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## Sharia Incorporated

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# 1

## Introduction: investigating the role of sharia in national law

*Jan Michiel Otto*

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## 1.1 Theme, purpose, and approach

### *What this book is about*

This collaborative study intends in the first place to explore the incorporation of sharia-based<sup>1</sup> rules in national legal systems. It tries to answer pertinent questions about islamisation of law throughout the Muslim world: Where? When? To what extent? How? Why? The fact that since the 1970s a number of Muslim countries, notably Iran, Pakistan and Sudan, have followed this course has been a cause for concern, both in Muslim countries and in the West. It has suggested a sidelining of modernising groups, weakening of the legal positions of women and religious minorities, and a return to cruel corporal punishments. One can hardly avoid the impression that islamisation of law equals disrespect for the rule of law and human rights. Yet, the discussion about these developments is hardly based on actual facts; rather, it is filled with controversy, speculation and all sorts of prejudices.

This book provides a factual and comparative overview of the role and position of sharia-based law in the national legal systems of twelve, representative Muslim countries. Each country study consists of two interrelated parts. The first part of each chapter describes the history of how the present legal systems of Muslim countries have been shaped by socio-political developments. It records major changes in governance and law, tracing in particular the role of Islam and sharia in this process. The second part presents the actual legal situation and shows to what extent national legal systems have or have not distanced themselves from the tenets of 'classical sharia' (see 1.2 below); these sections also address the compatibility of these systems with the rule of law and human rights (see 1.4 below). The country studies focus on those areas of national law, where the introduction of sharia has caused most concern, namely constitutional law, family and inheritance law, and criminal law.

### *Purpose and perspectives*

This book does not only offer a wealth of data, it also employs a set of conceptual perspectives, or frames, in order to forge the data into a useful body of knowledge.

Through our first frame, we look at a particular country and its national legal system, for we can only start to understand the relationship between sharia and national law by looking at countries individually. Therefore this book is in the first place a repository of country-based knowledge. In addition, this frame also serves as a tool to gain insight into the broader picture of 'the Muslim world'. The first frame is

further explained in 1.3 and 1.4. Preliminary results are presented in the concluding chapter in 14.4.

Our second frame is thematic: the book focuses on what are probably the four main concerns that have arisen and dominated the political debate about sharia-based law over the last few decades. Those concerns are the alleged supremacy of sharia, the status of women, degrading punishments, and human rights. In this aspect, the book differentiates itself from similar collections which usually focus on one single theme, either constitutional law, or women, or criminal law, or human rights. This frame is explained in 1.3, and results can be found in 14.3.

Our third perspective is historical. We look at how the relationship between sharia and national law has evolved since 1800, with a focus on the twentieth century, and following developments until the present day. This is explained below in 1.6; results are summarised in 14.2.

Our fourth perspective is governance. It regards the relationship between sharia and national law essentially as a major challenge for each state, i.e. to form and apply the main rules for a stable, prosperous, and just society, interacting with major political players and social groups. Section 14.5 reflects on governance aspects.

The fifth frame of this book addresses the struggle between ‘moderates’ and ‘puritans’ in each country and in the Muslim world at large; this dichotomy plays a crucial role in the discussion on factors that influence the relationship between sharia and national law. The points of departure of both ‘camps’ are explained in 1.5. Going beyond this dichotomy, the study will show that the ideological-religious spectrum is influenced by a number of other (f)actors adding to the complexity of the picture.

The sixth perspective is normative pluralism. It positions sharia as one of the normative systems that have had an impact on the people and states in the Muslim world. It is a fact that customary law, colonial law, foreign law, and international law, including human rights law, have also exerted significant influence on the development of national law and local legal practices until this very day (see 14.5).

This multiplicity of frames allows the book to be used for several purposes and by various readerships. The study enables country-by-country comparison, whilst at the same time all periods, governance contexts, areas of law, concerns and issues can be compared. In addition, the book may help in developing a realistic overview of the problem as a whole. It strives to appeal to students of law, of history, of governance, and of Islamic studies. It also aims at informing decision-makers and observers in the field of foreign policy and international relations, for whom our assessments of the (in)compatibility of sharia-based law with the rule of law, including human rights, may be useful. And finally, it may serve to counterbalance the image of sharia as depicted by the

constant stream of media reports and the alarmist responses which are mentioned in the preface of this book. Perhaps reading this book will help to put things in perspective.

### *Approaches chosen*

The focus of this book lies on the contemporary legal systems of twelve, predominantly *developing* countries with clear Muslim majorities.<sup>2</sup> The book certainly does not pretend to be a major book about sharia as such. There are excellent works by renowned authors such as Hallaq (2009), Vikør (2005), or the earlier generation of Coulson (1964) and Schacht (1964), who focus on sharia – or Islamic law – itself. They do so mostly from a historical perspective, usually dealing with recent developments only briefly at the beginning or end of their studies. They explore the issues of the formation and theory of sharia, its methodologies, and its prescriptions, in great detail. There is also a rich selection of literature about particular aspects of sharia, on Islam and constitutional law, Islam and human rights, the status of women and family law in the Arab world, Islamic criminal law, Islamic courts, etc.

In contrast, this book looks at the processes of incorporation of sharia in national legal systems from a socio-legal perspective. This means that the authors do not only describe the contents of the law, but also try to shed light on the formation and functioning of law in context. One of the strong points of socio-legal scholarship is its capacity to distinguish law from social reality, ‘law in the books’ from ‘law in action’, text from context. This is important because it is precisely in this border area that confusion and contestation about sharia have often originated.

As for the historical parts of the respective country chapters, the authors have identified longitudinal and recent trends. In the sections about recent history (1985 to the present) they pay particular attention to governance contexts, facilitating our understanding of why actors made certain decisions. Thus we have looked at law as a reflection of political and social forces and values that have evolved over time in particular societies.

The study’s focus on national laws raises questions about its relevance, such as: Do these laws really matter to ordinary people? How do these laws relate to the local social realities of justice seekers? Several of the chapters refer to studies in legal anthropology about the interaction between citizens and legal institutions. I regret that the scope of this project did not allow more space to the authors, some of whom are indeed social and legal anthropologists, to go down to the grassroots level and present local case studies. Still, you may notice that much of their writing is informed by first-hand knowledge of local developments. In

this way, the book tries to link law not only to history and governance, but also to society at large.

The term 'Muslim countries' in this book is used merely to describe the setting. It does not imply any social, political, or legal characteristic, and has no explanatory value. The term 'developing countries' is more important in this respect. The countries in this book are often societies that face serious development problems. Not only do many developing countries suffer from insecurity, economic stagnation, poverty, injustice, and a lack of quality education and proper health care, they also see first-hand that their traditional rural societies are falling apart in the face of rapid urbanisation. Breakdown of social control in such transitional societies has led to a rise of social ills common in almost every country in the world – crime, prostitution, drug abuse, drinking. Often socio-political conditions are not conducive for national law and governance to take over the full and effective regulation of society. Corruption, lack of resources, and other inefficiencies appear to be endemic.

The approach taken in this study fits within the academic domain that addresses the formation and functioning of legal systems of developing countries and their contributions to governance and development, which at a number of universities worldwide is now called Law, Governance, and Development (LGD) studies. The impetus for the study at hand stems from that intellectual tradition. LGD studies have their roots partly in the studies of colonial law and postcolonial law. Generally, LGD studies is regarded as part of the broader category of socio-legal studies, which combines the study of law with the legal specialisations of other disciplines.<sup>3</sup>

Many LGD case studies have drawn gloomy conclusions about the effectiveness of national law in Asia, Africa and Latin America, about injustices and the lack of 'real legal certainty'. Explanations often refer to the colonial heritage of legal pluralism, the imbalance of political power, uneven economic conditions, and/or legal and institutional weaknesses. These explanations differ considerably from an approach, which mainly points at the islamisation of law as the root cause of injustice and failing legal systems in the Muslim world. Such approach has become fashionable among some islamologists and philosophers, who consider Koranic verses as the unchangeable, uniform, normative essence of Muslim thought and behaviour. In contrast, socio-legal scholars focusing on the interaction between law and social context, are prepared to observe change, and diversity, both in legal texts as well as in social practices.

## 1.2 Sharia incorporated

### *Conceptualisation of sharia and Islamic law*

This book will often refer to the term ‘sharia’. Like its counterpart ‘Islamic law’ the term ‘sharia’ is surrounded with confusion between theory and practice, between theological and legal meanings, between internal and external perspectives, and between past and present manifestations.

According to Islamic jurisprudence, theology and historiography, the rules of sharia are based on the revelation by God of his plan for mankind to the Prophet Muhammad until his death in 632 (Vikør 2005: 20). In order to interpret God’s will from the available sources, religious scholars developed Islamic jurisprudence (*fiqh*) from the eighth century onwards. The scholars (*ulama*) put God’s revelation into effect, drafting a scientific, legal corpus of behavioural rules. Notably, in the first two centuries numerous scholarly *fiqh*-books were filled with case studies and rules. From the outset, many differences of opinion cropped up, for example disagreements over the sources of sharia, its unchanging character, its scope, and its validity ‘as law’. Some of the authors, such as Al-Hanafi, Al-Maliki, Al-Shafi’i and Al-Hanbali gained great influence. Their names were given to different *fiqh*-schools, which came to represent ‘the dominant opinions’ of what we may call ‘classical’ sharia, especially since two centuries later Muhammad’s ‘gate to free interpretation (*ijtihad*) was closed’.<sup>4</sup>

The profession of the Muslim scholars who, thus, studied and developed the sharia, has always been a mixture of what we nowadays would call theologians and jurists. In Arabic those among the *ulama*, who specialise in Islamic jurisprudence are referred to as *faqih* (plur. *fuqaha*, expert of *fiqh*, jurist, or ‘legal’ scholar). They may work as a scholar and teacher in a seminary, as a *mufti* (the one who issues *fatwas* or legal opinions about what rule of sharia applies to a particular case) or as a judge (*qadi*).<sup>5</sup> The broader category of *ulama*, is usually translated as ‘religious scholars’, or just ‘scholars’. While in this book different authors use all of these terms sometimes in different ways, in the introduction and conclusion of this book I will refer to the *ulama* as ‘scholars’. Islamic law has often been said to be a law of scholars, as opposed to civil or continental law, which is often regarded as law-maker’s law, and common law, which is supposedly judge-made.

It has been the perennial objective of Islamic scholars to discover and develop ‘the sharia’ as a concrete body of rules and principles. Common people used to consult the scholars, asking them what ‘the sharia’ would prescribe in a particular case. Meanwhile, the many



differences in interpretation between, for example, Sunnis and Shiis, and between the different schools of law, are obvious. Scholars who studied Islamic jurisprudence have explained the diversity as a result of its open, discursive character, which should help to bridge the gap between the divine abstract source and the variety of human behaviours and contexts to which it should apply. There seems to be agreement among modern scholars about the very diversity of sharia itself. Vikør (2005: 1) states in the introduction to his history of Islamic law:

There is no such thing as a, that is one, Islamic law, a text that clearly and unequivocally establishes all the rules of a Muslim's behaviour. There is a great divergence of views, not just between opposing currents, but also between individual scholars within the legal currents, of exactly what rules belong to Islamic law. The jurists have had to learn to live with this disagreement on and variety in the contents of the law.

Likewise, another scholar of Islamic law, Peters (1997: 260) wonders if sharia is a legal system at all '[...] because such a diversity of opinions exists next to one another [and] [e]ven within the schools of law there are often differences of opinion'. The rules of sharia are not unambiguously laid down in the law, but rather they are formulated in scholarly explorations or, as Peters states, 'in a continuous debate with their predecessors and colleagues' (ibid: 260, translation by JMO). Fuller (2003: 57), a senior political observer, for instance, states:

There is no one Sharia but rather many different, even contesting ways to build a legal structure in accordance with God's vision for mankind. A single Sharia doesn't exist. It is not a book that one can purchase. It is shaped, and interpreted by humans' differing understanding of what the Qur'an and the Prophet's life and experience mean.

Yet, we face the problem that many people – from 'puritan' Islamists to their Western critics – continue to assume and propagate that the sharia is a uniform thing, a fixed set of norms that is binding upon all Muslims, regardless of where they live, and which cannot be modernised, because it is 'divine and unchangeable'. Indeed, many nations, groups, and individuals use the term sharia to present *their* interpretation as *the* definitive divine law. How then can this idea of a fixed, unchangeable sharia, deriving from Islamic theology, be consonant with the social reality of widely diverging interpretations of sharia, or, as Fuller and others suggest, of a diversity of 'sharia's'? A realistic solution starts with the acknowledgment that the manifold ways in which law-

makers, judges, religious scholars, academics, and others refer to the sharia, should be analysed and categorised. In the course of this project it has proven useful to discern four distinct ways in which the term sharia is used, namely as divine abstract sharia, as classical sharia, as historically transferred sharia, and as contemporary sharia.

First, *divine, abstract sharia*: this is God's plan for mankind and as such contains the rules for good order and human behaviour that should guide his religious community. The existence of this divine, abstract sharia is accepted as a fact by all devout Muslims, 'moderate' or 'puritan' (see 1.5). Before it can be applied in practice it needs explanation and elaboration by scholars. Al-Azmeh (1993: 12) has considered the implications of this abstract meaning of sharia for the debates surrounding islamisation of law, noting that:

Islamic law is not a code. This is why the frequently heard call for its 'application' is meaningless, most particularly when calls are made for the application of sharia – this last term does not designate law, but is a general term designating good order, much like *nomos* or *dharma* [...].

Secondly, *classical sharia*: this is the corpus of rules, principles, and cases that were drawn up by *fiqh*-scholars in the first two centuries after the Prophet Muhammad. Sharia, in this sense, is concrete and refers to the classical writings of leading scholars and the early commentaries on them. As such, classical sharia necessarily bears the traces of how religion, society, and politics were experienced in particular parts of the world more than a millennium ago.

Thirdly, *historically transferred sharia*: this includes the whole body of interpretations developed and transmitted throughout a history of more than a 1,000 years across the Muslim world, from the alleged closure of the gate of free interpretation to its reopening in the nineteenth century, and up to the present day. The notion of historically transferred sharia encompasses an immense, full spectrum of considerations and ideologies – ranging from personal beliefs to state ideology, from living law to formal positive law, from moderate to 'puritan' interpretations. While classical sharia, as taught and interpreted by mainstream, conservative religious scholars, has been the main point of reference in most Muslim countries, certain modernist scholars have seen and seized opportunities for smaller and larger reforms of sharia. Usually, though not always, they did so on the basis of the classical religious sources and commentaries. This was especially so in the nineteenth and twentieth centuries when many interpretations of the classical sharia were introduced as reforms of the national legal systems of Muslim countries,

including, for example, throughout the Ottoman Empire and in Egypt, Iran, Afghanistan, and Pakistan.

Lastly, *contemporary sharia*: this concept of sharia refers to the whole of principles, rules, cases, and interpretations that are actually in use at present throughout the Muslim world. Contemporary sharia has become a vast, fragmented, and dispersed mass. Ideas travel ever faster following domestic and international migration, the missionary (*daqwa*) movements since the 1970s, and the use of journals, radio, television, and the Internet. While governments, institutes of higher religious education, and mass movements all promulgate and publish their own versions of sharia, individuals and study groups around the world seek their own preferred scholars to instruct them about the prescriptions of 'the sharia'.

Hopefully this fourfold distinction will help the reader, when coming across the term sharia in this book, to understand from its context which notion of sharia is actually meant. It may also help to recognise those instances in which different meanings of sharia are conflated, such as in the famous phrase 'introducing the sharia'. Some authors, also in this volume, use the term sharia mainly for the divine sharia, which is abstract and general. They call the other three – all results of human activity – *fiqh*.

### *Sharia incorporated*

The title *Sharia incorporated* is meant to catch the essence of the twelve stories that make up this book.<sup>6</sup> In all Muslim countries of old sharia has been regarded as a divine plan. To be applicable and practical, however, the principles and rules of sharia must be interpreted and laid down. This has always raised vital questions, such as: Who will do this? When and where? To what extent? How? And with what purpose? Will there be a check on this power? What if people do not agree? Initially, as indicated above, religious scholars performed this task, and often with a considerable degree of autonomy from the rulers. That situation has changed notably since the early nineteenth century, when the world was gradually divided up into independent states.

States by definition consist of institutions that are supposed to have the authority to make and enforce rules that govern their people. Their internal and external sovereignty is a *conditio sine qua non* of their existence. Therefore, states can in principle not accept the existence of a parallel structure with similar objectives, unless it can be incorporated in the structures and laws of that state itself. This is exactly what we have seen happening with sharia.

Intermediate stages of incorporation occurred as long as Muslim territories formed part of colonial empires – or the Ottoman empire for

that matter – during the nineteenth and early twentieth centuries. After independence, which came to the Muslim states in three big waves, in the 1920s, the 1940s, and the 1960s (see 1.4.2), the new political elites had to decide how religion should be embodied in ideology, policy, and law. Suddenly nationalist leaders and religious leaders, who had fought side by side in the struggle for independence, became opponents. For in all Muslim countries the new political elite of independent states opted for supremacy of their own authority, their own decrees, their own national laws. That was the new rule of the game, and it would not change. All other normative systems and the traditional elite were to be incorporated into the state's legal, political, and administrative systems. As such, state interference with sharia became broad and deep. Political and legal marginalisation became the fate of both sharia as well as of the class of scholar-jurists, who had developed and applied it.

As you will read in the following chapters, the modalities of incorporation differed hugely. The kings of Saudi Arabia, who have always had to rely on support of the powerful religious elite of Wahhabi scholars, proclaimed the Quran and the Sunna to be the country's 'constitution', and as such denied that name to the 'basic law' that spells out the organisation of that state. They gave the Wahhabi scholars important positions and powerful voices within the state legal and political system. To the contrary, the new elite under Atatürk removed sharia from the Turkish legal system and kept tight control on religion through the *Diyanet*, the state office for religious affairs. The King of Morocco became 'commander of the faithful' and had a decisive voice in how sharia-based law would be codified in family legislation. The government of Egypt accepted in its constitution the principles of sharia to be 'the source of legislation', but ultimately decided not to adopt its substantive criminal law, and to modernise its family law. In Iran, the Shah failed to recognise the political power of the scholars in his country; upon the overthrow of his regime, Khomeini and his clerical associates became the new political elite who could incorporate their views in state policies and national law.

A consistent fact in all twelve national laws except for secular Turkey is that sharia has been incorporated in the state system, often adapting old interpretations of sharia to socio-economic changes. Although criticised and contested by many different – if not all – sides, the incorporation of sharia by the state remains essentially a fact of life. About this incorporation different political camps use different discourses to further their goals. So it is not uncommon to see that certain acts of incorporation are regarded as islamisation of national law by one camp and as annexation of sharia by the state by another (see 1.5).

### 1.3 Countries, concerns, and contested issues

#### *Selecting twelve Muslim countries*

In order to have a fair representation of the Muslim world, twelve Muslim majority countries were selected. These twelve countries represent about two thirds of the world's total Muslim population of 1.5 billion (see table 1 below). Most Muslims live in South and Southeast Asia, and a considerable number live in Sub-Saharan Africa. This study includes countries from those regions, thus avoiding the common tendency of equating the Muslim world with the Arab world or the Middle East. The selected countries include five countries from the Middle East and North Africa (Egypt, Morocco, Saudi Arabia, Sudan, and Turkey), three from Central and South Asia (Afghanistan, Iran, Pakistan), two from Southeast Asia (Malaysia, Indonesia) and two from West Africa (Mali and Nigeria). The politico-legal orientation of the governments of these countries ranges from 'puritan' to 'moderate' to 'secularist'. They vary in size of their population, percentage of Muslims, their social and economic development, their security situation, the degree of democratisation, and their political stability.

**Table 1** *Twelve countries by number of inhabitants, % Muslims*

<i>Country</i>	<i>Inhabitants (Mln.)</i>	<i>Muslims (%)</i>
Egypt	80,3	90
Morocco	33,8	99
Saudi Arabia	28,0	100
Sudan	41,0	70
Turkey	71,2	100
Afghanistan	31,9	99
Iran	70,0	98
Pakistan	174,0	97
Indonesia	234,7	86
Malaysia	24,8	60
Mali	12,6	90
Nigeria	140,0	50

*Source: Bartleby: <http://www.bartelby.com/151/indexes/countries/1.html>, accessed March 2010*

For the purposes of this study, a 'Muslim country' is understood to be a country of which at least 55 per cent of the population is Muslim. The international organisation of Muslim countries, the Organisation of the Islamic Conference, has 57 member states. Of these, 41 or roughly three quarters meet the above-mentioned definition. The fourth quarter is made up of member states with Muslim minorities. For a long time Malaysia was considered a borderline case at 55 per cent, but this number is now commonly estimated at 60 per cent. Strictly speaking,

Nigeria, with a Muslim population of only about 50 per cent, does not meet our definition of a Muslim country. However, the size and importance of the country – and the ramifications of the programmes of sharia implementation recently undertaken in twelve of its Northern states – led to the decision to include Nigeria in this study.

*Main concerns, contested issues, common assumptions, and questions*

There are four main concerns that have arisen as a consequence of the islamisation of law:

- (i) Supremacy of sharia
- (ii) Legal status of women
- (iii) Cruel corporal punishments
- (iv) Violations of human rights

The book's preface refers to the post 9/11 context in which these concerns took centre stage, namely heated domestic and international debates and strongly conflicting ideas on Islam, and especially sharia. To Muslim 'puritans', embracing the sharia has always seemed the very best thing that they themselves and their country could do. Muslim 'moderates' have held different views both of the role of sharia in state and society and of how sharia should be interpreted; but being Muslims, they have of course not been opposed to sharia as such. For many people in the West, however, sharia started symbolising the main foreign threat to their society. Among those alarmed, vocal academics, politicians, and other opinion leaders embarked on a more confrontational course.

For years the abovementioned concerns were constantly brought to public attention, and the sensitised media were able to report almost daily on worrisome issues from the Muslim world – topics ranging from the prosecution of Baha'i in Egypt, to the rise of a 'puritan' Muslim party in Morocco, to honour killings in Turkey, to the hanging of young homosexuals in Iran, to violent attacks in Pakistan, or to public flogging in Aceh, Indonesia. Most of the headlines covered a specific issue that seemed to fit well within one of the four main concerns mentioned above. For the purpose of systematic analysis, I have listed those worrisome issues and added the alarmist assumptions that since a few years have become so common in the West.

*Supremacy of sharia*

Within this first area of concern, the following issues can be distinguished:

- *Scope*. This issue concerns the extent to which sharia influences a national legal system as a whole. Many assume that in Muslim

countries sharia has pervaded all areas of public law and private law.

- *Territory.* This issue involves the geographical spread of particular sharia-based laws within a particular country. It is often assumed that islamisation of the law in a specific district or province represents a wider change and spread throughout the whole country.
- *Orientation.* This issue touches on which of the competing views and movements within the Muslim world is actually dominant, especially in interpretations of sharia. Many assume that islamisation of law automatically implies the supremacy of ‘puritan’ views, rather than ‘moderate’ perspectives.
- *Basic norm.* This begs the question as to whether the foundational norm of a country’s legal system is the constitution itself – as opposed to ‘the sharia’ or ‘Islam’ – if particular provisions in the constitution state that sharia is the main source of legislation or that every law should comply with the tenets of Islam. It is often assumed that an increasing number of constitutions have actually introduced sharia as their highest or basic norm.
- *Legal decision makers.* This issue is about who ultimately decides the rules in a legal system: religious scholars, who are experts of the *fiqh*? Or the office holders and officials of the state, such as elected parliamentarians, administrators and bureaucrats, and professional judges trained in national, largely secular, law. Many assume that sharia-based legal systems are theocracies that leave decisions in law-making, interpretation, and adjudication to religious scholars trained in Islamic religious institutions rather than to professional policy-makers and jurists trained in secular universities. Consequently, law enforcement in these systems is assumed to be entrusted to a religion-based sharia police.
- *Islamic codification.* The issue is whether the existing law codes, which were often based on Western models, have been thrown overboard completely and replaced by fully Islamic codes. It is often assumed that Western law codes have indeed been replaced by new Islamic codes that are totally different.
- *Islamic courts.* The issue is whether states have established separate Islamic judiciaries that have taken on the functions of secular state courts. A popular assumption is that Islamic courts have indeed been established or entrusted with increased powers.
- *Islamic ruler.* The issue involves the conception of an Islamic government as essentially authoritarian, without powerful elected parliaments or independent courts capable of maintaining a check on the powers of the ruler or head of state. Many assume that heads of the executive power possess vast legal authority derived from sharia, and without any democratic constraints.

Most of these eight issues are addressed in a country's constitutional law.

#### *Legal status of women*

Within this second area of concern we selected the following issues.

- *Repudiation (casting off)*. The question is whether a man's right, bestowed upon him by classical sharia, to repudiate his wife at will, unilaterally, and without having to give any reason, is still valid. It is often assumed that husbands can indeed divorce their wives arbitrarily by unilateral declaration without judicial or governmental approval.
- *Polygamy*. This issue involves the right of a man, as provided for by classical sharia, to conclude multiple marriages with up to four wives, as he likes and without the need for permission of the first wife or of state authorities. Many assume that Muslim men can marry up to four wives at will.
- *Divorce*. This issue concerns the possibilities for a woman to obtain a divorce from a court, which according to classical sharia are very limited. A common opinion is that a woman can hardly initiate a divorce.
- *Inheritance*. The issue is that classical sharia provides that in the case of inheritance a female heir inherits half of what a male heir in a similar position would inherit. It is generally assumed that a woman indeed inherits only half of the portion of a man.

These four issues are addressed in a country's personal status, family, and inheritance law.

#### *Cruel corporal punishments*

In this third area of concern, cruel corporal punishments, the most prominent issues are threefold:

- *Hadd offences*. This issue involves the enactment of five, and in some countries six, criminal provisions, based on classical sharia, that prescribe heavy corporal punishments for specific crimes, namely extramarital sex (*zina*), accusation of extramarital sex, robbery, theft, consumption of alcohol, and, according to some schools of thought, apostasy. Many assume such provisions have indeed been enacted.
- *Execution of corporal punishments*. The issue is whether it is common practice to actually administer corporal punishments, such as stoning and amputation. It is readily assumed that these barbaric punishments are regularly executed throughout the Muslim world.
- *Retribution and blood money*. This issue involves the enactment of criminal provisions, based on classical sharia, that entail the



retribution (*qisas*) of violent offences, such as murder, manslaughter, and assault, according to the principle of an ‘eye for an eye’; and that retribution can also be bought off with ‘blood money’ (*diyya*). It is generally assumed that retaliation provisions are common and applied in practice.

These three issues are addressed in a country’s criminal law.

#### *Violations of human rights*

This fourth area of concern is different from those mentioned above in that it departs from established normative standards – those of international human rights treaties with universal objectives –, and refers to institutional mechanisms for identification and condemnation of violations. It includes the abovementioned concern with women’s legal status by reference to the right to freedom from discrimination, enacted in the international Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It also encompasses the right to physical and mental integrity, which is guaranteed by the international Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This area of concern is thus broader and addresses all areas of law. For the purpose of this study four issues are selected.

- *Freedom from discrimination.* The issue is that besides the discrimination of women in family and inheritance law, sharia-based law also discriminates against several other groups, including homosexuals, non-Muslims, ‘deviant’ Muslims, adherents of other religions, and atheists. The assumption is that such discriminatory provisions have indeed been enacted, and as such make life for minority groups difficult, or even impossible.
- *Freedom of religion.* The issue is the Islamic prohibition against leaving one’s faith, which constitutes the crime of apostasy and is punishable under classical sharia law with heavy penalties, allegedly even in some circumstances the death penalty. It is commonly assumed that criminalisation of apostasy violates the freedom of religion for Muslims.
- *Other prohibitions of and prescriptions for (un)Islamic behaviour.* This issue relates to the legal obligation to refer to Islam, its prescriptions, and its symbols with deep respect only – for women to wear the veil, for Muslims to refrain from music and dance, and for compulsory education in Islamic scriptures. Many assume that such provisions are often enacted and in practice encroach upon fundamental freedoms.
- *Adherence to international human rights law.* The issue is whether Muslim countries have accessed, ratified, and implemented the

major human rights treaties. It is often assumed that Muslim countries are not bound by such human rights treaties, and that they have not established national human rights laws and institutions to promote human rights domestically.

### *Economy and finance*

Each of the twelve country studies in this book pays attention to most of the abovementioned concerns and issues. In addition, they briefly touch on sharia-based law in the sphere of economy and finance. Such law, it is assumed, includes a ban on Islamic banks to charge interest. Muslims must also pay special religious taxes to religious authorities, symbolising their adherence to religious, rather than worldly, authorities. As there is no direct connection with the violation of any human right, this aspect has led to minimal, if any, Western concerns and criticisms in the international debates on sharia and the rule of law. To the contrary, Western banks, law firms, and governments have taken a keen interest in Islamic banking.

### *Monitoring the islamisation of law*

The abovementioned issues, totalling about twenty, constitute a useful set for monitoring the impact of islamisation on national legal systems. The selection of issues remains contestable, but by and large this set may serve as a fair representation of the issues that have dominated domestic and international debates about Islam and sharia. For the authors of the country studies, each issue was an open question, to which a verifiable answer had to be found. By aggregating the outcomes of the twelve country studies, this research project has obtained a rich set of data that enables a systematic comparative overview of legal provisions. If we also take into account the historical and socio-political background of legal change on these issues, we may begin to grasp a better understanding of the changing relationship between sharia and national law in the Muslim world.

## 1.4 National legal systems, three delicate areas of law

### *Composition of national legal systems*

At first glance most developing countries seem to have national legal systems set up like that of any more developed country. The term 'national legal system' here refers to the whole body of legal rules, legal institutions, and legal processes. Developing countries have laws on any conceivable topic, many of which closely resemble the laws of developed countries. They also have much the same legal institutions, such as legislatures at central and regional levels, ministries, executive agencies, regional and local governments, supreme courts, appeal courts and courts of first instance, ombudsman institutions, bar associations, law faculties, legal aid institutions, etc. As most Muslim countries fall in the category of developing countries, the main set up of their laws and legal institutions is not different from that of any other country.

A closer look at the structure of legal systems of developing countries, however, reveals layers and fragmentation. Under the surface of the more visible present-day national laws, we find layers of legal provisions and ideologies deriving from, for example, the socialist, authoritarian era of the 1960s and 1970s, of colonial law, of religious law, and of tribal customary law. The 'geo-legal' structure of a country, though, is far from uniform. Customary law, for example, may apply in one place, for one group, or for one particular topic, while elsewhere, for other parties or a different topic, religious law or a national law may apply instead of the customary law applied elsewhere. The layers of law differ in territorial scope, in subject matter, and in institutional set-up.

Customary law is strong in rural areas, and often concerned with dispute settlement, land law, inheritance law, and in many regions with family law. Its key actors are traditional authorities, i.e. chiefs and traditional councils. In most Muslim countries Islamic law has a particularly strong impact on family and inheritance law. Since colonial law used to recognise the indigenous law as 'law of the natives', it gave rise to the formal incorporation of customary and religious courts in the judiciary. After independence, most young states wanted to assert full control over the law of their subjects. Rather than maintaining the colonial legacy they strived for unification of their legal systems. And indeed, most developing countries have developed an impressive amount of national laws and established the relevant national legal institutions to implement these laws. In comparison to the staggering numbers of modern national laws and regulations, the hard kernel of sharia rules over which actual agreement exists, is rather miniscule. Yet, in the same way as customary law, sharia has continued to play a role until today, as we shall see in the country studies.

The inheritance of colonial law also consists of codifications of civil and criminal law, of jurisprudence, of laws of procedure, of types of judicial organisation, of legal styles and ways of legal reasoning, legal education, and legal language adopted primarily from European models. The colonial legal traditions have been carried on in developing countries by legal professions and scholarship. Former British colonies like Nigeria, Pakistan, and Malaysia are now members of the Commonwealth and still exchange legal information with other Commonwealth countries. Former French colonies – e.g. Morocco and Mali – are still oriented towards French legal development and legal information. Remarkably, French law has also been a major reference for the codifications of Egypt, Iran, and Afghanistan, even though they were never colonised. Egyptian law, especially its civil code, has had a major impact throughout the Middle East, from the Gulf States to Afghanistan. In contrast, Turkish civil law has largely been based on the Swiss Civil Code. Thus, different ‘centers of radiation’, to use the concept of Arminjon’s work on comparative law, have influenced the legal systems of developing countries, including those which form part of the Muslim world (Arminjon, Nolde & Wolf: 1952). Table 2 (see below) provides some basic information about the centers of radiation influencing the twelve legal systems under review, such as their constitution, colonial legal tradition, school of Islamic jurisprudence, and the role of customary law.

Today, domestic laws are increasingly influenced by public international law. International organisations like the WTO, ILO, FAO, WHO, IMF, World Bank, and UNDP provide advice on domestic legal drafts. Financial aid is often made conditional upon the adoption of law reform. Human rights conventions and movements have also prompted legal change. Competition between developing countries for foreign direct investment has been another driving force behind emulating the laws of ‘successful’ countries. While this enumeration of centres of radiation is far from complete, it is clear that law-makers in developing countries have been drawing from various domestic, foreign, international, and transnational sources in their efforts to achieve national policy objectives.

### *Dysfunctions of legal systems*

Whatever sources have been used in the formation of the laws of developing countries, and whether they include versions of sharia or not, it is common knowledge that the actual operation of these legal systems is marked by serious dysfunctions and shortcomings. Many legal systems simply fail to fulfil what is their main task, namely providing justice and legal certainty for all.

**Table 2** *Twelve national legal systems with their legal traditions*

Country	Year of independence	Year of present constitution/ last amendments	Colony/ Protectorate	Legal tradition		Scope of customary law (1: small; 2: moderate; 3: vast)
				Civil law/ Common law	Fiqh tradition	
Egypt	1922	1971 <sup>1</sup>	Ottoman, Britain	Civil law	Hanafi	1
Morocco	1956	1996	France	Civil law	Maliki	2
Saudi Arabia	1932	- <sup>2</sup>	-	-	Hanbali	1
Sudan	1956	2005 <sup>3</sup>	Britain	Civil/ Common law	Hanafi	3
Turkey	1923	1982 <sup>4</sup>	-	Civil	-	-
Afghanistan	1919	2004	(Britain)	Civil law	Hanafi/Shia	3
Iran	<sup>5</sup> 1979	1979	-	Civil law	Shia	2
Pakistan	1947	1973 <sup>6</sup>	Britain	Common law	Hanafi	3
Indonesia	1945	1945 <sup>7</sup>	Netherlands	Civil law	Shafi i	2
Malaysia	1957	1957 <sup>8</sup>	Britain	Common law	Shafi i	2
Mali	1960	1992	France	Civil law	Maliki	3
Nigeria	1960	1999	Britain	Common law	Maliki	3

<sup>1</sup> Several important amendments were incorporated, notably in 1980, 2005 and 2007.<sup>2</sup> According to the Basic Ordinance (1992) the country's divine sources of Islamic law form its constitution.<sup>3</sup> This is an Interim Constitution for a five years period, after which South Sudan will decide about its future.<sup>4</sup> The constitution was last amended in 2004<sup>5</sup> The history of independent Iran goes back thousands of years.<sup>6</sup> Many amendments were incorporated.<sup>7</sup> Since 1998 four important amendments have strengthened the rule of law considerably.<sup>8</sup> Since 1957 hundreds of amendments were enacted.

This lack of justice and legal certainty can in part be attributed to legal causes, such as the inadequacy of laws, restricted or faulty legal mandates of institutions, and incomplete or vaguely construed legal procedures. In addition, the dysfunctions are closely related to other, non-legal problems of development and governance, such as insecurity, poverty, illiteracy, authoritarianism, and corruption. Curing the problems of legal systems, therefore, presupposes progress in other areas. The plurality, fragmentation, and overlapping of normative systems in most developing countries add to the problematic nature of governance and law. It would require much imagination to see how the general Islamist recipe – ‘introduction of the sharia’ – can provide a practically feasible way out of these complex problems. Meanwhile, the common objective and direction to which most countries have subscribed is the ‘rule of law’. This has become an appealing concept because it reflects the ideal of justice, which underlies all ideologies, religions, and nation-states, and it also provides for an elaborate set of legal and institutional standards with practical guidance.

#### *Rule of law and human rights: authoritative standards?*

Rule of law has become the most common international umbrella concept prescribing normative standards for legal systems (Tamanaha 2004). International donor policies have made good governance and the rule of law a focal point of their assistance to developing countries (Carothers 2003). Meanwhile, there has been much debate about the clash, as Huntington phrased it, between the ‘Western’ concept of the rule of law and Islamic concepts of law, or more specifically about the compatibility of sharia with human rights. But what does the rule of law mean, how Western is this concept, and how does it relate to human rights? Bedner (2010) has concluded on the basis of an extensive literature review that the rule of law concept can be best understood by distinguishing two complementary sets of standards, namely procedural and substantive standards, as well as a third set regarding what he calls ‘control mechanisms’.

The main procedural standards of the rule of law, as accepted in authoritative documents and academic literature, are that (a) state policies must employ written laws – acts, ordinances, decisions – as major instruments; (b) all state actions must be subject to law; (c) the law must be clear and consistent in substance, accessible and predictable for citizens, and general in its application; and (d) the substance of the law and its effectuation must be influenced by citizen approval.

As for the main substantive standards of the rule of law, there is consensus that all laws and their interpretations must be subject to (a) fundamental principles of justice; and (b) human rights and freedoms of

individuals, notably civil and political rights, social and economic rights, and group rights.

In order to control compliance with these procedural and substantive principles, the rule of law, as Bedner has proposed, also requires a third set of elements to be in place, namely of control mechanisms: (a) the executive arm of the state must establish internal correction mechanisms on unlawful administrative actions; (b) an independent judiciary, accessible for every citizen, must be responsible for conflict resolution through interpretation and application of the law; and (c) complementary quasi-judicial institutions, such as an ombudsman, a national human rights-institution, and various tribunals, must be in place to further ensure compliance with the rule of law.

Over the last few decades the legal systems of the world have undoubtedly moved towards this rule of law. Yet, while country A's legal system may have succeeded in complying with most rule of law standards, it can still violate certain human rights. In the case of a Muslim country, such violation may stem from its adherence to certain interpretations of sharia. 'Puritan' regimes will as a matter of principle refuse to formally review provisions of the divine sharia against secular legal standards, but instead prescribe a reverse testing. 'Moderate' regimes rather tend to accept the rule of law to be the dominant standard for most practical purposes. In fact, both camps can agree about most of the abovementioned elements of the rule of law, since there is no conflict with any sharia provision. Yet, certain human rights standards are contested by puritans time and again as being 'Western' and 'un-Islamic'. From a human rights perspective, it is precisely the violation of those standards that has given rise to the concerns and contested issues listed above in 1.3. The recurring conflicts about those issues have made certain parts of national law in the Muslim world rather thorny and delicate, politically speaking. We find those delicate parts mostly in constitutional, family, and criminal law. For this reason, the focus in the legal sections of each country study is on these three areas of law and their relationship to sharia in the country at hand.

## ■ 1.5 Ideological-religious currents and discourses

### *The moderate-puritan dichotomy and beyond*

Throughout the twentieth century different views were held across the Muslim world about what should be the relationship between sharia and national law. They ranged from Saudi Arabia's preservation of classical sharia to Turkey's strict secularism. Two discourses have fuelled the interpretation and implementation of sharia more than any other, namely those espoused by 'puritans' on the one hand, and by

‘moderates’ on the other hand. Both believe, as Abou El Fadl explains, ‘in the oneness, completion and perfection of God’ and in his mercy and compassion (Abou el Fadl 2007: 127-132). They also agree that God should be approached by human beings ‘with submission, humility and gratitude’. However, ‘puritans’ and ‘moderates’ differ dramatically in their ideas about what God wants from human beings, how mankind should use its ability to reason, and in particular about the role of sharia in that relationship.

Moderate Muslims believe that in the moment of creation God has entrusted humanity with a heavy responsibility, by providing human beings with rationality and the ability to differentiate between right and wrong. They should use this capacity to relentlessly strive to achieve goodness, which includes justice, mercy, and compassion. Those are actually the real objectives of God’s law. As Abou El Fadl writes:

In moderate thought, God is too great to be embodied in a code of law. The law helps Muslims in the *quest* for Godliness, but Godliness cannot be equated to the law. [...] the technicalities of the law cannot be allowed to subvert the objectives of the law. Therefore, if the application of the law produces injustice, suffering, and misery, this means that the law is not serving its purposes [...] then the law must be reinterpreted, suspended, or reconstructed, depending on the law in question (ibid: 130-131).

In contrast, in the ‘puritan’ conception, good Muslims should be fearful of God and study and obey his rules as strictly as possible. Whatever is in the sacred sharia is thought to reflect God’s mercy and compassion. So, what they need is a sharia which prescribes exact rules to which they can submit by strict compliance. Through this only will they obtain salvation:

Through meticulous obedience, Muslims will avoid punishment in the Hereafter and will enter Heaven. [...] By performing acts of submission, Muslims earn good points, and by disobeying God they earn sins (or bad points). In the Final Day, God will total up the good points and the sins. Heaven or Hell is determined by the balance of points [...] (ibid: 127).

In the ‘puritan’ paradigm there are no grounds for legal reforms that take contemporary socio-economic changes into account. In the ‘puritan’ view:

The actual social impact that the law might have upon people is considered irrelevant. Although people might feel that the law is



harsh or that its application results in social suffering, this perception is considered delusional (ibid: 128-129).

While the opposition between ‘moderates’ and ‘puritans’ has been a constant throughout the history of Islam, contemporary politics and societies feature an ideological-religious spectrum which is in fact broader and more complex than this dichotomy. Orientations of strategic Islamic movements and groups range from nationalist, secularist, human rights, feminist, liberal, social services, clean government, modernist, and democratic, to conservative, traditionalist, orthodox, pan-Islamist, radical, and ultimately, revolutionary, militant, and terrorist (cf. Fuller 2003; Hallaq 2003). In practice, these orientations often overlap and the meanings and connotations of the labels often differ. Political positioning of such movements on religious issues often intersects with other issues of domestic and foreign policy. Many of these movements and groups are quite pragmatic and versatile, as power configurations surrounding them are in constant flux and choices must be made between competing political discourses.

#### *Major discourses about incorporation of sharia*

Different political actors have voiced a variety of discourses on the incorporation of sharia. Governments have done their best to present the incorporation as a deliberate policy that both demonstrates their respect for religious beliefs among the people and provides them with state-guaranteed legal certainty. According to this discourse the government has opted for an incorporation that contributes to nation-building and socio-economic progress, and is thus beneficial. While certain groups may disagree with the outcome, the government has acted as an arbitrator who, standing above the parties, has come up with the best possible and most balanced solution. Often governments have ensured themselves of the support of high-ranking clerics, who have gone along with this state discourse about the beneficial incorporation of sharia.

In contrast, Islamic scholars, who have *not* posited themselves as an extension of the government, have presented the incorporation of sharia as the political elite’s erroneous appropriation of the power to interpret God’s will, to ascertain the rules of sharia, and to administer justice accordingly. This power used to be theirs. So, for them, the incorporation of sharia constitutes a marginalisation of their profession and the distortion of a good thing that has now fallen into the wrong hands. Academic expositions about the transformations of sharia often concur with this narrative. Hallaq (2009) describes the fate of sharia as the result of a lost battle. He points to the fact that the political elites of the independent Muslim countries have interfered much more broadly and

deeper in religion in their societies than their colonial predecessors ever dared. Feldman (2008) similarly depicts the scholars as the good experts of justice who used to exert a necessary and beneficial influence on authoritarian rulers, until modern bureaucratic regimes chose to sideline them and made a mess of what used to be a capable religious administration of justice.

The disappointment of the scholars about their marginalisation by the state is not shared by the 'puritans'. In their discourse, the incorporation of sharia is the product of an essentially impious, amoral, and opportunistic governance. They contend that rulers and scholars have both failed to comply with God's law; they have indulged in luxury and corruption, neglected their real duties, and plunged their country into misery. Incorporation of sharia, as it was conducted by such unfaithful elites – lackeys of the West! – must be brought to an end so that revolutionary Islamist forces can take over and promulgate new laws in full accordance with God's will.

While these are perhaps three of the leading discourses about incorporation of sharia in the Muslim world, the first two make themselves seldom heard in the West, while the third has got through only to some extent. In Europe and North America another discourse about this incorporation dominates all others, namely that which equates incorporation of sharia with islamisation of law, deterioration of human rights, and a threat to both world peace and Western civilisation.

## **1.6 Towards a realistic history of sharia and national law**

### *Selecting turning points and historical periods*

The interaction between sharia and national legal systems has a long history, which has been depicted in the academic literature in different ways. While Hallaq and Feldman have denounced the displacement of sharia in modernising states, others such as Huntington and Marshall have emphasised the islamisation – if not rapid then 'creeping' – or 'shariaisation' of national law. The country studies in this book attempt a balanced interpretation of that history. Normally the history of each country would deserve its own periodisation. However, for the purpose of comparison this study has used a common periodisation for all country studies.

We have used the year 1800, the beginning of the nineteenth century, as a starting point because it marks the start of major modernisations in law and governance, both in the Ottoman Empire and Egypt, as well as in European colonies in Asia. Since Napoleon's 1798 journey to Egypt, the Middle East was suddenly confronted with European

progress and modernity. In this period Islamic modernism emerged and Muslim scholars ‘reopened the gate of free interpretation’.

The next turning point, 1920, was chosen since it marks the end of the first World War, the subsequent end of the Ottoman Empire, and the rise to independence of most Muslim countries in the Middle East. What followed was a period of nationalism, state-building, and, especially after 1945, a rapid succession of ideologies and foreign influences. Sharia as a normative system continuously had to face new political contexts, from modernisation and liberalism during the interbellum to socialism and authoritarianism in the 1950s and 1960s. Ambitious legal policies of political elites were often informed by an urgent desire for unification, modernisation, and secularisation and aimed for a wholesale transformation of societies. The governments, however, lacked the capacity to implement, and social resistance to the transformations turned out to be considerable (Allott 1980).

We have chosen 1965 as the starting point for the decline of this over-ambitious nationalist, and often socialist and secular-oriented, rule in a major part of the Muslim world. The heroic age of the first generation of national leaders like Nasser and Sukarno was coming to an end. African decolonisation was largely completed, and many of the young Muslim countries in Asia and Africa went searching for their own ideologies and identities. Disappointed by broken promises of development and the failures of governments, several countries experienced ideological and power vacuums, which in countries, such as Iran, Pakistan, and Sudan were filled by coups that brought islamisation of law and governance.

As noted in the book’s preface, developments during the twenty-five years after 1985 have been the subject of heated debates and speculations about the islamisation of law. An important objective of the historical part of this study is to provide a balanced assessment of this process in recent decades.

The histories of national legal systems in the chapters ahead start mainly from around 1800. About the long period before 1800, the studies had to be brief. Yet, the preceding millennium was important as an era that saw the growth and flourishing of sharia, as well as emerging tensions with the laws of the state. Therefore, this section ends with a brief introduction to that early period.

### *The millennium of sharia as the living law (c. 800-c. 1800)*

In theory the legal system of the early, burgeoning Muslim state knew only one lawgiver (God), one prevailing legal system (sharia), and one type of judge (the *qadi*, who formed the single-headed sharia court). Since 750, however, a parallel legal system under the Abbassid Caliph

developed, serving practical and administrative needs (Esposito 1998: 22; Vikør 2005: 190). As rulers do, the Caliph made rules, issued decrees, and passed judgments himself. Formally, these decisions served to carry out his main task, namely the preservation of sharia. The justification under sharia was that rulers were granted a discretionary power, or *siyasa*. This power was seen as permissible – acknowledged by the *ulama* – in so far as it did not conflict with the sharia (Esposito 1998: 23; Vikør 2005: 192).

A part of this parallel system under the Caliph, a sort of professional administration of justice, was set up with boards of grievances or *mazalim* courts. Initially, these were only intended for complaints against high government officials or judges, but gradually the Caliph broadened the jurisdiction of the *mazalim* courts to include criminal, administrative, and trade cases. In this way, the competence of the sharia courts was reduced to family and inheritance law, religious endowments, and in certain regions, perhaps also contract law. The *mazalim* courts were not the only type of non-sharia courts that existed from the early days of the caliphate. More important for most people were the police courts (*shurta* courts), which operated as a separate system based on police investigations and which were ‘unhampered’ by the strict rules of evidence prescribed by the sharia (Vikør 2005: 190-195). Thus, a dual system of state law and religious law operated, theoretically unified by the principle of *siyasa*. As most country chapters will reveal, customary law prevailed in most rural areas, as a third important element.

From 1500, after centuries of stagnation, several Muslim princedoms developed into expansive empires with considerable military power: the Ottoman Empire in the Middle East and Southeast Europe, the Mughal Empire on the Indian subcontinent, and the Shiite Safavid Empire in Persia. As cultural capitals, Istanbul, Delhi, and Isfahan became worthy successors to the Baghdad of the Abbasids (Esposito 1998: 26). In addition, the Ottoman sultan bore the religious title of Caliph. Islam provided the legitimation, the political ideology, and the law for the governing of the three large empires. Sharia was the official prevailing law in all three. The actual scope of sharia courts, however, was usually limited to family law and inheritance law. The sultans continued to issue their own decrees and maintained the *mazalim* courts. Sometimes their princely edicts differed from classical sharia. In the fifteenth century, the Ottoman sultan decreed that the strict *hadd* punishments were not to be applied under his rule (see 6.1). In the three empires, the sultans were virtually absolute rulers and were supported by vassals, civil servants, and military forces.

In opposition to this absolutist rule, the *ulama* tried to maintain their own basis of power. In the Ottoman and Mughal empires this was done through an implicit alliance with the ruler. In the Safavid Empire, the

*ulama* maintained a more independent position, in accord with Shiite doctrine. Certain *ulama* were active as judges, as state advisors, and for the enforcement of the law. Above them, in addition to a chief judge, was now also a chief religious functionary, known as the chief *mufti*, or the *Shaykh al-Islam* (in the Ottoman Empire) or the *Sadr al-sudir* (in Persia and South Asia). According to Hallaq (2003: 1710), the system of Islamic religious scholars functioned as a counterweight to the state and government, and ‘it did so with remarkable independence and success.’ However, ‘the judge[s] who [were] appointed and paid by the state’ were soon suspected of being ‘agents of corrupt politics’. Other religious scholars or *ulama* were responsible for an expanded and often flourishing educational system. Finally, they controlled a large number of social services. The *ulama* often used the income from land grants and religious endowments (*waqf*) for mosques, hospitals, schools, and other public services. In this way, they acquired much authority among the people, which strengthened their position *vis-à-vis* the secular authority. Thus, Islam and sharia functioned for about a thousand years in the Muslim world as a system of religion, governance, and law. As Abou El Fadl writes:

The Shari’a [...] functioned like the symbolic glue that held the diverse Muslim nation together, despite its many different ethnicities, nationalities, and political entities. [...] [T]he Shari’a remained the transcendent symbol of unity, and the jurists [scholars] were the Shari’a’s guardians [...] and] stayed above the petty political and military conflicts and [...] provided the quintessential source of religious authority in the Muslim world (Abou El Fadl 2007: 34).

Although practice was often different from the sacred doctrine, Islam, nevertheless, furnished the people with a cohesive element and historical continuity. Rule according to sharia was the common element, as it was also the minimum requirement for an Islamic government. The recognition by the ruler that sharia was the official law preserved the unity of the community and its Islamic character. Under the great sultans, Islamic law was thus ‘the criterion for the legitimacy of an Islamic state’ (Esposito 1998: 31).

## 1.7 A voyage around the Muslim world

After this introduction it is now time to proceed to the country chapters, embarking on our voyage around the Muslim world, which starts in Egypt (see chapter 2), the ancient kingdom on the border of the two continents Africa and Asia. Egypt, the largest country in the Arab world,

has played a central role in the development of law in the Middle East. During the nineteenth century, Egypt became one of the prime leaders of modernisation in the region. Later, the country was to become the centre of Islamic modernism inspired by Muhammad Abduh. The country was also home to the great legal scholar Sanhuri, who managed to draft a civil code during the interbellum on the basis of French law, Egyptian case law, and sharia, which was to be introduced in over a dozen countries in the region. In 1980 a constitutional amendment declared the principles of sharia to be the main source of legislation, but, as we will see, this would not stop the liberalisation of marriage law.

From Egypt, we will move to the very Western corner of the Muslim world, Morocco (see chapter 3). When the country became a French Protectorate in 1912, the sultan agreed to seek French assistance for the development of its legal system. Soon after independence in 1956, Morocco introduced a codification of sharia, the Personal Status Code of 1958. Having been amended several times, it now contains one of the most progressive family laws in the Islamic world. During this process, the king, who according to the constitution is 'Commander of the Faithful', played an important role.

Like many Muslims do each year, we now set course for Saudi Arabia (see chapter 4), where we find a different set of legal rules altogether. Protecting the Holy Places where Islam originates from and hosting the annual pilgrimage, Saudi Arabia, led by the ruling dynasty of the Sauds, takes centre stage in the Muslim world. Sharia is its national law, and law reform has been slower and more cautious than in any other country. For decades, the powerful clan of the Wahhabi, which sits in the country's most powerful religious seats, has promoted missionaries all over the world to present the Wahhabite puritan model as the only right one. Religious missions in Asia, Europe and Africa were funded by profits made from the rich oil reserves.

Next we cross back over the Red Sea to Africa, to the Sudan (see chapter 5). This state has been devastated by long lasting civil wars arising from the conflicts between the Islamic North, the non-Islamic South, and later with rebel groups in Darfur. When in 1983 general Numeiri had not succeeded in lifting his poor country into a higher stage of socio-economic development, he announced a grand scale islamisation of the law. Since then, the Sudan has tried to 'cleanse' its legal system of all traces of liberal British and Egyptian-French roots. However, as part of the peace negotiations with the South in 1998 and 2005, relatively liberal constitutions were put back in place.

From the Sudan we continue into Turkey (see chapter 6), the country that is considered by some as the bridge between Europe and the Middle East – among the most populous countries in the Middle East, like Egypt and Iran, and a country that has been steering its own

ideological course for almost a century. Atatürk turned Turkey into a secular nation after the end of the First World War, and to date it continues to be so. However, the rise of religious parties, such as the AK led by Erdogan, has repeatedly led to tensions involving the army, the police, and the judiciary. Perceived as symbol of religiosity, the issue of the wearing of the veil has been the centre of tense political and legal debate, perhaps more so than in any other country in the world.

Our journey continues into Afghanistan (see chapter 7) in Central Asia. King Amanullah tried to reform this country at the same time when and in the same way as Atatürk was busy reforming Turkey. Yet, nation building in Afghanistan turned out to be a slow and difficult process. Since the late 1970s, a large part of the country became the battle field for tribal warlords, Russian troops, and Islamic resistance fighters. The 1990s saw how the resistance forces were joined and overruled by a new militant movement, established with support from the United States, Saudi Arabia, and Pakistan: the Taliban. During their authoritarian rule, the Taliban gave Osama bin Laden the opportunity to prepare the infamous Twin Towers attack in 2001. After the subsequent American invasion, the Taliban were expelled and foreign troops were deployed to support the government in Kabul in hopes of maintaining the rule of law in this poor and fragmented country.

If one crosses the border into Iran (see chapter 8), one arrives in a relatively organised and developed country. It is here that the Shah launched his greatest modernisation policy, which only partially succeeded. In response to severe political repression, the Iranian people supported the 1979 Islamic Revolution *en masse*. More than thirty years after the Revolution, it may seem that the strong islamisation of the legal system has barely, if at all, been toned down. Iran is the only country of our dozen where religious scholars have seized executive and judicial power and oversee the governance of the state. However, over the last decades, social, intellectual and political movements have vigorously advocated legal change – with some limited successes – and reformers have gained an increasing amount of support. During the 2009 election campaigns, opposition against the present regime and calls for reform became massive.

Pakistan (see chapter 9), a country stricken by poverty and ethnic conflict, had a troublesome start and until the present day is frequently uprooted by violence. As is the case in Afghanistan, customary law is still dominant in the rural areas. Military and civil presidents have upheld a fairly authoritarian regime. In 1979, General Zia ul-Haq overthrew the democratically elected government of Ali Bhutto in a *coup d'état* and tried to legitimise his rule by introducing a strict adherence to Islamic law. Large nationalist parties, as well as the judiciary, which follows the British legal tradition, exert a moderating influence on the

extensive power of the presidents as well as on the islamisation of the national law.

Just a few hours by plane one reaches Southeast Asia, an area where Islam has blended in with local custom (*adat*) and the old traditions of Hinduism and Buddhism. Indonesia (see chapter 10) is the largest Muslim country in the world, an enormous archipelago of thousands of islands, and home to hundreds of ethnic groups. While Dutch colonial rule recognised the country's elaborate systems of customary *adat* law, since independence in 1945 the emphasis has been on national law. Islamic law has remained in a secondary position. Consequently, the word Islam does not appear in Indonesia's constitution. But this country, too, has been subject to efforts of islamisation. Yet, the consecutive governments – democratically elected since 1998 – have continued to steer a course with national unity as their overriding objective. Islamisation of law has so far been quite limited, the remote province of Aceh, however, being an exception.

It takes only a short trip overseas to Malaysia (see chapter 11), where almost the same language is spoken. This country provides a home to both the Islamic Malay population as well as a large minority group of Chinese, has, like other Muslim countries, seen a rise of Islamist movements in the last decade. These movements strongly contrast the older, more tolerant and moderate form of Islam that has been the mainstay of Malaysia's history. The judiciary, operating in a British legal tradition, has had to play a crucial role in dissolving conflicts that arise out of the more assertive stance of 'puritan' Muslim movements.

From one region in the 'periphery of the Muslim world' to another: Sub-Saharan Africa. In poverty-stricken Mali (see chapter 12), an ex-French colony, the state is fairly secular by nature, and the predominantly rural population adheres mostly to customary law. Yet, here too, Islamic traditions and Muslim missionaries have left their mark on politico-legal developments. Mali, relying on development aid, is confronted with Western donors who wish to improve the position of women, and with Islamic donors such as Saudi Arabia who wish to increase the influence of classical sharia. To date, the government has been able to preserve stability and steer a course of compromise between the conflicting forces.

The final stage of our journey takes us to Nigeria (see chapter 13), the most populous country in Africa, which is divided into an Islamic North and a Christian South. This federal state, rich in oil, has experienced many violent conflicts, both between tribal as well as between religious groups. Military coups brought the country under army rule for long periods. Only since 1999 civilian rule has been reinstated. The year 2000 marked the significant event of eleven provinces in the



North promulgating Islamic criminal law. Ten years later this book reconstructs the events and takes stock of the results.

After this cursory voyage you have reached the end of the introductory chapter. Hopefully you are now prepared to immerse yourself into the fascinating individual country chapters, and to gain, while reading, an ever more complete overview and deeper insight into how sharia has been incorporated in national legal systems throughout the Muslim world.

## Note to Preface

- 1 Berger 2006; Otto 2006; Otto, Dekker & Van Soest-Zuurdeeg 2006.

## Notes to Chapter 1

- 1 In this chapter in particular and in many parts of the book the term 'sharia' is used instead of 'Islamic law'. For the purpose of this study it was found preferable to differentiate between sharia and law. The term sharia then denotes divine rules that, according to the religion of Islam, emanate from God. The term law, as commonly used, refers to man-made rules and norms, issued by and enforceable by state institutions. Of course we can also define the term law more broadly to encompass systems of religious law and religious authorities, but in the context of this study that could also easily create unnecessary confusion. Readers can especially be confused when in certain literature about sharia (translated from Arabic into English), authors refer to 'sharia' by using the term 'the law', as in the phrase for example '[t]he status of women according to the law is equitable to men'.
- 2 Except for Nigeria, see 1.3.
- 3 These specialisations include legal history, sociology of law, legal anthropology, law and development studies, law and economics, comparative law of developing countries, court studies, and the legal dimensions of political and governance studies.
- 4 This closure of the gate has been an established theory but some authors have contested it, a.o. Hallaq (2009).
- 5 Dispute resolution according to classical *fiqh* requires parties and/or the judge to consult a *mufti*, whose *fatwa* will then be applied to the case by the judge. Today, this system is still in use in Saudi Arabia.
- 6 The term 'incorporated' is merely introduced in order to point at the historical process, in which states have appropriated the legal function of sharia. The term does not have the connotation of a business enterprise or a multinational company and should not be understood as such.

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