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12 Sharia and national law in Mali

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Abstract

The Republic of Mali is a multi-ethnic nation with an overwhelming Muslim majority and a constitution embodying a parliamentary system, multi-party democracy, and freedom of religion. Its legal infrastructure is strongly shaped by the legacy of the French Civil Code and the French principle of secularism (*laicité*) and does not make room for any incorporation of Islamic law into the constitutional order.

Islamic law has never been strongly represented or institutionalised in any colonial or postcolonial state law. Its traces have become weaker, even if Islam, as an idiom of community building, has gained a new momentum since the late 1970s and a greater public prominence after the political liberalisation of the early 1990s. Mali's current positive legal system reflects several dilemmas and legacies deriving from a longer-standing legacy of colonial dual administration, from the particular power constellation between Muslim forces and the state, and finally, from the autocratic political heritage of its recent postcolonial history.

Mali's present-day legal system does not comprise a separate Islamic judicial sector, and sharia does not figure in any area of codified law. Nor did sharia play a role in the development or modification of Malian law. At the same time, democratisation and the empowerment of secularist forces within the government since the early 1990s has not put an end to Islam's imminent

political force. At the level of positive law, however, the secular character of the constitution and of political parties is expressly maintained.

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The Republic of Mali gained independence from France in 1960 and presently counts around 12.6 million inhabitants. Various ethnic groups live in Mali, including the Mande (Bamana, Maninka, Soninke) (50%), Peul (17%), Voltaic (12%), Songhai (6%), and the Tuareg and Moor populations (10%). Ninety per cent of Malians are Muslim, and nine per cent of the population professes an indigenous religion. Only one per cent of the population is Christian. French is the official language, but 80 per cent of the Malian population speaks Bamanakan and/or one of several other African languages.

(Source: Bartleby 2010)

12.1 The period until 1920

The coexistence of diverse politico-legal orders – a situation disrupted by French colonial administration

Precolonial centralised polities and diverse forms of local legal practice

Throughout the nineteenth century, the area of today's Mali was structured by various forms of politico-legal organisation. Some regions were under the tutelage of centralised polities. Although these polities are often referred to as 'kingdoms' (in scholarly publications as well as in local parlance), they differed from medieval European kingdoms with respect to their administrative and political organisation. They were based primarily on warfare, trade, and on the redistribution of booty and tended to be characterised by a high degree of instability. Royal and noble lineages and the principle of inherited leadership existed, but were often challenged by contending warrior entrepreneurs. Some of the ruling lineages were closely affiliated with lineages of Muslim scholars and traders, and had themselves adopted a Muslim identity. The majority of the population, in contrast, continued to subscribe to non-Islamic religious practices and belief systems.

Areas outside these centralised polities were by and large constituted by conglomerations of relatively autonomous village communities, which formed temporary and strategic military alliances against foreign aggressors. Here again, only few families considered themselves Muslim.

Starting in the late eighteenth century, populations in the southern triangle of contemporary Mali witnessed the emergence of a number of Islamic theocratic states. Among them were the empire of Macina (founded in 1810 and ruled by Sekou Amadou from 1755-1849) and the Tukulor empire of El Hadj Umar Tall (1794-1864), who, after his return from Mecca to his home base in the Futa Tooro (eastern Senegal),

sought to create a warrior empire, which, however, due to the growing presence of the French colonial powers, never achieved a high degree of institutionalisation and stability. From 1852 onwards, El Hadj Umar gradually occupied south eastern Mali, which until then had been under the control of the empires of Kaarta, Macina, and Segu. The expansion of these theocracies did not bring with it a mass conversion to Islam. Widespread islamisation occurred only in zones under the immediate influence of these empires.

As a consequence of the varying degrees in islamisation, locally diverse legal orders and practices co-existed in many areas. In the northern regions, Islamic law (Maliki school of jurisprudence) was predominant in and near the urban centres such as Gao and Timbuktu where Muslims made up the majority of the population. In most regions of the French Sudan (Soudan Français), in contrast, customary practices of establishing 'law and order' were based exclusively on oral tradition, relatively fluid, and situationally contingent. Because Muslim communities existed as islands within non-Islamised populations, legal practice was characterised by a selective combination of Islamic and non-Islamic normative orders. This selective combination of normative orders was facilitated by the fact that only few people were literate and most normative principles were passed down orally. It is likely that many interpretations of Islamic law were inflected by customary legal principles. Only in towns where families of Muslim religious scholars had a political weight was this intermingling of different normative orders mitigated by the interventions of religious experts who watched over the correct application of Islamic legal conceptions.

The early days of French colonial administration

Earliest contact by the French colonial powers with the area of today's Mali dates back to the fifteenth century. But, actual colonisation of the region started only in the nineteenth century, in the context of a growing struggle among European powers over overseas colonial territories. Moving from the Senegalese coast to inner zones of Sahelian West Africa, French colonial troops gradually occupied a region that later was to constitute a major part of the Afrique Occidentale Française (AOF). French colonial occupation of the area started in the late 1850s and ended in 1892, with the subjection of El Hadj Umar's son Ahmadou Tall. In 1892, the 'French Sudan' (*Soudan Français*), the area comprising present-day Mali, was declared part of the French colonial empire; in 1902, it was incorporated into the administrative unit of 'Sénégambie et Niger' and, later, in the period between 1904 and 1920, into the 'Haut-Sénégal et Niger'.

12.2 The period from 1920 until 1960

The spread of Islam in the face of colonialism

The consolidation of colonial rule

The name 'French Sudan' (*Soudan Français*) was reintroduced for the area of today's Mali in 1920 and became a separate administrative unit in 1937. Colonial administration never affected local politico-legal and social structures to the same extent as in the case of the coastal French colonial territories. This is due to the fact that, apart from the commercial rice cultivation programme in southern Mali (region of Segu), colonial exploitation of natural resources was almost non-existent.

The majority of the Malian rural population, in particular in the South, converted to Islam only after the 1920s, that is, during the colonial period. The gradual conversion to Islam was facilitated by several factors. For a long time, Muslim faith had been associated with an erudite, cosmopolitan, and economically successful identity. Individuals and families critical of colonial occupation came to equate Islam with a modern, progressive orientation that constituted an alternative to the colonial normative and cultural order. The modernising, cosmopolitan outlook of Islam was reinforced under the influence of religious and economic entrepreneurs with intellectual and commercial ties to the Arab-speaking world. It allowed younger people to distance themselves from traditional political authorities as well as from an older generation of Muslim religious experts, many of whom had established a friendly relationship with the colonial authorities.

The role of Muslim authorities as brokers between local producers and the colonial state was significantly less important than in other West African countries, such as Senegal and Nigeria. Lineages associated with the Sufi orders, a prominent social form of Islam in West Africa, were influential in pre-colonial polities mostly in and around some urban areas (such as Timbuktu, Gao, Mopti, Djenne, Segu, Nioro), an influence that sometimes expanded in the colonial era. The three important Sufi brotherhoods – the Qadiriyya-Mukhtariyya, the Tijaniyya, and the Hamawiyya – emerged in doctrinal distinction from, and in political competition with, each other from around the late eighteenth century. Yet, today, their leading lineages and followers jointly constitute the basis of established or 'traditional' Islam. A crucial step in this fusion of representatives of the diverse doctrinal orientations into a group with a common structural position in contemporary Malian society was the active support of French colonial administrators for some of the Sufi lineages. French administrators considered them to be representatives of an established 'African' Islam capable of

limiting the growing influence of a new group of Muslim entrepreneurs with strong intellectual and business ties to the Arab-speaking world.[2] The latter, labelled 'Wahhabi' by colonial administrators (and by many people today), consider themselves 'Sunnis'. Since their emergence in the 1940s, they have denounced some practices and beliefs associated with the Sufi brotherhoods as unlawful innovations, that is, as distortions of the original teachings of the Qur'an and Hadith. Although the Sunnis jointly opposed the representatives of the Muslim establishment, they never constituted a homogenous group.[3]

The French system of colonial administration invested the French Parliament with full legislative powers and with functions allowing for a direct administration of colonies, thus covering the domains of criminal law, of public matters, and of political and administrative regulation. In addition, the Governor General of 'French West Africa' (Afrique Occidentale Française or AOF), seated in Saint-Louis (Senegal), had the authority to promulgate legislation in the form of ordinances and of administrative orders.

A decree of 1903 by the Governor General of the AOF that stipulated that the French Civil Code should be applicable in French West Africa marked the formative period of colonial administration and the attempt of the French colonial powers to establish a legal system of general validity throughout this colonial territory. It established a dual colonial legal system with two distinct bodies of law and spheres of their application. French positive law (*Code Napoléon*) regulated the affairs of French citizens and 'assimilés', that is, French expatriates, non-African foreigners and those Africans who had acquired French citizenship (*citoyens*). The rest of the colonised population, the so-called 'French subjects' (*Sujets Français*), were adjudicated under the *Justice Indigène*, that is, according to various 'indigenous' or 'customary' laws among which Islamic law held a privileged position. The treatment of Islamic law as part of customary law served a *divide et impera* strategy that effectively contributed to the mutual neutralisation of competing local political factions and of the normative orders these different groups sought to establish as the dominant order. Colonial politico-legal practice thereby perpetuated the highly dynamic and conflict-ridden relations among different segments of the population.

Colonial attempts to control the normative regulation of social and political life were played out in, among other things, the absence of a separate Islamic or customary judicial sector. There was no direct and explicit incorporation of Islamic law into the constitutional order. The application of customary and Islamic law was limited to certain social domains, such as the customary regulation of marriage and inheritance matters. Yet, even if the regulation of these intra- and inter-familial matters remained by and large in the hands of male family members who

exerted their authority in this domain, these matters did not remain fully outside colonial legislation. French politico-legal control interfered, for example, in the form of decrees such as the *Décret Mendel* (1939) and the *Décret Jacquinot* (1951), which set the minimum age for marriage and limited the amount of the bride-price, respectively.

Formal adjudication of disputes took place at the level of the district (*cercle*) and of the province. The third level of jurisdiction was the Court of Appeal in St. Louis (Senegal). The French administrator-judges working in the indigenous courts (*Tribunaux Indigènes*) relied on both customary law (including Islamic law) and modern law; they were supported in their work by advice from experts (*assesseurs*) in local legal norms and practices (Sall 1986; Hazard 1972). Some administrators invested great efforts in compiling and systematising 'local custom' as it appeared before their courts.

In regions with a Muslim majority, one of the two assessors or advisors to the judge was either an expert in Islamic jurisprudence or some other Muslim notable. As these Islamic experts turned into assessors, they lost crucial competences and decision-making powers with respect to the settlement of disputes over inheritance, land use, and slaves.[4] Because French magistrates had the authority for decision making in disputes centring around divorce, land use rights, succession, and so forth, their role had the effect of severely reducing the political power of village elders and Islamic notables. That being said, it is likely that a number of experts in Islamic law and in non-Islamic legal conventions, by contributing to the standardisation of different customary laws, were able to enhance their personal powers and to buttress the structural position of the group they represented. Furthermore, in spite of the seemingly overarching powers of colonial administrators, their possibilities to enforce their rulings were actually quite weak and, by and large, limited to the administrative centres and the immediate surrounding areas. Also, one has to keep in mind that, except for the areas where Islam had been established for centuries, Islamic legal norms and regulations were often strongly inflected by non-Islamic normative principles, such as in the domain of inheritance, marriage, and divorce matters. Accordingly, the endorsement of Islamic norms remained limited to areas under the influence of powerful lineages of Muslim religious specialists.

The times of the independence struggle

Islam never became a central rallying idiom for anti-colonial resistance in the Soudan Français. In the times of the independence movement (since the late 1930s), many representatives of traditional Islam joined the Parti Socialiste de Progrès (PSP), the basis of which was constituted primarily

by the former political and religious establishment. The PSP was originally the more successful political party, but it lost political terrain to its competitor, the Union Soudanaise-Rassemblement Démocratique Africain (US-RDA), in the legislative elections of 1957. The latter adopted a more explicit socialist orientation and had its stronghold among segments of the population that were considered socially inferior (e.g. descendants of former serfs). Initially, the US-RDA also counted among its ranks a number of 'Wahhabi' activists and merchants.

After the official establishment of the internal autonomy of the French West African Colonial Territories in 1958, full legislative powers were transferred to the territorial legislative assemblies, created in the same year. Mali achieved independence as a member of the Malian Federation (which then comprised the French Sudan and Senegal); its first constitution was ratified in January 1959. After the failure and subsequent dissolution of the Malian Federation on 20 August 1960, Mali was declared an independent nation; its new constitution, adopted in September 1960, was a slightly revised version of the initial constitutional text.

Islam was not explicitly mentioned in either constitution. Article One simply states the indivisible, democratic, secular, and social character of the Malian Republic (Konaré 1982: 160). The legal system also did not comprise a separate Islamic judicial sector, and sharia did not figure in any area of codified law. Almost immediately after its independence, Mali became a member of the United Nations (September 1960).

12.3 The period from 1960 until 1985

From Keita's socialist single-party rule to Traoré's military regime

1960-1968: Keita's socialist single-party rule

The postcolonial evolution of the state legal system testifies to the persistent colonial legacy of a dual legal order, which established two distinct types of subjecthood (*citoyen* versus *sujet*). In the postcolonial context, the *Justice Indigène* was discontinued. But the duality of the colonial system was perpetuated in another form, that is, in the substantial gap between legal regulations on the one hand, and social practice and local law in a broader sense, on the other hand. The legacy of the dual colonial legal system is further reflected in the on-going, *de facto* exclusion of the majority of the population from basic citizenship rights. Most Malians – in particular those who live in remote, rural areas – have very limited, if any, access to courts and legal support. The reverse side of this situation is the judiciary's lack of legitimacy and means with which to enforce judgements.

The first President of Mali, Modibo Keita, pursued a socialistic policy. Although some 'Sunni' reformists had initially supported the cause of the US-RDA party that led Mali into independence, the reformists soon lost political terrain, as did their political opponents, the representatives of traditional Islam. The opposition of conservative Muslim forces to Keita's rule was certainly one reason why his party promoted a decidedly secular interpretation of the constitution. President Modibo Keita never went so far as to denounce the influence of Islamic clerics on local politics, but his secularist policy sought to neutralise them. However, his marginalisation of Muslim forces, especially of Muslim merchants, was only temporarily successful; it provided a seed of growing popular disaffection and passive resistance that would ultimately lead to the overthrow of his regime.

The first constitution of the Republic of Mali, adopted by the National Assembly in September 1960 by unanimous vote, was revised three times during the *de facto* single-party rule of the US-RDA.[5] The political system laid down in the constitution was a parliamentary democracy with a strongly centralised and personalised executive power. The division of legislative and executive powers was analogous to that of the French Constitution of 1958. Apart from the Supreme Court, a State Court (*Cour d'État*) combined constitutional, jurisdictional, and administrative functions with those of the Auditing Office (Lavroff & Peiser 1961: 172; Konaré 1982: 12). In the later years of Modibo Keita's rule (post 1965), amendments to the constitution reflected an ever increasing tendency towards monopolisation of political power and the downplaying of judicial independence and authority.[6]

The new constitution provided for the codification and legislative reform of several domains. The reorganisation of the judiciary in May 1961 put an end to the dualist colonial judicial system. However, adjudication on the basis of legal advice from assessors was still permitted, however, in yet unlegislated domains, such as in the area of inheritance. Revised versions of the colonial Criminal Code (*Code Pénal*) and the Code of Civil, Commercial, and Social Procedure (CPCCS) were enacted in August 1961, and the colonial Code of Criminal Procedure was reformed in August 1962. The penal code was subsequently modified again in 1967 and in 1972 in an effort to ensure the equal treatment (punishment) of men and woman under Malian law. Reforms established, for instance, that men too should be punished in the case of adultery, abandonment of spouses and children, and for refusal to provide financial support (Sall 1986: 387). The Code of Civil, Commercial, and Social Procedure was modified in 1972, under the military regime of Moussa Traoré (see below). New legislation also emerged in other areas, including, for example, laws on nationality and labour relations.[7] Sharia did not play a role in the formation or adaptation of Malian law.

The legislation of previously untouched domains occasionally put the new political power in a paradoxical situation. The US-RDA's version of an 'African path to socialism' was distinct from the atheist agenda of Marxism-Leninism. Islam was seen as an important source of both cultural values and socialistic values derived from traditional Malian culture. Subsuming Islam under the umbrella of an authentic, pre-colonial African heritage was part and parcel of the US-RDA's strategy of encompassing cultural and political difference, rather than excluding or marginalising certain cultural conventions at the expense of others. Yet, by appealing to a common nationalist agenda, Keita's regime reproduced the tensions inherent in the conception of a shared public interest as formulated by liberal Western political theory. Muslim identity and national identity were occasionally equated in official representations, but religion *per se* was treated as a matter of individual conviction and relegated to the realm of the private.[8] No legal or educational institutions or organisational structures were created that were directly inspired by, or served to promote, Islamic normative principles.[9]

The combination of a socialist programme with a legitimising rhetoric based on references to an authentic African cultural heritage confronted the state with contrasting, even mutually exclusive, objectives. This, and the particular role that Muslim authorities played in a struggle over legitimacy and control, is illustrated by the codification of family law. In 1962, the Law on Marriage and Guardianship (*Code de Mariage et de Tutelle*) was enacted. This codification was intended to support the programme of economic restructuration and development that Modibo Keita's socialist regime had designed. This programme of economic development revolved around the aim of transforming the notion of extended family as the basic unit of the traditional social order and of pre-capitalist relations of production. This required interference in social institutions that had remained outside the control of colonial administration. Moreover, it implied a substantive limitation of the prerogatives of gerontocratic authority. Given that the new nation was claimed to be based upon and to represent the perpetuation of 'primordial' African forms of social solidarity, this hardly authorised the new leadership to affect precisely these kinds of changes. From this dilemma, there resulted administrative reforms, which sometimes neutralised each other, and a potpourri of, sometimes incongruent, legal provisions (or the lack thereof).[10]

For instance, the Constitution of 1960 made women full citizens with equal civil and political rights. The *Code de Mariage et de Tutelle* of 1962 was based on a new, nuclear family model based on horizontal bonds between spouses. As such, the code laid down the full civil capacities of married women (Art. 36). Clauses such as the determination of the minimum marriage age and of the necessity of the wife's consent

to the marriage crystallised the attempt to weaken the gerontocratic family complex based on the authority of male elders over the pro-creational capacities of women and daughters and over the productive capacities of sons.

The interference of the state with processes of decision-making within the family privileged the bond between the spouses and thus supported the emergence of new possible alliances within the family. However, the fact that the area of inheritance was never legislated reflected the continuing reluctance of the state to intrude into sensitive domains of everyday life. Consequently, fifty years post independence, there is an incongruence between the constitution, which guarantees women equal rights and full civil capacities, and Article 231 of the above-mentioned CPCCS which leaves the regulation of inheritance matters to locally diverse customary conventions – even where they are adverse to the principles of gender equality.

In rural areas, the substantial privileges of male elders (in some areas bolstered by references to Islamic principles and norms) were maintained principally because the relations of production remained largely unaffected by the changes imposed from above, in spite of the efforts of party representatives at the local level. For example, the limitation of the amount of the bride-price stipulated in the *Décret Jacquinot* of 1951 was generally disregarded, and no punitive measures were taken against it, partly because officials themselves continued with this practice. Arranged marriages, often of legal minors, also continued to be the rule. Likewise, although official registration of marriage was made a requirement, its application was nowhere enforced, allowing patriarchal prerogatives to be maintained.[11] Remaining traces of customary influence in the domain of marriage and divorce legislation reflect a reticence on the part of the US-RDA to police sensitive areas of patriarchal family control and to engage in conflict with religious authorities.

1968-1985: Traoré's military single-party rule

An alliance between representatives of the Muslim establishment and a new generation of Muslim businessmen was instrumental in the forming of a resistance to Modibo Keita's socialist policies, which ended with his overthrow by a group of officers of the Malian army in 1968.

Immediately after the putsch, an Ordinance (No. 1/1968, dated 19 November) suspended the Constitution of 1960 and established new, provisional structures of public powers that were to combine executive and legislative functions (effective until 1979). The result was the creation of the Military Committee of National Liberation whose president was to assume the function of the head of state.[12] A new constitution, approved by popular referendum (a novelty) on 2 June 1974, became

effective only in 1979, with the creation of a new assembly, a government and the election of the leader of the military committee, Moussa Traoré, as the new president of the country, now under the single-party rule of the Democratic People's Union of Mali (*Union Démocratique du Peuple du Mali*, UDPM).

The new Constitution of 1974 emphasised its continuity with the secular nature of its predecessor and reconfirmed its adherence to the Universal Declaration of Human Rights (and civil liberties) of 1948. But in practice, Traoré granted Muslim groups special privileges, in spite of Mali's secular constitution. One motivation for Traoré's pragmatic revision of the former regime's decidedly secular orientation was the political weight of influential Muslim families, many of which had business connections to the Middle East. Granting this group special privileges allowed Traoré to extend his control over powerful segments of the religious establishment and their new opponents, the *arabisants*, that is, graduates from institutions of higher learning in the Arab-speaking world. Because of their higher religious education, the *arabisants* soon occupied leading posts in the state bureaucracy, especially in the Ministry of Interior (which comprises a Department of Religious Affairs) and the Ministry of Education. For this reason, they had strategic advantages over both the representatives of the Sufi orders and the older generation of 'Wahhabi' merchants. The foundation of the national 'Association Malienne pour l'Unité et le Progrès de l'Islam' (AMUPI), in the early 1980s consolidated state control over the activities of the various groups of Muslims. The organisation's official *raison d'être* was to reconcile 'traditionalist' forces of the Muslim camp with their principal contenders. The organisation allowed the government to monitor the funds that, starting in the late 1970s, flooded the country, under the orchestrated efforts of the Saudi government to extend their *da'wa* movement of proselytising to fellow Muslims in sub-Saharan Africa.

Over the years of Moussa Traoré's rule, Islam, sponsored by international public and private money, acquired a very visible presence in the form of infrastructure (such as mosques and *medersas*, that is, schools with a reformist pedagogy) and of a stronger discursive representation in the national political arena. Since then, influential Muslim merchants and religious experts have exerted a persistent and important informal influence on national politics. Legislation in the proper sense was not affected by these developments. Still, from about the second half of the 1980s, leading Muslim figures have been able to influence political decisions, such as the closing down of bars and sites of popular entertainment during the month of Ramadan.[13]

The 1974 Constitution also created a constitutional basis for military rule and extended the presidential powers to the president of the

military committee. Changes in the new constitution involved a further weakening of the judiciary *vis-à-vis* executive power, and the reinforcement of executive powers *vis-à-vis* the legislature. For instance, the constitution undermined the independent status of members of the Supreme Court, by making their selection entirely dependent on the decision by the president (of the military committee and later that of the ruling party). Additionally, members of the Supreme Court were no longer elected for life (as stipulated in the Constitution of 1960), but for a limited period of time (Hazard 1972: 21). The establishment of a Court of State Security (on 15 September 1969, see Hazard 1972: 21f), in which members of the ruling military committee participated, can be seen in the same light. The above-mentioned strengthening of the executive power *vis-à-vis* legislative power manifested itself in amended legislative procedures; law proposals could previously be submitted by the president as well as by the parliament, but from now on the principal procedural power resided with the president (Sall 1986: 384ff). The president was also granted the power to appoint special delegates who should replace municipal councils.

The 1968 putsch had also marked a departure from the socialist economic policy of the previous regime.[14] Therefore, most of the legislative changes enacted in this period, by way of ordinances, addressed administrative, fiscal and economic matters. Almost no legislative changes were made with respect to penal and civil law.[15] This continuity is remarkable because it implies that the greater public prominence and political weight of Muslim authorities did not affect positive law, at least not in these legal domains.

A similar trend became evident in the proposed reform of family and personal status law, such as the 1962 Law on Marriage and Guardianship. A bill, submitted for discussion in 1973, did not reflect a greater influence of Muslim forces on this process. Instead, it illustrated a greater effort toward bringing Malian family and civil law into conformity with the international aspirations of the Malian state (for example the support of the U.N. Conventions of the rights of women and of children, Hazard 1973: 20, 22f). The proposed changes included the equal treatment of women and men with respect to inheritance matters, an attempt that implied a reassessment of both Islamic regulation and of non-Islamic customary conventions that prohibit women to inherit any share of family property (and occasionally even treat women as part of the inheritance). Another proposal was to change the legal status of illegitimate children, who were not recognised as such either by non-Islamic, customary law or by Islamic regulations. The draft law also laid down the legal status of adopted children, giving them the same rights as blood children to inheritance and the same obligation to support their aging adoptive parents. To date, this draft law has not been approved.[16]

12.4 The period from 1985 until the present

The new appeal of an Islamic idiom of political and social critique

Liberalisation and multi-party democracy under Konaré and Touré

The relative absence of substantial developments in the set-up of legal institutions and legal change throughout the late 1970s and 1980s reflects the general political stagnation that characterised the military regime and single-party rule under Moussa Traoré. One reason why the growing political weight of influential Muslims did not translate into an islamisation of the legal institutional framework is certainly the coterminous, growing influence of Western donor organisations to which Moussa Traoré turned increasingly throughout the 1980s in search for financial support.

Social protest movements directed against his regime surfaced intermittently after the early 1980s, yet were always bloodily repressed. Another reason why these protest movements did not lead to any substantive political institutional change under Moussa Traoré's government is that they originated almost exclusively in the urban youth. Only in 1989 did Moussa Traoré give way to the pressure of the democratisation movement. This movement, run by urban professionals, academics, and students was inspired by developments throughout Africa and in Eastern Europe and called for the introduction of a multi-party democracy.

In March 1991, a military coup under the leadership of Colonel Toumani Touré put an end to Moussa Traoré's single-party rule and to several weeks of bloody confrontations between the security forces and students and other supporters of the democracy movement. President Traoré's fall from power also marked the demise of the privileged political position that Muslim interest groups had occupied under his government. A *communiqué* of the national reconciliation council (*Conseil de Reconciliation Nationale*), led by Colonel Toumani Touré, suspended the Constitution of 1974 and dissolved the government. A transitional government under the leadership of Colonel Touré and his fellow militaries (*Comité de Transition pour le Salut du Peuple*) assumed provisional administration of public orders on the basis of an ordinance dated 31 March 1991. From the latter emerged a new constitution, which was adopted by popular referendum on 12 January 1992 (Pimont 1993: 462). Islam was again not mentioned in the constitution.

In 1992 the country's first democratic elections were held; only 21 per cent of the population participated. The newly-elected president Alpha Konaré and his party ADEMA (Alliance pour la Démocratie au

Mali) favoured a more stringent interpretation of Mali's secular constitution. They also ostracised the *intégristes*, who, as a recently constituted group of Muslims, capitalised on the liberalised public sphere and called for an introduction of 'the sharia', most often without specifying the exact contents of the reform to which they aspired.[17] Yet, President Konaré (as well as Toumani Touré who followed him in office in 2002) could not afford to antagonise prominent representatives of the Muslim establishment whose informal political influence is based on kin-related and clientelistic modes of followership.

In other words, the recent process of democratisation and of the empowerment of secularist forces within the government has not put an end to Islam's imminent political force. The latter never stopped to run like a red thread through Mali's political history as an independent nation-state. The ambivalent attitude towards Islam of current state and party officials is evident in their regular rituals of allegiance to Islamic values performed in the presence of influential figures of the Muslim establishment. At the level of positive law, however, the secular character of the constitution and of political parties[18] is expressly maintained.

The supremacy of the constitution was further established by the creation of a separate constitutional court charged with the assessment of the constitutionality of legislative change.[19] A major novelty in the 1992 Constitution is that it stipulates the replacement of the former presidential system with a parliamentary system, establishes a clearer separation of the legislative and executive powers, and substantially enhances the powers of the former *vis-à-vis* the latter.[20]

General tendencies of the past ten years

Since the political liberalisation of the early 1990s, Mali has witnessed an invigoration of Muslim actors who articulate a wide array of positions with regard to the extent to which Islam should provide the basis of the legal foundations of the political community. A numerically relatively minor group of actors, the *intégristes* mentioned above, denounced the prohibition of religious parties in 1991. At present, they seek to exert influence on public policy making and particular political processes, such as the reform of the judiciary and the draft family law. The debate over the reform of family law and of the judiciary is representative of several, sometimes paradoxical, trends. Contrary to their own claims that Islam should provide the normative basis of legal reform, their actual interventions are often guided by pragmatic concerns. Accordingly, these Muslim spokespersons often form strategic and shifting alliances with secularist representatives of the current government.

Women's rights activists constitute another group of actors that plays a prominent role in current controversies over the extent to which

Islamic regulations and values should be included in personal status law. While these women claim to defend the rights of women, their actual interventions reveal their preoccupation with interests and dilemmas of urban intellectual middle-class women; their public interventions, the ways in which they frame the issue of women's rights, and the kind of issues they address (e.g. female circumcision) also demonstrate that their activities and aims are importantly shaped by the current agendas of international governmental and non-governmental organisations.

Thus, current controversies over legislation and over the Islamic nature of national culture reveal how a local landscape of Muslim and secularist activism is fuelled and partly restructured by Western funding agencies (from e.g. the United States, France, Germany, and through European development funds) and by donors from Arab-speaking countries and other areas of the Muslim world (e.g. Libya, Saudi Arabia, Iran, Pakistan).[21] An expansive law reform project initiated in 1999 with the financial support of a number of international donor organisations (mainly U.S. and European funds) is indicative of this malleable climate. In aid negotiations with the government, these organisations were able to place this law reform at the top of the list of priorities.

The project's primary aim is to eliminate inconsistencies between the 1962 Family Law (*Code de Mariage et de Tutelle*), the 1972 CPCCS, labour legislation, and the 1992 Constitution, that have taken root as a result of the sometimes conflicting customary, Islamic, and state legal orders. Without explicitly specifying its agenda with respect to sharia-based law, the reform project is clearly intended to minimise the influence of puritan interpretations of Islamic norms. Furthermore, the reform project aims at creating institutional support for an extra-judicial arbitration system, the major function of which would be to deal with issues of property and land use.[22] It also includes measures to restrict practices of judicial corruption that are a principal reason for many people's tendency to evade the courts. Finally, it aims at improving people's opportunities for accessing courts and legal aid institutions.

Throughout the precolonial, colonial, and postcolonial history of contemporary Mali, sharia or sharia-based law never constituted a distinct, and even less so, overruling domain of relevant legal practice. To date, tendencies towards a dual legal order exist only at the level of norms, not in the form of separate court systems.

12.5 Constitutional law

Sharia-based law is not explicitly referred to in any part of the constitutional law in force. The pervasive and persistent secular character of the

constitution was once again illustrated and bolstered by the provisions of 1991, which laid down the secular character of all political parties. The 1992 Constitution establishes the citizens' right to freedom of religion, as well as the equal status of adherents of different religious orientations before the law. Yet in reality, proponents of the two book religions, Christianity and Islam, have a greater political weight than those representing traditional African religions.

The Constitution of 1992 expands the list of 'fundamental rights and duties of humans and citizens' (*Droits et Devoirs Fondamentaux de l'Homme et du Citoyen*) elaborated upon in the Constitution of 1974. The preamble declares the determination to defend 'Rights of the Woman and Child' and subscribes to the Declaration of Universal Human Rights (1948) and to the African Charter of Human and People's Rights (1981).

At the same time, the constitution establishes a difference between the rights and liberties that are simply recognised as opposed to those that are guaranteed by law. Certain rights (e.g. to work, housing, vacation, and health and a healthy environment) are by their very nature difficult to assure, especially in the context of a country where these rights have been established only in recent times; as such, their non-application is not tied to any possibilities for legal recourse.

In the wake of the growing political salience of Islam, a major bone of contention between Muslim forces and state representatives is the degree of autonomy that practitioners of the different religions should have in regulating internal affairs of their religious community beyond state control. So far, state representatives have successfully fought off attempts by Muslim forces to gain greater control over community and intra-family affairs.

12.6 Personal status and family law

It must be noted that at the grassrooots level polygamy and other conventions in the sphere of marriage and family relations were never regarded as specifically Islamic practices. In most rural and urban zones of contemporary Mali, physical punishment, repudiation, and other practices reaffirming women's inferior status position and rights *vis-à-vis* elders and men are commonly accepted. These actions are occasionally attenuated by the intervention of mediators and kin. But the actions are nevertheless acknowledged as accepted custom. Whether this custom is defined as Islamic or non-Islamic is of little relevance, except in the case of urbanites who, influenced by a Saudi Arabia-sponsored missionary (*da'wa)* movement, recently adopted an explicit Muslim identity and distance themselves from others whose 'un-Islamic' practices they

denounce. In other words, over the past twenty years, with the financial support of donors from the Arab-speaking world and, more recently, with political liberalisation, Islam has acquired a new political force and a salience as a symbolic language of legitimacy and normative distinction. In the course of this process, personal status law has become a bone of contention.

So far, family law is the only domain of legislation in which Islamic legal norms constitute an issue for debate. A new bill prepared in 2000 aims at the reform of the 1962 Marriage and Family Law (*Code du Mariage et de la Tutelle*). It forms part of the above-mentioned project on the promotion of democracy and justice in Mali funded by Western donor organisations and intended to enhance the effectiveness and credibility of the judiciary (see 12.6). The draft law aims to eliminate internal inconsistencies in the legal code arising from the sometimes conflicting principles of Islamic law and of conceptions derived from the *Code Napoléon*. The principal issues at stake are the fixing of a maximum amount of the bride-price, marriage registration, choice of the form of matrimony (i.e., monogamous versus polygamous), obligation of obedience to the husband, and choice of the site of residence.

Another goal of the project is to codify as yet unlegislated domains, such as that of inheritance. Muslim representatives who intervened during the publicly staged debates of the draft law in 2000 were guided not simply by a concern with the incorporation of Islamic legal norms in the positive law, but by an interest in gaining greater autonomy *vis-à-vis* the state in regulating affairs within the Muslim community. However, the government's effective neutralisation of Muslim interest groups in the drafting of a new family law is a clear indication of the current leadership's refusal to comply with these aspirations. In spite of the invigoration of Muslim political forces, their initiatives have not led to a greater presence or institutionalisation of Islamic legal norms, practice, institutions or practitioners within the family legislation.

This persistent exclusion is facilitated by the fact that Islamic legal adjudication was incorporated into the legal system of the colonial and later postcolonial state only as one form of customary law, which could be overruled by the legal principles laid down in the constitution.

12.7 Criminal law

The *Code Pénal*, revised several times since its initial legislation in the first constitution of independent Mali (September 1960), has not incorporated Islamic penal law. The latter also does not feature in the top priorities of the agendas of Muslim actors who call for the introduction of the sharia. Over the past eight years, only a handful of Muslim

spokespersons have explicitly referred to elements of Islamic penal law in their public interventions, calling for example for public corporal punishment for the offense of adultery.

12.8 Other areas of law

Neither commercial and banking law nor civil procedural law have been influenced by Islamic legal conceptions.

12.9 International conventions and human rights

Mali ratified the Covenant on Civil and Political Rights (ICCPR, 1966) on 16 July 1974 (entry into force on 23 March 1976). It signed the Convention of Elimination of All Forms of Discrimination against Women (CEDAW, 1979) on 5 February 1985 (ratified on 10 September 1985; entry into force 18 October 1985). And, on 26 February 1999, it signed and ratified the Convention against Torture (CAT, 1984), which went into force on 28 March 1999.[23] Assessments of the second periodic report regarding CAT[24] and of the first periodic report regarding CEDAW[25] expressed concern about the invocability of the covenants (Art. 2), the persistence of slavery-like practices and hereditary servitude in the North, and the continued practice of female genital mutilation as well as the existence of laws discriminating against women with regard to marriage, divorce, inheritance, and succession.

The 1992 Constitution, together with other legislation, establishes a number of institutions and structures for the protection and promotion of human rights in such areas as equality of citizens before the law, equality of access to the courts, impartiality in decision making. The organisation of the judiciary should guarantee the independence of judges, the provision of remedies, and measures for the protection of citizens' rights against arbitrary action. However, the basic conditions that would ensure these rights are far from being realised. The limitations to this realisation do not reside in the legal texts *per se*, but in the political and social conditions that pose clear limitations to the application of legal provisions.

Mali's signing of the Platform of Beijing (1994) has led to a politicisation of certain governmental measures, such as the campaign to eradicate practices of female circumcision. While women's rights activists present this practice as a challenge to women's right to bodily integrity, its defendants present it variously as an Islamic or customary and authentic practice. Here again, references to the Islamic origins of this practice should be interpreted as a political gesture and as an attempt to

bolster one's authoritative position by referring to the foundational texts of Islam. As with other domains where clear human rights abuses continue to take place, their commission and perpetuation generally have little to do with sharia or Islamic law.

12.10 Conclusion

In Mali, Islamic law has never been strongly represented or institutionalised in any colonial or postcolonial state law. Its traces have become weaker, even if Islam, as an idiom of community building, has gained a new force since the late 1970s and a greater public prominence after the political liberalisation of the early 1990s. Mali's current legal system reflects several dilemmas and legacies deriving from a longer-standing legacy of colonial dual administration, from the particular power constellation between Muslim forces and the political power, and finally, from the autocratic political heritage of its recent postcolonial history. Throughout the pre-colonial, colonial and postcolonial history of the Malian legal system, Islamic normative conceptions were acknowledged and incorporated as instances of traditional or customary regulations. Sharia or sharia-based law never constituted a distinct and separate domain of Mali's state legal system.

Mali's governments, past and present, have tended to exert great caution in intervening via legislation into sensitive domains of Muslim authority and of patriarchal family control. This cautious dealing with Islamic matters was realised to a limited extent by the first government of President Keita, but acquired a new salience under President Traoré. It was motivated by a pragmatic acknowledgement on President Traoré's part of the considerable political power and informal influence of Muslim authorities and interest groups. Discrepancies between the Constitution of 1974 (established by Traoré's government) and actual political practice exemplify his *realpolitik* in relation to Muslim political forces. The new constitution continued to establish the secular character of the constitution. Over the years, President Traoré granted Muslim interest groups special privileges. Still, the absence of legislative changes with respect to penal and civil law throughout the 1980s implies that the greater political weight and public prominence of Muslim authorities and interest groups had little real effect on positive law. This illustrates how Traoré's government carefully juggled competing interests and aspirations. He sought to appease Muslim authorities and thus to bolster the regime's shaky basis of political legitimacy.

President Traoré's *realpolitik* also needs to be related to dynamics emerging at the interface between national political processes and an international field of political interests. On the one hand, by granting

special privileges to Muslim political actors, President Traoré gained greater control over local recipients of financial donations from the Arab-speaking world – donations that had begun flooding the country since the late 1970s under the orchestrated efforts of the Saudi government. On the other hand, Traoré's tendency to comply with the aspirations of Muslim political actors only to a limited extent, formed part of a gradual *rapprochement* to Western countries and donor organisations over the 1970s and 1980s. It illustrates the pragmatic orientation of Moussa Traoré's regime, which motivated it to depart from the anti-Western, socialist orientation of the previous regime of Modibo Keita.

The, as yet unaccomplished, project of legislating intra-family relations is another striking evidence of the pervasive effort of the different regimes to steer national policy-making in the triangle constituted by Muslim political influence at the national level, Saudi-orchestrated efforts to gain an influence on national politics, and finally the interests (and growing financial support) of Western donor organisations. Legislating this sensitive area of patriarchal control has historically been likely to destabilise the regimes' shaky foundations of political legitimacy by bringing state institutions and actors into conflict with Muslim and traditional political authorities. The fact that the respective draft law of 1973 has not been approved until today – forty years later – illustrates the persistent reticence by government and state officials to break with this pact.

The precarious power balance between party politicians, government officials and Muslim authorities who exert a considerable informal influence continues to shape administrative and legislative policy. The current relationship between Muslim actors and representatives of the secularist government could be appropriately described not as one of open conflict and confrontation, but as a struggle over representation in the national arena and over popular support and informal power. In some localities, Muslim authorities exert an important influence and, due to the lack of articulation between local, traditional forms of arbitration and the state legal system, may importantly shape the decisions of traditional authorities and, occasionally, of state employees.

Notes

1 Dorothea Schulz is currently a professor of anthropology at the University of Cologne. The author wishes to thank Amandou Keita for his comments.

2 French administrators, who feared a pan-Islamic resistance to European colonialism, sought to contain the influence of Arab Islamic reformist movements on what they labelled 'African Islam'. Therefore, the group of actors to whom I refer to as the current 'Muslim establishment' (and what, in popular parlance, is often called 'traditional' Islam) is a conglomerate of diverse Muslim actors who reacted to, and often

benefited from, the policy and discourse of French colonial administration; also subsumed under the rubric of 'established' Islam is a wide array of local ritual conventions, as well as beliefs and practices associated with Islamic esoteric knowledge (Brenner 1993, 2001).

3 Fissions within this group have been reinforced since the 1980s, when young Sunni intellectuals, who graduated from institutions of higher learning in the Arab-speaking world (the *arabisants*, cf. Otayek 1993), returned to Mali and entered into competition with the older generation of Sunni businessmen.

4 One important effect of the imposition of a colonial judicial system was that the former elite of Islamic scribes, that is, legal experts, were replaced by Sufi sheikhs who constituted a new, spiritual type of leadership. See Roberts 1991; Sarr & Roberts 1991.

5 The revisions entailed the suppression of the vice-president of government, a modification of the national flag, and the replacement of the State Court (*Cour d'État*) with a Supreme Court.

6 See e.g. the decree issued on 24 February 1968 to reduce the role of the judiciary (in this case, the *Cour d'Appel*) to that of an advisory body (ASAL 1968: 237; Prouzel 1979).

7 Such as the *Code de Nationalité* (February 1962), the *Code du Travail* (August 1962), the *Code de Prévoyance Sociale* (August 1962), the *Code Foréstier* (February 1968), the *Code sur l'État Civil* (February 1968), the *Code Électoral* (December 1968), and the *Code de Parenté* (July 1973) (Sall 1986: 382f). Sharia-based law did not play a role in the formulation of these codes.

8 This representation did not acknowledge the existence of non-Muslim minorities (Christians and those who engage in 'traditional' cults); nor did it account for the fact that Islam was more firmly entrenched in the northern societies of Mali.

9 The containment of Islamic influence was manifest in the field of education. Traditional and reformist institutions of Islamic learning were not granted the same status as French-language schools, and some of the reformist schools were integrated into the national educational system schools (Brenner 2001: 169-173).

10 The restructuring of the administrative organisation aimed at limiting the influence of traditional political authority by creating party structures at the village level. But for various reasons (e.g. generational conflicts and the lack of formation, training and legitimacy of these party structures), the impact of these party structures in transforming conventional administrative organisation and power structures remained very limited; rather, they contained the seed for the contestation that led up to the military putsch in 1968 (Prats & Le Roy 1979: 171-173).

11 The fact that women had relatively few possibilities to oppose an arranged marriage or to leave a husband against the will of their own families was, however, counterbalanced by the fact that kin-controlled marriage enhanced the stability of marriages because it rendered repudiation (whether justified by reference to Islamic or non-Islamic norms) more difficult. In contrast, today, in particular in urban areas where elderly control is weakening, the stability of the marriage union and a woman's possibility to forego repudiation depends to a larger extent on extra-familial resources she might mobilise in order to enhance her negotiating position *vis-à-vis* her husband.

12 Similar to the first constitution of independent Mali, the Ordinance allowed for the existence of multiple political parties. Only the Constitution of 1974 expressly laid down a single-party system.

13 Many Muslims strongly resented this decision by Moussa Traoré. This illustrates that although popular support for an Islamic basis of state legislation has increased in urban areas since the 1980s, the majority of Malian Muslims remained convinced that Islam should be treated as a personal faith and be relegated to the private realm.

Proponents of a strictly secularist constitutional order and politics were (and still are) Western-oriented intellectuals and individuals working on behalf of Western donor organisations (Brenner 1993).

14 Such as changes in taxation; the modification of commercial law to facilitate the development of a private commercial sector (ASAL 1969: 270); and the modification of legal texts that define the status of public enterprises and minimise the central controlling functions of the state (i.e. a planned economy according to a socialist agenda) and thus facilitate private investment (ASAL 1969: 268f).

15 Exceptions were: (a) the amendment of the criminal code, which provided a penitentiary regime for persons convicted of crimes against public property (1969); and (b) amendments to the criminal procedure code, which gave the army an investigatory role comparable to that of judicial police and also invested the criminal chamber of the Supreme Court with jurisdictional powers over crimes committed by high-ranking party officials (Hazard 1973: 20).

16 The current family bill, placed under considerable public scrutiny in 1999-2001, constitutes a modified version of this draft law. The fact that the draft law has been up for discussion for thirty years shows that the proposed changes concern highly sensitive issues.

17 Because they addressed the issue of legalising religious parties in most of their interventions, it seems that their frequently voiced intention to fight for 'the establishment of Islamic law as the basis of our constitution' was shorthand for their attempt to gather a following in a pluralised political field and to gain standing in a landscape of competing parties.

18 Also, the new constitution stipulates that multipartism cannot be subject to constitutional revision (Diarra 1995).

19 A constitutional court already existed in the form of the constitutional section of the Supreme Court (Constitution of 1974) or of the State Court (Constitution of 1960). The novelty in the 1992 Constitution concerns the strengthening of an independent judiciary. The new constitution provided for a reduction of the powers of both the executive (head of government) and the legislature (president of the assembly) over the selection of members of the Supreme Court and over the approval/ support of its decisions (Pimont 1993: 468).

20 The constitution establishes a 'bicephalous' executive power consisting of the head of state (*Président*) and the chief of government (*Premier Ministre*). It also introduces two new institutions: the Supreme Council of Regional Entities (*Haut Conseil des Collectivités Territoriales*, which bears resemblance to the French parliamentary system and its *Conseil de la République de la Constitution française*, and whose members are elected by direct popular vote to ensure the representation of the regional entities) and the *Conseil économique, social et culturel* (with purely consultative functions in the domain of economic and 'development' policy).

21 While many funds from the latter countries are channelled through projects of *da'wa* (Arabic, mission, call) and humanitarian aid, Western donor organisations (except for funds provided by Christian missionary services) generally present their loans as being directed towards the development of technical infrastructure and, more recently, of civil society and capacity-building.

22 Because these issues are not considered by Muslim authorities to fall into their area of expertise, it is likely that the establishment of these mediation institutions will not constitute a bone of contention between protagonists of legal reform based on sharia-law and their secularist opponents.

23 Other international treaties to which Mali has acceded are the CESCR, CERD, CRC, and the *Rome Statute of the ICC*.

24 The first report to CAT was submitted on 14 August 1979; the second on 3 January 2003.

25 Submitted on 13 November 1986. For the full evaluation of subsequent reports, submitted on 10 March 2004, see http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/287/17/IMG/N0428717.pdf?OpenElement, on the second, third, fourth, and fifth reports.

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