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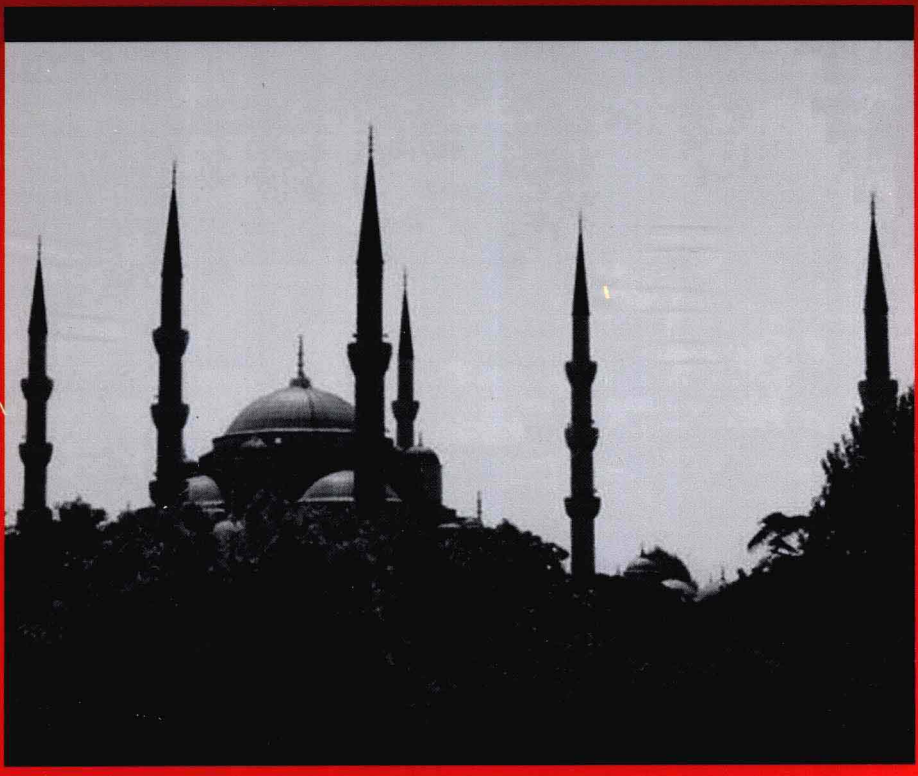
Shari'a As Discourse

Legal Traditions and the Encounter with Europe



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Legal Traditions and the Encounter with Europe

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in Conflict: Coping with Cultural Diversity in Law (London: Glass House, 2005); *Migration, Diasporas and Legal Systems in Europe* (ed, with W. Menski, London: Cavendish, 2006); and *Law and Ethnic Plurality: Socio-legal Perspectives* (ed., Leiden: Martinus Nijhoff, 2007).

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Preface

Jørgen S. Nielsen and Lisbet Christoffersen

The chapters in this volume arise out of an ongoing discussion among specialists in Islamic studies on the one hand and, on the other, various kinds of legal experts with a continuing interest in the interaction between European legal systems and Muslim communities. It has been argued that, in some sections of the Muslim communities in Europe, aspects of custom related in some way to Islam – Marshall Hodgson invented the term 'islamicate' to cover this relationship (Hodgson, 1974, I, 177) – remain so persistent that for the legislator and the judge to ignore them is tantamount to institutionalizing severe injustice and, especially, leaves women at the mercy of male-dominated practice. This would, for example, be the case in a marriage conducted Islamically but not recognized by European family law jurisdictions, which could therefore find such jurisdictions unable to hear any arising dispute and thus often leave a woman at the mercy of informal systems of social control. From a Muslim perspective the discussion refers to the wider contests taking place about the nature and role of Shari'a within the Muslim world, contests which can be traced in various ways to the early generations of Islamic learning and which are to be found all over the Muslim world today, often formulated in the context of a response to the ominous 'other' associated with the dominant, ex- and post-imperial 'West'. From a European perspective we are witnessing an engagement with a religious/legal/cultural complex of traditions which have until the last couple of generations been located outside Europe, or at least outside the western and northern parts of the European subcontinent, and which certain European institutions had some experience of engaging with but only as the external, colonial 'other'. These two perspectives have now become engaged within the boundaries of Europe, often in a contest of some virulence both in their mutual relationship and in their respective internal negotiations and arguments.

The chapters in this book are an attempt to expose some of the various issues thus raised and to put the two intellectual and legal traditions into some form of dialogue and to explore how the encounter is working out in practice in selected locations both in Europe and in the Arab Muslim world. The starting point, as is indicated in the first chapter by *Jørgen Nielsen*, is that too much polemical attention has been given to certain sets of rules associated with Shari'a. More interesting and more productive, it is suggested, is to look at how the processes of theological-legal interpretation have been expressed and are being expressed in a more or less common intellectual framework and to do so in a dialogue with similar processes

in Europe – and to record how certain more polemical contemporary approaches close off possibilities of change. So the volume brings together a number of scholars of Shari'a and Islamic law with counterparts from parallel European disciplines: hermeneutics, philosophy and jurisprudence.

Part 1 of the book focuses on legal theory in the broad sense. *Mona Siddiqui* uses some specific themes to show how the '*ulama*' of the developed *fiqh* writings of the classical period were concerned with logical coherence but in the process could reach a number of varying and equally valid solutions to the problems they posited, in contrast to the modern trend towards codification and mistrust of diversity of opinion. *Asma Afsaruddin* develops this theme with reference to the contest between those she calls 'modernists' and 'hardliners'. It is suggested that one of the central elements of that contest is the approach to and use of history – history as context for the interpretations of earlier generations, and history as itself contested territory – as well as, from some quarters, an implicit or explicit assertion of the irrelevance of history. In the encounter with Europe, Shari'a discussion meets a new context with its own history, and *Mark van Hoecke* considers the implications both in terms of comparisons and in terms of consequential challenges each to the other. On the way he touches on the growing awareness of a contemporary European legal pluralism, which *Lisbet Christoffersen* explores in greater depth. Her starting point, as it is also in Chapter 1 by *Jørgen Nielsen*, is the Refah case at the European Court of Human Rights. She proceeds to debate the nature of law in its European context and thence to discuss how, and how far, Shari'a can be regarded as law in such a sense. She ends on a transitory note: the field is changing, and it is changing in unpredictable ways over which the present generation of experts, practitioners and observers have only limited influence. One of the most sharply controversial fields, and one of those which often drives the controversies, is the place of women, and we examine this in the rest of Part 1. *Hanne Petersen* shows how conditional Scandinavian feminism and the moves towards equality for women are located in a particular cultural, religious and political history. The continuing process of 'gender neutralizing' the more or less secularized countries of Scandinavia appears to run parallel to a process of 'gendering' Shari'a. *Kjell-Åke Modéer* considers the Scandinavian legal tradition and the contested relationship between its strong nation-state tradition and the growing internal social pluralism and the related contest between the monopoly of territorial jurisdictions and the impact of discussions about legal pluralism and polycentricity in the context of pressures related to Muslim communities and their concepts of Shari'a.

Part 2 transfers the more theoretical discussions to particular local experiences. *Matilda Arvidsson* takes us to the very local experience of the functioning of a Swedish family court dealing with one particular case involving the child custody claim of one woman of Iranian origin. She shows how the quite separate cultural enclaves of the Swedish judge and court administrators and the Iranian Muslim family in its local Malmö context meet and interpret each other within a strongly asymmetrical power relationship. Britain is probably that European country which has most extensively engaged with Shari'a in its legal system. *Prakash*

Shah shows how far as well as the limits for such engagement, limits which have become more marked and, he suggests, more discriminatory in relation to Islam and Muslims in time with the growth in political controversy surrounding Muslims both internationally and domestically. This controversial focus on Islam has been earlier and, in some ways, more marked in France, but *Manni Crone* also shows how some French Muslim leaders, in particular Tareq Oubrou of Bordeaux, have been engaged in developing an understanding of Shari'a more attuned to the situation of Muslims in a French minority situation. She concludes that there are forms of Shari'a which can accommodate to the European situation by emphasizing the ethical dimensions. Contrary to that is Shari'a as predominantly a legal phenomenon, primarily viable in the traditionally majority Muslim countries, which is treated in the remaining three chapters in Part 2. *Dorthe Bramsen* takes us to what is often considered to be the opposite end of the spectrum, namely the legal practice of Saudi Arabia. Here the official debate is around the process of what amounts to a codification of Shari'a as Islamic law. This is illustrated with reference to a number of opinions expounded by two leading representatives of the conservative end of the Saudi legal establishment, namely the shaykhs Ibn Baz (d. 1999) and Ibn 'Uthaymin. The status of women inevitably enters this debate, and *Dima Dabbous-Sensenig* selects one particular expression of this discussion in the form of a discourse analysis of two broadcasts on the subject on Al Jazeera satellite television by the renowned Egyptian-Qatari shaykh Yusuf al-Qaradawi. His way of discussing the subject, she concludes, is one which closes off options with which he disagrees, in a manner which is unlike more traditional forms of discussion. *Jakob Skovgaard-Petersen* rounds off this part with an analysis of the way in which Islam has become a contested theme also in constitutional politics, here with Egypt as the case study. Through a series of constitutional documents during the 20th century, the place of Islam has moved from the end to the beginning, most recently in the document adopted in 2007. Also in these most recent debates much public discussion and political negotiation took place before the status of the Shari'a was reconfirmed as being 'the principle source of legislation'.

The short final part of the volume includes two chapters which, each in their own way, recapitulate the main themes running through this book. *Mogens Müller* illustrates both the shared and the disparate approaches to scriptural hermeneutics in the Western Judaeo-Christian tradition and the Muslim tradition. *Peter Madsen* surveys the 20th-century development of discourse analysis as a method for understanding language and applies it to the controversy surrounding the publication in Spain in 2003 of a book by the Malaga imam Mohamed Kamal Mostafa. He shows how this attempt internally to regulate Muslim interpretations of Qur'an 4:34 was interpreted – and politicized – in quite different ways within a much broader public Spanish frame of reference.

The draft chapters were discussed in some detail at a conference organized as a joint project between the Danish Institute in Damascus under its then director, Jørgen S. Nielsen, who has since moved to the Faculty of Theology, University of Copenhagen, and the University of Copenhagen's Research Priority Area 'Religion

in the 21st Century', whose research director Lisbet Christoffersen is now based at the Department of Society and Globalization at the Roskilde University Centre since the Research Priority Area concluded its work at the end of 2007. The editors are extremely grateful to these institutions for their support for this conference and the production of this volume. Finally, the editors wish to recognize their debt of gratitude to Mr Niels Valdemar Vinding whose work as student assistant to the conference and the subsequent assembly of the revised chapters was invaluable.

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Shari'a Between Renewal and Tradition

Jørgen S. Nielsen

Shari'a: Immutable or Adaptable?

Shari'a is one of the main focuses of current attention on Islam from the side of the European public, often accompanied by a manner which betrays alternatively ignorance and misapprehension. At the same time Shari'a is one of the central resources in the search by many parts of the Muslim world for ways of dealing with modernity and globalization. And in those trends, whether self-declared Muslim or secular, which do not regard the Shari'a as such a resource, the Shari'a is often regarded as the main obstacle to progress. Whichever way one looks at it, a discussion of Shari'a cannot be avoided.

One of the key problems in such a discussion is what the various protagonists mean by Shari'a. Many Muslim radicals as well as Western critics tend to view Shari'a as a code characterized by certain notorious features, particularly in the field of criminal law and the position of women. This tends to lock most Western debates about Shari'a onto a narrow positive law track, while the equivalent Muslim debate tends to become intolerant and exclusive of others.

A recent example of the resultant confusion was the series of court cases arising out of the initiative of the Turkish military establishment in 1995 to ban the Refah Party, a party with a self-declared Islamically based ideology. The accusation was that members of the party, including its then leader Necmettin Erbakan, had expressed themselves in terms which breached the secular nature of the Turkish constitution. Among other things, these individuals were reported as having called for introduction of Shari'a law in parallel with other codes. In response to legal appeals the Turkish Constitutional Court had upheld the banning of the party, which then appealed to the European Court of Human Rights in Strasbourg, Turkey being a signatory to the European Convention on Human Rights (ECHR).

In its first treatment of the Refah case, the chamber of the European Court rejected Refah's appeal against the Turkish Constitutional Court's decision to dissolve the party. Among other things the court concluded that the Shari'a which Refah was allegedly attempting to introduce 'would oblige individuals to obey ... static rules of law imposed by the religion concerned.'[1]

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1 *European Court of Human Rights, Case of Refah Partisi (The Welfare Party) and others* v. *Turkey* (applications nos. 41340/98, 41342/98 and 41344/98), 31 July 2001, para. 70.

Further, it quoted with approval the Turkish Constitutional Court's view that

> sharia was the antithesis of democracy in that it was based on dogmatic values and was the opposite of the supremacy of reason and of the concepts of freedom, independence and the ideal of humanity developed in the light of science.[2]

The Strasbourg court concluded

> that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable ... It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values ...[3]

This view was confirmed just over 18 months later by the Strasbourg court meeting in Grand Chamber.[4]

It is clear here that the European Court of Human Rights accepted the view of the Turkish courts that the Shari'a is essentially a non-negotiable code whose authority lies outside the human plane, and certainly outside the authority of a modern state. It therefore conflicts fundamentally with the requirements and the sovereignty of the nation and the state. Presented as a set of immutable rules resting on the authority of divine revelation the Shari'a must therefore be incompatible with democracy.

It is not difficult to find Islamic sources presenting a similar view of the Shari'a. Take one quote off the internet:

> Our love for Allah (Subhanahu Wa Ta'aala) and His Messenger (Sall Allahu Alaihi Wasallam) makes it haram to keep silent while man made kufr ideas and solutions exist in society. Islam obliges us to accept the Sovereignty of Allah (Subhanahu Wa Ta'aala) in all of life's affairs from the individual to social, economic and political affairs.[5]

This is recognizable from media portrayals of Islam – and from the speech of certain noisy individuals presenting themselves as speaking for Islam. In fact, the source is Hizb al-Tahrir, a small but very vociferous movement which originated in Jordan in the 1950s as a radical offshoot of the Muslim Brotherhood (Taji-Farouki, 1996) and which since the early 1990s has found some limited but highly profiled support in parts of Europe, especially among Muslim students whose

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2 *Ibid.* para. 71.

3 *Ibid.* para. 72.

4 *European Court of Human Rights, Case of Refah Partisi (The Welfare Party) and others* v. *Turkey* (applications nos. 41340/98, 41342/98 and 41344/98), 13 February 2003.

5 <http://www.khilafah.com/home/category.php?DocumentID=6454&TagID=2>, accessed 13 May 2005.

parents immigrated from parts of the Muslim world in the 1960s and 1970s (see Grøndahl et al., 2003; Husain, 2007).

The coinciding views of the European Court and Hizb al-Tahrir reflect only one of several understandings of the nature of Shari'a to be found in both its classical forms and in much serious modern Islamic discussion. Is Shari'a primarily a law code or is it rather a framework for thinking, a discourse, under cover of which a wide variety of practical solutions to existential problems and the ordering of individual and social life has been and can be developed? In his study *Between God and the Sultan: A History of Islamic Law*, Knut Vikør points out that 'the central factor was that the law was common and had the proper authority, not necessarily what it said'. (Vikør, 2005, 30). Indeed, the American legal anthropologist Lawrence Rosen holds the view that Islamic law fits into a classification of 'common law' systems in contrast to 'codified' legal systems (Rosen, 1989).

An older school of Western research on Shari'a has tended towards the view that after the formative and classical periods of development the Shari'a tended to stagnate (e.g. Schacht, 1964; Coulson, 1964). However, more recent research has shown that this picture is too simplistic, and Coulson showed later that his own ideas about Islamic law were more dynamic than had previously appeared (Coulson, 1969). In Hanafi *fiqh* in India, significant change took place in the 16th and 17th centuries, a period when the forms of Hanafi law, which have since become dominant in the subcontinent, were laid down by al-Marghinani (1791) and in the *Fatawa Alamghiriyyah* (Bazmee Ansari, 2008). In a quite technical but at the same time theoretically ground-breaking study, Professor Baber Johansen has shown, using a case study of land tax and rent in the late Mamluk and Ottoman period (Johansen, 1988), that through much of Islamic history, it was not the specific solutions or legal rulings (*ahkam*) which were considered legitimate or illegitimate, the key was rather whether they had been arrived at within the generally accepted framework of thought using the generally accepted intellectual tools.

The ground is much more contested in modern times, as much on political, social and cultural grounds, as on intellectual, legal or theological grounds. For this reason, it is also the case that Muslim thinkers today are much quicker to condemn each others' views than they were in the past, just as it is the case that Western observers very often are ignorant of this aspect of the nature of Shari'a. It is thus no surprise that the views of, for example, the shaykhs of Al-Azhar University in Cairo have become much more contested over the last century (see Zebiri, 1993).

Returning to summary presentations of the nature of the Shari'a, here is a statement which the majority of Muslims today would recognize:

> This religion consists of belief and Shari'a (Islamic Law), and the latter is application of the former. The difference between Shari'a and fiqh (Islamic jurisprudence) is that Shari'a is set by Allah; whereas fiqh is the human