Rule of Law, Adat Law and Sharia: 1901, 2001, and Monitoring the Next Phase

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Jan Michiel Otto*

Many in the West believe that sharia and rule of law as defined by international law are hard to reconcile. In his think piece, Otto argues that this view ignores developments and trends in many Muslim countries which point to a gradual rapprochement between sharia and rule of law. He also points out that many Western observers are insensitive to the fact that rule of law requirements can be met in non-Western ways. In this connection, Otto reminds his readers of Van Vollenhoven's monumental effort to map out and understand Indonesian *adatrecht* against the background of a Dutch colonial administration that was arrogant, incompetent and indifferent with respect to local laws and sharia. Otto concludes his piece by formulating an ambitious research-agenda for the *Hague Journal on the Rule of Law* with respect to rule of law and sharia.

In 1901 Queen Wilhelmina of the Netherlands promulgated a new colonial policy for the Dutch East Indies, the so-called Ethical Policy. This declaration promised the end of colonial exploitation and plunder, and the beginning of a developmental policy. In the same year a young, ambitious professor of law was appointed to the Leiden Law Faculty, Cornelis van Vollenhoven. His ideas on law and justice in the Indies would have a lasting impact on Dutch thinking about international, national and local legal orders. Inspired by the genius of Grotius, he outlined the structure of an international governance structure, with an international police force for maintaining and enforcing the international legal order. Within that framework national governments should operate strictly according to the principles of the *Rechtsstaat*, summarized in the adage 'no power without accountability'. In his view, the key challenge of European national governments which ruled over societies overseas with different legal orders, was to recognize those orders, ascertain their rules, frame them cautiously within national colonial law and have them applied by a coherent structure of national and local authorities.

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Strongly committed to a just and coherent legal order, he found that Dutch legal interventions overseas had been fundamentally flawed in that they had failed to take into account the prevailing local laws and social realities. He found the existing views of most bureaucrats and academics about legal issues, notably regarding land tenure, to be based on misconceptions. First, he argued, they did not see and recognize that these other societies had their own legal orders which differed fundamentally from that of the Netherlands. Secondly, even if they tried to deal with those orders, they understood neither their different legal structures and processes nor their principles and norms. Western jurists were unable to think beyond their own western legal tradition. Thirdly, they did not understand the way in which local laws were interconnected and overlapped with local culture, religion, power, and economy. For example, they often mistook the classical religious precepts of Islam, sharia, for living local law. In short, they generally failed to understand the indigenous legal systems.

It took some decades of hard work for Van Vollenhoven and his many colleagues and students to map out Indonesian *adat* law (*adatrecht*), as they called it, and to have it formally recognized and applied as law. The rules of the *adat* laws of different regions were diligently recorded in thousands of publications. At the same time, the investigations uncovered the inherent flexibility of local customary law, and its relational and procedural nature. Much to the regret of Muslim scholars, the *Adatrechtsschool* considered sharia, or Islamic law, to be part of the local *adat* law in as far as it was actually applied by the communities, and enforced by their authorities. In 1882 the Dutch formalized Islamic courts in the colony to rule on marital and inheritance disputes between Muslims. The laws of most other colonies in Asia and Africa also recognized customary law and religious law, and their institutions.

Did this powerful colonial heritage of legal pluralism survive the transitions that most developing countries have gone through since 1945? In the early decades it seemed that the young states' new efforts towards nation-building and socio-economic development would displace traditional legal systems altogether. The new leaders aimed generally for unification, modernization and secularization of law. Their socialist policies called for equality between women and men. Most international donors also tended to pay little attention to traditional norms. Then, in the 1970s the world witnessed a resurgence of Islamic law in several countries, and since the 1990s also growing attention for customary law. Anno 2009 the international donor community has rediscovered the importance of both customary and religious laws, in Africa and Latin America as well as Asia, including Indonesia, where after 1998 many regions witnessed some kind of return to *adat* law. This trend is reflected in Jakarta-based donor projects which now stress the importance of both 'formal and informal justice'. They include the World

Bank's 'Justice for the Poor', UNDP's 'Access to Justice', and AusAid's project to support religious courts. A hundred years before, Van Vollenhoven and his monumental, comprehensive ascertainment of *adat* law had been driven by a missionary sense of justice for all in the framework of a *Rechtsstaat*, and a burning rage against what he saw as the arrogance, incompetence and indifference of most colonial officials with regard to indigenous values and norms. Today, the role of foreign intervention is of course much more limited. But there is perhaps a common denominator, namely the desire to make the universal rule of law inclusive and contextual, and therefore to take local normative patterns seriously.

In 2001 president Bush, in response to the 9/11 attacks by Al-Qaeda terrorists on targets in New York and Washington, announced a new policy in defense of the West, against Islamist forces, the War on Terror. By attacking Taliban-controlled Afghanistan, the home base of Al-Qaeda terrorism, and by invading Iraq in 2003, the US unilaterally re-interpreted international law. The American liberators initially aimed for radical change of the national and local laws of 'tyrants and terrorists'. They wanted new laws which would reflect the values of democracy, good governance and the rule of law. After having deposed the Taliban regime and Saddam Hussein, the new occupying US forces learned that communities and their leaders in Afghanistan and Iraq actually wanted to see part of their religious and traditional laws reflected in their new national legal systems. The US government called on American academics like Barnett Rubin and Noah Feldman to advise them about how to solve the difficult dilemmas of law and governance, which in some ways were reminiscent of those faced by colonial legal scholars like Van Vollenhoven: how to reconcile sharia with the rule of law in a way that connects local and national law to international law? What is the nature of sharia, and how to deal with its flexibility in the context of a modern legal system?

In other ways, the context was quite different from the situation in which Van Vollenhoven had once worked and advised. Far removed from the tenets of the Ethical Policy and the *Adatrechtsschool*, the ideology of the Bush government in the early 21st century was strongly influenced by neo-conservatives, who enthusiastically engaged in a 'clash of civilizations' which they felt would bring victory for 'western' values such as the rule of law over the dangerous ideology of Islam. Western politicians, opinion leaders and media had constantly highlighted elements of sharia which they saw as conflicting with international human rights law: inferiority of women and non-Muslims, cruel corporal punishments and a lack of religious freedom. Yet, the new governments of Afghanistan and Iraq desperately needed sharia to retain legitimacy in the eyes of their own people. After all the misery their countries had experienced, Islam was one of the few remaining forces that could foster a sense of unity and harmony. When Afghanistan and Iraq redefined themselves in the constitutions of 2004 and 2006, a prominent place was given to Islam.

While the dramatic events in Afghanistan and Iraq have attracted the world's attention, normative tensions between national law, the rule of law and sharia – and customary law – have existed for decades, if not centuries, in dozens of Muslim majority countries. It is no exaggeration to say that a rule of law that denies or combats sharia is unlikely to succeed and prevail in large parts of the world, if we take into account the numbers of 1.3 billion Muslims, their political 'awakening' since the 1970s, and the established fact that most of them would like to see sharia as part of their country's legal system (see below).

I therefore recommend that this journal in its future issues should pay frequent attention to how the legal systems of Muslim majority countries evolve, and especially to what promoting and strengthening the rule of law really means within those countries, why this is often so difficult, and what it requires. Paradoxically, the recent globalization of economic and political activity has not been accompanied by the growth and internationalization of knowledge of this issue. As Carothers has argued, the present wave of international rule-of-law promotion suffers from a serious 'problem of knowledge'. This applies as much to the specific legal issues of Muslim countries as to the issues of customary laws administered by traditional authorities in Africa, Latin America and Asia.

In this short piece my focus is on sharia. I hope that in the decades to come this journal will record a gradual decrease of the perceived contradictions between the rule of law and sharia. These are not just the hopes of an optimist turning a blind eye to the range of conflicts between 'Islam and the West', or between Islamic sharia – as defined by puritans – and the rule of law – as defined by international law. My hopes are based on my observation that most of the longitudinal trends and research evidence point in that direction. The findings of an explorative comparative survey on sharia and national law in twelve Muslim majority countries which I carried out together with a team of colleagues between 2003 and 2009 indicate a gradual tendency of legal systems in Muslim countries to move towards the rule of law. This journal could try to record the landmark decisions and main trends in the changing relationship between sharia, national law and the rule of law in the Muslim world. It could also pay attention to major explanatory factors of those decisions and trends. Let us look at some themes which may deserve this journal's attention in the years to come.

First, the prevalence of pragmatism in law-making, judicial rulings and public opinion. The Iraqi Constitution of 2006 declares in Article 2:

> '… Islam is the official religion of the State and is a foundation source of legislation:
> A. No law may be enacted that contradicts the established provisions of Islam.
> B. No law may be enacted that contradicts the principles of democracy.

C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.'

In my view, this constitution prescribes an interesting triple basic norm, which implies that sharia in Iraq should not contradict democracy and human rights – thus a modernist interpretation. Egypt had also introduced, in 1980, a constitutional Article 2 which provides that 'Islamic jurisprudence is the principal source of legislation'. The Egyptian Supreme Constitutional Court, when deciding about whether this would invalidate provisions of the 1948 Civil Code which, allow for interest on loans, for instance, decided that the 1980 amendment had no retroactive effect. The basic norm of Article 2 is respected but the 'modern' Civil Code is preserved. This flexibility of law-makers and judges is not limited to the legal or political professions. Global Gallup investigations aimed at finding out what ordinary Muslims really think found overwhelming evidence that the vast majority of Muslims around the globe want both 'sharia' and 'democracy', as well as 'equal women's rights'.

Secondly, such moderate pragmatism has been supported by moderate Islamic scholars who constantly seek sharia interpretations which fit the changes in Muslim countries as a result of education, urbanization, economic growth, human rights and the emancipation of women. Even in Iran, which is one of the few states where religious scholars occupy leading positions, the radical changes under Khomeini have been followed by changes in family law based on more moderate interpretations. In most other Muslim countries moderate scholars sanctioned interpretations aimed at modernization which have significantly improved the position of women. Recent examples include the new family laws of Morocco (2004) and Egypt (2000), which go further than, for example, the moderate family laws of Indonesia (1974) and Pakistan (1961). Even the famous abolition of polygamy by Tunisia in 1956 is said to have been based on an interpretation of Islamic law.

Thirdly, the follow-up and implementation of seemingly dramatic measures introducing 'the' sharia in countries like Libya, Pakistan, Northern Nigeria. The media highlighted how Libya in the early 1970s was the first to re-introduce sharia criminal law, how Pakistan followed suit in 1979, and finally Northern Nigeria in 2000-2001 leading to the infamous *Amina Lawal* case. There is a need for a factual and precise type of investigation, as was carried out by such scholars as the late Jan Brugman on Libya, Martin Lau on Pakistan, and Philip Ostien on Nigeria, who demonstrated that in spite of the new Islamic criminal provisions, the higher criminal courts in these countries have actually never allowed the draconian punishment of stoning to be implemented.

Fourth, this journal should be equally interested in countries and cases where the rule of law is under serious attack or is likely to come under attack. Degrading

norms and practices in marital relations, whether on the basis of Christian, Islamic, Hindu, Jewish, customary or other norms, are often in conflict with substantive elements of the rule of law. As are grossly inhuman punishments which are still carried out, for example in Saudi Arabia, and executions of adolescents as happened in Iran. The journal's key role here could be to strive for well-informed articles which present backgrounds and trends.

Fifth, the journal could pay attention to international programs for 'law and development' or 'rule-of-law-promotion' in the Muslim world. The number and scope of such programs will probably increase after the end of the Bush administration. Obviously, the time has come for a more constructive, collaborative relationship between the Muslim world and the West with joint concern for justice, for balanced information, and for attitudes of modesty and patience on both sides.

Sixth, the journal should monitor the diverse relationships between sharia and customary law in the context of national legal systems. Historically, religious law has played an important role in overcoming the dark sides of traditional customary law. It has focused on the brotherhood of all humans irrespective of race, tribe, clan, caste or class. It has strengthened the freedom of the individual from traditional group pressure. There is research-based evidence that sharia in certain regions of Africa or Asia is definitely more female-friendly and in accordance with rights-based development than local customary law. In other areas the converse is true. Now that the international community has become so interested in 'informal justice', it is time to study it, once again, more systematically.

Lastly, I expect that the journal will also witness a gradual merger of the international human rights debate with national rule of law debates. As the discussion moves from the levels of international pressure and national obligations to domestic and local implementation in law and practice, it will have to take into account the complexities of domestic legal systems, the dilemmas and weaknesses of governance, and the contradictions of development. This might also entail more debate about what Eva Brems has termed 'inclusive universalism', the view that if one wants human rights to be universal one should also be ready to include values and views from other countries and cultures and infuse these into the human rights debate.

In sum, the HJRL could provide an international forum for debate, research-based findings and exchanges by practitioners to remove ill-founded conceptions and stereotypes of sharia and its relation with the rule of law. The fact that there are many different interpretations of sharia, from very puritan to very liberal, and that these interpretations differ widely among countries, among groups and among individuals, should not only make us skeptical about broad generalizations but also raise our curiosity as to which interpretations of sharia will help to strengthen justice and law around our globe.