

Law

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The installation of large numbers of Muslim immigrants in Western Europe and the United States has contributed to a renewed interest in Islamic law in these countries. Knowledge of Islamic law is considered necessary in order to understand the behaviour of Muslims, especially in cases in which it conflicts with indigenous norms in Western societies. In addition to the emphasis on Islamic law, it is important also to study the diversity of norms governing the behaviour of Muslims. Apart from *sharīʿa*, norms related to state law and to local customs are also significant as is the relationship between these different sets of norms considered in a historical perspective.

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The attention on the plurality of norms in Muslim societies has a tradition of more than a century in the Western study of Islamic law. Instead of the binary opposition of theory and practice, as can be found in the work of founding fathers like Goldziher, Snouck Hurgronje and Schacht, I propose a triangular model, related to an approach in the anthropology of law, which stresses the plurality of legal norms.¹ The three domains in this triangular model are the *sharīʿa*, state law as developed by the government, and a rather diffuse complex of local customs. This last domain is the most difficult to define, also because of the problematic character of notions such as 'folk law' and 'customary law'. Considering the dominance of an Islamic idiom in all three domains, as well as in the discourse on legal norms in general, it is possible to speak of an 'Islamic' triangle.

In this model, the emphasis is on the necessity of considering the different domains in relationship to each other, instead of viewing them as isolated entities. Study of the process of state formation, in which a central government claims the monopoly on the imposition of uniform and generally valid legal norms, offers a key to understanding the constantly changing relationships between the three domains. The model provides a better understanding of the diversity of norms in Muslim communities. As a starting point for discussion, a schematic overview of the development of legal norms in Islamic societies and in immigrant communities in Western Europe is presented below.²

A triangle in development

In pre-modern Islamic states, the central government generally had rather limited control over the contents of Islamic law. The *ʿulamāʾ* were the main agents in the interpretation of God's will and thus developed legal rules. The state could try to direct the course of legal thinking, as in the Ottoman Empire, but in general this did not lead to independent state legislation. Furthermore, the state hardly had the power to impose these official interpretations of the *sharīʿa* on the population. In practice, local customs often played an important role in the regulation of daily life. *ʿulamāʾ* did their best to integrate these customs in official Islamic legal thinking in as far as they did not conflict too flagrantly with orthodox norms.³ This condition of accommodation between state and Islamic law, and local customs, was characterized by considerable flexibility and dynamism.

Colonial rule pretended to aim at a so-called modernization and rationalization of the state. Generally this meant strengthening the central government and importing legal norms from the European 'mother country'. However, it was also often part of colonial policy to strengthen the plurality of legal norms by transforming local customs into folk law.

Elevating customs to that status of law went hand in hand with a marginalization of Islamic law, which allegedly did not work 'in

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practice'. The role of the *sharīʿa* was limited and placed in the framework of the state legal system. A government-led confrontation between Islamic law and local customs replaced the pre-colonial situation of accommodation. The opposition to this colonial policy joined forces with Islamic purification movements that developed in the same period. These nationalist puritans wanted to cleanse Islamic orthodoxy from local, 'un-Islamic' practices. Their struggle for a pure Islam was simultaneously a struggle against colonialism and customary law. According to this view, the *sharīʿa* should be the law of the independent state for which they were fighting.

After independence, the new power-holders readily took over the colonial legacy of a strong, centrally-governed state. State law functioned in these new states as an ideology of national unity. There remained hardly any space for diversity of legal norms. Customary law was abolished as a colonial invention, even if it lived on in daily practice. Negation of other legal norms replaced the colonial tradition of confrontation.

However, the creation of a national legal system did not mean (re)introduction of Islamic law as it existed before colonization. In the view of many independent governments, the classical learned law books were not suitable instruments to administer a modern state. Only legislation could perform this new task. Only in the 1970s was a further Islamization necessary in some states to legitimize existing regimes. A favourite symbol with which to create such a new legitimacy was the invention of an Islamic penal law with ample attention for corporal punishment and public executions. Another popular measure was the creation of Islamic banks. Even in Iran, the revolution of 1979 did not mean a direct return to the rich *shīʿī* legal literature, but a large-scale codification of Islamic law according to Western textual forms.

Post-modern Islamic law

There are many indications that nowadays the relationship between *sharīʿa*, state law and customs is again drastically changing. In Indonesia, the limits of the power of the central government has become obvious. Militant Muslims no longer accept the pluralism of *pancasila* ideology and demand an Islamic state. At the same time Indonesian intellectuals dare to think in an unorthodox way about the contents of this 'post-modern' Islamic law. Increasing literacy and the introduction of new means of communication affect the monopoly of the traditional scholars on the interpretation of Islamic law. On the Internet, Muslims from all over the world discuss – in English – these new forms of Islam. Cheap CD-ROMs of classical texts produced by *mullahs* in Qum enable ordinary believers to browse, in an unorthodox manner, in what was until very recently an enclosed garden for initiates.⁴

Muslims in Western Europe and North America play an important role in the devel-

opment of these post-modern forms of Islam. Not only do they have easier access to schooling and modern communication technologies, they also enjoy in most cases a greater freedom to exchange their religious and political ideas. In Western societies, Muslims from all parts of the world meet, and get to know their diverse customs and beliefs. For Muslim immigrants of the first generation, their mutual differences are often of great symbolic importance, but the governments of their European host countries take another view. For these governments, these strangers are all Muslims, and they should organize themselves in one group, with one clear set of opinions. Religious young persons of the succeeding generations seem to be willing to comply with this wish for unity. Many of them seem to give more importance to a shared Islamic identity than to differences in law schools and customs. They consult modern 'restatements' of Islamic law, such as al-Zuhaylī's *al-Fiqh al-Islāmī wa-adillatuhu* (fourth edition, 1997), instead of the classical manuals of the respective *madhhabs*.

Customs in the diaspora

In the 'diaspora', state law and customs change as well. In addition to the state law of their countries of origin, the immigrants are faced with the state law of their country of residence, partly in the form of private international law.⁵ At the same time, their customs can no longer be described as local. In these new communities of immigrants, normative customs are not tied to one locality. The members of the 'moral community' are scattered all over Western Europe. In the well-known cases of 'crimes of honour', the behaviour of people living in Western Europe is governed by considerations of public opinion in the villages of origin, thousands of miles away. The killing of a daughter might be meaningless in the eyes of German neighbours, for example, but inevitable and honourable according to the standards of grandparents and cousins in Turkey.

Research on these legal customs is of great importance to understand the behaviour of Muslims living in Western Europe. Many Islamic immigrants come from societies in which customary law traditionally played an important role, such as the Rif in Northern Morocco, Kabylia, Anatolia, Kurdistan, and recently also Somalia and Albania. Special attention should be paid to changes in these customs which are linked to the context of migration. Do Islamic or state norms replace these 'older' values and norms? Knowledge of these issues can be of great importance in order to properly prosecute behaviour which is defined as 'criminal' by the laws of Western European countries. This research is also of scholarly value, because this kind of research is often difficult to conduct in the countries of origin where their governments prefer to deny the existence of other, non-official norms.

A plea for comparative studies

The triangular model which is presented here is not intended as a general outline of the 'nature' of Islamic legal systems. On the contrary, this contribution is a plea for research on the diversity of legal systems and their historical development. In my own work on the genesis of the modern Moroccan legal system since the 19th century, attention is paid to the interaction of the three domains of legal norms.⁶ A comparative perspective is vital in order to understand the peculiarities of the different legal systems of the Islamic world. Our discipline might greatly benefit from a comparative essay which might be entitled, as a pun on Clifford Geertz' famous book, *Islamic Law Observed*. ♦

Notes

1. See, for example, Dupret, Baudouin, Maurits Berger, and Laila al-Zwaini, eds. (1999). *Legal Pluralism in the Arab World*. The Hague, etc.
2. See Messick, Brinkley (1993). *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley, etc.), for a study of the transformation of the Islamic legal system in Yemen, to which I am greatly indebted.
3. See Johansen, Baber (1999). 'Coutumes locales et coutumes universelles aux sources des règles juridiques en Droit musulman hanéfite', in his *Contingency in a Sacred Law. Legal and Ethical Norms in the Muslim Fiqh*. Leiden, etc; and also Masud, Muhammad Khalid (1995). *Shāḥibī's Philosophy of Islamic Law*; Islamabad, especially chapter 10.
4. See, for example, Eickelman, Dale F., and Jon W. Anderson, eds. (1999). *New Media in the Muslim World. The Emerging Public Sphere*. Bloomington: Indiana University Press, especially John Bowen's contribution 'Legal Reasoning and Public Discourse in Indonesian Islam'.
5. See, for example, Strijbosch, Fons, and Marie-Claire Foblets, eds. (1999). *Relations familiales interculturelles. Séminaire interdisciplinaire juridique et anthropologique / Cross-Cultural Family Relations. Reports of a Socio-Legal Seminar*; Oñati, especially Fons Strijbosch's contribution, 'The Anthropological Study of Customary Law for Practical-Judicial Ends: Some Remarks on Methodology'.
6. For example, in my *Islamitisch recht en familiebetrekkingen in Marokko* (Islamic Law and Family Relations in Morocco). Amsterdam: Bulaaq, 1999.

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