Application of Islamic Law in Courts

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Conference Report

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From 26 to 28 October 2001, the ISIM, in collaboration with the University of Amsterdam and Cornell University, held an international conference in Leiden on the 'Application of Islamic Law in Courts'. The conference conveners, Muhammad Khalid Masud, Rudolph Peters and David Powers, invited historians, lawyers, anthropologists and sociologists to come to Leiden to engage in a discussion on the manner in which Islamic legal doctrine (*fiqh*) has manifested itself in daily practice as reflected in the activity of the *qadi*, or Muslim judge.

PHOTO: WIM VREEBURG, 2001

Rudolph Peters and Baber Johansen at the conference.

Is the *shari'a* merely a system of ethical rules and recommendations, as many have argued, or is it a legal system properly speaking? What is the nature of the relationship between legal doctrine and actual court practice? Is Islamic law an unchanging essence or has there been diversity in its interpretation and dynamism in its development and application? These are some of the broad questions that were discussed over the course of the three-day conference. The 23 presented papers addressed Islamic law from the 8th century to modern times in areas including Bulgaria, Egypt, India, Indonesia, Jordan, Libya, North Africa, Syria and Zanzibar. Six general themes emerged: modern judicial systems and Muslim courts, *shari'a* courts in modern Muslim nation-states, historical perspectives, court documents, judicial practice, and legal pluralism.

Historical perspectives

Most of the authors examined the activity of the *qadi* by analysing a specific court document or set of documents. A common theme was the diversity and changing nature of *qadi* courts. One frequently raised question was whether local practices of judges necessarily qualify as 'Islamic law'. As Islamic legal norms were translated into local practices, there emerged a wide range of court structures, procedures, documents and judicial reasoning. As Erin Stiles noted, the Muslim court in Zanzibar constitutes a public space where people negotiate their rights within the framework of *fiqh*. Referring to contemporary Syrian courts, Taima Jayoush observed that the courtroom is a site of negotiation where the judge is guided by both cultural and legal norms. Similarly, Najwa Qattan concluded that the *qadi* judgment constitutes a site where Islamic legal theory finds its embodiment in local practices that vary across time and space.

Drawing on biographical literature, fatwas, and *fiqh* texts, several authors examined *qadi* courts in different periods of Islamic history. Although it is generally held that court records from the period prior to the 16th century are not available, the Mamluk documents analysed by Müller date from the 14th century.

During the Ottoman period, which figured prominently at the conference, *shari'a* courts had jurisdiction over personal status and pious endowments, as well as civil, criminal, and administrative affairs. A tension between central and provincial courts reflected the shifting political framework of the empire. As R. Gradeva observed, Ottoman jurists instructed *qadi*s to disregard the command of the Sultan if it was not in conformity with the *shari'a*. The local court played a crucial role in the transformation of the legal system into an instrument of imperial rule. Writing about Gaziantep, L. Pierce argued that the sovereign and his subjects sometimes had different views on law and society, and that the local *qadi* court was the arena in which their differing claims were negotiated. And as A. Rafeq explained, *fiqh* was sometimes used to serve the interests of influential groups, including the military, notables, and foreign nationals. The systematic recording of court documents and the pluralistic structure of the judicial system added to the complexity of the Ottoman legal system.

During the colonial period, foreign legal concepts were often superimposed upon local laws. Tahir Mahmood noted that in the early colonial period, Indian judges determined facts from the perspective of foreign law and issued their judgments on the basis of local law. Rudolph Peters observed that in Nigeria, colonial rulers allowed *shari'a* criminal law to be applied, thereby creating a dichotomy between federal and area courts; the latter often being called '*shari'a* courts'.

In the early 19th century the jurisdiction of *shari'a* courts was reduced to the law of personal status. In the 20th century, those *shari'a* courts that continued to function had an increasingly narrow jurisdiction. Writing about contemporary Yemen, B. Messick described the *shari'a* courts that operate today as 'hybrids' that combine Islamic legal categories and methods with imported legal forms, as spelled out in codes issued by nation-states. Mahmood noted that in East India *shari'a* courts have operated since 1917 as private institutions that enjoy the respect of the Indian government for their work as alternate institutions of dispute resolution and arbitration.

Shari'a courts also contribute to the political objective of nation building, even if only as a formal constitutional requirement. A. Layish described how *shari'a* courts in modern Libya play an important role in integrating Bedouins, who are undergoing a process of sedentarization, into normative Islam. In Nigeria, Rudolph Peters noted, the constitution calls for the application of a recently enacted *(shari'a)* penal legislation, but many legislators and judges treat this requirement as a legal formality.

Courts

The application of penal law poses problems relating, on the one hand, to the intricacies of Islamic procedural law and, on the other, to restrictions and special rules that govern the criminal process. The testimony of upright witnesses, which is the lynchpin of Islamic court procedure, is closely associated with notions of social integrity. *Qadi*s understood 'proof' in a broad sense. The term *thubut* (literally 'proof'), which in some court records signifies a *qadi*'s certification of a legal act, must be differentiated from a *hukm*, or formal *qadi* judgment, as Müller demonstrated. Although it is often asserted that *fiqh* does not attach any validity to written documents, Powers and Layish drew attention to authorized written documents, known as *rasm istir'a* and *shahadat al-naql*, that were commonly submitted as evidence in North African courts; in fact, these documents are discussed at great length in Maliki legal texts. In some settings *qadi*s and muftis worked closely with one another; in others, *qadi*s seem to have done their work without the assistance of muftis. As A. Christelow explained, a special tribunal known as the *majlis* was established in Algeria in the early 20th century to assist *qadi*s and emirs, but was later abolished.

Several authors explored the manner in which the social and legal perceptions of the *qadi* affect his handling of a litigation (*khusuma*) and issuance of a judgment (*hukm*). In Indonesia, J. Bowen observed, judges invoke broad social norms when issuing their judgments. Similarly, as L. Welchman wrote in her paper, in divorce disputes Palestinian judges balance their knowledge of *fiqh* by exercising judicial discretion on the basis of their perceptions of what constitutes acceptable or unacceptable behaviour on the part of the wife; these perceptions are gendered (*qadi*s invariably being men) and may vary across time and space.

According to Islamic legal doctrine, a *hukm* is 'a text that contains a record of a litigation together with the final ruling by the judge'. It is 'a final judgment that concludes a claim'. As noted, the Mamluk documents demonstrate that 'there is a clear legal distinction between an order (*amr*) or action (*fi'l*) of a *qadi*, on the one hand, and his judgment (*hukm*), on the other. It is possible for a *qadi* to issue a court decision without issuing a binding judgment. A judgment comes into existence and acquires its binding nature only when the *qadi* explicitly states *'hakamtu bi kadha'* (I have issued a *hukm* about this matter). According to Messick, '[t]he Yemeni *hukm* has features that are distinctive with respect to what we know of *shari'a* court judgments elsewhere prior to the advent of modern jurisdiction.'

Court records

Although we possess a wealth of historical and doctrinal sources for the period between the 9th and 16th centuries, we have virtually no court records for this period, with the exception of the Haram al-Sharif documents (14th century) and transcriptions of court decisions in literary sources. *Sijillat* only begin to appear in the 16th century. Several explanations were offered for this puzzling riddle: a *hukm* is only valid for the specific case about which it was issued; it does not create a legal precedent; jurists were critical of the activity of *qadi*s and therefore did not record and transmit their judgments; jurists were concerned with the systematic integrity of the legal system, not with the facts of a particular case; and the judgment of a *qadi* was intimately linked to the legal facts established by witness testimony. Authors used fatwas and biographical literature to reconstruct *qadi* judgments. K. Masud spoke about the early Umayyad *qadi* judgments on alimony payment to the wife in divorce cases.

Conference participants:

- Camilla Adang *(Tel Aviv University)*
- Ahmad Akgündüz *(Islamic University, Rotterdam)*
- John Bowen *(Washington University, St.Louis)*
- Léon Buskens *(Leiden University)*
- Baudouin Dupret *(CNRS/CEDEJ, Cairo)*
- Allan Christelow *(Idaho State University, Pocatello)*
- Rossitsa Gradeva *(Institute of Balkan Studies, Sofia)*
- Taima Jayoush *(Lawyer in Damascus, Syria)*
- Baber Johansen *(EHESS, Paris)*
- Stefan Knost *(Orient Institute, Beirut)*
- Remke Kruk *(Leiden University)*
- Aharon Layish *(Hebrew University of Jerusalem)*
- Tahir Mahmood *(University of Delhi)*
- Muhammad Khalid Masud *(ISIM)*
- Brinkley Messick *(Columbia University, NewYork)*
- Christian Müller *(CNRS – IHRT, Paris)*
- Leslie Peirce *(University of California at Berkeley)*
- Rudolph Peters *(University of Amsterdam)*
- David S. Powers *(Cornell University, Ithaca)*
- Najwa al-Qattan *(Loyola Marymount University, Los Angeles)*
- Abdul-Karim Rafeq *(College of William and Mary, Williamsburg)*
- Delfina Serrano Ruano *(Germany)*
- Ron Shaham *(Hebrew University of Jerusalem)*
- Erin Stiles *(Washington University in St. Louis)*
- Frank Vogel *(Harvard)*
- Lynn Welchman *(SOAS, London)*
- Amalia Zomeno *(CSIC, Escuela de Estudios Árabes, Granada)*
- Laila al-Zwaini *(ISIM)*
- Sami Zubaida *(University of London, Birkbeck)*

The conference papers are not available for public distribution at this time. Authors may be contacted through the ISIM. Muhammad Khalid Masud, Rudolph Peters and David Powers will edit the papers as an ISIM publication, which is expected to appear in 2003.

For further information, please contact the ISIM: isim@let.leidenuniv.nl