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**The compatibility of sharia with the rule of law.
Fundamental conflict: between civilisations? Within
civilisations? Or between scholars?**

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Knowledge in Ferment

Knowledge in Ferment

Dilemmas in Science, Scholarship and Society

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Preface

Dilemmas, fundamental controversies, basic oppositions between methods and approaches, occur in all fields of science and scholarship. Often dilemmas arise at the interface where science and society meet, or whenever several sciences or disciplines clash. The paradox of dilemmas is that although one might prefer to do without them, they are nevertheless indispensable. Without dilemmas progress in science and scholarship would be unthinkable. New paradigms come into existence and compete with the old for acceptance. Thus, by inciting researchers to make new efforts and pose new questions, dilemmas reveal new insights and sustain the ferment of knowledge.

As the Rector Magnificus of Leiden University for six years, from 2001 to 2007, Professor Douwe Breimer devoted his great talents and his best endeavours to developing and improving teaching and research inside and outside Leiden. As Professor of Pharmacology in Leiden from 1975, of Pharmacology and Pharmacotherapy from 1981, Breimer was the architect of, first, the Center for Biopharmaceutical Sciences (1983), then the Center for Human Drug Research (1987) and finally the research school, the Leiden/Amsterdam Center for Drug Research (1992). In 1984 he became Dean of the Faculty of Mathematics and Natural Sciences. Breimer's meritorious services to scientific research and to the organisation and development of science have been recognised in the seven honorary doctorates which he has received from universities all

over the world. But as Rector Magnificus, Douwe Breimer has been much more than the champion of the natural and life sciences, for he has also upheld Leiden's pre-eminence in the humanities, jurisprudence and the social and behavioural sciences. As a scientist, an administrator and especially as Rector Magnificus Breimer has been accustomed to act with circumspection, but also with decisive vigour. He has always shown himself to be one of the *esprits préparés* of Louis Pasteur's dictum, 'Le hasard ne favorise que les esprits préparés', a saying very dear to his heart. But he is also the embodiment of a proverb in his own mother-tongue, Frisian, 'Sizzen is neat, mar dwaen is in ding' (talk is nothing, but doing is something). He always was, and is, a man with style.

During his rectorship Douwe Breimer has enjoyed the deep respect and warm sympathy of the whole University. The University continues to regard him with pride and admiration. On his retirement as Rector Magnificus his friends and colleagues wished to demonstrate their gratitude by offering him this volume of studies. They have chosen as its theme 'Knowledge in ferment: dilemmas in science, scholarship and society'. In the word 'ferment' one may detect an allusion to a phenomenon in Breimer's own field of study; but it also refers to the catalytic role that dilemmas play in the development of science and scholarship. Colleagues from all Faculties and many departments of the University have contributed with enthusiasm to this volume. Authors and editors offer it to Douwe Breimer as a tribute of their gratitude, respect and friendship.

Leiden, 8 February 2007

Adriaan in 't Groen
Henk Jan de Jonge
Eduard Klasen
Hilje Papma
Piet van Slooten
Editors

To Douwe Breimer

on the occasion of his retirement as Rector Magnificus
of Leiden University

after a six-year term of office (2001-2007).

During these years he has inspired the University through
the example of his exceptional scientific achievements and his ideal
of the university
as promoter of welfare, well-being and culture.

He has exercised his office with unflagging energy, uncontested authority,
a rigorous insistence on the highest academic standards,
the wisdom of his judgement and experience,
his profound humanity
and grand style.

**The compatibility of *sharia* with the rule of law.
Fundamental conflict: between civilisations?
Within civilisations? Or between scholars?**

Jan Michiel Otto

On 13 September 2006 the Dutch minister of Justice, Piet Hein Donner, was urgently summoned to parliament in The Hague. In a heated debate, politicians from all parties, including his own Christian-Democrats, strongly condemned him for comments he had made in an interview. The minister had remarked that introducing the *sharia*¹ should also be an option in the Netherlands if a large enough majority demanded this. His opponents, however, stressed that the *sharia* was incompatible with the very essence of the Dutch state, the rule of law. This was the thousand-and-first episode of a public debate about Islam and rule of law, or *rechtsstaat*, which has been raging in the Netherlands and elsewhere in Western Europe since the 1990s.

In fact, the issue has been discussed for centuries in many Muslim countries.² While rulers of early Muslim states usually governed under the banner of Islam and undertook to 'implement the *sharia*', in reality a growing body of state law and institutions had emerged. In the Ottoman Empire, which was never colonised by European powers, ruling elites in the nineteenth century decided to modernise and codify law. Those Muslim countries which had been colonised by Britain, France, and the Netherlands had to make crucial decisions on this issue at the time of their independence. Colonial jurisdictions had accepted Islamic law and customary law as legitimate parts of their legal systems. Changing these pluralist systems into unified national systems would prove to be a daunting task. But such historical considerations hardly played a role in the first years of the twenty-first century.

Other frames of reference had taken their place. Italy's Prime Minister Berlusconi had caught the headlines in September 2001 (!) with his pronouncements. He said: 'We should be conscious of the superiority of our civilisation, which consists of a value system that has given people widespread prosperity in those countries that embrace it, and guarantees respect for human rights and religion'. He added: 'This respect certainly does not exist in the Islamic countries'.³ It was not only populist politicians who made such statements. A respectable institution like the European Court of Human Rights declared in a ruling of 13 February 2003 on the case of the *Refah* Party versus the Turkish state that *sharia* is incompatible with democracy as laid out in the European Convention.

The claims of Berlusconi and the Court very much reflected the thrust of an influential American publication called *The Clash of Civilizations*, by Samuel Huntington, a professor of political science at Harvard University. Huntington claims that in the new world order a clash between *civilisations*, in particular between 'the West' and 'the Muslim world', is the greatest threat to world peace. He states that *sharia* conflicts with the rule of law, a cornerstone of Western civilisation. Moreover, he suggests that extreme *sharia* is spreading rapidly, replacing 'western' law. Therefore Huntington urges the West to defend its civilisation against the rise of the 'other' civilisation.

Many have called Huntington's *clash* a self-fulfilling prophecy. The beginning of the twenty-first century was indeed marked by the 9/11 attacks by Al-Qaeda in 2001, the immediate US reprisal against the Taliban regime in Afghanistan, the war in Iraq, deadly bombings in Madrid and London, and the ongoing conflict between Israel and Palestine. Many westerners are frightened by the idea that this violence, this destructive human behaviour, is essentially caused by the dictates of fixed religious Islamic rules, believed to come from Allah and therefore beyond rational human criticism.

In fact, Muslim peoples and states throughout history have always exercised human judgment in establishing the scope of *sharia* in their communities. Slavery, which was permitted in classical *sharia*, has been abolished, even in Saudi Arabia. Tariq Ramadan, a leading Islamic scholar in Europe, proposed a worldwide moratorium of the infamous *hadd* punishments. The term 'hadd' refers to certain specified crimes and punishments which are prescribed by divine sources such as the Qur'an and the Sunna, as laid down in the so-called Traditions. Therefore their

suspension is no minor step. Moreover, over time the status of women under national marriage legislation has significantly improved in most Islamic countries, and recently in Egypt (2000) and Morocco (2003). Clearly, modernist interpretations of *sharia* have brought such national laws closer to the rule of law in several countries. Modernisation was also the trend in Iran under the authoritarian Shah until it backfired and the conservative clergy launched an Islamic revolution. They received much popular support. This episode demonstrates that forcefully separating a society from its religious roots may have a high price. As Wael Hallaq, a well-known expert of Islamic law, warns, referring to recent destructive violence by Muslim radicals: 'And let there be no doubt that, at the end of the day, the culprit is the rupture of history. The abrupt disconnection from the past, from its legacies, institutions, and traditions, lies at the heart of these problems'.⁴

For most Muslims, Islam indeed represents a major source of public morale, virtue, rightness and self-respect. For the poor and oppressed it also is a source of consolation, acceptance and trust. Therefore, enacting provisions of national laws, which are perceived as an attack on Islam or *sharia*, is a politically hazardous adventure.

The incompatibility of Islam with the rule of law has become a multilevel issue. On a global level Osama bin Laden resorted to discourses on Islamic Holy War (*jihad*) against the United States. The answer of Bush and Blair was a war justified in terms of 'freedom and democracy'. However, it would be a serious mistake to think that the incompatibility issue is merely or even mainly a problem *between* two civilisations. For most Muslim states it contains fundamental *domestic* dilemmas. Should, for example, governments with liberal interpretations of *sharia* admit powerful Islamist groups to form political parties and participate in elections, even if these groups deny the legitimacy of their government and promote orthodox interpretations which would, if enacted, lead to barbaric punishments and serious discrimination of women and religious minorities?

In Egypt this is called 'the Algerian dilemma'. Zakaria refers to this problem in *The Future of Freedom* as 'the Islamic exception'. Meanwhile in Western Europe, increasing problems and accusations surrounding ethnic communities of Muslim migrants have led to feelings of enmity on both sides. A few radical Islamist groups in Europe also proclaimed that they

would rather take guidance from *sharia* than from state laws, and resorted to violence. One proponent was the murderer of Dutch film director Theo van Gogh. Against this background it is no wonder that Minister Donner's remarks caused a row in Dutch politics.

Emotions run high in the public debates about the compatibility between *sharia* and democratic rule of law, both in the Muslim world as well as in some European countries. Rational discussions are often complicated by feelings of pride – 'our system is superior to theirs' – or fear and suspicion – 'they will attack, conquer and rule us and destroy our value system'. Clearly, in order to have a fruitful and rational debate about compatibility, a solid knowledge base is needed. How then has this problem been addressed by academic research? How have scientists coped with its sheer magnitude? Which academic domains, approaches and methods have been employed? Are there any main findings which could serve as a point of departure? Could such findings assist policy-makers and law-makers in their efforts to manage or even solve this nagging problem of compatibility?

Some academics have already been working hard on this issue. For example, Ann Mayer, in an important effort to disentangle this problem in *Islam and human rights* (1995), demonstrated that there was compatibility in most areas, but incompatibility in four specific areas (see below). Halliday, in *Islam and the Myth of Confrontation: Religion and Politics in the Middle East* (2003), dissected the argumentation of Islamic groups who believed in compatibility – by 'assimilation' or 'appropriation' – or incompatibility – by 'rejection' or 'particularism'. The proposals of An-Na'im, a leading proponent of compatibility, range from a radical reinterpretation of Meccan verses of the Qur'an, in *Towards an Islamic Reformation, civil liberties, human rights and international law* (1990) to, in his more recent research project *The future of Sharia*, a rejection of *sharia*-based legislation for the sake of preserving *sharia* as a valuable, religious source of morale and justice. However, the extensive knowledge of such scholars has hardly resonated in the polarized public debates.

In 2003 a high-ranking independent think-tank of the Dutch government, the Wetenschappelijke Raad voor het Regeringsbeleid (WRR; Scientific Council for State Policy) commissioned several projects for a critical investigation into the changes in Islamic thought, political activism and national laws in the Muslim world, in an effort to contribute

to the scientific knowledge base and a more balanced debate. As director of the 'Sharia and national law' project I undertook and coordinated cooperative research on the position and role of *sharia* in twelve Muslim countries and its compatibility with the rule of law. The selected countries are Egypt, Morocco, Sudan, Turkey, Saudi Arabia, Afghanistan, Iran, Pakistan, Malaysia, Indonesia, Mali and Nigeria. In 2006 the findings were published in three books.⁵ This chapter, which presents some of the data, is a reflection on that project, in particular on the different perspectives I encountered in various academic domains.

In the course of our comparative study a five-step method was developed: (1) the concepts of *sharia* and rule of law were first defined and operationalised, (2) the national law of the twelve countries was investigated focusing on certain areas and topics of the law where *sharia* might have a serious impact, (3) the results of the research were put into comparative and historical perspective, (4) explanations were sought from the political and social contexts of *sharia* and law, (5) and finally to draw a general conclusion about the compatibility question data on different countries, areas and topics were aggregated and analysed.

Essentialism and multiplism, two competing perspectives

Two different perspectives prevail in the writings about compatibility of *sharia* with the rule of law. The first perspective considers *sharia* to be a fixed set of binding norms found in authoritative sacred texts representing the essence of an Islamic civilisation, an Islamic culture, an Islamic legal system. This, in short, is the essentialist perspective.

A second perspective focuses attention on the variety of social contexts in which such norms have been formulated, interpreted and applied in practice. It recognises that social change may bring new textual interpretations as well as different practices. Rather than seeing Islamic civilisation, culture and law as having one clear, identifiable core, the second perspective is prepared to see a highly differentiated picture. It accepts that people have multiple identities and live in polynormative societies. Scholars applying this perspective do not hesitate to speak of *Islams* rather than of *Islam*. They assume different concepts of *sharia* in different contexts. This is the multiplist perspective.

Huntington's clash theory reveals an essentialist perspective. His theory conceptualises 'the Islam', 'the Muslim people', 'the Muslims' and 'Islamic

law' as fixed and delineated entities. Such reduction sometimes leads to rather absurd theoretical statements that contradict social realities that everybody can observe. Bernard Lewis,⁶ a major mainstay of this school of thought, for example states that '(...) in the Muslim perception, the state itself is a manifestation and an instrument (of religion)'. Ibn Warraq, another outspoken critic of Islam, maintains that women 'do not work under Islam'.⁷ In the same vein the American activist for 'religious freedom' Marshall states that 'in the past 25 years the number of countries and regions being governed by a radical version of shari'a has increased';⁸ his boss, Nina Shea, an adviser of George Bush, sees a common 'definable state ideology of extreme *sharia*'⁹ in a variety of different Muslim countries including Indonesia.

In spite of such mistaken statements, we should not conclude that an essentialist approach has nothing of value. Its key hypothesis, namely that there *is* a core of Islamic values and norms which *can* be mobilised to make *any* Muslim behave accordingly, deserves at least investigation. Such research should address two dimensions, i.e. preaching and practising. Studying written and oral pronouncements which suggest that all Muslims ought to comply with *sharia* is one thing, what we need just as much is empirical evidence of how this is actually practised.

Sociologists and anthropologists have produced a vast body of research findings which demonstrate differences within the Muslim world, its societies, politics and legal systems. The available ethnographic, socio-historical and legal research refers to a much more complex and differentiated idea of 'Islamic tradition' than essentialist approaches suggest. Eickelman, a leading American scholar in anthropology of the Middle East states that the heterogeneity of local normative patterns in the Muslim world is so great that 'as a consequence, the notion of "an Islamic essence" has been difficult to sustain'.¹⁰ Peters, a leading scholar of Islamic law, doubts whether it is appropriate to refer to *sharia* as 'a legal system' anyway. For the discursive and open nature of Islamic, jurisprudence has produced a multitude of legal opinions which often contradict one another. Indeed, today the existence of a variety of liberal, conservative and orthodox interpretations of *sharia* is an undeniable fact. Understandably, in contemporary socio-legal studies multiplist perspectives are fairly dominant. The question about compatibility of *sharia* with the rule of law is thus approached with the hypothesis that certain versions of *sharia* are more compatible with the rule of law than others.

Regarding the concept of *sharia*, we found in the research that three different meanings have been attached to it, which are seldom explicitly distinguished from one another. The first meaning refers to *sharia*'s divine origins: *sharia* is God's plan and contains his guidelines for the community of believers. This definition is general and creates space for different manifestations of *sharia*. The second meaning of *sharia* is: the corpus of rules, principles and cases that were drawn up by *fuqaha* in the first centuries after Muhammad before 'the gate of free interpretation' (*ijtihad*) was closed. This definition is more concrete and refers to the classical writings. The third meaning comes from the endlessly varied reality of the contemporary Muslim world: *sharia* then represents any one of the many possible interpretations of God's will by a certain person, group, institution, or state which states that it is based on 'the' *sharia*.

Rule of law, we found, is regarded as an umbrella concept comprising three types of principles: procedural, substantive as well as control mechanisms.¹¹ Examples of each type are the principle that laws should be written and consistent (procedural), the fundamental human rights (substantive), and independent courts (control mechanisms).

Research questions and academic domains

Aware of essentialist and multiplist presumptions, we now turn to an analysis of the problem of incompatibility of *sharia* with the rule of law by asking some research questions. A first question to be asked is: what are the relevant prescriptions in the *sharia*? This leads us to the study of Islamic jurisprudence, i.e. the investigation of sacred Islamic texts which are the sources of *sharia*. These texts include the Qur'an, the Traditions, the *fiqh* books of authoritative scholars filled with casuistry and reasoning by analogy. The research methodology has been developed by the experts (*fuqaha*) of jurisprudence (*fiqh*).

A second question is: how have national legal systems of Muslim countries dealt with the *sharia*. Sub-questions are: which position and role has been attributed to *sharia* within national law? What are the contents of national *sharia*-based law? How do we assess the present *sharia*-based laws in terms of rule of law standards? This calls for investigation of constitutions, national and sub-national laws as well as administrative decisions and case law of higher and lower courts, as well as treaties such as human rights conventions.

A third question relating to the compatibility issue is how do political forces influence the processes of shaping, interpreting, fixing, mixing, invoking, adopting and enforcing the rules of *sharia* as well as of national law? An empirical investigation of such forces coupled with a study of political documents may explain whether (and when, where, to what extent and how) *sharia*-based law has been made compatible with the rule of law. It also helps to understand fundamental dilemmas of governance in the Muslim world.

A fourth question is about how practices and ideas of social groups and individuals are shaped by rules of *sharia*, national law or international law, and vice versa. Empirical socio-legal research will shed light on people's practices, motives, needs and attitudes toward different normative systems. This requires qualitative methods of anthropological research coupled, if possible, with quantitative surveys.

A fifth question concerns the historical dimension: how has the relation between *sharia* and the rule of law evolved over time? Have legal systems of Muslim countries indeed been incorporated by extreme *sharia* over the last 25 years, as Marshall claimed, and moved away from the rule of law?

Each of these five questions leads us to a different academic domain. While I suggest approaching the compatibility issue in this fivefold interdisciplinary way, within the limitation of this article, I will pay special attention to the second question, concerning law.

Islamic jurisprudence

The study of religious texts has been treated above in the context of essentialism. It takes us, in the footsteps of the religious scholars, back to classical texts and traditional doctrines. After all, the most impressive development of *sharia* took place during the eighth and ninth centuries when scholars diligently expanded the body of rules until it was found sufficiently comprehensive and clear. Only then was the 'gate of free interpretation' (*ijtihad*) closed. Henceforth the scholars, many of whom specialised as *fiqh* experts (*fuqaha*) acting as legal scholar-adviser (*mufti*) or judge (*qadi*), were bound to the opinions of authoritative scholars of the first centuries, notably of the founders of the main *fiqh* schools. *Sharia* became rather stagnant and static. However, as a complement, rulers of early Muslim states, according to Islamic doctrine, could also issue laws based on their own discretionary power (*siyasa*). According to a well-

established *sharia* rule, they were allowed to enact laws (*qanun*) in the public interest *as long as these laws did not violate the sharia*. This rule established a wide space for state law besides religious law. So rulers could publicly adhere to *sharia* as the supreme law while making and enforcing their own state law at the same time.

Moreover, since the late nineteenth century, scholars increasingly began to question the closure of the gate of *ijtihad*. A growing number of *fuqaha* argued for new interpretations in a rapidly modernising world. In the twentieth century both intellectuals and political elites have appropriated the right to exercise free interpretation, ‘neo-*ijtihad*’ in the words of Coulson, professor of Islamic law at SOAS. This practice became of great importance to modernisation of national law. Reinterpretations of family law could thus be approved by moderate and progressive *ulama*, and then enacted by the state. This happened for example with the liberal family laws of Pakistan (1961), Indonesia (1974), Egypt (2000), and Morocco (2004). Yet modernist interpretations are often contested by conservative and orthodox scholars. The Saudi-based Hanbali school, for example, has promoted its conservative views throughout the Sunni world, causing regressive reforms, for example in Malaysia (1994). Thus, a brief excursion into this domain teaches us that, even though the emphasis is on texts and learned interpretations, *sharia* is more than static and stagnant. While an essentialist approach is useful in sensitising us to rules and practices that do *not* change, the potential for innovation warrants a multiplist approach to the compatibility question.

Law

Which position and role have been attributed to *sharia* within national law? The first place to look for an answer is the constitution. From the twelve constitutions we investigated, six had provisions which pronounced the *sharia* to be an eminent or major source of national law, and the other six had no such provisions. Five constitutions proclaim an ‘Islamic state’ and seven do not. Surprisingly, the research revealed that such constitutional provisions tell us very little about the actual position of *sharia*. The constitutional provisions of Egypt and Morocco suggest a bigger role for *sharia* than the constitutions of Nigeria and Sudan do, but an investigation into family law and criminal law of these countries shows the opposite. What we did learn from the comparison of constitutions is

that the normative foundation of most constitutions is twofold; both the constitution itself and the tenets of Islam or Islamic law are mentioned as supreme or basic. Such a dualist basic norm keeps the door open to a constant review of national law by *sharia* standards as well as a continuous review of *sharia* rules by constitutional standards. The latter usually refer to rule of law principles, including a host of human rights, enacted in the constitution. So, implicitly the dualist constitutions of most Muslim countries contain a foundational norm which says: the basic idea of this state is the compatibility of *sharia* and rule of law, but working out the details requires continuous review and negotiation. To be sure, in political and legal practice, state institutions usually have the final say in these reviews and negotiations.

Apart from the constitution, family law, inheritance law, criminal law, banking law and some scattered provisions, most areas of law have fairly little to do with *sharia*. So, state review bodies, as in Egypt for example, have declared this large part of legislation not to be in conflict with Islam or *sharia*.

What are the contents of national *sharia*-based laws? *Sharia* owes its negative reputation in the first place to its inhumane punishments, such as stoning to death for adultery and amputation of hands for theft, which are incompatible with international rule of law standards laid down in the 1984 UN Convention Against Torture. Our research demonstrates that these two punishments are legally in force in six of the twelve countries we examined. However, in these six countries they are never or very rarely¹² applied in practice, with the exception of Saudi-Arabia. The non-application rests on judicial policies of the supreme courts. Classical *sharia* also prescribes heavy punishments for apostasy. Seven out of twelve states have not made apostasy a crime under criminal law; three did, and in the laws of two countries, it is contested. Executions for apostasy do not take place at all in eight out of twelve countries; in two countries no executions have taken place in recent years, and in two other countries executions rarely occur.¹³

The significance of the aforementioned *sharia*-based criminal provisions is largely political and symbolic. They signal religiosity of the incumbent regime, an anti-western stance, and a physical threat to the opposition.

The second aspect of *sharia*'s negative connotation can be found in marriage law, especially the status of women. We see in most countries,

generally speaking, a gradual trend of liberalisation. The change, though, has been quite slow and cautious, and with some instances of regression as in Iran (1979) and Malaysia (1994). In five countries, unilateral repudiation of a wife is still permitted without any interference by the state, while in seven countries the state's role as a guardian of women's rights has been enhanced by law. Concerning rights of women to initiate divorce from their husbands, in six countries such rights were considerably extended by national law over the last decades. In Pakistan, for example, a remarkable emancipation was facilitated by liberal judge-made law.¹⁴ In all country studies legislators, administrators and judges play a vital role in shaping national law by mediating between rule of law, *sharia* and custom.

How do we assess the present sharia-based laws by rule of law standards? We have seen that in most areas of law incompatibility is not an issue. As for the procedural elements of the rule of law that we mostly find in constitutions, compatibility prevails. Such procedural elements include the principle that laws are written in a clear and consistent way, that government action must be based on law, and that laws must be based on the democratic consent of an elected parliament. *Sharia*, in most common interpretations, has no problems with this. The rule of law also comprises control mechanisms such as independent judiciaries, ombudsmen and human rights commissions. Most Muslim countries have laid down such principles in their constitution. Again, we see no major incompatibility with *sharia*. However, in 'delicate areas' of the law, where *sharia* and the rule of law might actually conflict, the principle of clarity and consistency of laws is often sacrificed to the perceived need of vagueness and the ambiguity of politico-legal compromise.

Substantive elements of the rule of law are fundamental principles of justice, and human rights, including civil and political rights, social and economic rights and group rights. According to in-depth research by Mayer there are four key areas of conflict between conservative interpretations of *sharia* and human rights: (1) severe corporal punishment which is in conflict with the right of humane treatment; (2) hierarchical distinction between men and women; (3) heavy penalties for apostasy and forms of blasphemy which is in conflict with the right to freedom of religion; (4) a hierarchical distinction between Muslims and non-Muslims. As for the first three subjects, our research demonstrated

that long term trends suggest convergence between recent *sharia* interpretations and the rule of law. The fourth topic, the position of non-Muslims, could unfortunately not be included in our project. Further research is recommended.

The twelve country reports confirm Mayer's observation that since the 1990s the governments of Muslim countries have abandoned their previously dismissive attitude towards the human rights standards of these treaties. Eight out of the twelve countries acceded to the 1966 International Convention on Civil and Political Rights. Nine out of twelve acceded to the 1984 Convention against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment. Ten out of twelve acceded to the 1979 Convention on the Elimination of All Forms of Discrimination against Women. The periodical reporting by Muslim countries under these treaties, the human rights declarations of international Muslim organisations themselves, the inclusion of human rights in national constitutions and the creation of national human rights commissions have all contributed to the legitimacy of human rights in the Muslim world. However, national governments also take into account political and social feasibility. Implementation of human rights in national law has often been contested by conservative and orthodox groups. So, for the time being some more or less serious contradictions between *sharia*-based law and human rights continue to exist especially with respect to the four above-mentioned points identified by Mayer.

As is evident from the above, our research has shown that the degree of compatibility of *sharia* with the rule of law definitely differs per country. In all areas of law Saudi Arabia, and to a lesser extent Iran, show the highest degree of incompatibility. Turkey's national law is secular, so compatibility with *sharia* is no issue. The other nine countries belong to a large middle group. Within this group Indonesia and Mali are more oriented to secularism, Sudan, Pakistan and Afghanistan tend more to classical *sharia*, and Egypt, Morocco, Malaysia and Nigeria are in the middle of the middle group.

Political science

Present relations between *sharia* and rule of law result from power configurations of state institutions, religious leadership and strategic social groups. The latter include feminists, human rights lawyers, intellectuals

and radical Islamists. The status of *sharia* under national law has been a dominant political issue throughout the history of Islam. Political forces in Muslim states can be arranged along an ideological-religious spectrum of secularists, modernists, moderates, conservatives, orthodox and radical Islamists. At present, conservative and orthodox forces rule in Saudi Arabia and Iran. But governments of Muslim countries are rather moderate and modernist. Also, in these countries the 'historical compromise' between state and religion, between national law and *sharia*, that we found, usually contains two major elements. First is the interpretation of the *sharia* which allows the state its own regulatory space (*siyasa*) as long as it does not contravene the *sharia*. Second is the acceptance by the clergy of the fact that state institutions exert the power to appoint officials who will advise and make binding decisions about what is and is not allowed in this space.

When Islamists have the potential to rise to power, governments of Muslim states face serious dilemmas of governance. Should they allow Islamist movements to form religious political parties and participate in elections for the sake of democracy or pursue an authoritarian course for the sake of stability and rights of women and minorities? Should they co-opt the conservatives and increase the role of *sharia* in law to take the wind out of their opponents' sails, or pursue a course of secular unification and modernisation? Beside their development policies, dealing with problems of insecurity, poverty, unemployment, and illiteracy, they must walk the tightrope to maintain stability on the *sharia* front.

In the Muslim countries of the large middle group ministries of religious affairs promote the spread of moderate interpretations of *sharia* and try to block or restrain the rise of radical, puritanical versions. At the same time they often promote a substantive role for the *sharia*. The position of *sharia* within national law can be regarded as the outcome of political and bureaucratic competition, clashes and compromise, an outcome that differs in each country.

Sociology and anthropology

The fourth domain addresses the ideas and behaviour of commoners. How do ordinary people view norms of *sharia* as well as of the rule of law, and how do they use them in their livelihood strategies and when they are involved in conflicts and disputes?

Most societies in the developing world live under normative pluralism and lack of consensus. In settling their disputes Muslims can invoke norms from various strands of Islam, Sufism, tribal custom of extended families, national law or international human rights. Often none of these normative systems offers full predictability and certainty. In the words of the American anthropologist Bowen, who did extensive field research in Aceh, 'the outcomes of ... cases ... are not predictable on the basis of norms ...'.¹⁵ Moreover, corruption can be rampant in state institutions but also in non-state institutions.

In the end, the main concern of ordinary people is with their livelihood, their basic needs. National politicians declare incompatibility of *sharia* and the rule of law, often they couldn't care less. To fulfil their needs, people, especially in rural areas, want pragmatic solutions that work in given socio-political contexts. When, as in Afghanistan, the rules of *sharia*, in whatever interpretation, are more advantageous to women than the rules of tribal custom, they prefer *sharia*. When in the West Bank the religious courts are the only ones which work, Palestinian people value these courts above state courts.

History

An important finding of our study is that the Islamisation which occurred between 1972 and 1985 and which introduced versions of *sharia* which were less compatible with the rule of law, did not have a domino effect on the laws of most Muslim countries. This seemed counter-intuitive to us and to most people who developed their opinion through press reports. The findings are clear, however, the most plausible explanation of a positive trend enhancing the compatibility between *sharia* and the rule of law is a historical one.

Over the last 150 years the Muslim world has witnessed the formation of national states led by new political elites, socio-economic development, and modernisation. In this context national legal systems have gradually been constructed. Since the mid-nineteenth century professional, national state law has been on the rise. Sharia rules were for the first time codified and thus appropriated by the state. Henceforth their meanings were interpreted by state officials and judges instead of by purely religious scholars. This led to a gradual displacement of religious authority.

This trend has been most pronounced after World War II when all

former colonies subscribed to an ideology of ‘development’ and their legal systems underwent modernisation, unification and secularisation, often in the name of socialism.

In the 1970s, several regimes of Muslim countries opted for a return to *sharia*. This was most dramatically manifest in the 1979 Islamic revolution in Iran, but there were similar changes in Libya (1972), Pakistan (1979), Sudan (1983), Afghanistan under the Taliban (1994), and Northern Nigeria (2000). Western world public opinion was shocked by press reports about several incidents which reinforced the image of *sharia* as a cruel and ‘barbaric’ system. Popular enthusiasm for the reforms in the Muslim world, however, did not last long. The country reports show that the core countries of Islamic revolution like Iran and Pakistan – as well as Libya – have retreated in several respects to a more moderate position. The ebb and flow of religious activism and nationalist unification have caused a permanent search and struggle of social and political groups trying to determine a collective identity and gain power. In the long run state formation and socio-economic progress exert a decisively modernising influence on law and *sharia*. The pursuit of modernisation, with its universal ‘development goals’, including the emancipation of women, is common and most likely permanent across the Muslim world.

Concluding observations

Is ‘the’ *sharia* compatible with ‘the’ rule of law which includes democracy and human rights? We have identified the different perspectives and positions in the Muslim world as well as in the West. Essentialist authors like Huntington or Marshall and conservative Muslims will answer this question with a plain ‘no’. For them, the *sharia* is part of a dangerous and destructive overall program of Islamisation, which conflicts with ‘western values such as the rule of law’. But they miss a vital part of the real debate by overlooking that in practice the concept of *sharia* has different versions and meanings. Many rules of the classical, medieval versions are indeed incompatible with most elements of today’s rule-of-law concepts. But if we look at the numerous modernist interpretations in the contemporary national laws of Muslim countries, we see many versions of *sharia* which are quite compatible with common rule of law concepts.

Some argue that the works of authoritative Islamic scholars (ulama) reveal their predominantly conservative doctrines, and that liberal

versions are supported only by a few modernist intellectuals. But such an argument overlooks the influence of three other groups of actors in the Muslim world: first, the state with its parliaments, administration and courts, secondly the pragmatic silent majority in most Muslim countries, and thirdly the professional jurists, many of whom adhere to the rule of law. Admittedly, in the legal systems of most Muslim countries a certain degree of incompatibility with the rule of law remains, which is different for each country and topic, depending on the seriousness, the most problematic areas being non-discrimination and freedom of religion. However, the trends of legal development in the twelve countries researched, show that the degrees of incompatibility vary and have been decreasing, although with stops and starts, in a long-term, incremental process. Marshall may be right about Islamisation of law in the last 25 years, but this period includes the 1979-1983 events in Iran, Pakistan, and Sudan. If we take the 1985-2005 period, we see that the first wave of this Islamisation did not really persist.

A purely essentialist analysis of sacred texts assuming that *sharia* is a fixed body of rules determining the behaviour of all Muslims and in unbridgeable conflict with the rule of law is unrealistic and insufficient. In order to disentangle the compatibility problem and to determine where precisely we find areas of conflict, what is the nature of such conflict and to which extent and under what conditions the conflict can be solved, we need solid knowledge from different academic domains. The study of Islamic jurisprudence offers an important point of departure which needs to be coupled with the study of law as well as empirical research in the social sciences.

Essentialists have often tried to stereotype their multiplist colleagues as 'cultural relativists' and themselves as 'universalist' defenders of human rights. This dichotomy is outdated and not very helpful when it comes to studying legal development in Muslim countries. Most multiplists show a clear preference for the rule of law and human rights, but because of their broader knowledge, their judgments of the best way to get there differ from their essentialist colleagues' opinions. Multiplists strongly disapprove of cultural clichés leading to blunt, confrontational approaches which they deem to be counter-productive. They see the enthusiastic atheist vanguard in the fight against Islam as bulls in a china shop. Most multiplists are convinced that a more sophisticated approach should be

possible based on sound knowledge of legal, political and social practices.

Since the 1970s international human rights policies have strengthened human rights and their defenders in most countries, also in the Muslim world. In the early 1990s even the governments of Saudi Arabia and Iran joined in this global trend. Brems has theorised about how to further pursue this trend and proposed a policy of 'inclusive universality' which aims at making human rights legitimate for people everywhere, including the Muslim world.¹⁶ Such policy should encompass an open approach of religious diversity. It should not too soon invoke 'the incompatibility of the *sharia* with the rule of law' since that would be a *de facto* acceptance of conservative definitions of *sharia*. It should also accommodate criticisms of double standards and hypocrisy in Western foreign policy.¹⁷ Such constructive policy must not be unconditional, however, and can succeed only if Muslim countries actually show that they are actually striving towards implementation of human rights, notably on the four difficult points discussed above. Yet, Western policy-makers should also learn to understand the governance dilemmas of Muslim governments. This means they must realise that progressive laws can also strike back at society like a boomerang; they should acknowledge the need in Muslim countries for symbols of Islamic belief, culture and national consciousness in the search for a collective identity; they should recognise the permanent danger of security threats by radical Islamists to Muslim governments as well as to the West and respond with caution and determination to both. Especially with the present unstable political climate due to the wars in Afghanistan and Iraq they should understand that Western models of liberalisation have, at least temporarily, lost much of their appeal and that quick, unambiguous solutions to the remaining conflicts between *sharia* and the rule of law cannot be expected.¹⁸

In summary, the best human rights policy toward the Muslim world is persistent, inclusive, incremental, pragmatic, and based on a flexible universalism that takes context realistically into account. To be effective, such rule of law promotion should be informed by and responsive to all major groups who take part in the ever-changing debate about *sharia* and the rule of law within the Muslim world.

Notes

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- 1 For the concepts of *sharia* and classical *sharia* see below at the end of the section Essentialism and multiplism.
- 2 In this article Muslim countries are defined as countries in which 55 percent of the inhabitants or more are Muslim.
- 3 *Guardian Unlimited*, 'Berlusconi breaks ranks over Islam'.
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- 5 Otto, J.M., *Nationaal recht en sharia. Rechtssystemen in moslimlanden tussen traditie, politiek en rechtsstaat* (Amsterdam 2006); Berger, M.S., *Klassieke sharia en vernieuwing* (Amsterdam 2006); Otto, J.M., A.J. Dekker en L.J. van Soest-Zuurdeeg (eds.) *Sharia en nationaal recht in twaalf moslimlanden* (Amsterdam 2006). English translations of these books are forthcoming at Leiden University Press.
- 6 Lewis, B., *What went wrong: the Clash between Islam and Modernity in the Middle East* (London 2002) p. 112.
- 7 Ibn Warraq, 'Is Islam compatible with democracy and human rights?', www.secularislam.org. See for the complete work *Why I am not a Muslim* (Amherst, NY: 1995).
- 8 Marshall, P., in: *Radical Islam's Rules* (Lanham 2005) p. 5.
- 9 Shea, N., 'Conclusion: American responses to Extreme Shari'a', in: P. Marshall (ed.) *Radical Islam's Rules* (Lanham 2005) p. 196.
- 10 Eickelman, D., *The Middle East and Central Asia: An anthropological approach* (Princeton NJ 1998), p. 52.
- 11 Bedner, A., *Towards meaningful rule of law research: An elementary approach*. Research Report VVI (Leiden 2004) and B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press 2004).
- 12 See for the sources and further information J.M. Otto, *Sharia and nationaal recht* (op. cit) p. 104.
- 13 *Ibidem*, p. 107.
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- 15 Bowen, J., *Islam, law and equality in Indonesia: An anthropology of public reasoning* (Cambridge 2003) p. 253-257.
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