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Sharia Incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present

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A Comparative Overview of the Legal Systems of
Twelve Muslim Countries in Past and Present

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Marileen and our children, Miriam, Benjamin and Saskia, have joined, supported and taught me more than I could ever expect.

Jan Michiel Otto
Amsterdam/Leiden, March 2010

Editorial note

Transliteration and glossary

As for the transliteration of Arabic terms, the authors of each chapter have followed their own rules regarding the use of diacritical symbols. In the introduction and conclusion I have not used any diacritical symbols, following for example The Oxford Dictionary of Islam. This means that shari'a will appear as 'sharia'. For the meaning of non-English, mainly Arabic, terms, please refer to the Glossary in the back of this book.

Detailed tables of contents

Please note that this book does not contain an index. The clear-cut structure of the chapters combined with the detailed tables of contents at the start of each country study are believed to provide sufficient guidance to the reader.

Tables

The tables in this book, other than those where a source is explicitly mentioned, have been composed by the editor and are based on conclusions drawn by the individual authors. The tables serve to allow the reader to compare countries on specific themes or issues. The tables can be found in the Chapter 1, Chapter 14 and in the Annexe.

Preface

In 2005 a reputed American human rights institute, Freedom House, published a book entitled *Radical Islam's rules. The worldwide spread of extreme Shari'a law*. The book argues that since the 1980s Muslim countries have started replacing their laws with extreme and barbarous 'sharia'. On the basis of seven country studies it claims that sharia, as it has been applied in those countries, undercuts legal systems, frequently employs cruel punishments, threatens Muslims who are not part of the dominant group, and reduces women to secondary status. All states, where such laws have been imposed, it says, produce terrorism (Marshall 2005: 15). In the foreword former CIA director James Woolsey promises: 'We will win this current long war [...] by defeating the Islamist ideology.'

While Freedom House thus advised the United States government to wage war against the Islamist ideology in general and against the forces that supposedly promote sharia in particular, the same problem became the subject of a research project undertaken by an institute in another Western country, based in The Hague in the Netherlands – one which would eventually lead to this book. The Scientific Council for State Policy, a think-tank of the Dutch cabinet (WRR, *Wetenschappelijke Raad voor het Regeringsbeleid*) consulted me in 2003 about the possibility of carrying out a study on sharia. This project would be the third in a series of projects concerning Islam. One stemmed from an inquiry by my colleague Erik-Jan Zürcher about whether EU accession of Turkey would be problematic, because of the fact that most Turks are Muslims. The other sprang forth from a study by another colleague, Nasr Abu Zayd, about reformation of Islamic thought.

The WRR was obviously concerned about deteriorating relations between the West and the Muslim world and had questions about the supposedly increasing role of extreme sharia in the Muslim world. Is sharia really a fixed set of norms that applies to all Muslims as their supreme rule? Do we see an Islamist subversion of national legal systems? Has the legal status of women indeed deteriorated, and have inhuman punishments, such as stoning and hand-cutting, become common practice throughout the Muslim world? Have conservative religious scholars become the key decision makers instead of elected politicians? And,

finally, is it really true that in the last 25 years legal systems in the Muslim world have been islamised and moved away from human rights, democracy, and the rule of law?

At the time of the start of the WRR projects, Islam had become a major issue in Dutch politics. Had it hitherto been regarded as a world religion with its good and bad sides like any religion, since the late 1990s maverick politicians had risen to prominence by calling Islam 'backward' (Pim Fortuyn, Ayaan Hirsi Ali) and its Prophet 'a paedophile' (Hirsi Ali). Likewise, filmmaker and columnist Theo van Gogh, before he was brutally murdered by a Moroccan fundamentalist, wrote consistently about Moroccan immigrant Muslims as 'the goatfuckers' or 'the fifth column'. He depicted the mayor of Amsterdam Cohen, admired by many for his capacity to bridge and unite, as soft and naïve, and even called him a 'Nazi-collaborator'. The heated atmosphere in the Netherlands during the years after 9/11 has been captured well by Ian Buruma in his book *Murder in Amsterdam*. The WRR research projects on Islam were to take place in turbulent conditions and could count on sharp criticism, regardless of the results.

Academic research about sharia is usually concerned with studying the classical sources of sharia, notably the *fiqh*-books in which Islamic scholars discuss cases and the application of rules and principles. The focus of such studies is often on the past, on the heyday of sharia, when it was the living law, developed and maintained by religious scholars throughout the Muslim world. However, '[t]o practice law in the modern era is to be an agent of the state' (Hallaq 2009: 549). The main issue at present has become the incorporation of sharia into state law. Which aspects? What exactly? To what extent? Where? When? How? Why? These questions formed the foundations for this study.

A study of this kind seemed to perfectly fit in with the research tradition of the Van Vollenhoven Institute of Leiden University, where since the 1980s my colleagues and I had been studying law and governance in developing countries. Some of the legal systems we had focused on, happened to be situated in Muslim countries, for example Indonesia, Egypt, and Morocco. In the academic domain of 'law, governance and development', which dates back to the study of colonial law and administration, we employ an interdisciplinary tradition, combining legal and social science approaches with language, culture, and history. During thirty years of research, I had become aware of the longstanding political tensions and legal problems surrounding the position and role of sharia within national legal systems. This concern was shared by my colleagues at the School for Oriental and African Studies in London, whose help has proven essential for the undertaking of this project.

On a more personal level, I observed a stark contradiction between what I experienced during in-country field research and what was considered public opinion in the West. With my wife Marileen, a medical anthropologist, I spent years living in Muslim areas, in the mid 1970s near Lucknow, a centre of Shia religion in North India, in the early 1980s in a village in rural Upper Egypt, and ten years later, with our three children, in an urban kampong on the outskirts of Bandung, Indonesia. We had developed personal relations with hundreds of Muslims of many different backgrounds. After 2001, back in the Netherlands, dominant discourses and media reports began to stereotype Islam, Muslims, and sharia in a consistently negative manner. Disturbing news and images related to sharia came in not only from Saudi Arabia, Iran, and Afghanistan, but also from Indonesia, Egypt, and Morocco, countries that had previously been regarded as 'moderate'. It seemed that there was a consistent emphasis in the media on horrifying events happening in the Muslim world, whilst developments in other parts of the world were ignored or paid minimal attention to.

In late 2003, the project started. The first challenge was the selection of countries: in order to cover a considerable, representative part of the Muslim world, I set out to select a number of countries, which together would constitute about two-thirds of the world Muslim population. Next, the selection of countries needed to represent the Muslim world in all its variety, i.e. a wide regional spread; a full range of secular, moderate, and orthodox regimes; and a collection of rich, middle-income, and poor countries, etc. It was decided that the project would focus on the following regions and countries. In North Africa and the Middle East the WRR and I selected five countries, namely Egypt, Morocco, Saudi Arabia, Sudan, and Turkey. The three countries selected in Central and South Asia were Iran, Pakistan, and Afghanistan. In Southeast Asia we opted for Indonesia and Malaysia. And finally, Nigeria and Mali were to represent Sub-Saharan West Africa.

The second challenge consisted of finding authors with sufficient expertise in the law and the socio-political context of the country concerned, who could provide impartial and objective analysis. They needed to be willing to participate in a collaborative research undertaking about a hotly contested issue with an uncertain outcome. I feel privileged to have collaborated with over a dozen authors, who share a longstanding commitment to the study of law and society. All were asked to adhere to the same format, both in terms of subjects as well as historical periods. Much to my relief, they were all willing to go along with the proposed outline.

In 2006 the findings and recommendations of this research were published in three volumes.¹ These books, like other WRR studies, were written in Dutch to serve a Dutch audience. However, given the nature

of the subject matter and the diverse backgrounds of the authors, an English language version had to appear. In 2007, we began work on this book. A few new authors joined the team. We took the time to discuss, revise, and rewrite. All authors fastidiously updated their country studies through to early 2010.

The conditions which gave impetus to this project in 2003 have not changed. Since 9/11 the West has been overcome with '[n]egative stereotypes of Islamic law as inflexible, arbitrary, and discriminatory and of legal institutions as oppressive, coercive, and incompatible with democracy' (Hirsch 2006: 168). In Europe, people's fear of terrorist attacks is combined with an anxiety related to signs of islamisation of their own society. Consequently, Europe has seen the rise of new anti-Islam politics, led by populist leaders, such as the Dutch parliamentarian Geert Wilders. Declaring Islam to be the root cause of world problems and depicting sharia as a backward, medieval law has given him and his colleagues enormous popularity and electoral success.

Politicians, such as Wilders, have close connections with a network of publicists and academics, both in Europe and the United States, who have embraced versions of Huntington's clash of civilisations theory, as well as the late work of Bernard Lewis. Huntington had suggested already in the late 1990s that Western civilisation is threatened by Islamic civilisation. In his view, the rule of law, which he describes as a cornerstone of Western civilisation, has come under threat whilst the legal systems of Islamic countries are being increasingly islamised (Huntington 1998: 116). In the aftermath of 9/11, Lewis produced several short books in which he argued that 'almost the entire Muslim world' can be seen as a 'failure of modernity' (Lewis 2003: 97). He claimed that Muslims recognise sharia as the highest and only norm, and that for them the state is nothing more than an expression of religion (2002: 106).

Whatever may be true of these statements, Lewis, his European epigones, and the neo-conservative architects of Bush's foreign policy, found welcome support in the writings of a few ex-Muslims who had migrated to the West and found a new mission in warning against Islam. For example, Ibn Warraq, author of the much-cited book *Why I am not a Muslim* (1995) stated: 'The truth of the matter is that Islam will never achieve democracy and human rights if it insists on the application of the Sharia.'

While the man in the street in the West believes such allegations to be hard facts, most internationally reputed scholars of Islamic law would argue the opposite. It is a mystery that their solid and thorough work on sharia has hardly been able to counter the abovementioned alarmist, confrontational discourse about sharia. Perhaps this is because academic writing remains nuanced and specialised, – often dealing only

with particular aspects or particular countries –, whereas alarmist claims about the rise of extreme sharia are rather absolute and general, always referring to Islam as a whole and to ‘the Muslim world’, thereby making it difficult to refute their arguments.

In sum, there is a gap, which I hope this book will be able to fill at least partly. It presents a new collaborative effort to lay the groundwork for the analysis of a major question, which will continue to engage many minds and rouse high emotions, both in the Muslim world as well as in the West. How can sharia-based law exist as an integral part of rule-of-law-based national legal systems?