



Universiteit  
Leiden  
The Netherlands

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Otto, J.M.; Otto J.M., Mason H.E.

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## Sharia and Law in a Bird's-Eye View: Reform, Moderation and Ambiguity

*Jan Michiel Otto*

Over the last three decades my area of research has been law and governance in developing countries. I have been particularly interested in the formation and development of legal systems in these countries, the way these systems operate in practice and the influence on governance and socio-economic development. As a researcher of law and governance, I studied local administration in rural areas of Indonesia or Egypt. One inevitably comes into contact with Islam and Islamic law, even if this is not the main research objective. For example, Islamic law became a prominent issue during my field research in Egypt in 1980, because the Egyptian constitution underwent a significant change in Article 2 from stating that 'sharia is *a* source of law' to 'sharia is *the* source of law'. In this way Sadat tried to regain the support of the Muslim conservatives. He had distanced himself by promulgating a progressive marriage law and by pacifying relations with Israel. At the time many wondered whether the constitutional change would influence other areas of law, such as criminal law. However, the next thirty years show that criminal law did not become strongly islamised. Did family law become more conservative as a consequence of the 1980 constitutional revision? The answer is no. Several critics including Rudolph Peters have recounted the way in which the government and its allies in parliament prevented this from happening. In fact, the Egyptian government first led by Sadat and later by Mubarak, made efforts to liberalise family law. By introducing the *khul'*-law in 2000 it eventually managed to do so.

Indonesia provides a second suitable example. During the last few decades the issue of sharia has drawn much attention, for example there have been questions about the Islamic character of the 1974 marriage law, which limits polygamy and repudiation and subjects cases to approval by the Islamic courts. There were debates about the broadening of the jurisdiction of these courts through a law in 1989. Further issues included the different legal position that Aceh received in 2001, which led to provincial regulations with Islamic criminal provisions.

Inspired by these observations, the idea arose to undertake a comparative study about sharia and national law. In collaboration with a group of international experts and on request of the Scientific Council for Government Policy (WRR) in the Netherlands, we started the project in 2004. The following countries were selected: Afghanistan, Egypt, Indonesia, Iran, Malaysia, Mali, Morocco, Nigeria, Pakistan, Saudi Arabia, Sudan and Turkey.

In these countries we did research into the development of the legal systems over the following four consecutive periods. We chose 1800 until 1920 as the first period. We labelled this period as the time of colonialism and European expansion. The second period runs from 1920 until 1965. This period is marked by state formation, an emphasis on national unification, decline of religion and tradition for the sake of 'development', liberal ideologies moving to socialism returning to liberal ideologies and a period of undemocratic regimes. The next period was decided to run from 1965 until 1985. In these twenty years, many countries saw authoritarianism followed by economic and political liberalisation. Tradition and religion reappeared. This period was also marked by the Iranian Revolution of 1979, the introduction of Islamic criminal law in Pakistan and Numeiri's introduction of sharia in Sudan (1983/1984). The final period in the study starts in 1985 and lasts until the present day. In this period we see a mixed picture. On the one hand, there is a revival of Islam, whilst on the other hand one can witness an expansion of democracies and human rights movements. These years also see globalisation of Muslim terrorism with 9/11 as the prime example, an increase of military and ideological conflicts, yet stabilisation and liberalisation domestically.

We investigated the following three areas of law: constitutional law, family and inheritance law and criminal law. In each of these areas the countries face similar problems. With regards to constitutional law the issues at stake are the foundations of the state and the division of power. What is the country's *grundnorm*: the constitution or the sharia – the first principles of Islam? In particular, to what extent are basic human rights, included in the constitution, the ultimate points of reference? The issues of non-discrimination and freedom of religion require special attention. Who reviews sharia-based law against the constitution or vice versa? What role do the supreme judges play in this process? In terms of family and inheritance law the position of women holds a central place. The issues include polygamy, repudiation, right to divorce and share of inheritance. One of the central questions posed in this respect is to what extent the power balance between men and women, which according to the classical sharia favours the men, has been equalised by national law? With regards to criminal law, questions rise around crimes and punishments prescribed by classical sharia, followed

by particular punishments: stoning in case of adultery, amputation in case of theft, flogging for the use of alcohol – punishments which most people would regard as inhumane nowadays. One of the most important conclusions of the study I would like to mention here:

*Research into the legal systems of a cross sample of twelve Muslim countries shows that on the whole these countries in terms of women's rights, corporal punishment and democratisation have become more liberal over the past twenty years, and not, as many may have expected, more Islamic in a puritan sense.*

The country experts who contributed to the study were jurists, social scientists, area specialists and often combined all disciplines. Most of the experts were highly experienced in undertaking research in their particular country. The period in which we received the very first results was exciting. It was the first time that anyone had provided a full overview of the relation between sharia and national legal systems in the Muslim world. Soon it became clear that Saudi Arabia and Iran are exceptional cases in comparison with the other nine, more moderate countries and secular Turkey.

Besides Turkey's secular system, there are other constitutions of Muslim countries that do not refer to Islam explicitly, as is for example the case in Indonesia. The Nigerian constitution even forbids the introduction of an official national religion. Yet, most of the countries in the study are typically built on a dual foundation. The fundamental conflict that many Muslim countries face is because they have institutions that review bills against sharia and/or the constitution, such as the Constitutional Court and the Council of Guardians. Most governments also include a ministry of religion or religious affairs, which takes on the intermediary role between the religious authorities and the government. Such a ministry also supervises religious education, the mosques and the religious courts in order to guard the unity and integrity of the state. With regards to the judiciary, you often see that relatively moderate supreme courts overturn extreme sentences assigned by lower courts. An example is the case in North-Nigeria regarding the death sentence for Amina Lawal, which was fortunately never carried out. Similar developments have taken place in Pakistan.

The ambiguity within the legal systems reflects the fact that societies and individuals find themselves in a phase of transition with many traditional customs disappearing without effective new normative systems already in place. In a situation of instability and insecurity, 'multiple identity' flourishes, as does poly-normativism, legal pluralism, the informal sector and corruption. There is often a huge gap between law and

practice. This applies both to the discrepancy between national law and social reality, and to the hiatus between classical sharia and daily practice.

It is worth noting that according to several of the country studies sharia and religious courts are frequently more woman-friendly and accessible than customary law and tribal chiefs prescribe. They even seem to surpass many state courts, which are hindered by red tape and corruption. It is the malfunctioning of state courts and perhaps also customary courts that explains the massive calls to support Islamic law in religious courts throughout the world. This leads to the second statement, which is also one of the conclusions of the study:

*While the legal systems of most Muslim countries are fairly moderate when it comes to Islam and sharia, their constitutions are actually built on a dual foundation: the rule of law and Islam. This ambiguity legitimises the state, the law and the regime as well as the clergy, and it contributes to their peaceful coexistence. However, sometimes this ambiguity leaves the rule of law in a vulnerable position, failing to channel religious-political tensions.*

Whilst the Western ideological and religious spectrum is marked by believers versus secularists, the spectrum in the Muslim world ranges from puritan to moderate, whilst the support for a secular system is rather limited. The struggle between the puritans and the moderates in the Muslim world is one which has dominated its history, politics and the law for many centuries – an issue that the West knows too little about. Moderation practised by national governments with regards to the sharia is as old as the road to Mecca, and mainly flows from the practical demands of administration. The opposition of extreme Muslim puritans is usually directed against the moderation of its own leaders.

A considerable number of Muslim scholars have been championing the case of moderation. They evidently live by the ideals of social justice and human rights and are wary of strict dogmatism. Their striving for fairness and justice has much in common with similar ideas in the West, in spite of the different background. This brings me to the final proposition:

*The sharia, as interpreted by pious and moderate Muslim scholars such as Khaled Abu el Fadl, Abdullahi An-Naim and the late Nurcholis Madjid, forms a useful source of inspiration for the promotion of human rights and the rule of law.*