

## Sharia and National Law in Muslim Countries

## Law, Governance, and Development

Over a short period of time, the strengthening of law and governance has become a major focus for international development organisations, as well as for governments and organisations at the national level. These are now devoting a substantial portion of development funds into reform and capacity building programmes aimed at legal and administrative institutions in transitional and developing countries.

However, the 'building' of legal and governance systems is proving to be a dauntingly difficult and complex task and one in which the methods of approach are highly contested. It has been assumed that law and governance reform is a technical, managerial and financial matter, which allows for the export of laws and the transplantation of legal and administrative structures. The disappointing results of such reforms have illustrated, however, that not enough attention has been given to how laws, policies, institutions and stakeholders operate in reality, in their socio-political contexts. The uniqueness of individual countries, sectors and institutions is often insufficiently understood, and the actual experiences with the myriad of law and governance programmes and projects are not translated into knowledge on how law and governance reform promotes development.

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# Sharia and National Law in Muslim Countries

Tensions and Opportunities for Dutch and EU  
Foreign Policy

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# 1 Views and Assumptions about Sharia and their Implications for Foreign Policy

## Views of Sharia: Confrontational, Promotional, Pragmatic

An overwhelmingly negative view of sharia has developed in the West, in part as a result of reported events in a few states, notably Iran and Saudi Arabia, in part as a result of terrorist attacks by Islamic extremists – 9/11 and the bombings in Bali, Madrid, London, for example – and, in part, as a result of the deliberate encouragement by certain Western opinion makers and politicians, notably in the Netherlands where Pim Fortuyn, Ayaan Hirsi Ali and Geert Wilders have had a significant impact on public opinion and national politics (Buruma 2006).

When we consider the strong differences of perception on the position and role of sharia, politicians, scholars and public opinion seem divided, mainly along three lines. First, there is the confrontational view of sharia, which is dominant in the West. It sees sharia as a threat to democracy and the Rule of Law<sup>1</sup> and should be confronted head on. Secondly, and in contrast, there is the promotional view of sharia, which sees sharia as a force which brings improvements. This view prevails in the Muslim world. It covers a wide variety of ideological and religious ideas, both moderate and puritan. Thirdly, we can also distinguish a pragmatic view of sharia, which sees it as neither negative nor positive, but rather as a force which must be reckoned with when trying to solve problems. In this view, some effects of sharia might be positive, others might be negative, or neutral.

## Testing and Reviewing ‘Common Assumptions’

The confrontational view of sharia is strongly supported by common and persistent assumptions that exist with regard to sharia. These assumptions significantly influence the policies of Western governments towards the Muslim world. Notably, the following three assumptions seem to have taken root:

- Sharia is a fixed set of norms that are exclusively binding upon all Muslims;

- An increasing number of Muslim countries have introduced sharia as the highest norm in their constitutions, thus 'Islamising' their national legal systems;
- The introduction of sharia is in conflict with national and international norms, particularly human rights norms.

The following sections of this Research and Policy Note will review these assumptions, and then discuss the possible implications for Dutch and EU foreign policy.

## 2 Sharia: A Fixed Set of Norms that Are Exclusively Binding upon all Muslims?

*To what extent is sharia a fixed set of norms that apply to all Muslims? Many assume that sharia rules can simply be found either by reading the Quran, or by listening to the opinion of any Muslim priest. They also assume that all Muslims are bound by the same rules, and that sharia rules can thus be enforced across national borders to all Muslims equally, in the Middle East, Africa, Asia, and Europe. But is this correct? And if not, what then is the correct understanding of sharia?*

*“When people refer to **the** sharia, they are, in fact, referring to **their** sharia in the name of **the** eternal will of the Almighty God.”*

### **‘The’ Sharia or ‘Their’ Sharias?**

Sharia is generally defined as God’s eternal and immutable will for humanity. This ideal Islamic law is expressed in the Quran and Mohammed’s example (*sunna*) and developed by jurisprudence (*fiqh*). However, numerous interpretations of sharia can be found in laws, scholarly literature, the media and in popular perceptions. In that respect, there are many sharias. In Tunisia, polygamy was formally abolished in 1956, allegedly referring to sharia, in Indonesia polygamy is limited and controlled by state ‘religious courts’ taking sharia into account, while in Egypt, women’s rights to obtain a divorce have recently been expanded with reference to sharia. Throughout history and throughout the Muslim world, sharia has been shaped and reshaped, influenced by local customs, reconstructed by colonial law, and more recently by national legislatures, administrators, courts and international treaties. This process is highly political. The involved political actors in Muslim countries are characteristically spread over an ideological-religious spectrum ranging from secularists and moderate modernists, to traditional conservatives and orthodox puritans, and ultimately, to radical and revolutionary Islamists. Due to the extraordinary variety of views on sharia within Muslim countries, the ‘rules in

use' of sharia differ greatly between these groups. When people refer to *the* sharia, they are, in fact, referring to *their* sharia in the name of *the* eternal will of the Almighty God. Struggles and coalitions between strategic groups in Muslim countries have led to different outcomes, which are reflected in the different positions of sharia within national legal systems. A rough, but useful classification would distinguish between the main group of Muslim countries that have mixed systems, a smaller group with classical sharia systems, and the group of secular systems.

### **Box 1: A Rough Classification of Legal Systems of a Selection of Muslim Countries**

#### *Mixed systems*

Most Muslim countries have mixed systems in the sense that these systems postulate the hegemony of the national constitution and the Rule of Law, while at the same time allowing the rules of Islam to play a dominant role and influence certain areas of national law. These countries not only have constitutions but also large codifications of civil and criminal law, modelled after European or Indian codes. These systems acknowledge concepts like the separation of powers and democratic elections, even though they are at times overshadowed by authoritarian regimes. In these mixed systems, politicians and jurists play central roles in the law-making process rather than religious scholars. Pakistan, Afghanistan, Egypt, Morocco, Malaysia, Nigeria, Sudan and Indonesia can all be classified in this category. These national legal systems can be changed and modernised and most of them have actually undergone many major changes when compared to the rules of classical sharia.

#### *Classical sharia systems*

A small minority of Muslim countries have classical sharia systems. National law in those countries is formally equated with classical sharia and in substance the national law is to a great extent based on sharia. Such systems often lack a constitution and a large-scale codification of laws. Orthodox religious scholars (*ulama*) play a decisive role in the interpretation and application of sharia as national law. Therefore, change and modernisation are difficult to achieve. The state has a ruler who promulgates laws, directs the executive, and functions as the highest judiciary. The ruler can make some legal changes and affect some aspects of modernisation, but his space is limited by sharia as it is interpreted by orthodox *ulama*. Saudi Arabia



is a clear example of this category, as are some other Gulf states. Iran shares many of the same features, but in other respects – parliament, codifications – it belongs more to the mixed systems.

#### *Secular systems*

In these systems, religious interference in state affairs, politics, and law is not permitted. State recognition and application of sharia within national law is considered to be irreconcilable with the democratic and secular constitutional state. Turkey is the prime example, although recently it has come under severe pressure. Several states in West Africa, (i.e., Mali), and in Central Asia (i.e., Kazakhstan), have also declared themselves to be secular.

### **Different Meanings of Sharia Enable a Flexible Discourse**

The concept of sharia as used in religious, legal and political discourse conveys different meanings. In comparative research, we have distinguished the abstract sharia, the classical sharia, the historical sharia(s), and the contemporary sharia(s).

*The divine, abstract sharia:* This is God's plan for mankind consisting of His prescriptions for human behaviour. These rules should guide His religious community. In this sense, sharia is a rather abstract concept which leaves ample room for various concrete interpretations by human beings.

*The classical sharia:* This is the body of Islamic rules, principles and cases compiled by religious scholars in search of God's will during the first two centuries after Muhammad, before 'the gate of free interpretation' (*ijtihad*) was closed. In this sense, sharia can be found in the classical works of the religious scholars of the dominant legal schools (*madhab*), and is therefore more concrete than in the first definition. The prevailing consensus (*ijma*) of scholars is a key source of sharia, according to *fiqh* doctrine.

*The historical sharia(s):* This includes the entire body of all principles, rules, cases and interpretations developed and transmitted throughout a history of more than one thousand years across the entire Muslim world, since the closing of the gate of free interpretation up to the present. In this context, authors have referred to sharias, in the plural. Historically, sharias have been influenced by time, place and people. The formulations of

sharias has differed depending on the interpretations of God's will by different people(s), groups, institutions and states. They have encompassed an immense, full spectrum: from personal beliefs to state ideology, from everyday social norms to formal positive law, from liberal to puritan interpretations. Classical sharia, as taught and interpreted by the religious scholars, has often served as a point of reference in these views, but progressive *ulamas* and others have seen and seized some opportunities in the classical religious sources and commentaries for smaller and larger reforms of sharia and sharia-based law. The extensive sanctioning of law reform by religious scholars has facilitated widespread changes in the national legal system of many Muslim countries since the 19<sup>th</sup> century.

*“The variety of meanings of sharia has given rise to a flexible, multi-interpretable discourse about sharia and law which moves smoothly from one meaning of sharia to another.”*

*The contemporary sharia(s):* This contains the full spectrum of principles, rules, cases and interpretations that are developed and applied at present, throughout the Muslim world, at international, national, sub-national and local levels by a wide variety of religious, political, legal and other actors. Migration, modernisation and new technologies of information and communication have decreased the dominance of the legal schools of classical sharia. ‘Inter-madhab surfing’ has become a new eclectic mode of change (Messick 2005; Yilmaz 2005).

The variety of meanings of sharia has given rise to a flexible, multi-interpretable discourse about sharia and law which moves smoothly from one meaning of sharia to another. While both moderates and puritans can agree on their respect for the sharia *in abstracto*, to a moderate, a reference to ‘the sharia’ may mean a specific contemporary interpretation. This same reference may signify a part of the classical sharia to a puritan Muslim.

### **Sharia in Polynormative Societies is Not Exclusive**

The idea that people in Muslim countries are *exclusively* subject to classical sharia is a common misconception. In practice, sharia as a functioning normative system has never existed in isolation, but has always been part of pluralistic legal systems in which it has found itself sur-

rounded by other normative systems. Initially, customary law dominated. This was followed by decrees that were issued by kings and rulers, and later by colonial laws. According to the sharia principle of *siyasa* (policy), rulers – or governments – have the power to make and apply laws, as long as they do not violate sharia. Consequently, national legal systems that are formally ‘based on sharia’ also include state law,

*“The theological assumption that sharia is a fixed set of norms that apply exclusively to all Muslims must be dismissed on the basis of both legal and empirical evidence.”*

and are, in practice, often overwhelmed by national laws. In the 20<sup>th</sup>-century Muslim world, state legal systems emerged and expanded, and after 1945, these national legal systems have increasingly been influenced by international law. So, as citizens, Muslims are subject to national law, and indirectly to international law; as members of a clan they are subject to custom or customary law; as Muslims they are subject to certain religious norms, the interpretation of which is variable. Thus, the vast majority of Muslim countries have a long-standing practice of legal diversity, normative dualism and pluralism. However, since religion is rarely openly rejected or publicly scrutinised in the Muslim world, the general importance of sharia – in the abstract sense, as God’s plan for humanity – has been and remains fairly undisputed. As a result, the position of legal scholars, who have studied long to decipher God’s will from the available sources, has been influential for a very long time. Consequently, the dogma of classical sharia as constructed by them as a body of ideal norms has stood firm for an equally long period. In its practical implementation, however, this dogma has often been overshadowed by pragmatic considerations and modernisation. Therefore, among puritan Islamists the dominant view is that, over time, sharia has been almost completely replaced by ‘western law’ and should be reinstated. In conclusion, the theological assumption that sharia is a fixed set of norms that apply exclusively to all Muslims must be dismissed on the basis of both legal and empirical evidence.

### *Policy Implications*

The differences between and within national legal systems in the Muslim world – mixed, classical-sharia-based, secular – the different meanings of sharia, and the polynormative nature of socio-legal systems have several implications for foreign policy.

First, different national systems require different policy approaches. In the case of mixed and secular systems, general programmes for

strengthening the Rule of Law in existing national legal systems seem desirable and feasible. Indeed, progress of national legal systems in Muslim countries towards the Rule of Law is of the essence. Only balanced, well-functioning national legal systems are able to protect the international legal order, domestic stability and the rights of individual citizens. They also give these countries a better position within the international community and the world economy. For this reason, Dutch and EU policy should be aimed at strengthening the legal systems of Muslim countries, in order to provide justice and legal certainty.

In areas of the law where sharia plays no role, rule-of-law promotion can employ similar approaches as have been successful in programmes of strengthening legal systems in non-Muslim countries. In the case of classical sharia systems, general programmes for rule-of-law-promotion would probably not fit. The judicial reforms announced by Saudi Arabia in the autumn of 2007, however, signal a gradual move towards the rule of law.

Secondly, with regard to mixed systems and classical sharia systems, in areas where national law and sharia overlap, foreign policy and international legal co-operation may have to take a stance regarding sharia-related issues. This would entail highly contextual decisions. There are two general considerations that may offer guidance:

- 1) It is highly recommended to always keep in mind that the concept of 'sharia' has different meanings, abstract and concrete, specific and multifaceted. The flexibility and malleability of the concept of sharia for the past 1350 years has made it possible for sharia to operate in conjunction with other normative systems. Ambiguity in the discourse about sharia and national law is a natural state. It maintains a space for constant deliberation and contestation. In fact, it opens the door to reform in all directions. When dealing with sharia-related issues in mixed and classical sharia-based systems, it is preferable to refer to 'sharia', 'sharia-based law' or 'interpretation of sharia' rather than to 'the sharia'. Even though it is, of course, not up to non-Muslim outsiders to interpret 'the sharia', foreign policy may well discover and acknowledge the space for pragmatic and constructive use of flexible sharia-based discourse.
- 2) Western foreign policy should be pragmatic in trying to distinguish between constructive and destructive sharia politics. Making such distinctions is not easy and requires careful, well-informed and precise analysis. Constructive sharia politics, in our view, use the symbolism and values of sharia in order to further the elements of the Rule of Law, including the well-being of women and the position of minorities, as well as religious freedoms. Constructive sharia politics protect such human rights against destructive forces. The liber-

alisation of family law, justified by Islamic reasoning, offers a pertinent example (see Box 2 below). Destructive sharia politics uses the symbolism and values of sharia in ways which impede the realisation of the Rule of Law elements, they often imply repression and religious-ethnic politics. Thus, a proper assessment of sharia-related law must distinguish between:

- norms and practices not leading to a violation of the Rule of Law (e.g., Islamic banking);
- norms and practices leading to grave violations of the Rule of Law (e.g., stoning to death);
- norms and practices leading to minor violations of the Rule of Law (e.g., mild forms of discrimination);
- norms and practices contributing positively to the Rule of Law (e.g., extending grounds for divorce upon the wife's initiative, forbidding polygamy on sharia-based grounds, combating extremely discriminating customs by reference to a much more progressive sharia, or the appointment of a *muhtasib* as an ombudsman).

Thirdly, foreign policies and legal co-operation programmes should make a pragmatic assessment of the pros and cons of the two main policy options of supporting either 'secular law' or 'sharia-based law'. This assessment should be informed by several considerations.

A pragmatic foreign policy should take into account that in most Muslim countries secularism has little support among the majorities of people and politicians. It must be acknowledged that clear majorities want their legal systems to refer to sharia (Esposito and Mugahed 2007: 48-55, 38). This is not easy for European politicians to understand and accept, especially for those who consider the 'separation of church and state' as a fundamental principle of the political philosophy of Western states, even though its interpretation varies considerably. However, outspoken Western support for secularists often runs the risk of being counterproductive. Given their religious-political spectrum and problems with potential instability, most states and legal systems in the Muslim world have not opted for a strict separation of religion and state, but rather for an explicit position of Islam and sharia in state ideologies and constitutions. This political choice has definitely enhanced the legitimacy of regimes and governments in the eyes of the majority of their populations. Therefore, a pragmatic stance towards state institutions such as ministries of religious affairs, sharia courts and sharia agencies that foster constructive interpretations of sharia, may be the most effective way for Western foreign policies to discourage destructive interpretations of sharia. In spite of ideological differences, dialogue and co-operation with such institutions may best serve the Rule of Law and other goals of foreign policy. In order to under-

stand the ways of modernist and moderate reasoning, it is of the essence to obtain some basic understanding of modernist sharia-interpretation (see Box 2 below).

A pragmatic foreign policy should also depart from social realities and people's perceptions of 'modern law' and 'traditional law' and their institutions in a certain country, with regard to a given area of the law. Sharia's age-old connotation with social justice for the common people has been deeply ingrained in many developing countries that have suffered from repressive, corrupt, and arbitrary governments. State courts have often been seen as an extension of these governments. Recent studies suggest that certain religious courts, e.g., in Indonesia and Palestine, have a better reputation of fairness, honesty and accessibility than state courts (Sumner 2008; Shehadeh 2005). One should be cautious, however, not to generalise and idealise 'informal' over 'formal' courts (Crook 2005).

### **Box 2: Ten Arguments for Modernist Reforms Based on Sharia**

In an article about the argumentation of Egyptian modernists in their endeavours to strengthen women's rights and liberalise family law, Mohamed Al-Nowaihi mentions the following ten arguments:

1. With regard to the changeability of divine rules a distinction must be made between the roots ... of Islamic law and the branches (*furu*) of Islamic law. While the roots refer to religious duties and are unchangeable, the branches refer to worldly matters which can be adapted to changing circumstances.
2. There is a recognised principle in Islamic law stating that 'diversity of options is a blessing' (lit. *Ikhtilafuhum rahma*: their difference of opinion is a blessing).
3. The classical schools of the *fiqh* (Hanafi, Shafi'i, Maliki, Hanbali) are well known for having adapted principles and rules that suit the particular time and place in which they would serve.
4. As the Quran itself represents major changes in principles and rules, it can be said that it is generally in support of change if needed.
5. In the Tradition (*hadith*) of the Fructification of the Date Tree, the Prophet tells his companions that they themselves are more knowledgeable about mundane affairs (like agriculture), than he is.



6. Under 'Umar, the second Caliph', major legal reforms have already taken place.
7. There is no priesthood in Islam, like in the Catholic Church, and each religious scholar, therefore, has the right to practice free interpretation or *ijtihad*.
8. The principle that 'Necessity (*darura*) knows no law' is an important standard which holds that sharia rules may be broken if there is no reasonable alternative.
9. The principle of Public Interest (*Al-maslaha*) is an important principle which may override and set aside all other rules.
10. The categorisation of sharia-rules in any of the five categories (obligatory, recommendable, indifferent, objectionable, forbidden) is amenable to change; thus 'polygamy' can be reclassified from objectionable to forbidden.

Source: Mohamed Al-Nowaihi (1975), *Problems of Modernization in Islam*, 174–185.

### 3 The Islamisation of Law? Identifying the Main Trend and Responding to It

*What is the main trend in the relation between sharia and national law? Many assume that during the last 25 years, in a wave of Islamisation, classical sharia has overtaken many legal systems in the Muslim world. It is suggested, by Huntington, Lewis and others, that most Muslim countries once had modern 'Western law', but are in the process of discarding these Western laws. It is also assumed that, as a result, national legal systems are now subordinate to religious precepts, endangering the position of women, minorities and those who stand trial in criminal procedures. Is this indeed the main trend? Why did the 1979 Islamisation of law in Iran and Pakistan occur, and what happened elsewhere afterwards?*

Apart from their direct effect on human rights, such laws [under extreme sharia] produce authoritarian countries, severe political repression, increasing poverty (even Saudi Arabia's per capita income has dropped dramatically over the past twenty-five years), widespread and destabilising violence, and a worldview that sees the West's embrace of democracy and freedom as antithetical to Islam. The result is failed states and failing states that are incubators of terrorism.

Source: Paul Marshall (ed.) (2005), *Radical Islam's Rules: The World-wide Spread of Extreme Shari'a Rules*, 15.

#### **Islamisation of Law, Detested or Welcomed?**

Since 1972 (Libya), some aspects of national legal systems in several Muslim countries have been adapted to sharia, most notably in 1979 (Iran, Pakistan), in 1983 (Sudan) and in 2000 (northern Nigeria). The significance of this reform for the position of women, non-Muslims, and offenders of certain Islamic prohibitions, such as adultery, robbery, or alcohol consumption, differs per country. In some cases, like Iran, this Islamisation has led to a demonstrable broad decline in certain fundamental human rights. It has resulted in a great deal of criticism,

both from within Iran and other Muslim countries as well as from the West.

The introduction of sharia and its institutions was often initially welcomed by parts of the population for several reasons. First, because it appeals to fundamental values and virtues as justice, integrity, obedience, selflessness, and diligence. Secondly, since it has responded to a perceived need for cultural authenticity and for the mobilisation of religious and political identity; it responded to forces that were perceived as a threat to the values and social fabric of society and state. Thirdly, it was hoped that this would put an end to crime, drugs, prostitution, family conflicts and other social problems. Fourthly, it was felt that a government based on 'western law' had had its chance to demonstrate its ability to bring about development and justice, but with no discernible positive results. The regime of Iran's last Shah is a case in point. Moreover, the Islamisation of law has often provided opportunities for politicians to serve their own political purposes, like scaring off political opponents, or outflanking more radical forces.

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### **The Long-term Trend**

However, in the majority of Muslim countries over the last 150 years, most laws, legal institutions and processes have evolved independently of sharia. The governments of most Muslim countries have for decades consistently made efforts towards the formation of stable states and development goals, by drafting national laws that met contemporary socio-economic needs and that usually were not founded on classical sharia. As a result, classical sharia has had little noteworthy influence in most areas of law. In fact, even in the key areas of family law and criminal law, the position of classical sharia has gradually been diluted in most of the twelve Muslim countries that were included in the WRR study.<sup>2</sup> States have enacted *their* sharia as national law, outranking the religious scholars who were the traditional keepers of 'the' sharia. Jur-

ists, trained at secular faculties became the new ‘masters of law’. The legal systems of these countries have thus become dominated by their common law or civil law styles. So, if looked at from a long-term perspective and over the full breadth of national legal systems, the gradual development towards a professional Rule of Law is quite visible in most Muslim countries. It is in most ways comparable to other countries in Asia, Africa, Latin America, and – a longer time ago – Europe and the United States. Even though over the past 20 years there have been several cases of regression in certain Muslim countries in certain areas of law, their scope is limited when compared to the numerous examples of unification, modernisation, codification, secularisation and liberalisation in other Muslim countries and in the same countries but in other areas of law.

### **Three Overlapping and Contested Areas of Sharia and National Law**

Yet, classical sharia has managed to retain influence in some areas of law, albeit in highly divergent ways. These areas are primarily (1) constitutional law, (2) family law and inheritance law, (3) criminal law.

*“Constitutional law in Muslim countries often has two basic norms, or, to put it differently, one foundational basic norm that seems to say: the basic idea of this state is the compatibility of sharia and Rule of Law, but working out the details will require continuous review and negotiation. The price tag is an inherent ambiguity and ongoing contestation about a range of specific issues.”*

#### *Constitutional law: two basic norms*

Classical sharia contains few clear prescriptions regarding constitutional relations within a state. Therefore, the number of references to Islam or sharia in most constitutions of Muslim countries<sup>3</sup> is relatively small. A number of them do contain phrases such as ‘Islamic Republic’, ‘Islamic state’, ‘sharia as *a* or *the* main source of law’ or refer to ‘Islamic precepts’ as supreme laws. But as long as concrete implementation by legislators, administrators or judges remains forthcoming, such phrases do not mean much in practice. The same constitutions usually also contain provisions that point in another direction: the duty of obedience to the constitution, the principle of democracy and the legisla-

tive authority of the parliament, the enactment of human rights such as the principle of equality, freedom of religion, and others, and an independent judiciary. As a result, constitutional law in Muslim countries often has two basic norms, or, to put it differently, one foundational basic norm that seems to say: the basic idea of this state is the compatibility of sharia and Rule of Law, but working out the details will require continuous review and negotiation. The price tag is an inherent ambiguity and ongoing contestation about a range of specific issues.

*Family and inheritance law: women's rights, liberalisation and stagnation*

Except in the case of secular systems, classical sharia does exert influence over family and inheritance law. It must be noted, however, that with regard to family law, the traditional laws in most Muslim countries have been complemented by regulations aimed at liberalising the position of women. This is most visible in the areas of marriage and divorce law. Marriage legislation in Pakistan (1961), Indonesia (1974), Egypt (2000), Morocco (2004) provide good examples of this trend. Notable exceptions are Iran, Saudi Arabia, Sudan, and Afghanistan.

Although polygamy is legally permissible in almost all Muslim countries – Tunisia and Turkey are exceptions – it has been limited in certain countries. Moreover, unilateral repudiation has been curbed considerably. In many countries, women have the right to seek a divorce in a court of law. In some countries, there is freedom of choice regarding the legal system one wishes to be subjected to, for example in marriage law in Nigeria.

Inheritance law has undergone fewer changes than marriage law. In most countries, women have a right to only half the inheritance that men have a right to. Judiciaries and societies have been divided on the issue. Case studies in Morocco and Indonesia reveal that, in practice, people have sometimes found ways to ensure that their daughters inherit the same as their sons.

Family and inheritance laws are rife with ambiguity. Traditional and modern interpretations often exist side-by-side, both in legislation and case law.

*Criminal law: regular law, and hadd punishments with patterns of non-enforcement*

Most Muslim countries have laid down their criminal law in modern criminal codes. A major exception is Saudi Arabia, which has consistently maintained sharia criminal law, although, surprisingly, in 2001, it enacted a new criminal procedure law. Since the 1970s, some countries have decided to include elements of classical sharia criminal law – in particular regarding the so-called *hadd* crimes – into the existing modern criminal law codes or relevant legislation.

However, the same countries have in recent years become increasingly hesitant when it comes to actually carrying out the more serious *hadd* punishments. Supreme courts rarely – such as in Sudan and Iran – or never – such as in Pakistan and Nigeria – uphold convictions of stoning or amputation. In Saudi Arabia, severe corporal punishments are still carried out regularly. In 2002, Iran promulgated a moratorium on the implementation of the punishment of stoning, and in 2003, a similar decision was made regarding amputations. However, under President Ahmedinedjad, cases of amputation have been recorded as well as one case of actual stoning, while 11 people in Iran are ‘waiting to be stoned to death on charges of adultery ... after grossly unfair trials (Amnesty International 2008: 1). In Pakistan, the sharia principle of retribution, with strong roots in customary law, was re-imposed in criminal law in the 1990s and is still often utilised.

### Other Areas of Law

In addition to these three major areas of law, there are also instances of contestation in other parts of the law. For years, various countries have experimented with regulating an Islamic economy and Islamic methods of taxation. The prohibition on interest (*riba*) for Muslims is strictly enforced in only a few countries, such as Saudi Arabia, Iran, and Sudan. In Pakistan, one of the pioneering countries, the highest court ruled in 2002 that contractual obligations to pay interest must be upheld and are not cancelled by a sharia-based prohibition of *riba*. In addition, the judge called on the state to reassess the viability of the system. In most countries, a dualistic system exists in which customers may choose between an Islamic or a ‘regular’ bank. Laws concerning Islamic taxes (*zakat*) exist in most countries alongside regular tax laws and play a minor role in fiscal terms. Even Iran was forced to accept that modern tax legislation was indispensable in a modern state.

Regarding the terrain of ‘virtue’ in religion, culture, and sexuality, most Muslim countries have a series of restraining regulations. Increased democratisation and decentralisation have encouraged sub-national governments (states, provinces, and even sometimes districts) with an Islamist orientation in Malaysia, Pakistan, northern Nigeria and Indonesia to issue certain sharia-based rules in their territorial jurisdiction. This has often been about dress codes, some degree of segregation, sometimes banning dance, music, certain religious expressions, etc. In certain cases, it has also involved local introduction of *hadd* punishment. A light form has been introduced and, in one reported case practised in Aceh in the summer of 2005. Some, like the Islamist NMA government of the Northwestern Territories Province in Pakistan,

were already voted out of power in 2008. National institutions usually have the legal powers to annul such regulations, but they often prefer not to enforce them, operating on the abstract presumption of compatibility. Thus, the legal consequences of sub-national sharia legislation have in fact often remained undecided, and therefore the law was not enforced. This has happened in both northern Nigeria as well as in Malaysia's states of Terengganu and Kelantan, where Islamist PAS governments suffered severe losses in both the 2004 and 2008 elections.

### **The Vital Role of Legal Institutions**

The overlapping of sharia and national law poses serious political and legal problems in most Muslim countries. Domestic and international pressures are exerted in opposing directions. Opportunities for simple and neat solutions are rare. At best, small steps forward and compromises are made: the national legislature, administration and judiciary each fulfil key roles in this process. To some extent, these legal institutions reflect the ideological-religious divisions of their societies. While some legislators, administrators and judges foster modernist interpretations of sharia and harmonisation with the Rule of Law, others tend to emphasise and sharpen the differences. However, in most Muslim countries and especially those with a mixed system (see box 1), these three state branches often exhibit a natural tendency for adjustment, harmonisation and compromise. After all, national states aspire by definition to the regulation of society, to meet development and *good governance* goals, to limit vigilantism and to be considered legitimate by their own population. In the majority of Muslim countries, this leads to constant processes of political and legal adjustment alternated by incidents of flaring conflict.

#### *Legislature*

In all Muslim countries, the legislative power of the state is legally based on the national constitution. The national legislature also has a religious legitimacy on the basis of its *siyasa*-authority to enact laws 'as long as they do not contravene sharia'. Time and again, this raises the question of which interpretation of sharia applies – modernist, conservative or otherwise. The above-mentioned double basic norm offers states both an Islamic legitimacy as well as a space for autonomous development of national law.

The centrepiece of sharia is family law, which has to a considerable extent been reformed through legislation. New family legislation combines traditional and modernist elements, sometimes in ambiguous formulations. Numerous principles, which can be seen as procedural

elements of the Rule of Law, have been introduced to limit the unilateral power of men by providing public institutions with powers of registration, of supervision, and of decision making. Sometimes, Islamist factions in parliaments propose bills with an 'Islamist flavour' without explicit reference to sharia. An example is the Anti-Pornography Bill in Indonesia, which aroused much criticism.

### **Indonesia dilutes anti-pornography bill**

Indonesian lawmakers have watered down an anti-pornography bill following criticism that it could restrict freedom and threaten the country's tolerant tradition, the parliamentary speaker said on Wednesday. Controversy over the bill has exposed deep divisions within the world's largest Muslim nation and various groups on both sides of the debate have held street protests over the issue.

Source: Reuters (28 February 2007)  
[www.reuters.com/article/worldNews/idUSJAK15739020070228](http://www.reuters.com/article/worldNews/idUSJAK15739020070228).

In some countries, special institutions have been established to guard the Islamic character of legislation enacted by parliament. In Egypt, a state commission officially declared large portions of the secular national legislation to be 'not in conflict with Islam'. In Iran, the Council of Guardians installed by Khomeini in 1979 so often blocked urgent legislation by parliament, that after ten years it had to be superseded by a new, more pragmatic body. Some Muslim countries, like Egypt and Indonesia, have established constitutional review by a special constitutional court, another major step towards the Rule of Law. If a constitution prescribes the Islamic character of legislation, it is up to the judges of these constitutional courts to decide whether a particular law meets that standard.

In Indonesia, reform legislation has been complemented by a Compilation of Islamic Law (1991), a formal restatement of marriage law, inheritance law and *waqf* (endowment) law, by a state-approved commission of jurists and religious scholars with the aim of granting government, citizens, and judges an authoritative reference with both political, legal-rational and religious legitimacy.

### *Administration*

The tasks and powers of the administrative authorities in the process of adjustment, harmonisation and seeking compromise are often underestimated. They include: registration of marriages and divorces, execution of punishments, the supervision of mosques, Islamic educa-

tion (from primary schools and *madrasas* to universities with sharia faculties), management of *waqf*-properties, and the organisation of *hajj* pilgrimages. Ministries of Religious Affairs in most Muslim countries propagate the dissemination of moderate interpretations of sharia and attempt to block or reduce the rise of radical, revolutionary versions. They are often staffed with graduates from faculties of Islamic studies or sharia, and form a political buffer between the state and the orthodox *ulama*. Ministries of Justice in countries with mixed systems tend to be bulwarks of jurists with legal training from secular faculties of law, who feel attached to national law, international law and the legal families of common law or continental law. Ministries of Education are very important in this respect because of their supervision of legal education.

### *Judiciary*

Judges must resolve disputes through the implementation of applicable law within the framework of national legal systems and in a manner which assuages the public sense of justice. In most developing countries, characterised by their heterogeneity and normative pluralism, this is a huge challenge. Muslim countries are no exception, and the position and role of sharia adds to the complexity of their tasks. State courts have largely ousted the traditional *qadi* in the Muslim world. Some of these state courts, however, are formally called 'Islamic' or 'religious' courts. It has been noted in several instances that such religious courts are deemed to be more accessible and less corrupt than the general state courts in such countries.

Higher courts have played an important role in the progressive application of law. For example, they have helped to reduce and surmount conflicts between sharia and national law in the area of criminal law. As mentioned earlier, stoning and amputation are not or rarely executed in most countries which have *hadd* punishments enshrined in legislation, thanks to decisions by higher judges. Furthermore, supreme courts in countries such as Malaysia, Pakistan, and Egypt, have decided that large portions of the legal system, such as the constitutional framework itself or large codifications such as the civil code legislation or family law, shall not be scrapped due to alleged conflict with sharia. However, one still finds many conservative judges, especially in the lower courts. Sometimes, as in the infamous case of Amina Lawal (Nigeria), they gain the attention of the international press with their harsh, conservative rulings, only to see their decisions overturned by higher courts, or just not enforced by the executive.

## Political Context and Ideological-religious Spectrum

Legal development depends to a considerable extent on the outcomes of political struggles and negotiations. We find the ideological-religious spectrum of actors mentioned above, not only in political parties and parliament, but also in government, bureaucracy, judiciary, civil society and business. Throughout the Muslim world, women's rights, for example, have been enhanced through the advocacy work of NGOs and through legislative and judicial change. While in exceptional cases, this change has been promoted on purely secular grounds such as human rights, generally law reform has been promoted through modernist interpretations of sharia, i.e., through what Coulson called '*neo-ijtihad*'.

The efforts of national governments to achieve a harmonisation of sharia and national law, often evokes opposition from Islamist groups that emphatically reject such progressive policies. In a few countries, notably Saudi Arabia, Iran, and Sudan, the vision of puritan Islamist groups has become official government policy. In most other Muslim countries, modernist governments have been able to remain in command, but they cannot escape the impact and demands of the puritan, Islamist opposition. In response, they have often made use of Islamic symbols to strengthen their own legitimacy. Having prevented a radical Islamisation of the national state, in turn, these governments have in a way nationalised and constitutionalised Islam, asserting the right to interpret sharia.

### *Policy Implications*

The main implication of this concise overview of laws and legal institutions is that policy making in this complex and dynamic field demands a constant comparative analysis of contested issues in key areas of national law and sharia. This analysis should be guided by a recognition of the long-term trend towards the Rule of Law, which can be deduced from changing interpretations of sharia, from procedural and substantive national law shaped and effectuated by legal institutions, from the common dominance of the state over religious scholars, and from practices of non-enforcement. Such a trend could occasionally be supported by legal development co-operation, promoting the Rule of Law, including human rights, while considering the particular context of each Muslim country.

*“Policy making in this complex and dynamic field demands a constant comparative analysis of contested issues in key areas of national law and sharia.”*

### *How to analyse?*

Political, ideological and philosophical debates about the compatibility of sharia and the Rule of Law are generally hampered by problems of definition (sharia, Rule of Law), by their abstract and general character, and the tendency of participants to rely on anecdotal rather than systematic evidence. Comparative analysis of events and circumstances allows one to better assess the particulars of legal development. Moreover, comparison can be extremely helpful in providing examples and illustrations of legal reform.

The analysis of overall trends also requires a historical perspective. Only by a comparison with earlier periods and phases of legal conflict about issues in the delicate overlapping areas, the issues can be seen in proper perspective. A historical analysis also reveals the particular, layered structure of legal systems, and the particular ways in which sharia coexists and interacts with customary law, colonial law, national law and international law.

The analysis of legal issues in this context calls for a socio-legal approach, rather than a purely legal approach. Such socio-legal analysis deals with the formation and functioning of legal systems in their real-life contexts. It includes the legal questions but goes beyond them to include empirical, sociological and political conditions. It focuses on the actual implementation of law, on access to justice and realistic legal certainty. A special focus must be placed on issues of social heterogeneity, polynormativity, interaction of different legal systems, and genre-mixing.

### *Diversity of policy options in legal development co-operation*

It is recommended that policymakers recognise and support the basic trend of gradual development of national legal systems towards the Rule of Law, even though this has not been a linear process. Legal development co-operation should focus both on the legal aspects of sectoral development programmes – e.g., agriculture, water, environment, gender – as well as on the strengthening of the legal system as such. Carefully selected and prepared projects and programmes can contribute to direct or indirect, procedural or substantive, changes in the Rule of Law. This requires broad co-operation with partners in Muslim countries such as ministries of Justice, Education, Religious Affairs, Foreign Affairs, the judiciary, the bar, advocacy, NGOs that deal with legal aid and empowerment, and institutions for legal education and research. Projects may cover issues of legislation, administrative implementation, enforcement, legal training, management of legal institutions, legal aid, legal empowerment, legal education, research and documentation. Projects and programmes should proactively bring together the existing demand for assistance, the priorities of donor

policy, and the availability of experts and resources to carry out such projects.

### **Saudi Arabia's Promised Reforms**

King Abdullah's announced reforms include the creation of a Supreme Court as well as specialised courts for criminal, commercial, labour and family matters, and the training of legal staff. These plans have been especially welcomed by foreigners doing business in Saudi Arabia, who have been hamstrung by the capriciousness of the religious judges.

Source: *New York Times* Editorial, 4 January 2008.

### *Long term investment needed*

It must be acknowledged that the processes of legal change often require long periods of time and thus require long-term investments. Presently, the capacity for legal co-operation with Muslim countries is rather limited on the supply side; there are not enough legal experts available who are sufficiently knowledgeable in this field. Their numbers need to be increased by promoting the secondment of experts to projects through supportive measures, and by placing more emphasis on the expertise and schooling of jurists, including those with bicultural backgrounds. A concentration of legal development co-operation in a number of Muslim countries and good donor co-ordination are recommended.

### *Dilemmas*

A properly founded foreign policy towards the Muslim world focusing on the Rule of Law must be aware of its dilemmatic nature. Under certain conditions, one standard of the Rule of Law – e.g., political freedom and democracy – can bring political groups to power that promote a strict implementation of sharia, which would adversely affect other elements of the Rule of Law, such as the principle of non-discrimination. Under these circumstances, a cautious compromise of consenting to a system of semi-democracy and semi-equality might be considered a feasible policy option for the time being. It would remain a highly unattractive choice between two evils, in which the question of how best to deal with upcoming radicalism and fundamental security issues may ultimately prove to be a justifiable decisive factor. Good public communication on the subject will increase popular support for such foreign policies.

## **4 Addressing the Question of (In)Compatibility of Sharia-based Law with National and International Rule of Law Standards, Particularly Regarding Human Rights?**

Efforts to directly answer the question of (in)compatibility between sharia and sharia-based law, on the one hand, and the Rule of Law, on the other, are hampered by the general, abstract nature of that question, by the implicit presumption that there is a fixed sharia, and, in practice, by the polarised atmosphere surrounding debates on this subject. A pragmatic, analytical, differentiated approach is highly recommended as a basis for foreign policy. Concerning the (in)compatibility issue, it is of the essence to distinguish between the semantic layers, the elements and the approaches of sharia to the degree that they may violate or support distinct elements of the Rule of Law. Human rights are an integral part of the Rule of Law. They are generally considered to be the core substantive elements of the Rule of Law.

### **Harmony and Conflicts between Sharia, Sharia-based Law and Rule of Law**

In the relationship between sharia and national law, harmony prevails in many areas. Basically, sharia recognises the legal power of state authorities (*siyasa*) to enact legislation for the regulation of society. For many topics, sharia has not formulated specific legal rules, and it is normally left to national law to provide such rules. There are no serious conflicts with sharia in most areas of public and private law. Sharia, as generally understood, does not contravene key elements of the Rule of Law, such as the principle of elected legislatures or independence of the judiciary.

Meanwhile, like in most developing countries, Rule of Law standards are often violated in Muslim countries. The majority of such violations have little to do with sharia. A number of violations, however, can indeed be specifically traced back to the presence and enforcement of specific interpretations of sharia or sharia-related law. The degree to and manner in which these conflicts manifest themselves in the Muslim world differ markedly from country to country, depending on the role, position and prevailing interpretations of sharia in the national legal system.

## Four Areas of Conflict

Generally speaking, conflicts between laws based on classical sharia and human rights occur mostly in four areas. The conflicts in these areas have been well researched and documented by Mayer (1995: 79-80).

### *Gender discrimination*

Classical sharia makes major distinctions between the legal positions of men and women, which are generally more advantageous for men than for women. For example, men have more powers to make key decisions about marriage, divorce and family life than women, men inherit more than women, evidence given in court by men is given higher value than evidence provided by women. In classical sharia, homosexual behaviour is prohibited.

### *Discrimination of non-Muslims*

Classical sharia gives followers of Islam a privileged position as compared to adherents of other religions or convictions, or non-recognised branches of Islam. For them, access to high political positions is limited, free choice of marriage partners is limited, rights to inherit are limited, rights related to religion (missionary work) are limited, and special obligations may be imposed with regard to taxes, food and rituals.

### *Cruel corporal punishments for transgression of contested prohibitions, among others*

Classical sharia imposes cruel and inhuman corporal punishments such as stoning, crucifixion, amputation, and flogging. In cases of theft and robbery it is not so much the punishability of the act that conflicts with human rights, but the inhumane nature of the sanctions. A double conflict with the Rule of Law occurs when such cruel sanctions are prescribed for violations of rules that in themselves are seen as violations of fundamental principles of justice. Tragic examples are the accusations, convictions and punishment of rape victims. Another example concerns couples who have been living together faithfully assuming that they were rightfully married, but whose previous divorce is contested and then annulled, exposing them to accusations of adultery.

### *Freedom of religion and freedom of expression about religion*

Classical sharia imposes severe punishments on those who convert to other religions; many religious scholars consider apostasy a crime. The defamation of Allah, the Prophet, the Quran and other central figures, symbols and elements of Islam is prohibited; these blasphemous actions are also regarded as crimes.

Conflicts between national law based on classical sharia and human rights are, in the first place, considered *legal* conflicts. A legal provision violates a legal principle or rule of a higher nature. Some Muslim states have tried to avoid such legal conflicts by expressing their reservations when ratifying international human rights treaties. Such reservations have been contested by European states since they were considered to be contrary to the core of the human rights in question. Working towards feasible solutions of the legal conflicts usually requires new interpretations of sharia by the state's legal institutions resulting in legal changes. Obviously, this is a long-term process involving political negotiations and social change as well.

In contrast, we also see *actual* conflict, when states who act in violation of human rights justify this by referring to laws based on sharia such as the actual imprisonment of rape victims, prosecution of minorities, the execution of cruel sanctions, physical threats to converts and to blasphemers. Such violations are often reported by the international press and by NGOs who may call for action.

### **The Interactions and Confusion between Sharia and Custom**

From a historical perspective, any of the rules in classical sharia can be traced back to traditional Arab customary law: arranged marriages of young girls, polygamy, repudiation, the unequal position of women in inheritance law, the subjection of individual freedom, the defective civil and political rights of women, and cruel corporal punishments. Traditional customary laws of societies in Asia, Africa, the Americas and Europe show similar features. This is not only relevant from a historical perspective. In the present day, tribes, tribal leaders, and customary law still have prominent positions in large parts of the Muslim world. In the interior of today's Afghanistan, the Punjab, Aceh or Mali, the available alternative to sharia in many cases is not an effective modern Rule of Law-based system, but rather a traditional, patriarchal customary law. In Central, South, and Southeast Asia as well as in Africa, the position of customary law and of tribal chiefs has remained strong. Recent literature has even noted a revival of customary law.

*“It is not often possible to determine in general terms whether a violation of human rights (gender discrimination, cruel punishment) has been caused by the influence of sharia (religion) or by traditional and repressive local customs (culture).”*

Meanwhile, the orthodox and radical interpretation of Islam strongly disapproves of customary law, which is seen as a deviation from the right path. In fact, sharia has often been applied as a major step in the process of liberalisation from a more oppressive customary system. Recent field research in East Africa as well as West Africa provided good illustrations of how women, trying to escape from unjust customary practices, identify and invoke their rights (*hakki*) through sharia and religious courts (Stiles 2008; Nasir 2007: 99-105, 118; Ostien 2008).

It is not often possible to determine in general terms whether a violation of human rights (gender discrimination, cruel punishment) has been caused by the influence of sharia (religion) or by traditional and repressive local customs (culture). Anthropological research shows that people in local communities often do not distinguish clearly whether and to what extent their norms and practices are based on local tradition, tribal custom or religion. Those who adhere to a confrontational view of sharia tend to ascribe many undesirable practices to sharia and religion overlooking custom and culture, even if high-ranking religious authorities have stated the opposite. These confrontational views often seek support from certain orthodox Muslims who claim that their classical sharia orientation is the only righteous one.

### *Policy Implications*

Policy analysis of conflicts in Muslim countries between sharia-based law and national and international Rule of Law standards should concentrate on:

- Major overall trends in legislation, administration and adjudication of sharia-related issues, both in particular countries as well as in comparative perspective;
- Concrete – actual and legal – violations of Rule of Law standards, notably of human rights;
- Verification of whether claims that a particular violation is actually based on Islam or sharia can be substantiated;
- Checking how sharia-based administration of justice relates to prevailing customary law;
- The general state of the legal system and its potential for improvement, especially from the perspective of justice-seekers.

### *Human rights policies*

Human rights policy seeks by nature to promote the Rule of Law and speaking out against failures to comply with human rights standards. This naturally also extends to the Muslim world, irrespective of whether such violations are justified on religious, political, security or other grounds. As has been noted, in many cases, even though certain

actors may claim that a violation can be traced back to sharia, it is often hard to distinguish particular interpretations of sharia from elements of 'local culture'. And from a human rights perspective, this does not matter. For this reason, concerns should be raised first of all in response to the violations, and only if necessary and appropriate, against the relevant interpretation of sharia.

With regard to sharia-related issues, a distinction between *legal* and *actual* violations of human rights calls for different policy approaches. Often sharia-based legal rules, which violate human rights, are not enforced – i.e., the provisions of Pakistan's 1979 Hudud Ordinance on stoning and amputation have not been enforced for 25 years now. We have noticed in many Muslim countries patterns of non-enforcement of sharia-based law, as characteristic ways to avoid major conflict with either puritans or moderates. Such *legal violation* calls for a stable and cautious long-term policy. In contrast, *factual violations* or acute threats thereof call for swift actions of complaint, protest and support.

*“With regard to sharia-related issues, a distinction between legal and actual violations of human rights calls for different policy approaches.”*

#### *Inclusive universality as a basis for human rights policy*

Human rights dialogue with and within the Muslim world must be promoted. This demands an appropriate, differentiated policy that combines constructive dialogue with an analytical and critical attitude. A purposive, realistic, credible, and feasible human rights policy towards the Muslim world stands to gain from a strategy of '*inclusive universality*'. This theory as developed by Brems (2001; 2003) stipulates that for human rights to be universally accepted, they should be inclusive by taking into account the circumstances in different countries as much as possible. The universal applicability of human rights can best be realised if there is a sufficient acceptance of these fundamental rights within the Muslim world, meaning that Muslim citizens eventually consider human rights as *their* rights. In the international arena, this requires a permanent dialogue in which both sides employ a constructive and flexible approach.

#### *Implementation*

The practical implementation of the theory of 'inclusive universality' as a fundamental basis of policy requires that:

- National human rights institutions and organisations in the Muslim world are supported, also in their educational, training, and legal aid operations;

- A systematic assessment is made of the ‘progressive realisation’ that is achieved and the steps, big or small, that are indeed being made, and appreciation is expressed in appropriate, respectful ways;
- The policy does not neglect the existing and interrelated governance dilemmas of governments of Muslim countries with regards to democratisation, Rule of Law, religious legitimacy of the state, and the relations with the West. (cf. Esposito and Mugahed 2008; Zakaria 2003);
- the ‘margins of appreciation’ of these governments are respected, except in instances of non-fulfilment without adequate justification of their basic obligations contained in binding human rights agreements.

*The importance of multilateral human rights conventions*

This strategy has already yielded considerable results through the monitoring and evaluative mechanisms of treaties such as the CEDAW, CAT, and ICCPR, and the work of UN Special *Rapporteurs*. These independent bodies have acted as effective advocates of the Rule of Law. In doing so, they have been respectful towards Islam and sharia as such, but clearly opposed to destructive interpretations of sharia, as outlined in this Note. It is therefore of the utmost importance to continue to actively support the work and legitimacy of such human rights treaties and institutions, and the international framework under which they operate.

**The Christian Community in Qatar has opened the first official church in the Gulf state**

St. Mary’s Roman Catholic Church was inaugurated in the capital, Doha.

Tens of thousands of Christians, most of them Catholic, live in the emirate, which has a mainly Sunni Muslim population. Previously, Christians were not permitted to worship openly. Saudi Arabia is now the only country in the region to prohibit church building. ... There are plans for further churches in Qatar, which correspondents describe as part of a strategy of opening up to the West.

Source: BBC News, 14/03/2008 – [http://news.bbc.co.uk/2/hi/middle\\_east/7297808.stm](http://news.bbc.co.uk/2/hi/middle_east/7297808.stm).

## 5 Coming Up with a Framework for Foreign Policy towards the Muslim World

Since the relations between 'Islam and the West' have become a focal point of international relations, Dutch and EU foreign policy should adapt to these new circumstances and come up with an adequate policy framework. This should also take into account the position and role of sharia in national legal systems.

### Foreign Policy towards the Muslim World?

Given current circumstances, Western governments should be seriously trying to develop a long-term policy towards the Muslim world, treating it as a new centre of gravity. The reasons for this are evident: relations between the West and the Muslim world and within the Muslim world itself have become crucial factors for the international legal order and stability as well as for domestic stability in the West.

When developing this kind of new 'pillar' (see below) of foreign policy, two simplistic approaches should be avoided. Firstly, one must never view the Muslim world as a monolithic entity. The Muslim world is both heterogeneous and complex, and therefore requires a highly differentiated policy. Secondly, one should not one-sidedly and speculatively trace back and explain all of the existing problems in the Muslim world to Islam and sharia, and subsequently base one's own policy on this flawed interpretation. In as far as certain Dutch politicians and public figures do propagate such misconceptions, foreign policy must make continuous efforts to provide factual corrections and counterbalances. If these considerations are taken into account, the development of a policy aimed specifically at the Muslim world is both essential and useful. This policy can then serve as a recognition of the broad importance, great sensitivity, high risks, and forgotten opportunities of relations between Western countries and Muslim countries.

*“When developing this kind of new ‘pillar’ of foreign policy, simplistic approaches should be avoided.”*

## Connection to Existing Policy Pillars

Inevitably, such a new policy focus must be connected in various ways to the three traditional pillars of Dutch foreign policy (see below). Dutch and European policy goals of stability and peace require both a highly professional, internationally co-ordinated fight against terrorism, as well as constructive relations with regimes and populations of the Muslim world. Where possible, the Netherlands must operate through united European and Atlantic frameworks, but at the same time it must exploit the distinct opportunities offered through bilateral relations, for example, with the countries of origin of Muslim immigrants and partner countries in development co-operation.

## Six Policy Elements

Important elements of such a foreign policy would be: (1) to control of 'terrorism in the name of Islam'; (2) a powerful rejection of the image of polarisation and dichotomy between 'the' Muslim world and 'the' West which is propagated by terrorists as well as by other 'fundamentalists' *on both sides*; (3) strengthening the Rule of Law and human rights in the Muslim world; (4) in close connection with this, socio-economic and legal development co-operation; (5) improved communication and mutual image-building; (6) improvement, expansion and exchange in relevant areas of education, research and documentation, with particular attention to trends in sharia and national law, both 'in the books' as well as 'in action.'

In the first section of this Note, three views of sharia were contrasted: the confrontational, the promotional and the pragmatic views. Dutch foreign policy has traditionally had both principled and pragmatic dimensions, often referred to as the 'reverend-merchant' – or, in Dutch, *dominee-koopman* – approach. The problem in the case of Islam-and-the-West is that the pragmatic view, which has obvious advantages to governments in both Muslim countries and Western countries, has been emphatically rejected by both powerful Islamists (in the Muslim world) as well as by powerful atheist/secularist and Christian groups (in the West). Politically, these groups have often succeeded in holding their governments hostage.

## Traditional Pillars and why a New One Is Needed

Dutch foreign policy since 1945 has rested upon two main pillars: an Atlantic policy and a European policy. In the 1970s, a third pillar was

erected, i.e., the strengthening of the international legal order and stability, including human rights policy, foreign aid, and peace-keeping operations. However, international relations have drastically changed since 1989. The centre of gravity of the international economy and politics has shifted to Asia and the Pacific region, the Cold War has ended, and the relationship between 'Islam and the West' has become a central issue. Dutch foreign policy must take these changed realities into account. Until recently, the Dutch government had barely developed an explicit, coherent long-term policy towards the Muslim world concerning sharia and the Rule of Law.

The development and substantiation of a broader, general policy vision towards the Muslim world has a special urgency, however. Since the late 1990s, ethnic politics has been on the rise in the Netherlands. Political movements based on anti-Islamic sentiments have been able to emerge and grow. The free exchange of opinions often tends towards the above-mentioned confrontational view and is often based on incorrect assumptions or half-truths. The public statements of Geert Wilders, member of the Dutch parliament and promoter of the so-called *Fitna* film, are a case in point. If these types of views go unchallenged and unchecked, their prevalence in Dutch public opinion may severely curtail the political space for a constructive foreign policy. If the formation, formulation and dissemination of an explicit and coherent policy is not forthcoming, the risk remains of exacerbating the growing and increasingly insurmountable gap between government, public opinion and social groups.

### **New Policy Initiatives of the Dutch Government**

An initial effort to formulate foreign policy towards the Muslim world was made by the Dutch government in its extensive official response (*Kabinetsreactie 2007*) to the WRR reports mentioned above. The parliamentary debate on the cabinet's position, scheduled for 6 September 2007, was frustrated as the event was overwhelmed by the parliamentary one-man show of Geert Wilders. Once again, his provocative statements on Islam were allowed to completely dominate the debate. The following day, the national press covered Wilders's performance while no media attention was given to the cabinet's policy document, which should have been the subject of the parliamentary debate. Meanwhile, in this policy document the government had reaffirmed its constitutional mandate to promote the international legal order, democracy and human rights, notably in its relations with the Muslim world. The Dutch government, in the first place, argued this because it is regarded as a *condition sine qua non* for peace and prosperity. Secondly, because

the Netherlands and the EU are engaged in the development of co-operation with many Muslim countries, and democracy and human rights are considered indispensable for sustainable development. Thirdly, it said, because militants pose a serious security threat it justifies their acts in the name of 'Islam'. The cabinet explicitly stated that it does not deem Islam incompatible with democracy and human rights. Given the diversity and complexity of the Muslim world, the Dutch government expressed an eagerness to expand its knowledge about the full religious and political spectrum of Muslim countries. In this document, the cabinet also said it was aware of the prominent role of religion in politics and development. It seeks appropriate partners in the Muslim world for a clear and respectful dialogue, and for action to promote the international legal order in a broad framework for co-operation, including media, women's rights and political rights. Rather than disengaging itself from the problems and dilemmas in this field, or embarking on confrontation, the government opted for the most demanding option, i.e., a policy of intensification of constructive relations and common interests along different tracks, including security, trade and investment, development co-operation, and the fostering of the Rule of Law, including human rights.

This kind of policy is supported by this Research and Policy Note, which has identified key features, problems and approaches of sharia-based law and has tried to link them to the goals of foreign policy.

## 6 General Preconditions for a Foreign Policy towards Muslim Countries

While the present Dutch government has embarked on a constructive, pragmatic and balanced policy concerning issues of Islam, sharia and law, this is made difficult by trends towards polarisation, and the confrontational nature of current dominant discourses. Effective implementation of Dutch foreign policy requires focused contributions to a depolarisation in the international and domestic arena by disseminating relevant information from and about the Muslim world on topics such as sharia and national law. This calls for increased and continuous communication and dialogue, a deliberate expansion of the relevant knowledge base on both sides, solid, objective, comparative research on the key issues, problems and solutions, and broad dissemination of findings.

### **Ms. Prof. Erturk, Special Rapporteur of the United Nations Commission on Human Rights on Violence Against Women**

Universality is under pressure. Human rights are increasingly utilised as political weapons. The tensions between the West and the rest of the world are growing due to Iraq, the Palestinian issue, the War on Terror. Everything the West wants is now rejected by the rest and vice versa. That complicates the work of the *Rapporteur* on the UN Human Rights Council. Everyone is suspicious of each other's actions.

Source: *NRC Handelsblad* 24 March 2008 'Universality of human rights under pressure' (translation by J.M. Otto).

### **Knowledge Base, Policy and Research**

The relationship between sharia, national law and the Rule of Law and the surrounding ideological, political, and social contexts forms a complex subject, which differs from country to country. Therefore, a proper policy dealing with these issues requires an accessible body of com-

parative knowledge. This should be largely accumulated and made accessible by research, documentation, and public dissemination.

Several key issues deserve particular attention: (a) the ambiguity of core concepts, including 'sharia' and 'law', as this is one of the primary stumbling blocks marring debates on sharia and national law; (b) the diversity of manifestations of sharia and law in social and political realities; (c) the similarities and differences between and within Muslim countries in law, legal practice, and context; (d) the use of a historical perspective as an interpretive framework for current events; and (e) the successes and failures of both foreign and domestic interventions in matters of sharia and national law.

### Communication and Dialogue

Foreign policy can facilitate and promote communication and dialogue in this area in at least two ways. It can undertake and support dialogue activities, and it can also work, more actively, towards shaping more realistic and balanced images of what is going on in the world of '*the other*'. The co-ordination and facilitation of dialogue and co-operation between governments, civil societies, businesses, educational institutions, legal institutions, and other relevant professional sectors, deserve high priority. It requires the selection of strategic dialogue partners from across the ideological-religious spectrum. Communication and dialogue would be supported if the attitudes of participants from both sides were more attentive, modest, self-reflective and constructive, and if they were well-prepared and well-informed about the main governance and development problems in their counterpart countries, including the role and position of sharia in national legal systems.

A key concern is whether the West is now clearly able to move beyond the widespread but dubious stereotyping of 'the Islam', 'the sharia', 'the religious scholars' and engages in open, analytical and constructive policy dialogues.

In Amman in 2005, 180 Muslim scholars from forty-five countries (including the United States) representing eight schools of Islamic thought convened a conference on 'True Islam'. Their purpose was to discredit self-promoting zealots who issue *fatwas* without being qualified to do so, and who seek to justify violence against other Muslims by dismissing the victims as apostates. The scholars sought to turn the excesses committed by terrorists against them and to apply Islamic law in a manner that exposes the yawning gap between the



terrorists' holy pretensions and their unholy actions. Ultimately, this is how terrorism will be defeated, by real Muslims uniting to protect Islam from the murderers who are trying to steal it (Albright 2006: 197).

Nobel Prize winner and Iranian human rights defender Shirin Ebadi in response to a question after her lecture in The Hague in April 2004 stated: 'The most important support you could give us is by not blaming a religion for the vile actions of people. After 11 September something went wrong. Certain people committed wrongful acts. Meanwhile, others who had nothing to do with it, and who often end up suffering in these situations and at the hands of their own government, were blamed, erroneously, and became the objects of anger. My request, as a Muslim, is for people to realise this before they become so angry' (Otto 2004: 170).



## Notes

- 1 In this publication, the concept of Rule of Law refers to a set of internationally accepted standards or elements. These standards include procedural standards and substantive standards (Tamanaha, 2004). Procedural standards include, among others, the principle of legality and the principle of democratic lawmaking. Substantive standards include, among others, human rights. Bedner (2004) distinguishes a third element, i.e., the control mechanisms, which check whether procedural and substantive elements are complied with.
- 2 This Research & Policy Note is largely based on the findings and conclusions of a study on sharia and national law conducted by Otto (2006) for the Dutch Scientific Council for Government Policy (WRR 2006; WRR 2007). That study, in turn, is largely based on 12 country studies by independent researchers covering Egypt, Morocco, Turkey, Saudi Arabia, Sudan, Iran, Afghanistan, Pakistan, Malaysia, Indonesia, Mali and Nigeria (Otto et al. (eds.) (2006)).
- 3 It is important to note that with the exception of Saudi Arabia, Muslim countries have formally enacted constitutions. In Saudi Arabia, a Basic Act fulfils a similar role. Other Gulf states, such as Qatar and UAE, have progressively shifted away from the stages of a 'basic act' or 'temporary constitution' to a more full-fledged constitution.

## References

- Al-Nowaihi, M. (1975), 'Problems of Modernisation in Islam', *Muslim World*, vol. 65, no. 3: 174-185.
- Albright, M. (2006), *The Mighty & the Almighty: Reflections on Power, God, and World Affairs*, London: Macmillan.
- Amnesty International (2008), *Campaigning to End Stoning in Iran*. <http://www.amnesty.org/en/news-and-up-dates/report/campaigning-end-stoning-iran-20080115> (accessed 11 June 2008).
- Bedner, A.W. (2004), *Towards meaningful rule of law research: An elementary approach*, Leiden: Van Vollenhoven Institute.
- Brems, E. (2001), *Human rights: Universality and diversity*, The Hague: Martinus Nijhoff.
- Brems E. (2003), 'Inclusieve universaliteit: Een theoretisch en methodologisch kader om inzake mensenrechten universaliteit te verzoenen met diversiteit', *Tijdschrift voor rechtsfilosofie en rechtstheorie* 2: 139-161.
- Buruma, I. (2006), *Murder in Amsterdam: The Death of Theo van Gogh and the Limits of Tolerance*, New York, Penguin Books.
- Buskens, L. (2008), *Sharia and national law in Morocco*, Paper presented to the Annual Conference of the Law and Society Association in Montreal, 28 May-1 June 2008. Forthcoming in: Otto, J.M. et al. (eds.), *Sharia and National Law*. Amsterdam: Amsterdam University Press
- Coulson, N. (1978), *A History of Islamic Law*, Edinburgh: Edinburgh University Press.
- Crook, R.C. (2005), *State Courts and the regulation of land disputes in Ghana: the litigants' perspective*, IDS Working Paper 241, Sussex: Institute of Commonwealth Studies: 1-21
- Esposito, J. and D. Mogahed (2008), *Who Speaks for Islam? What a Billion Muslims Really Think*, New York: Gallup Press.
- Kabinetsreactie WRR-rapport Dynamiek in Islamitisch activisme (2007), Kamerstuk 2006-2007, 30800 VI, no. 115, Tweede Kamer.
- Marshall, P. (ed.) (2005), *Radical Islam's Rules: The World-wide Spread of Extreme Shari'a Law*, Lanham, MD: Rowman & Littlefield.
- Mayer, A.E. (1995), *Islam and Human Rights: Tradition and Politics*, Boulder: Westview Press.

- Messick, B. (2005), 'Madhabs and Modernities'. In: P. Bearman et al. (eds.), *The Islamic School of Law. Evolution, Devolution, and Progress*, Cambridge, MA: Islamic Legal Studies Program, Harvard University Press: 175-190.
- Nasir, J.M. (2007), 'Sharia Implementation and Female Muslims in Nigeria's Sharia States'. In: P. Ostien (ed.), *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook*, Ibadan: Spectrum Books Ltd., 76-188.
- Ostien, P. (2008), *Sharia and national law in Nigeria*, Paper presented to the Annual Conference of the Law and Society Association in Montreal, 28 May-1 June 2008. Forthcoming in: Otto, J.M. et al. (ed.), *Sharia and National Law*. Amsterdam: Amsterdam University Press.
- Netherlands Scientific Council for Government Policy (2007), *Dynamism in Islamic Activism: Reference points for Democracy and Human Rights*, [www.wrr.nl/content.jsp?objectid=4323](http://www.wrr.nl/content.jsp?objectid=4323).
- Ostien, P. (2008), *Sharia and national law in Nigeria*, Paper presented to the Annual Conference of the Law and Society Association in Montreal, 28 May-1 June 2008. Forthcoming in: Otto, J.M. (ed.), *Sharia and National Law*. Amsterdam: Amsterdam University Press.
- Otto, J.M. (2004), 'De verhouding tussen sharia en nationaal recht volgens 'essentialisten' en 'multiplisten'. Indonesië als *casus* in vergelijkend perspectief.' In: B.C. Labuschagne (ed.), *Religie als bron van sociale cohesie in de democratische rechtsstaat?*, Nijmegen: Ars Aequi Libri, 145-172.
- Otto, J.M. (2006), *Sharia en nationaal recht. Rechtssystemen in Moslimlanden. Tussen traditie, politiek en rechtsstaat*, WRR-Verkenning, no. 11.
- Otto, Dekker and L.J. van Soest-Zuurdeeg (eds.) (2006), *Sharia en nationaal recht in twaalf moslimlanden*, WRR webpublicatie no. 13.
- Shehadeh, N. (2005), *Justice without Drama; enacting family law in Gaza City sharia court*, Ph.D. thesis. The Hague: Institute of Social Studies.
- Stiles, E. (2008), *Rights and relatedness: Daughter v. Father in a Zanzibari Islamic court*, Paper presented to the Annual Conference of the Law and Society Association in Montreal, 28 May-1 June 2008.
- Sumner, C. (2008), *Providing Justice to the Justice Seeker. A Report on the Indonesian Religious Courts. Access and Equity Study - 2007. Summary of Research Findings*. Jakarta: Mahkamah Agung and AusAid.
- Tamanaha, B. (2004), *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press.
- Wetenschappelijke Raad voor het Regeringsbeleid (2006), *Dynamiek in islamitisch activisme*, The Hague: WRR.
- Yilmaz, I. (2005), 'Inter-Madhab Surfing, Neo-Ijtihad, and Faith-Based Movement Leaders'. In: P. Bearman et al. (eds.), *The Islamic School*

*of Law. Evolution, Devolution, and Progress*, Cambridge, MA: Islamic Legal Studies Program, Harvard University Press: 191-206.  
Zakaria F. (2003), *The Future of Freedom: Illiberal Democracy at Home and Abroad*, New York: Norton.

## Further Reading

- An-Na'im, A.A. (1990), *Towards an Islamic reformation: Civil Liberties, Human Rights, and International Law*, Syracuse: Syracuse University Press.
- An-Na'im, A.A. (2008), *Islam and the Secular State: Negotiating the Future of Islam*, Cambridge, MA: Harvard University Press.
- Eickelman, D.F. (1998), *The Middle East and Central Asia: An Anthropological Approach*, Upper Saddle River, NJ: Prentice Hall.
- Fuller, G.E. (2003), *The Future of Political Islam*, New York: Palgrave Macmillan.
- Halliday, F. (2003), *Islam and the Myth of Confrontation: Religion and Politics in the Middle East*, London: Tauris.
- Huntington, S.P. (1996, 1998), *The Clash of Civilizations and the Remaking of World Order*, New York: Touchstone.
- Lau, M (2003), 'Article 2A, the Objectives Resolution and the Islamisation of Pakistan Laws', in: *Beiträge zum Islamische Recht III*, Frankfurt am Main: Peter Lang, 173-304.
- Lewis, B. (2002), *What Went Wrong: Western Impact and Middle Eastern Response*, New York: Oxford University Press.
- Lewis, B. (2003), *The Crisis of Islam: Holy Wars and Unholy Terror*, London: Weidenfeld & Nicholson.
- Masud, M. (2001), *Muslim jurists' quest for the normative basis of shari'a*, Leiden: ISIM.
- Peters, R. (1998), 'Islamic law and human rights', in: F.A. van Bakelen (ed.), *Recht van de Islam*, Groningen: RIMO, 7-24.
- Peters, R. (2005), *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge: Cambridge University Press.
- Saikal, A. (2003), *Islam and the West: Conflict or Co-operation*, Hounds-mills Basingstoke: Palgrave Macmillan
- Welchman, L. (2007), *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*, Amsterdam: Amsterdam University Press.

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This Research & Policy Note was written by Jan Michiel Otto, Professor of Law and Governance in Developing Countries at Leiden University. It is largely based on the findings and conclusions of a study on sharia and national law conducted by Otto (2006) for the Dutch Scientific Council for Government Policy (WRR 2006; WRR 2007). That study, in turn, is largely based on 12 country studies by independent researchers covering Egypt, Morocco, Turkey, Saudi Arabia, Sudan, Iran, Afghanistan, Pakistan, Malaysia, Indonesia, Mali and Nigeria (Otto et al. (eds.) (2006)). In 2009, an expanded and revised English translation of both the general study and the 12 country studies will be published. More information will become available on the VVI Website.

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