Sharia Incorporated

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14 Towards comparative conclusions on the role of sharia in national law

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14.1 Introduction

Preliminary analysis

This chapter draws some preliminary conclusions from the country studies. It does not yet attempt to present a comprehensive analysis of all issues addressed in the country studies. More extensive work is needed to expose and analyse the rich harvest of these studies. A publication including full comparative analysis is planned for the near future.

Different uses of the term sharia

Many people assume and propagate that sharia is a uniform thing, a fixed, unchangeable set of norms that is binding upon all Muslims. On the other hand, we can all see a diversity of schools and interpretations of Islam. In section 1.2 it was suggested that this contradiction stems from conflating the different ways in which the term 'sharia' is used. The twelve country studies have illustrated the co-existence of these different uses of the term sharia beyond any reasonable doubt. Whereas sharia in Saudi Arabia equals a set of puritan interpretations, which have kept the legal status of women quite similar to the times when its rules were developed by the classical scholar al-Hanbali, in Egypt, Morocco or Indonesia sharia manifests itself quite differently, for example in moderate, contemporary interpretations which provide for a better legal position of women in marriage law.

The chapters provide abundant historical evidence of shifts in the interpretation of sharia as well as of a great variety in orientations both among and within national legal systems. To pick just one example, we trace Iran one century back, when it witnessed a movement that culminated in the Constitutional Revolution of 1905-1911.

> Mirza Mohammad Hossein Na'ini (1860-1936), the most high-ranking cleric to support the movement, provided for instance religious arguments for the rejection of absolutism and a defence of constitutionalism. In contrast, the main clerical opponent of the constitution, Sheikh Fazlollah Nuri, argued that ideas of democracy and freedom, the reforms advocated by the constitutionalists, and the establishment of a parliament to enact legislation, were in contradiction with Islam. (Mir-Hosseini *intra*, see 8.1)

The common assumption that sharia is *binding*, i.e. that Muslims are exclusively subject to classical sharia, is also based on misconceptions. This book illustrates that since the early Islamic states of the eighth and ninth centuries sharia always existed alongside of other normative

systems which could be as binding as or even more binding than particular versions of sharia. Whilst religious scholars have always argued that God's divine law is binding upon believers, in practice the application of the doctrine has often been made subordinate to other norms, for example to the state's definition of the public interest, or to local custom. This is also the case in states that are supposed to have 'completely' islamised their laws, like the Sudan.

> At present, the Sudan possesses a legal system that is characterised by a high degree of legal pluralism. The heritage of the common law is, despite the ups and downs of twenty years of Islamisation efforts, still clearly visible in two important aspects: first of all, certain laws of the time of the condominium are still valid, and, secondly, more recent legislation can be traced back to the condominium in terms of organisation and wording. Most significantly, despite efforts of the Bashir government to marginalise it, customary law is still of major importance in the rural areas of the Sudan. It is estimated that as much as 80 per cent of all cases in the Sudan are judged in accordance with customary law. (Köndgen *intra*, see 5.10)

The essentialist trap

Misconceptions about the 'unchangeable' and 'binding' nature of sharia are not just isolated opinions. They are indispensable building bricks of an essentialist perspective, which conceptualises 'the sharia', 'the Islamic law', 'the Islam', the Muslim people', 'the Muslims' as fixed and delineated entities. In this perspective, particular provisions in authoritative texts are held to represent the essence of a whole Islamic civilisation, an Islamic culture, and a living Islamic legal system. Such essentialism is, in the first place, the trademark of puritans in the Muslim world. In addition, it provides the main rationale for Islamophobia in the West. The simple reduction of the values and norms of millions of people to a few daunting notions, is a familiar tool in the discourse of ethnic politics. Clearly, essentialists are not impressed by the fact that such reduction often leads to generalised assumptions – for example, 'women do not work under Islam' as Ibn Warraq put it in *Why I am not a Muslim* – which are in stark contrast with transparent social realities.

The puritan discourse of how sharia has been incorporated in national law, is equally essentialist: the incorporation has been all wrong, corrupt and Western, and only complete replacement with 'true sharia'

can bring salvation. As explained in section 1.5, this is only one of several ways to look at the incorporation of sharia.

'Structural death' or 'incorporation' of sharia?

A different view of incorporation holds that the sharia's actual structures of authority – including the jurisconsult (*mufti*), the judge (*qadi*), and the law professor (*sheykh*) – and the discursive and cultural practices that had always existed within the sharia, met their 'structural death in the nineteenth and early twentieth centuries' (Hallaq 2009: 15-16). For those who have been worried about the recent expansion of sharia, it is perhaps surprising to learn from a leading academic scholar in this field that sharia, as an organic system, is no more; in his previous work Hallaq (2003) found this an understandable reason for 'Muslim rage'. His analysis is shared by Feldman who writes about the sharia: 'Most devastating, the one institution that historically played a central role in establishing and maintaining the rule of law in Islamic states has been destroyed' (Feldman 2008: 126). He deplores this big role reversal, which transferred final authority in legal matters to the state, calling it plainly a 'disaster' (ibid: 7).

The country studies in this book confirm that most Muslim states – with the exception perhaps of Saudi Arabia – have indeed replaced those age-old structures and practices with new legal institutions which are shaping and reshaping the legal rules of the present. Indeed we could conclude with Cammack that '[T]he acquisition by the modern state of a virtual monopoly over law-making presents the Islamic legal tradition with one of its most basic challenges' (Cammack 2005: 190).

At the same time, the vast majority of contemporary Muslim-majority states, confronted with the imposing heritage of sharia, decided to preserve important elements. They probably realised that this also is what most of their citizens prefer and expect. In *Who speaks for Islam,* Esposito and Mogahed (2007) confirm on the basis of large-scale opinion polls, that there is widespread support 'for sharia in the Muslim world' (Esposito & Mogahed 2007: 35). However, the desired sharia seems not to be of the classical and static type, and does not fully depend on the old structures of authority. For according to Esposito and Mogahed, the Gallup data demonstrate that clear majorities of respondents throughout the Muslim world find that women should have the same legal rights as men (ibid: 51). Generally, the support for democracy and human rights is also significant (ibid: 47). Muslims seem to entrust key decisions in law and governance to the 'new' legal institutions of the state, rather than to the old structures of sharia authority.

> Significant majorities in many countries say religious leaders should play no direct role in drafting a country's constitution, writing national legislation, drafting new laws, determining foreign policy and international relations, or deciding how women dress in public or what is televised or published in newspapers. Others who opt for a direct role tend to stipulate that religious leaders should only serve in advisory capacity to government officials. (Esposito and Mogahed 2007: 50)

In section 14.5 we will further explore how governments, in matters of incorporation of sharia, are often forced to steer a middle course between the main opposing forces and their discourses, namely puritans, religious scholars, tribal and community leaders, and human rights critics at home and abroad. Struggles and negotiations are conducted in several governance arenas, of which the 'new' legal institutions, government, parliament, judiciary, and, last but not least, the bureaucracy, play crucially important roles. It remains here to say that the preservation of important elements of sharia, whether in the puritan or moderate form, continues to be a factor which cannot be ignored in any discussion of legal systems in most Muslim countries.

Not an overview of human rights violations

The country studies in this book sadly confirm the well-known fact that in most developing countries violations of human rights occur frequently and systematically. Up-to-date information on such violations is available from websites and reports of monitoring committees of international human rights treaties, of governments and non-governmental organisations like Amnesty International, Human Rights Watch, or Freedom House. However, unlike many assume, violations in Muslim countries often have little to do with sharia. Abiad (2008: 173-175) even concludes on the basis of another comparative research of Muslim countries, that 'it is not Sharia which is preventing the implementation of human rights', but a 'lack of political will' of the governments (ibid: 173). In contrast, Abiad argues, 'the very nature of Sharia demonstrates the potential of reform in the interest of human rights' (ibid: 173).

Our study finds that a number of violations is directly related to norms and practices based in Islamic legal traditions. The fact that similar violations elsewhere may be based on Christian, Hindu, Buddhist or other convictions and ideologies, does not diminish that relation. In many cases, such human rights violations are condoned by the state, and in certain cases they are even officially justified by sharia-based state law.

Although this book does not systematically list human rights violations, as there is no need to reiterate the existing reports, the authors' chapters are thoroughly informed, if not motivated by the said concerns. In our probing of national law, we have, often implicitly, explored and assessed the human rights protection systems available in the respective countries. It is in view of the sharia-related violations of human rights that this study has defined four areas of main concern (see 1.3). Discrimination of women, freedom of religion (apostasy), and cruel corporal punishments are among the concerns investigated. Other important concerns, for example the legal position of non-Muslims and non-orthodox Muslims, of atheists, and of homosexuals, could not be included in this study.

Structure of the chapter

Following these words of introduction, the second section (see 14.2) will summarise historical changes in the relationship between sharia and national law. The section will start with developments in most recent decades, and then unfold the trends and changes which took place in relevant historical periods, going back in time. In section 14.3 we will consider the law presently in force in the twelve countries under review and draw preliminary comparative conclusions about the four concerns identified in the introduction, i.e. the supremacy of sharia; the legal status of women; degrading corporal punishments; and the compatibility of sharia with human rights. The next section (see 14.4) will compare the twelve countries under review in respect of the degree to which sharia-based rules, especially those of a puritan orientation, have actually been incorporated in their respective legal systems. The final section 14.5 will look at the incorporation of sharia as a problem of governance. It will consider several aspects of governance: how has the state been incorporating sharia amidst many other concerns with development and governance; the pressure of puritan politics and the religious establishment of scholars; customary law and its complex relationship with sharia; attitudes of the West; and, in conclusion, it will look at the conditions under which the relation between sharia and national law may further develop on the long and winding road to justice.

14.2 Understanding the present by the past

The twelve country chapters in this book examine historical changes and trends in the relationship between sharia and national law. For the purpose of comparison they use a common periodisation. Section 1.6 explains why the years 1800, 1920, 1965 and 1985 were selected as turning points.

1985 up to the present: taking stock of recent developments

One of the most striking findings of this study is that the first wave of stringent islamisation of law, which took place between 1972 and 1985 in no less than four countries, was not followed by a similar second wave. As the country studies demonstrate, since the mid 1980s core countries of the Islamic revolution such as Iran, Pakistan, the Sudan – as well as Libya – have shown second thoughts about some of their early legal reforms. Actually, most of the countries under review have shown a sense of moderation, by either rolling back on some of the earlier reforms (Iran), or moving – slowly or rapidly – towards constitutionalism (Saudi Arabia, the Sudan, Afghanistan, Turkey), continuing liberalisation of marriage laws (Egypt, Morocco, Pakistan), restraint in the execution of cruel corporal punishments (Pakistan, Malaysia, Nigeria), significant progress in democracy and human rights (Indonesia), or just maintaining the *status quo* (Mali). Their record in ratification of human right treaties confirms this trend (see 14.3).

In Afghanistan, the puritan Taliban regime was replaced with a constitutional regime, though by military force. In Indonesia, after Suharto's fall in 1998 a regime emerged, which was much more devoted to the rule of law, democracy and human rights. Liberal reforms of marriage law were notably carried through by innovative legislation in Egypt (2000) and Morocco (2004), by amendments of the civil code of Iran (see 8.6), and by case law in Pakistan (see 9.6). The expansion of sharia criminal law in particular, which had caught worldwide attention in 1979 (Pakistan) and in 1983-1984 (the Sudan), lost much of its practical application. This became clear also in North Nigeria, where sharia criminal law had been introduced only in 2000/2001. In Iran the orthodox fervor of the revolution and its massive support base have declined over the last decade; even the conservative Council of Guardians had to tolerate a more pragmatic body above it. Saudi-Arabia announced a major judicial reform in 2008 and appointed its first female cabinet minister in 2009.

Despite this evidence of moderation, there were also some signs of reverse trends. The most evident examples include: the introduction of retribution punishments in Pakistan (1997); the rolling back of marriage law reform in Malaysia (1994); the abovementioned introduction of sharia criminal law in Northern Nigeria (2000) and in other sub-national entities, including Indonesia's remote province of Aceh. In Iran, as Mir Hosseini describes (see 8.6), at the time of writing parliament is revising a conservative draft Family Protection Law, which women's rights defenders have chosen to call an 'Anti-Family Bill', and a bill making apostasy a criminal offence.

On balance, however, trends of moderation and gradual liberalisation seem to outweigh the trends in opposite direction. This conclusion goes against the publications of influential academics such as Huntington and Lewis, and strongly suggests that the alarmist report published by Freedom House in 2005 stating that the world in the last 25 years has witnessed the rapid replacement of liberal Western law by extreme sharia, is at best incorrect (Marshall 2005).

1965 to 1985: the rise, flowering and effect of the Islamic revival in law

The remarkable Islamic 'Revolutions' of Iran and Pakistan (1979), and the Sudan (1983) were the result of both domestic as well as international processes. Development policies had been rather unsuccessful in those countries. The centralised, authoritarian, mostly socialist, ideology of the 1960s was showing cracks, and so were the reputations of ruling political elites. Governments and politicians felt a strong pressure from traditional elites, such as religious scholars and tribal chiefs, and had to respond, even if only for tactical reasons. During this period religious scholars and puritans made their voices better heard throughout the Muslim world, and in Iran under Khomeini the clergy even seized power.

The international impact was tremendous, especially in the Muslim world. Islamists everywhere were encouraged to gear up their opposition against governments. Their puritan ideology featured three elements: a broad and bitter critique of the government in power; an outspoken dislike of the West because of its political, military, and economic dominance and of what is seen as its moral decadence; and a competing governance model, i.e. the 'Islamic state', which should 'introduce the sharia' and replace 'Western law'. General Zia-ul-Haq, who seized power in Pakistan in 1979 and General Numeiri, who had long been in power in the Sudan, both sensed the legitimising effects of this ideology, and decreed islamisation of law.

Because Islam in most Muslim countries is Sunni, whereas Islam in Iran is Shii, most puritan movements were more open to Sunni missionary movements. These were often sponsored by Saudi Arabia, while the Egyptian Muslim Brotherhood served as a model for political programmes and organisational methods. The aversion of the Brotherhood and similar movements to the West dated back to the times of its founding in 1928 by Hassan al-Banna; only a while ago most Muslim countries had been under European colonial rule. After struggling for independence they were liberated from foreign rule, and yet many felt that Western domination had still not disappeared.

1920 to 1965: decolonisation, developmental ambitions of new states, and their limits

In this period colonial rule came to an end, with a first wave of independence of Muslim countries in the 1920s, and a second after 1945. Modernisation, or 'development' as it came to be called after 1950, became a declared goal for almost all new governments. Reforms in the Muslim world were sometimes quite radical.

> [I]n 1920 [...] the Ottoman Empire collapsed and the Turkish Republic rose from its ashes. The founder of the Republic, Kemal Atatürk, tolerated the continued existence of Islamic law in the Republic for only a very short period of time. Especially during the period 1924-1929, a number of voluntary receptions of codes of law from Western countries gave Turkey its civilian, secular character. The Constitution of 1924 confirmed the principle of laicism as a key foundational principle of the Republic. After the 1930s, the influence of the shari'a on national law evaporated. (Koçak *intra*, see 6.10)

Inspired by the Turkish example, strong modernist rulers, such as Reza Shah in Iran and King Amanullah in Afghanistan, also distanced themselves from the religious establishment and classical sharia in order to create strong nation-states with modern legal systems. In Egypt, the first post-independence cabinets opted for more gradual modernisation. The same goes for Morocco, which had become a French Protectorate in 1912. In the Arab paeninsula King Abd al-Aziz was building the nation-state of Saudi Arabia, having just united, as Van Eijk puts it 'the cosmopolitan Hijaz' in the West 'with his own conservative Wahhabist followers in the Najd' (see 4.2).

From the 1950s onwards, almost all newly independent states embraced the ideology of development, cherishing the twin goals of nation-building and socio-economic progress. Consequently, countries such as Egypt, Indonesia, Pakistan, the Sudan, Malaysia, Mali, Morocco, and Nigeria, also set out to build for themselves a modern national legal system, as an instrument for social transformation. Especially after World War II, socialism, with its atheistic standpoint, exerted much influence in developing countries. 'Arab Socialism', emphasising equality – also between men and women – became a dominant ideology in the Middle East under the leadership of Egypt's President Nasser. Under the new nationalist but authoritarian regimes, the displacement, nationalisation and reform of sharia, which had started in the nineteenth century (see below), were accelerated. Nasser, for example, closed the

religious family courts in 1955, placing jurisdiction for marital and inheritance cases under the umbrella of a unified, national judiciary.

> [...] the Nasser government saw the existence of the separate family courts as a legacy of Ottoman colonisation [...]. (Berger and Sonneveld *intra*, see 2.2)

The religious scholars who had once been the leading authorities of sharia, found themselves in a third-rank position; tribal and community leaders, who had been in charge of customary law for so long, were also marginalised.

However, by the mid-1960s it appeared that many states had achieved less security and socio-economic development than they had hoped for and promised. The fact that leading politicians, civil servants and army officers used their public positions for private gain, began to create widespread resentment. Also, government's attempts to unify and modernise sensitive areas of law, such as family law and property law, bringing them in accordance with rule-of-law standards, caused considerable resistance (Allott 1980). Ethnic conflicts, separatist movements, military coups and other conflicts threatened the stability of many young states.

Although modern legislation existed on paper, its implementation and enforcement proved disappointing. As the people expressed dissatisfaction with their governments, traditional leaders saw opportunities to regain lost powers. Many people loosing faith in the state resorted to the mosque and the imam, even if only for Friday prayers, for marriages, burials, and rituals. Prominent religious scholars, like the Iranian Ayatollah Khomeini, bided their time in seminaries. Perhaps the time was ripe for a successful counter-movement against the changes that had begun to overtake the Muslim world more than 150 years earlier.

1800 to 1920: European expansion, modernisation, colonial pluralism, and the rise of nationalism

When Napoleon and his famous mission arrived in Egypt in 1798, sharia had been the prevailing legal system for more than thousand years (see 1.6). The Ottoman Empire had carried on this tradition throughout the Middle East for centuries. But around 1800 processes of rapid modernisation were set in motion under the influence of European expansion, and '[T]he whole complex edifice that supplied religious authority in Islam started to crumble' (Abou el-Fadl 2007: 35).

The introduction of European legal concepts took place in two ways. In the Ottoman Empire, Egypt and Persia it was a matter of deliberate

efforts by local elites and voluntary reception, whereas in Asia and Africa the process occurred rather through colonial legislation and adjudication. Colonial expansion of European law occurred in the countries under review which are today known as Indonesia, Malaysia, Pakistan as well as Mali, Morocco, Nigeria, and the Sudan. Indigenous rulers, chiefs, and religious office-bearers were incorporated in colonial structures led by European non-Muslims, and thus moved to a secondary position.

The advance of modern law also sealed the fate of classical sharia. The Tanzimat reforms in the Ottoman empire introduced large scale codification in all important areas of law. Secular courts were introduced to adjudicate cases on the basis of national law codes. Meanwhile modernist religious scholars like the polyglot al-Afghani and Muhammad Abduh in Egypt – which was still under formal Ottoman authority – proclaimed the reopening of the gate of free interpretation of sharia (*ijtihad*), and prepared for cautious codification and modernisation of sharia-based marriage law.

Meanwhile, in the British, French and Dutch overseas territories, colonial governments enacted a massive amount of new legislation, which had nothing to do with sharia. New secular courts were established, whilst sharia courts and other indigenous courts were regulated and restricted. In areas, where European law overlapped with sharia or customary law, new forms of mixing took place. In Britain's colonies an enlightened 'Anglo-Muhammedan' law emerged through legislation and case law. In Indonesia and other colonies, the government elevated 'customary law' to serve as the law of the indigenous population, whereas sharia was recognised only in so far as it was part of living customary law. So, in different ways sharia law and institutions were restricted or even pushed aside. A citation from the chapter on Nigeria gives a good example of the advance of European law.

> Public law, including Orders in Council of the Government of Britain (in the case of Nigeria's colonial constitutions) and some of the enactments of the Governors-General, was of course 'English'. The British also enacted various other laws specific to Nigeria, including penal laws, and imported their statutes of general application, their doctrines of equity, and their common law. English law was applied in English courts staffed by British judges, according to British rules of procedure and evidence. On its private side, English law was originally intended for application primarily to non-natives, and most by far of all cases coming before Nigerian courts – upwards of 90 per cent, including, for a long time, criminal cases – were handled in the Native Courts according to native law and custom. The proviso was that

> no native law or custom should be enforced which was 'repugnant to natural justice, equity and good conscience [as determined by the British] or incompatible either directly or by necessary implication with any [English] law for the time being in force' (Keay & Richardson 1966: 233-238). Under this rule the penalties imposed in the Native Courts, in particular, were quickly brought under control. Mutilation – in the North whether as *hudud* or as *qisas* – was abolished; death sentences had to be carried out in a humane manner (Milner 1969: 263-264). Various means were used to enforce the repugnancy rule, including supervision of the Native Courts by British administrative authorities and finally, in 1933, rights of appeal from the Native to the English courts. (Ostien *intra*, see 13.1)

A remarkable exception to these patterns of European legal expansion was Saudi Arabia. No Western power had the ambition to conquer this vast desert land, so that the power of the ruling Saudi tribes could remain connected with radical-puritanical Wahhabi doctrine, as it had been since the eighteenth century. Under Wahhabi influence classical sharia prevailed unimpaired as law.

Back to the present

It is safe to say that the main historical turning point in the relation between sharia and national law occurred as the state in the nineteenth and twentieth century appropriated the leading part in legal development, a role hitherto played by the religious scholars (*ulama*). As explained in the introduction, before 1800, in the Muslim world, a ruler's power to make laws was derived from the sharia-principle of *siyasa*, which required that the laws remained within the limits of sharia (see 1.6). The authority to decide whether this was the case, rested, according to sharia, with the scholars – a system which is often regarded as the classical Islamic version of constitutional checks and balances (Feldman 2008). This led to a situation in which legal systems in the Muslim world consisted of two branches – scholars' law and state law – which could come together at the top in the Sultan-Caliph, and below him in state-appointed *qadis* and *muftis*.

After the Ottoman reforms and the European colonial administration of justice had prepared the ground for the take-over by the nation-state, from 1920 onwards a growing number of independent Muslim states began to introduce their own policies regarding incorporation. It was not their main concern, though. The governance challenges for the newly independent, developing, Muslim countries were daunting. From the 1950s until the 1970s separatism, civil wars, and military coups

were frequent. Despite the fact that many states succeeded in stabilising society, and making progress in many areas (agriculture, industry, education, public health), partly with the help of oil revenues, much went wrong too.

There seems to be consensus on the idea that in that period most developing states suffered from major governance failures. Political elites made policies for the common people without giving them a political voice. Bureaucracies blocked and frustrated private entrepreneurship. Individual rights were systematically subordinated to the public goods of 'stability' and 'development'. Politicians who now had the power to manage vast public funds became self-serving, and corruption increased. Most countries were unable to maintain effective courts, which were to control illegal practices and provide remedies. And, finally, there was a serious underestimation of people's attachment to tradition in the form of symbols, structures and authorities of religion and custom.

In response to the above-mentioned governance failures a range of domestic and transnational actors, began to promote democratisation, privatisation, human rights, anti-corruption measures, and rule-of-law policies, all with different motives. Also part of this counter-movement were the *ulama* and their supporters, who called for religious and cultural authenticity. The latter translated into the broad transnational trend often indicated as the Islamic resurgence or awakening, or the advent of political Islam. While the diversity among islamist movements was enormous, most of them shared the twin goals of introducing an 'Islamic state' as well as 'the sharia', instead of the pre-existing constitutions and laws which were considered 'bad' and 'Western'. The next section discusses the effects of the efforts to islamise national law, since Iran's 'Islamic revolution' of 1979. How did the Muslim countries under review deal with the various demands to radically change their constitutional, family and criminal laws? And are the alarmist assumptions about the islamisation of law, so common in the West, actually justified?

14.3 Concerns and issues, preliminary findings

In the introduction I identified four widely shared concerns about islamisation of law, and divided them in concrete issues. This section will consider what preliminary conclusions can be drawn about these concerns and issues on the basis of our country studies.

Supremacy of sharia

Scope

To which extent has sharia influenced the national legal systems as a whole? Most country studies demonstrate clearly that most areas of law have not been pervaded by sharia-based law. Saudi Arabia is the main exception, followed at a distance by Iran, and then perhaps by the Sudan. The majority of moderate governments strives to ensure that national law meets modern socio-economic needs. This has meant that in many areas governments did not replicate classical sharia. Perhaps surprisingly, Ayatollah Khomeini himself shared this view.

> In order to facilitate legislation considered to be socially necessary, even if it was in conflict with sharia, Khomeini gave a fatwa in 1981 granting parliament the authority to proclaim such legislation with absolute majority votes. Subsequently, the Guardian Council ignored this fatwa and refused to approve much legislation promulgated on the basis of it. Khomeini responded in 1984 with another fatwa authorising parliament to create legislation based on the Islamic principles of social necessity (*zarurat*) and expediency (*maslahat*) with a two-thirds majority.
> (Mir-Hosseini *intra*, see 8.3)

> Khomeini had written that the Leader's mandate is absolute, that he can even order the suspension of the primary rules of Islam (for example regarding prayer or pilgrimage) if the interests of the Islamic state (*maslahat-e nezam*) demand it. Clearly, when Khomeini had to choose between the sharia and the survival of the state, he chose the latter (Arjomand 1992: 156-158). (ibid, see 8.4)

In addition, it becomes clear that in eleven of the twelve countries the impact of the colonial legal heritage of civil law and common law has remained substantial (see Table 2 in 1.4). This does not apply only to 'sharia-neutral' areas of law – such as environmental law, labour law or telecommunications law, where no influences of *fiqh*-texts are found – but also to the politically 'delicate' areas where *fiqh* has traditionally played an important role, such as family and inheritance law. Harding's observation about Malaysia that

> The constitution and the institutions of the common law have indeed provided the means whereby accommodation between two fundamentally contradictory conceptions of legality has been achieved. (Harding *intra*, see 11.10)

could also apply to legislation and the rulings of supreme courts in other common-law countries as well as in civil-law countries. In Egypt, a civil law country, the scope of sharia, potentially widened by the 1980 amendment of Article 2 of the constitution, is in fact delineated by the Supreme Constitutional Court, which

> has laid down a few important ground rules: first, it is the only court allowed to rule on (in)compatibility of Egyptian legislation with the sharia; and, second, only legislation implemented after 1980 must conform to the principles of the sharia. Furthermore, the Constitutional Court holds a restrictive view of what is encompassed by obligatory rules of sharia and, consequently, accords the legislature a wide margin of legislative freedom. (Berger and Sonneveld *intra,* see 2.4)

Territory

To which extent has sharia-based law been enacted at sub-national levels, notably in specific states, provinces or districts? In the 1990s waves of democratic decentralisation led to the empowerment of sub-national entities – states of a federation, provinces, districts, towns. Some of them decided to enact sharia-related regulations, usually to promote Islamic 'virtue' in religious and social behaviour. Certain states in federations such as Malaysia, Pakistan, and Nigeria, as well as provinces and districts in Indonesia issued regulations with criminal provisions, prescribing dress codes for women and men, or compulsory lessons in religion. Some prohibited the consumption of food and drinks during Ramadan, the consumption of alcohol, or 'indecent behaviour', notably extramarital sex. On the latter, a much disputed regulation in Aceh, Indonesia, even put a death penalty by stoning, in September 2009. In reality such regulations are not systematically enforced, in the first place because it would be practically impossible to do so, and secondly because the legal basis of such regulations is often contested. As national legal institutions are usually slow and reluctant to interfere in such cases, issues are mollified, and legal uncertainty prevails.

Basic norm

To which extent have constitutions introduced sharia as the highest or basic norm of legal systems? In five of the twelve countries, the constitution holds provisions which establish an 'Islamic state' (see Table A.2 in Annexe). In seven of the twelve countries, constitutional articles declare Islam to be the state religion (ibid). Six countries proclaim sharia as 'a source' or even 'the source' of the national legal system or declare that all legislation must be tested for its accordance with sharia (see Table A.3 in Annexe).

However, the suggestion of sharia supremacy created by such provisions must be questioned, since at the same time, many provisions in the same constitutions testify to supremacy of the constitution itself and of the rule-of-law standards laid down therein. As a result, constitutional laws in Muslim countries often seem to have a 'dual basic norm'. This gives the national legal systems of these countries an inherently ambiguous character.

Legal decision makers

This issue is about who ultimately decides the rules in a legal system: religious scholars or the office holders of the state? Iran provides us with the only example of a national legal system where ultimate decisions are the prerogative of a religious scholar, the Leader; other important state offices in Iran must also be fulfilled by religious scholars, such as six of the twelve seats of the Guardian Council which can veto laws which parliament has approved, as well as the chief of the Supreme Court. In Saudi Arabia religious scholars often enjoy a veto in the legislative drafting process; especially the *fatwas* of the Council of Senior Ulama and of influential government-employed *ulama* have 'a near legislative effect' (see 4.5). Judicial office is accessible only to graduates from the sharia colleges. Sharia legal opinions (*fatwa*) by jurisconsults (*mufti*) are important constitutive elements in the interpretation of the law.

As to the other ten countries, most important decisions in the respective legal systems are made by office holders of the state instead of religious scholars.

Islamic codification

The issue here is twofold, the first whether the area, in which sharia is most influential, i.e. family law, is regulated by uncodified sharia law or by codified national law, and the second whether due to recent islamisation policies pre-existing law codes, based on Western models, were thrown overboard and replaced by fully islamised codes.

According to Table 3 (see below) Islamic family law is codified into national legislation in eight of the twelve countries; secular marriage law is codified in three others namely Turkey, Mali and the Nigerian federation. Uncodified sharia is applied in marital affairs only in Saudi Arabia, and North Nigeria.

A full scale islamisation of existing law codes seems to have taken place in two countries mainly, the Sudan and Iran, not in the others.

It must be noted that Saudi Arabia has made some important steps to codify hitherto uncodified areas of law into national legislation, namely its constitutional law in the Basic Ordinance of 1992, and its criminal procedure law in the code of 2001.

Table 3 *Codification of Islamic family law in twelve countries*

Country	*Codification: Yes/No*	*Year*
Egypt	Yes	1985,2000
Morocco	Yes	1958, 2004
Saudi Arabia	No	-
Sudan	Yes	1991
Turkey	- [1]	-
Afghanistan	Yes	1977
Iran	Yes	1931, 1935, 1992, etc.[2]
Pakistan	Yes	1961
Indonesia	Yes	1974, 1975
Malaysia	Yes	1984, 1994
Mali[3]	No	-
Nigeria[4]	No	-

1 In 1917 a Family Code was enacted, based on sharia. In 1926 it was replaced by a secular Civil Code including family law, based on the Swiss Civil Code.

2 A procedural Marriage Law of 1931 is still valid. Substantive family law is codified in the Civil Code of 1935, which was changed several times since the Islamic revolution, namely in 1982, 1991, and in the early 2000s. The Family Protection Law of 1967 was changed in 1975, suspended in 1979. In 1992 an Amendments to Divorce regulation was enacted. In 1996 a Family Courts Law was enacted. In the early 2000s 21 bills became law. In 2010 a new controversial Family Protection bill is debated.

3 In 1962 Mali enacted a secular code of family law, which was elaborated in 1975.

4 A federal Marriage Act of colonial origin is still in force, as well as a 1970 federal Matrimonial Causes Act.

Islamic courts

Have states established separate Islamic judiciaries[1] that have taken on the functions of secular state courts? We noted that in four countries, namely in Malaysia, Indonesia, the Sudan and North Nigeria, there are broadening mandates and powers of separate 'religious' or 'Islamic' courts.[2]

Islamic ruler

Is the 'Islamic ruler' with his apparatus essentially authoritarian and without a check on his power, i.e. does 'oriental despotism', to use Wittfogel's famous term, still prevail? Among the Muslim countries under review, monarchs and dynasties are not common anymore. Of the twelve countries, ten are republics, and two are monarchies, namely Saudi Arabia and Morocco; in both countries the king is powerful and authoritarian.

In all countries, with the exception of Saudi Arabia, national parliamentary elections are held. In several countries the office of president is also elected. For example, in Iran people elect the president, who can be impeached by Iran's parliament. Iran's Leader is elected by the Assembly of Experts, who can also depose him. In the Sudan, the ruling military dictatorship called elections in Spring 2010, ensuring

democratic legitimacy of his regime. As in most developing countries, political culture in the Muslim world is still marked by authoritarianism, albeit in varying degrees.

Legal status of women

Of all areas of law, family and inheritance law are most influenced by classical sharia. Turkey which has adopted a civil code based on a Swiss model, is the exception to this rule. Sharia-based family law discriminates against women on a number of issues. However, family laws in many Muslim countries have gradually taken distance from classical sharia to the benefit of women; repudiation and polygamy are restricted by procedural and substantive requirements which are laid down in legislation, case law, and in (standard) marriage contracts. Such provisions vary in their severity and effectiveness.

Repudiation (unilateral divorce by the man)

Is a man's right, bestowed upon him by classical sharia, to repudiate his wife at will, unilaterally, and without having to give a reason, still valid? Unilateral repudiation is restricted in six of the countries, and prohibited in one, Turkey. In five of the twelve countries under review the man can still on his own authority cast off his wife, with no or hardly any restriction (see Table 4).

Polygamy

Has the man maintained his right, as provided for by classical sharia, to conclude multiple marriages with up to four wives, without the need for permission of the first wife or of state authorities? In only three of the twelve countries under review a man may freely marry a second,

Table 4 *Family law: unilateral repudiation of wife by husband, in twelve countries*

	Not or hardly limited	*Several procedural and/or substantive limits*	*Prohibited*
Egypt		x	
Morocco		x	
Saudi Arabia	x		
Sudan	x		
Turkey			x
Afghanistan	x		
Iran		x	
Pakistan		x	
Indonesia		x	
Malaysia		x	
Mali	x		
Nigeria	x		

third, or fourth wife on his own authority and without any restrictions or formalities. In other countries polygamy is legally controlled and restricted by the state, usually by family courts or councils.

Divorce, initiated by women
Does a woman have the possibility to obtain a divorce from a court? In ten of the twelve countries women can apply to the court for divorce – whether or not the divorce is based on grounds established in her marriage contract; frequently the law gives women considerable space.

Inheritance
Do female heirs inherit half of what male heirs in a similar position would inherit? Inheritance law has distanced itself much less than marriage law from classical sharia. Formally, women in most of the countries under review have indeed the right to one half of the heritage of a man in an equal position. Some country studies, however, like Morocco and Indonesia, refer to research suggesting widespread discontent with such discriminatory law, and presenting evidence that in practice people manage to find ways to leave equal shares to their daughters as to their sons.

Cruel corporal punishments

Enactment of hadd-offences
Have national criminal laws enacted the classical sharia-based provisions that prescribe heavy corporal punishments for five specific *hadd*-crimes, namely extramarital sex, accusation of extramarital sex, robbery, theft, and consumption of alcohol; and have they added, as some schools prescribe, apostasy as a sixth *hadd*-offence? Of the twelve countries, there are five where these *hadd*-offences are partially or fully enacted in national law, i.e. Pakistan, Iran, the Sudan, Saudi Arabia, Afghanistan (see Table 5 below). Four countries have not done so, namely Egypt, Morocco, Turkey, Mali, and the Nigerian federation. While Indonesia, Malaysia as well as Nigeria have a long tradition of national criminal law without such provisions, they were introduced in the 1990s by several Malaysian states, and in the 2000s by eleven Northern Nigerian states, as well as by the remote Indonesian province of Aceh. Concerning apostasy, see below and Table A.6 (in Annexe).

Executions of heavy corporal punishments
To which extent is it common practice to actually administer cruel corporal punishments, such as stoning and amputation. According to the country studies, at the time of writing, only Saudi Arabia is still

Table 5 *Twelve times hadd-punishments in law and actual executions, in twelve countries*

	Hadd-punishments in the law[1]	*Stoning and/or Amputations carried out*[2]
Egypt	No	-
Morocco	No	-
Saudi Arabia	Yes	No recent stonings, amputations continue
Sudan	Yes	Declined strongly
Turkey	No	-
Afghanistan	Yes, but legality disputed	No
Iran	Yes	Irregularly[3]
Pakistan	Yes	No
Indonesia	No	-
Malaysia	No, except in certain states	No
Mali	No	No
Nigeria	Yes, in Northern states	No stoning, amputation strongly declined

1 The penal code of Saudi Arabia is completely based on sharia, including *hadd*--punishments. In the other "yes" nations the punishments can be found in the following legislation: the Sudan, penal code of 1991, articles, 78, 26, 146, 157, 168, 171; Afghanistan, penal code of 1976; Iran, penal code of 1996, articles 63-203; Pakistan, *hudud* ordinances of 1979; Malaysia, *hudud* laws in two member states, Kelantan and Terengganu; Nigeria, penal codes of eleven Northern states.

2 In some nations, whipping has taken place regularly, e.g. in Pakistan, particularly in the early 1980s.

3 In July 2005, two boys were hanged after being convicted for homosexuality. This execution shocked many, the more so since Iran had suspended applying corporal punishment, such as stoning and amputations, since 2002. It should be noted that hangings are anyway not in line with the traditional *hadd*-punishments, as mentioned in classical sharia. Since 2005, when the new conservative government under Ahmadinejad came in, amputations and to a lesser extent stoning were carried out again.

executing the *hadd*-punishment of amputation. As Table 5 shows, in the other countries where such punishments are legally in force, such executions are reportedly very rare to non-existent.

Retribution and blood money

Have national criminal laws enacted classical sharia-based provisions that entail the retribution (*qisas*) of violent offences, such as murder and assault, according to the principle of an 'eye for an eye', or its being bought off with 'blood money' (*diyya*). Such provisions are not found in seven of the twelve legal systems. In five countries, Saudi Arabia, the Sudan, Iran, Pakistan, and North Nigeria, such provisions are in force; the legal situation in Afghanistan is uncertain.

Violations of human rights

This fourth area of concern is different from those mentioned above in that here we are concerned with the extent to which international human rights standards are accepted, affect national laws, and are adhered to in practice.

Joining international human rights treaties

Have Muslim countries actually accessed, ratified, and implemented the major human rights treaties, and are they subjected to regular evaluation and benchmarking? The country studies confirm that since the 1990s governments of Muslim countries have abandoned their previously dismissive attitude towards human rights. Becoming signatories to international treaties and adopting human rights in national constitutional law, Muslim countries have made important steps in a process of convergence between their national laws – whether formally referring to sharia or not – and human rights standards. Table 6 below details the year of signature, accession, and ratification for three key human rights treaties by each country reviewed.

Table 6 *Signing, years of accession and ratification of human rights treaties in twelve countries*

	ICCPR[1]		*CEDAW*[2]		*CAT*[3]	
	Signed	Ratification, *A*ccession, Signing year	Signed	Ratification, *A*ccession, Signing year	Signed	Ratification, *A*ccession, Signing year
Egypt	Yes	1982 R	Yes*	1981 R	Yes	1986 *A*
Morocco	Yes	1979 R	Yes*	1993 R	Yes	1993 R
SaudiArabia	No	-	Yes*	2000 R	Yes	1997 *A*
Sudan	Yes	1986 *A*	No	-	Yes	1986 s
Turkey	Yes	2003 R	Yes	1986 R	Yes	1988 R
Afghanistan	Yes	1983 *A*	Yes	2003 R	Yes	1987 R
Iran	Yes	1975 R	No	-	No	-
Pakistan	Yes	2008 s	Yes	1996 R	Yes	2008 *A*
Indonesia	Yes	2006 *A*	Yes	1984 R	Yes	1998 R
Malaysia	No	-	Yes*	1995 *A*	No	-
Mali	Yes	1974 *A*	Yes	1985 R	Yes	1999 *A*
Nigeria	Yes	1993 *A*	Yes	1985 R	Yes	2001 R

* *Reservation(s) related to sharia*

(Source: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV, last accessed on March12, 2010)

1 International Covenant on Civil and Political Rights (1966)

2 Convention on the Elimination of All Forms of Discrimination against Women (1979)

3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

Freedom from discrimination
To which extent do laws and practices discriminate against women in family and inheritance law, as well as against other groups? Table A.4 (see Annexe) shows that the constitutions of eleven of the twelve countries under review embrace the principle of equality – the exception being Saudi Arabia. Two countries, Iran and Egypt, make express reservations for conformity with Islamic rules.

However, as the country studies demonstrate, a host of particular rules in national laws and case law conflict with the constitutional guarantee of equality, not to speak of social practices on the ground. Of the frequent practices of discrimination – a hard fact of life in most countries – a number is sanctioned by national and local sharia-based laws and regulations. In most countries efforts to completely remove such discriminatory provisions run up against fierce puritan and conservative resistance (see 14.5).

Freedom of religion and apostasy
Is leaving one's faith criminalised as apostasy and punishable with heavy penalties? As shown in Table A.5 (see Annexe) eleven of the twelve constitutions guarantee freedom of religion, the exception being Saudi Arabia. Seven out of twelve countries have not criminalised apostasy (see Table A.6). In two countries, Saudi Arabia and the Sudan, apostasy is a crime, and in Iran, at the time of writing, a bill of similar import is pending (see 8.7). In Afghanistan it is unclear and disputed, while in at least one state in Malaysia, it is punishable, though the subject is heavily contested.

14.4 Comparing and ordering national legal systems

This section will attempt to classify the twelve countries' legal systems according to the degrees in which they have been impacted by sharia-based law, notably of puritan orientation, by introducing a rough, threefold division. The first category consists of systems where sharia-based law of a puritan orientation pervades most areas of law. Saudi Arabia and Iran fit into this category. A second category consists of secular legal systems, in which sharia has no role whatsoever. Turkey is a prominent example. This leaves us with the majority of legal systems, a middle group of 'mixed systems' as our third category. In these legal systems sharia-based law has no overall dominance but plays a significant role in one or more areas of the law. We will begin with Saudi Arabia and Iran, followed by the large middle group in order of decreasing level of puritan islamisation. We will conclude with Turkey.

Puritan orientation towards classical sharia

Saudi Arabia and Iran have, each in their own way, a strong orientation towards classical sharia. For Saudi Arabia sharia is the basic norm, while Iran wants to combine the two competing norms of what is called Islamism (*eslamiya)* and the republicanist state *(jomhuriyat)* (see 8.4). In these two countries conflicts between sharia-based law and human rights are most prevalent and acute.

In the traditional, closed, autocratic kingdom of Saudi Arabia, under supervision of the royal house and the powerful *ulama*, uncodified sharia of a puritan orientation has remained the backbone of the country's legal system until the present day.

> Saudi Arabia not only has a unique legal system, compared to Western systems, but also compared to other Muslim countries. The Saudi model is perhaps closest to the classical form of shari'a adherence and application which developed after the establishment of Islam on the Arabian peninsula in the early seventh century. [...] While the revealed law has always been – and remains – the general law of the land, the government also issues important 'regulations'. However, Islamic jurisprudence remains the first point of reference in cases concerning personal status, crime, civil contracts, property, etc. Judges have resorted primarily to the Qur'an, the Sunna, and *fiqh*-books in their quest for justice. A judge [...] enjoys great discretionary power and is not bound by doctrine of precedent. Religious scholars are also permitted to give their opinions on the application of shari'a by giving legal advice (*fatwa*). *Fatwa*s are of legal importance in Saudi Arabia and judges take them into consideration. (Van Eijk *intra*, see 6.10)

The Islamic Republic of Iran (1979) is led by a supreme Leader, who, with support from other high clerics, maintains sharia in the Shiite tradition. Contrary to Saudi Arabia, Iran established a tradition of parliamentary elections and law-making, codification, and a centralised judiciary (1906-1907). Today's Iran is shaped by a revolutionary response to the last Shah's repressive regime.

> Ruled by clerics, it combined not just religion and the state, but also theocracy and democracy. The founders made two broad assumptions: first, that what makes a state 'Islamic' is adherence to and implementation of the sharia; secondly that, given free choice, people will choose 'Islam' and will, thus, vote for clerics as the interpreters and custodians of the sharia. When they

> framed the constitution, the founders included both theocratic and democratic principles and institutions. The Constitution clearly recognises the people's right to choose who will govern them. But some institutions, including Parliament and the presidency, though elected by direct popular vote, are nevertheless subordinated to clerical oversight and veto. This contradiction remained unresolved but unproblematic while Ayatollah Khomeini was alive and able to mediate it [...]. (Mir-Hosseini *intra*, see 8.10)

However, 'after over a decade of the experience of Islam in power, Islamic dissent began to be voiced among "insiders" and became a magnet for intellectuals whose ideas and writings now formed the backbone of the New Religious Thinking.' In the 1990s they sought new directions, and. [...] 'armed with Soroush's theory of the relativity of religious knowledge, they wanted to create a worldview reconciling Islam and modernity, and argued for a demarcation between state and religion.' (ibid, see 8.4). Such debates among Iran's religious scholars display a dynamism which differs considerably from the static conservatism prevailing in Saudi Arabia. In recent years,

> [...] the notion of sharia as an ideal enabled the reformists in Iran to argue for democracy and the rule of law and to challenge patriarchal and despotic laws enacted in the name of Islam. They did so by appealing to Islam's higher values and principles, and by invoking concepts from within Islamic legal theory, notably the distinction between sharia as 'divine law' and jurisprudence (*feqh*) as the human understanding of the requirements of the divine law. (Mir-Hosseini, *intra*, see 8.10)

Large middle group

Of the nine countries of the large middle group, the Sudan, Pakistan, and Afghanistan are more oriented toward classical sharia and puritan orientations. Yet, they belong to a category different from the first two countries in that their basic norm combines the 'introduction of sharia' with more explicit and broader adherence to rule-of-law standards. In these countries, the basic norm seems more dualist and ambiguous.

In the Sudan, many of the legal codes were replaced by Islamic codes in 1983-1984. Because the non-Islamic South would not accept this, war under a military dictatorship prevailed for many years. However, the 1998 Constitution established a remarkably pluralistic basis for the law, which was reconfirmed in the 2005 interim national constitution (INC) following the Comprehensive Peace Agreement. At present 'a

non-Muslim could, theoretically, become president of the whole of the Sudan (Art. 53)' and the Sudan has a constitutional court to uphold its moderate constitution (Köndgen *intra*, see 5.5).

> Only a few of the INC's articles make direct reference to Islam. Article 1 (INC) states that the Sudan is a multi-racial, multi-ethnic, multi-religious, and multi-lingual state. Thus, *de jure* Islam is not the state religion. (Köndgen *intra*, see 5.5)

Accordingly,

> The INC also guarantees men and women equal rights in the areas of civil, political, social, cultural, and economic rights (Art. 32). These guarantees, however, contradict to some degree other Sudanese legislation. Equal rights for men and women are especially relevant with regard to shari´a-based parts of the Criminal Act (1991) and in consideration of family and inheritance laws, which are known to be disfavourable to women in a variety of ways. (ibid)

Pakistan was founded in 1947 as a republic for Muslims, but islamisation of the constitution and other laws had to wait until the 1970s (see 9.3-9.5). Islamic criminal law, including the law of retribution, applies today, but family law, codified in the Muslim Family Laws Ordinance of 1961 was not further islamised. In both areas of law, judges in the higher courts have carried out an intense battle of ideas – often by use of impressively reasoned common law arguments – to maintain a moderate position. Among other things, they were able to strengthen the legal status of women in divorce matters and to prevent severe *hadd*-punishments; also they called the legislative ban on interest into question.

> How the position and role of classical sharia will be further developed in Pakistan's national legal system will depend largely on the political choices to be made by the PPP, choices pertaining to socio-economic development, electoral results, political stability, relations with the West, Iran and China, and last but not least, to the Pakistani judicial authorities. At present, faced with the violent attacks carried out by Islamic extremists not just in the tribal areas but in the very hearts of Pakistan's cities, politicians seem to have lost any interest in pursuing a policy of Islamisation. (Lau *intra*, see 9.10)

Afghanistan's constitution has a dual basic norm and progressive human rights provisions. It bears the marks of years of intense

international and national negotiations in the wake of the 2001 Bonn Accords. Yet, the liberalisation of marriage laws has been very limited. In criminal matters it is unclear to what degree sharia or any codified criminal law is now in force. Customary law plays a major role in property dealings and a considerable role in family law and criminal matters as well. For the time being, the political and security situation hinders the effectiveness of any legal system, whether based on sharia or another source.

> The result is disjointed legislation, with many gaps and unregulated areas of law. Röder calls the legal landscape 'a patchwork' of various norms (Röder 2009: 257). [...] a fragmented *mélange* of secular, customary, and religious law variously applied according to local acceptance of central legislation and modified by shifting conditions of governmental authority. [...]. The limited practical value of Afghanistan's statutory laws has to be attributed to the decline and demise of central political authority in Afghanistan as a result of the civil war, but also to the lack of training of legal professionals and the inability to adapt statutory law to Afghanistan's particular circumstances. This means for instance that judges either do not know the law well, or know it, but are reluctant to apply it. (Yassari and Saboory *intra*, 7.10)

> Any reform of the legal system to bring it in line with international human rights standards or with the provisions of the new constitution will require as an essential prerequisite the existence of a stable, functioning, and capable state, both able and willing to enforce laws (Lau 2003: 4). At present, this is sadly not the situation in Afghanistan. (Yassari and Saboory *intra*, see 7.9)

As compared to the three abovementioned countries, the constitutions and laws of both Egypt and Morocco seem relatively stable. Their criminal laws have stuck to their European models without sharia-based provisions. Similarly, their civil laws, in French fashion, have remained unchanged, while the marriage laws in both countries have been strikingly modernised.

Morocco's 2004 reform of the family law codification, almost fifty years after its first enactment, marked the end of a long and intense domestic debate.

> The debate on family law was waged almost entirely in Islamic terms. Progressive groups frequently referenced the applicability of universal human, women's, and children's rights and the

> importance of international women's conferences and conventions, but they never dared to voice the possibility of viewing Moroccan family law from a secular perspective. By constantly referring to *ijtihad*, the modernists placed themselves within the Islamic tradition. [...] While Islamic family law has gained renewed meaning as a political symbol, 'human rights' (*huquq al-insan*) as a concept has become the most important political discourse in present-day Moroccan society, as a means of both legitimising and criticising government policy. (Buskens *intra*, see 3.4)

In Egypt, the relation between sharia and national law is marked by strong opposing forces. On the one hand, puritan political pressure is exerted to stretch the meaning of Article 2 of the constitution which states that the principles of sharia are the source of legislation. On the other hand, we see a Supreme Constitutional Court acting as guardian of the rule of law, and a new marriage law, which is

> one of the most radical reforms also being Egypt's first law of the twenty-first century. Article 20 of Law 1/2000 effectively provides for the right of women to unilaterally divorce their husbands through a court procedure called *khul'* (Sonneveld 2009; see also 2.6). This is exceptional for two reasons. Firstly, while the law was presented as a law of procedure, it, in actual fact, contains rules of substantive law. Secondly, although the article on *khul'* was presented as being in accordance with the sharia, it is not part of the corpus of any of the four Sunni schools of jurisprudence. [...] This law therefore brought about an expansion of the authority of the legislature with regard to interpretation of the sharia. (Berger and Sonneveld *intra*, see 2.4)

Two other countries of the 'large middle group', namely Nigeria and Malaysia, are federations with large non-Muslim population segments, which enacted rather progressive constitutions that ascribe only a limited place to Islamic law. Both countries have a strong common law tradition. Sharia plays an important role in matters of family law. In both countries leading politicians at sub-national state level promised to introduce sharia-based criminal legislation at the time of elections, won, and kept their promise. In Nigeria, this process happened on a much larger scale and more systematically than in Malaysia. In both countries the jurisdiction of sharia courts was extended at the cost of general courts.

In Malaysia, according to Harding, between the sharia courts and the civil courts there 'have been and continue to be significant skirmishes

at the borders, which are expressed principally in terms of legal struggles over territory or 'jurisdiction' (see 14.10). There is, for example, a difference of opinion in the federal courts over the question as to whether the states have the power to introduce sharia criminal law, and execute punishments. In Harding's view:

> The success of the legal cultures of Southeast Asia over hundreds of years in absorbing and melding various legal worlds and concepts indicates that a syncretic, creative, and peaceful solution to the problem of Islam and constitutionalism is by no means impossible. At present it seems as though such an ideal solution is fraught with both political controversy and intellectual confusion. (Harding *intra*, see 14.10)

However, the very fact that these conflicts are debated, and often eventually decided, in the courtroom makes the author conclude that the mechanisms of the common law are capable of structuring and moderating the fundamental conflicts between sharia and the rule of law (ibid.).

In 2000 and 2001 eleven states in Northern Nigeria went so far as to implement Islamic criminal law and entrust its application to Islamic law courts. While this is a major legal shift, it should be noted that the judiciary still has allowed no stonings, and since 2002 no more amputations. The federal government has decided to allow islamisation for as long as, in its judgment, the constitution is not actually violated.

> Governor Sani [of the northern state of Zamfara, JMO] 's announcement of his sharia implementation programme exhilarated Nigeria's Muslims, and produced tremendous pressure on the governments of other northern states to follow suit. But it aroused fear and loathing among Christians, who expected the worst; civil war was even predicted by some [...] Everyone's worst fears seemed to be confirmed by the first amputation of a hand for theft already in March 2000, and then by the stoning cases of Safiyatu Hussaini (2001-2002) and Amina Lawal (2002-2003), which caused an uproar around the world. Since those early days, however, the clamour has died down completely, to the point that sharia implementation was a non-issue, virtually never mentioned, in the state and federal election campaigns of 2007. (Ostien *intra,* see 13.4)

The legal systems of the two remaining countries of the large middle group, Indonesia and Mali, are more secularly oriented. The word Islam does not appear in Indonesia's constitution, while Mali's

constitution states that it is a secular republic. Both systems, founded on a colonial heritage of continental law, Dutch and French respectively, allow only limited space to sharia, mainly in family and inheritance law.

Indonesia has a codified Marriage Law (1/1974), which assigns considerable powers to the state Religious Courts to decide about cases of divorce and polygamy. The 1991 Compilation of Islamic Law is to back up the work of the Religious Courts with an Indonesian restatement of *fiqh*-rules. In 2006 a similar compilation was issued for the area of economic law. While until 1998 Indonesia's ruling elites, whether colonial or postcolonial, tried to control, bureaucratise and direct people's religious orientations,

> Indonesia is presently conducting a unique experiment with democratic law-making in the context of cultural islamisation. In this process, it has been responding both to Islamist pressure and the call to respect human rights. (Otto *intra*, see 10.10)

This experiment has led to many local and provincial regulations aiming at the promotion of Islamic virtue and the prevention of vice.

> Remarkably, the promotion of sharia-based legislation, both in Aceh as well as in other provinces and districts, has largely been driven by non-Islamist parties such as Golkar and PDI (Bush 2008). Similarly, Aceh's turn to the sharia [...] did not unequivocally express the strong demand of all Acehnese. On the contrary, when after the Peace Agreement the Free Aceh Movement had turned into a regular political party, and this newly formed Partai Aceh won the 2009 elections, they opposed the radical turn to sharia-based law. (ibid.)

In Mali, 'Sharia did not play a role in the formation or adaptation of Malian law' as '[I]slamic law has never been strongly represented or institutionalised in any colonial or postcolonial state law.' (see 12.3, 12.10).

> 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. (Schultz *intra*, see 12.4)

The way in which people equate their local customs with sharia also needs to be taken into consideration.

> It must be noted that at the grassroots 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. (Schultz *intra*, see 12.6)

Efforts to pass a new bill on family law have been frustrated for many years, due to the conflicting views of puritans and moderates, and of Western and Islamic donors.

Secular system

In Turkey sharia is completely removed from the national legal system. Secularism or kemalism is constitutionally anchored, and a constitutional court watches out for any violations. An Office for Religious Affairs supervises religion and education. The first three articles of the constitution (1982) formulate 'fundamental principles described as 'immutable provisions' in Article 4'. They stipulate that

> Turkey is a constitutional parliamentary democracy with a wide range of human rights [...] Articles 1, 2, and 3 [...] outline the constituent characteristics of the system which include it being a democratic, laic, constitutional state that respects human rights.[...] The republic remains loyal to Atatürk's nationalism and the fundamental tenets set forth in the preamble, which states that 'as required by the principle of laicism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics [...]. (Koçak *intra*, see 6.5)

The secular legal system, however, is often tested by individuals, groups and political parties demanding more space to profess their Islamic religion, for example by wearing a headscarf. The judiciary and the army's general staff remain on guard to protect the state against what they see as a direct threat.

As this section has shown, the differences between countries in how they have incorporated sharia in their national legal systems – or not – are considerable. In view of such overwhelming diversity an essentialist approach seems beside the point. The future modalities of incorporation of sharia do not primarily depend on puritan rage, or on

transnational human rights activism. The leading part is played by national office-bearers – politicians, law-makers, judges and bureaucrats – who, interacting with civil society amidst opposing and complex ideological forces, will continue to struggle, negotiate, and decide about the guiding principles and rules of incorporation.

14.5 Governance

Policy re sharia and contemporary challenges of governance

It may be the case that this book has created the impression that problems of sharia-based law appear as priority issues on cabinets' agendas throughout the Muslim world all the time. In reality, far more frequently discussed are issues of security and stability, economic growth, public finance, poverty reduction, education, public health, housing, decentralisation, elections, and foreign relations. No different than anywhere else, Muslim governments aim for the three goals of stability, prosperity, and social justice. Governance efforts to reach these goals require a degree of democracy, sound administration, and an effective legal system, whether derived from *fiqh*-sources or not.

Perhaps in Saudi Arabia and Iran sharia is so central to all policy concerns that political decision-making immediately touches upon issues of sharia-based law. In most Muslim countries, however, political debate about sharia and national law is often just simmering in the background, only to flare up when attention is called to specific events and issues. High profile cases of 'Islamic crimes', a new marriage bill, puritan violence, skirmishes about judicial competences, inter-religious conflict, are all of great political sensitivity.

Governance in such areas comes down exactly to how Hyden et al. define it, namely as "the formation and stewardship of the formal and informal rules that regulate the public realm, the arena in which state as well as economic and societal actors interact to make decisions" (Hyden et al. 2004: 16). Governance decisions, as Hyden et al. elaborate, are made in six different arenas of governance, i.e. government, civil society, political society, bureaucracy, economic society, and the judiciary (ibid: 18-22). The country studies in this book have explored many of these arenas, and show that the Muslim state has taken many different shapes: just caliphate, despotic sultanate, colonial empire state, independent state, authoritarian state, socialist state, developmental state, sharia state, democratic state, aid state, corrupt state, failing state, rule-of-law state.

In section 14.2 we concluded that during the first decades after World War II most developing countries suffered from several serious governance failures. In response, a 'new governance' emerged in the developing world during the last few decades. Therefore, contemporary

policy discussions on incorporation of sharia take place in a governance context which has changed. First, market forces have been released and created in many countries an entrepreneurial middle class with a vested interest in the rule of law. Furthermore, democratisation and elections have changed political landscapes significantly. Demands for respect of individual human rights cannot be neglected by governments without strong criticism. Corrupt behavior is openly discussed, yet still omnipresent. Domestic and international programmes to strengthen judiciaries in order to promote the rule of law are in full swing (Carothers 2006). And, finally, religion, notably Islam, has returned to the center stage. No doubt, this new governance cannot be a cure for all policy problems, but it certainly shows a learning curve.

As for the relationship between sharia and national law, the experiments with puritan governance in Iran, the Sudan, Pakistan, Afghanistan, and North Nigeria have provided an opportunity to experience the 'introduction of the sharia' in contemporary states. The chapters by Mir-Hosseini, Lau, and Köndgen, describing Iran, Pakistan, and Sudan – the forerunners in this process – strongly suggest that the era of revolutionary Islamic law reform is past its peak. Ostien's chapter emphasises that for Nigeria the learning experience of islamisation is essentially a good thing, and that within a decade since its inception, the introduction of sharia has already become a non-issue. Yet, there is no reason to expect that political pressure to incorporate sharia in national law will altogether wither away.

Governments, puritans and scholars: clashes and compromises[3]

In every country study in this book, sooner or later the puritans pop up; for example, the Mahdi in nineteenth century Sudan, the Muslim Brotherhood in Egypt, the *mullahs* who deposed king Amanullah of Afghanistan, Khomeini and his Ayatollahs, the Saudi rebels occupying the Grand Mosque in Mecca, the MMA-coalition in Pakistan, and the PAS party in Malaysia. No region, no era in Islamic history escapes completely the presence of the puritans.

Time and again they display the same features, these men – and women – of ideals, imagining a better society and government. Quite a few are individual models of selflessness, devoted to 'the cause' and to providing social services. Both characteristics are rare in developing societies, where most people struggle to make ends meet. In doing so they act as catalysts of popular discontent. A minor segment is militant, and ready to die as martyrs. All of this is part of their appearance as true and pious Muslims.

Most governments fear puritans. Puritan groups are often well-organised, have large numbers of active followers and transnational

networks, their own media, and (inter)national financiers. They also are among the few organised movements who speak about the real and serious problems that disrupt society in most of these countries: poverty, lack of security, education, and health; invasion of the government into everyday life; and corruption, urbanisation problems, social and cultural changes, partly under foreign influences (Halliday 2003: 118). Although many of them are young students, one can find senior members in religious institutions, the bureaucracy, the judiciary, the army, and the business sector. While puritans are often capable of infiltrating those institutions, state intelligence units are often able to detect and arrest them.

In the struggle to change the existing relationship between sharia and national law, puritan movements deploy their activists along a number frontlines, which largely coincide with the main concerns and issues discussed in previous sections (see 14.3).

Another important party in this struggle is the religious establishment of scholars. Many scholars have an ambivalent relationship with the puritan movements: they feel criticised by them, and they see them as unskilled in *fiqh* and overzealous. But, at the same time, they see them as the front soldiers, who could pave the way to an Islamic state in which they, the scholars, will finally play a leading role again. In spite of their marginalisation from the national legal system, scholars retain important functions. They are senior staff at the ministries of religion. They sit on local, regional and national bodies as the official representatives of religion, and issue *fatwas* about many different subjects, from Islamic banking to euthanasia. As judges in family courts, many of them have earned a reputation of fairness and ability to find reasonable solutions for problematic cases. As preachers, they lead the Friday prayer and are called to attend to the important 'rites de passage' – birth, marriage, divorce, death – and to act as people's moral compass in the problems of daily life. Some of them do this also on radio, TV, or the Internet. In addition, they oversee educational institutions, the management of *waqf*-land, the annual pilgrimage, and the collection of Islamic alms (*zakat*). On all issues discussed in section 14.3, scholars take positions based on their interpretation of the *fiqh*. Most governments hope that such positions will support state policies and laws, as the scholars' religious blessing is most welcome to enhance the state's legitimacy.

Besides puritans and religious scholars, the ideological spectrum of Muslim countries is beset with feminist movements, human rights groups, and explicitly liberal Muslim groups. While deciding upon sharia-related issues, governments have to consider the – often conflicting – demands of the conservative *ulama*, the puritans, the modernists, the religious minorities, the feminists, and so on. Inevitably, they will invoke disappointment and anger from one party or the other. In order to

take the wind out of the puritans' sails, to appease the clergy, and to reconcile the various goals of development and good governance, clever compromises are needed. The country studies in this book testify to the impressive balancing capacities of law-makers, administrators and judges, using the dual basic norm and legal ambiguity to the best of their knowledge.

The complex relationship between sharia and custom

Meanwhile, governments in developing Muslim countries also have to deal with communities, clans, and tribes which make up much of the social structure of their countries. Alongside the rise of Islam, sharia brought a series of religious, social and legal reforms to a patriarchal and often brutal society, where Arab tribal customs constituted the prevailing law. In spreading their religion, Muslims set out to replace local traditions with sharia as the prime normative system. However, customary norms were not simply washed away, being deeply rooted and closely connected with kinship, power, and economy. In certain areas consensus emerged by mutual acceptation and adaptation. As the scholars developed sharia, they took local norms into account. Islamic jurisprudence recognises custom (*orf*). Leaders of clans, tribes and local communities converted to Islam and added sharia to the repertoire of norms they applied. In other areas, tensions grew between such leaders, their customs and old-established authority structures on the one hand, and the Islamic authorities with their firm beliefs, their message of reform, and their more uniform and elaborated justice system on the other hand. Both harmony and conflict between sharia and custom are played out throughout this book.

Puritans especially tend to hold local custom and local culture in low esteem. They disapprove of pre-Islamic norms, they denounce casual dress, close companionship between unmarried women and men, they dislike the widespread respect for Sufism, for saintly figures, for music and dancing, branding it all as un-Islamic. Their zealous promotion of puritan ideas, however, has yielded not only political successes, but also a variety of counter-movements. In a book entitled 'The Illusion of the Islamic State' (*Ilusi Negara Islam*) the late former president of Indonesia, Abdurrahman Wahid, strongly condemns the infiltration of Saudi-funded transnational puritan movements in Indonesia, accusing them of 'cultural genocide' (Wahid 2009: backcover).

In contrast, there is also evidence from countries in both Africa and Asia that there is a strong demand for sharia as a substitute for arbitrary and repressive tribal justice. In fact this is a historical role of sharia. As Yassari explains 'the status of Afghan women under customary

law is worse than the status afforded to them under the most conservative interpretation of Islamic law' (see 7.10). Ostien suggests that activists who seek to improve the legal status of women in Nigeria take recourse to sharia for the same reasons:

> That Islamic personal law as applied in northern Nigeria is still often contaminated by local custom antithetical to women is confirmed by the work of the Federation of Muslim Women Associations in Nigeria (FOMWAN), founded in 1985 (Yusuf 1993), and more recently by the attitude taken toward sharia implementation by Muslim women activists (see 13.6).

Ostien's findings confirm the recent findings of Stiles (2009) about Tanzanian Muslim women who discovered that Islamic justice provides them with individual rights (*hakki*), opening the desired road to freedom from a tribal life without rights. Today, amidst much understandable criticism of sharia, it is often forgotten that the only alternative which is available in many places, is unfortunately not an effective and fair state justice system, but rather a semi-functional customary system.

Often it is difficult to entangle the religious from the customary. Does sharia justify customs such as female circumcision, or honour killings, or are these local traditions, which the sharia disapproves of? In spite of authoritative *fatwas* denying the Islamic nature of such customs, for example the one on circumcision issued by Egypt's supreme religious authority, the Sheykh al-Azhar (see 2.9), such practices continue. At grassroots level, people often do not know nor mind the precise normative foundation of their behaviour, as long as it is part of 'our tradition'.

Similarly, it is sometimes difficult for outsiders, including Western journalists, to distinguish Islamic court rulings from primitive mob-justice or repulsive misuse of authority by local policemen or other officials. If primitive clan members kill a woman accused of extramarital sex by stoning her, as has happened repeatedly in Pakistan – in flagrant violation of sharia's basic procedural and evidence rules – Western media are often quick to link it to what they call 'Islamic law'.

Since tribal and community leaders are real power holders in many areas of the Muslim world, they often are instrumental for national political stability. In their communities they are 'big men', who solve problems and settle conflicts by applying traditional or indigenous law. They manage the relations between the local and the national, acting as intermediaries between the police, the army, business, and as vote-brokers in elections. In times of trouble they can become small or big warlords, turning their clan members into fighters. Governments, for the

sake of stability, must therefore also keep the tribal leaders satisfied, and be careful not to disregard their wishes and 'their traditions'.

Attitudes of the West

Our country studies confirm that the relationship between sharia and national law is highly dependent on domestic politics. Transnational relations within the Muslim world is another important factor. In addition, the West remains involved in this matter, as certain sharia policies are in part motivated by a rejection of the West and others by appeasement. At the time of writing, two decades of extreme Western *hubris* that started with the fall of the Berlin wall, seem to be coming to an end. The Western banking system has undergone an unprecedented financial crisis. China, India and other economies have emerged successfully; Muslim countries such as Indonesia, Turkey and Saudi Arabia have joined the G-20. Regime change in Iraq and Afghanistan, as conceived by the West, has been far more difficult than expected. Western foreign policy regarding the Muslim world also seems unable to solve the democratisation dilemma: on the one hand, the West pushes for free elections; on the other hand, it is not always ready to accept the outcome.

A more productive attitude regarding problems in the Muslim world will require refreshing the knowledge base, and adapting positions. An important lesson from the country studies is that, as Buskens puts it, the far-reaching debates on family law are waged almost entirely in Islamic terms. Even progressive groups do not dare to present their views from a secular perspective. By constantly referring to *ijtihad* they place themselves within the Islamic tradition. Meanwhile 'human rights' (*huquq al-insan*) as a concept has become a very important political discourse, as a means of both legitimising and criticising government policy (cf. 3.4).

Some authors, such as Lau on Pakistan, state that politicians in the Muslim world have lost interest in pursuing a policy of islamisation, due to the violent attacks, for which Islamists claimed responsibility. Perhaps the effect of those attacks on domestic policy is greater than most human rights interventions by the West; this would count in favour of Western foreign policies of restraint. Reading through the country studies in this book, one cannot but agree with Zakaria (2003: 155), who comes down on the side of caution in the democratisation dilemma, and turns against rapid and large-scale democratisation as was advocated by the Bush administration. In this connection he warns against 'ugly ethnic forces' and argues for 'a longer period of state-building.' He feels that in certain situations elections can be held only after 'civic institutions, courts, political parties, and the economy have

all begun to function. As with everything in life: timing matters.' He advocates 'a certain sophistication' in this regard, warning that '[t]he haste to pressure countries into elections [...] has been, in many cases, counterproductive.'

In any case, the international quest for justice in the Muslim world deserves to be pursued with political sophistication, and a solid knowledge base (Carothers 2006). If human rights are to be 'everyone's right', they should not be in conflict with the beliefs of 1.5 billion people (Brems 2001). In the international monitoring procedures to oversee the implementation of human right treaties there should be some recognition for the difficult dilemmas faced by governments of Muslim countries who often cannot but respond to the fact that the majority of their citizens do hold sharia in a positive light.

Perhaps the West could provide useful technical and financial assistance for the strengthening of human rights protection systems. For, the 'supply side' of justice systems, i.e. the quality of legal process, requires much investment and leadership. Whereas legal institution-building is in the first place a domestic affair, international legal cooperation, with professional assistance from other Muslim countries as well as from Western countries, can probably be of help, if carried out well.

The long and winding road to justice

While 'good' governance can mean different things to different people, there is consensus that rules and governance are good when they contribute to stability, prosperity and justice. 'Justice' is the keyword in Western treatises about the rule of law and human rights. Justice (*'adl*) is also the core concept in Islamic jurisprudence (*fiqh*). This book demonstrates that under certain conditions both concepts of justice do actually coincide in the established practice of moderate interpretation of sharia, which is manifest in laws, rulings and legal practices in Muslim countries, as well as in religious discourse (see 1.5).

Moderate practice has a long tradition in Islam. Akbar, a Mughal emperor in India (1591) who was leading a vast Muslim empire in an age when in Europe the 'Inquisitions were in full swing', promoted freedom of religion and 'insisted that we should be free to examine whether reason does or does not support any existing custom, or provides justification for ongoing policy'. This Muslim emperor figures in Amartya Sen's *The Idea of Justice* also as a fierce proponent of the freedom of religion (Sen 2009: 36-39). Recent studies of sharia by Abou el-Fadl (2005), Ardjomand (2008), Feldman (2008), and Hallaq (2009) all highlight the old 'Islamic constitutional state' and the 'Circle of Justice', providing many historical examples of what contemporary Western

lawyers would call 'legality', 'due process', and, indeed, 'justice'. Islamic legal history is more than what puritans often suggest it is. As Hallaq demonstrates in his 2009 work, the historical archives of sharia and ruler's law contain many treasures to be discovered and valued as the building bricks of a strong moderate tradition.

In the long term the processes of state formation and socio-economic change will probably contribute to the convergence of sharia and the rule of law. Essentially, for legal development there is no main route other than through the state, its laws, its legal processes and institutions. Meanwhile, the emancipation of women, the democratisation of politics, and the increase in respect for human rights are developments that cannot be denied or halted. After nationalisation and adaptation of sharia, we are now witnessing its democratisation and constitutionalisation. Sharia-based laws, therefore, are increasingly adapted – by legislatures and courts – and applied in accordance with the prevailing sense of justice, as our country studies demonstrate.

This puts huge responsibilities on the legal institutions that have been established for these purposes. The country studies in this book suggest that most legislatures, bureaucracies and courts in the Muslim world have made considerable progress in a few decades time. Harding, referring to Malaysia, argues that modern legal institutions are, in principle, able to bring 'the problem of Islam and constitutionalism' to a peaceful solution, even though their work is complicated by political controversies and intellectual confusion. In countries such as Turkey, Pakistan, and Egypt, fairly independent courts play key roles in accommodating or even solving fundamental conflict. The very fact that these conflicts are dealt with in a legal procedural manner, is a clear sign of hope that, as Harding puts it, the mechanisms of modern law are capable of structuring and moderating many of the fundamental conflicts between sharia and the rule of law (see 14.10). Generally speaking, though, the state of legal institutions in the developing world is far from ideal, and much remains to be done, but at least they are there, and channel conflicts.

While professional jurists operate from the end of national law, much work lays also ahead at the other end, i.e. for religious scholars to make constructive use of the intellectual heritage of the *fiqh*. Mir-Hosseini shows how in Iran *ulama* have taken the lead in intense discussions about ways to make interpretations compatible with contemporary aspirations, notably with human rights. Scholars therefore are increasingly trained in the new methodologies, as Hallaq discusses in the last chapter of his latest book. Egypt's Ashmawi, Syria's Shahrur, Kuwait's Abou el-Fadl, Pakistan's Fazlur Rahman, Iran's Soroush, Indonesia's Hazairin, were raised and studied in different Muslim countries, but

they all share a strong desire to reconcile sharia with modernity (Hallaq 2009: 500-542).

Puritans will remain a social and political force to reckon with. In recent decades they have been associated with radicalism and violence, without any credible and feasible perspective on justice for all (Fuller 2003). Perhaps their recent recourse to human rights and democracy will open up more constructive and successful routes. In any case, they will keep reminding the world that sharia remains a cornerstone of Islam. And as long as the state's legal systems keep suffering from serious shortcomings, many people will feel a strong desire for better governance, for a better system of law. In such circumstances, God's law, the sharia, will remain an obvious reference for legal development, or at least, a source of moral and political inspiration, as has been proposed by An-Na'im in his visionary *Islam and the Secular State* (2009).

Vikør, in conclusion of his historical analysis of sharia, sees in most Muslim countries

> 'both a dichotomy between 'state law' and an independent 'Sharī'a' and – as under the medieval siyāsa – a merger of them through the incorporation of Sharī'a-based rules into the codified laws of the state.' (Vikør 2005: 346-347).

It is this incorporation, this merger, which has been the main theme of this book. If the collaborative efforts of all contributors have provided the reader with a realistic and balanced overview and a deeper insight into the relationship between sharia and national law, our main objective has been achieved. Hopefully, this book will also serve as a useful foundation for further comparative research, moving into three directions, as to include analyses of landmark decisions by the courts, of field studies on local sharia-related practices, and, finally, initiate additional socio-legal studies of the sharia-based laws of other Muslim countries.

Notes

1 As we learned from the country studies, the terms 'Islamic court', 'sharia-court' or 'religious court' are labels which in themselves contain little relevant information, not any more than 'national court' or 'general court' for that matter. Some 'Islamic' or 'religious courts', like in Indonesia, are actually state courts, subordinate to a supreme court of a basically secular set-up. Elsewhere, for example in Saudi Arabia or Iran, courts are not given such label, but the law they apply and their legal interpretations are clearly based on *fiqh*.

2 The next phase of this research project will address developments in the case law of religious courts. Based on the country studies so far, our overall hypothesis is that

higher courts tend towards more moderate interpretations as compared to the sometimes strict interpretations in the rulings of lower courts.

3 See for an analysis of 'the clash within the Islamic civilisation', Trautner (1999).

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