslims are one single *umma (al-muslimūn ummatun wāḥidatun)*". From this identity, the authors of the constitution derived very different aspects of state law which, however, did not touch the question of nationality or citizenship.[47]

The *MBI*-proposal was not discussed openly. The *MBI*-session of 1979 could not be held, as most participants from the *duwal ar-rafḍ*, i.e. from

[43] In 1976, the Wahhabiya from the Muḥammad b. Saʿūd University in Riyadh also tried to establish a transnational Law Academy; during its preparatory conference on Islamic Jurisprudence, several non-Saudi jurists presented papers on the question of the legitimacy of *ijtihād*, see *Jāmiʿat al-imām Muḥammad b. Saʿūd al-islāmīya* (ed.), *al-Ijtihād fī sh-sharīʿa al-islāmīya wa-buḥūth ukhrā*, Riyadh 1404/1984. On that conference, see *at-Tauthīq at-tarbawī*, Riyadh, 13/April 1977, pp. 36 ss.

[44] *AAI* 830/6.6.1983, pp. 8 s., and 831/13.6.1983, pp. 2-4.

[45] *al-Umma* (Qatar) 34/July 1983, pp. 54-58.

[46] Text in *Majallat al-Azhar* 51 (1399/1979), 4, pp. 1092-1100.

[47] See also J. J. Donohue, Islamic constitutions, *CEMAM Reports 1978/1979*, Beirut 1981, pp. 121-137, with a short analysis pp. 139-141.

those states which rejected the Egyptian Israeli peace treaty of 1978, were not allowed to travel to Cairo. Again, divergent political views prevented the jurists from defining a legal conception of the Muslim *umma*. The main problem, of couse, was to what extent an Islamic constitution should be the legal framework of the *umma;* mostly it was postulated that an Islamic constitution should be the model of nation-state constitutions. It should prescribe an Islamic form of government and jurisdiction without questioning the sovereignty of the nation-states. It was in this sense that the Secretary General of the Islamic Council of Europe, Sālim ᶜAẓẓām, presented a "model of an Islamic Constitution" at an International Islamic Conference on "Islam Today" held at Islamabad on December 10th-12th, 1983.[48] This proposal did not define the Muslim *umma* other than culturally. Chapter 1, Article 2 reads:

> "... is part of the Muslim world and the Muslim peoples of ... are an integral part of the Muslim *umma.*"

The legal provisions of the Constitution now include:

> "Sovereignty belongs to Allah alone, and the *sharīᶜa* is paramount" (Chapter 1, Article 1a)[49]

and

> "The *sharīᶜa* - comprising the Qur'an and the Sunnah - is the source of legislation and policy." (Chapter 1, Article 1b)

Citizenship should be determined by law (Chapter 2, Article 14a), but "every Muslim has a right to seek citizenship of the State. This may be granted in accordance with law" (Ibid., b).[50]

Referring to the absolute sovereignty of God, the Islamic Council of Europe had introduced a new legal theme into the discussions of the political identity of the *umma,* which had hitherto been the domain of

[48] English text in *Journal of the Muslim World League* (Mecca, *JMWL*), 11 (1404/1984), 5-6, pp. 27-33. An Arabic translation may be found in ᶜAlī Muḥammad Jarīsha, *I'lān dustūrī islāmī,* Manṣūra 1985, pp. 119-160, cit. from Badry, *Wasfī,* p. 100, n. 2.

[49] In a "Constitution of the Islamic State", the President of the World Federation of Islamic Mission, Muhammad Fazl-ur-Rahman Ansari simply stated: "Sovereignty belongs to God" and "The right to legislate belongs basically to God", see *The Qur'anic foundations and the structure of Muslim society,* vol. 2, Karachi n.d., pp. 344 ss.

[50] Cf. Abul Aala Mawdudi, *Human rights in Islam,* Leicester 1976, p. 11.

the ideological programmes of Islamic intellectuals like al-Maudūdī and Sayyid Quṭb.[51] In the 1989 draft of the Islamic Declaration of Human Rights of the ICO[52] this conception was reiterated as follows:

> "All human beings are Allah's subjects, and the most loved by Him are those who serve His subjects, and no one has superiority over another except on the basis of piety and good deeds" (Article lb).

Closely linked to the idea of an Islamic citizenship is the question of apostasy. In a legal sense, apostasy would mean the deliberate abandonment of Islamic nationality. As Islam, if constituting a state *(daulat al-islām)*, is what in German would be called a «Zwangskörperschaft", nobody is allowed to cease to be a Muslim; of course, he may leave the territory of Islam and change his "nationality" by becoming e.g. a Christian; the apostate would, however, be prosecuted if he retumed to the State of Islam. Jurists who considered Islam as (divine) law sometimes accepted the *sunna* to kill a Muslim apostate and to imprison a Muslim woman who "left Islam";[53] they did not, however, regard this as a step towards the establishment of a State of Islam, but as a symbol of the Islamic identity of a state.

It should be added that following the Wahhabi doctrine that the Koran is the Islamic constitution, many Islamic intellectuals rejected the idea of a genuine Islamic constitution. In 1980, the former Muslim Brother Muḥammad ʿAbdallāh as-Sammān who in the 1950's bitterly attacked the Islamic scholars and later went to Riyadh wrote:

> "All other states based on sound principles are states which are absolutely bound by their constitutions. Do not say that they are ossified; no, they are developed states. The State of Islam is a state which is regarding to its constitution exceptional. The difference between it and these states is that their legislation is made by human beings who have the tendency to let in passions and interests; as for the Muslim State, its constitution is made by God and not for passions and interests."[54]

[51] For a summary of the discussions on *ḥākimīyat Allāh* (or *al-Islām)*, see Aḥmad Muḥammad Jamāl, *Fikrat ad-daula fi l-Islām*, Riyāḍ 1406/1986, pp. 51 ss. This booklet contains a strong attack against al-Maududī's opponent, the Indian scholar Abu l-Ḥasan ʿAlī an-Nadwī.

[52] Cit. *Kayhan International*, 30.12.1989.

[53] Cf., e.g., Muḥammad Muḥammad Abū Zahra, *al-Waḥda al-islāmīya*, 1971, pp. 266 s.

[54] Muḥammad ʿAbdallāh as-Sammān, *al-ʿAqīda wa-sh-sharīʿa*, Cairo 1400/1980, p. 12; on him see Schulze, *Internationalismus*, p. 311.

This shows, I think, that in modern political thought, Islam is sometimes construed as a nation-state. Here we may trace the influence of al-Maudūdī who idealized Islam as a state and emphasized the second part of the famous dictum *al-islām dīn wa-daula.* Citizenship in a Nation of Islam, of course, is nothing but a political ideal of those Islamic intellectuals whose political ideology centers around the notion of the State. Others who focus on the notion of society would not accept the formulation that Islam is a State, but would rather stress the ethical identity of Islam. Consequently, intellectuals who favoured a legal conceptualization of the Islamic *umma,* mostly adhered to the state apologists.

Despite this clear intellectual orientation, contemporary Muslim jurists have seldom advocated a State or a Nation of Islam. It seems that jurists have been far more conscious of the vague character of the *sharīʿa* which does not allow either its own codification or its application to a single state. In a way, jurists involved in transnational debate on Islamic law tended to accept some conceptions which clearly refer to such conceptions as *ḥākimīya* which originally referred to the identification of Islam as a state, but nevertheless they did not develop the underlying legal implications. They instead based their activities on dogmatic and ethical questions, for instance with regard to *iftā'* or the conceptualization of Islamic human rights.

The debates on the politicization of the *umma* through the unification of the Islamic law which would inevitably lead to a concept of Islamic citizenship did not prove successful. It seems that the classical distinction between religion and law prevented a further theoretical approach. As Baber Johansen put it:

> "Dennoch sind das Subjekt der Religion und das Subjekt des Rechts nicht identisch. Das Subjekt der Religion ist das Individuum, das den Islam annimmt, und zwar aus freiem Willen (...) Die Annahme des Islams entscheidet sich im unmittelbaren Verhältnis des Individuums zu Gott und ist dem Staatszugriff entzogen. Das Subjekt des Rechts aber ist staatsabhängig: es ist der Untertan einer islamischen Regierung."[55]

Insofar as the Maudūdian conception of *ḥākimīya* defines an Islamic citizenship, the classical Islamic separation of religion and law (or if we may say the state, as every law requires a state) is abrogated. Naturally, most Muslim jurists will fight such an ideology as otherwise their own

[55] Baber Johansen, "Staat, Recht und Religion im sunnitischen Islam", *Essener Gespräche zum Thema Staat und Kirche,* 20/1986, pp. 12-60, here p. 56.

social and cultural position would be endangered. Hence, as long as jurists are responsible for Islamic law they will help to consolidate the secular character of centemporary nation-states. Perhaps, Islamic law is able to stress the ethnification of Muslim communities; but this would not mean a step towards a politicization of the Islamic *umma;* on the contrary: the ethnification and communalization of Muslim identity would contribute to a restoration of nationalism. It is here that Islamic law plays an important role. The intellectual debates on the legal character of the Islamic *umma* will, however, remain a subject of a very limited public.

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