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# FAMILY LAW IN ISLAM

Divorce, Marriage and Women in the  
Muslim World

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# INTRODUCTION

*Baudouin Dupret and Maaïke Voorhoeve*

In this introduction, three issues are addressed. First, emphasis is placed on the necessity of addressing the law and its practice in the Middle East and North Africa in a descriptive, non-interpretive way. Second, clarification is sought in the meaning and uses of several frequently-used words and concepts in this field of inquiry. And third, a suggestion is made to draw a distinction, within this domain, between the study of the discourse *on* the law and the study of the discourse *of* the law – that is, how the law is formulated and then referred to.

## I

Since they were mainly considered an offspring of the jurisprudential corpus called ‘Islamic law’, the many legal systems of the Middle East and North Africa (MENA) used to be treated in terms of their relationship to Islam. The direct outcome of this tendency was to ascribe overarching importance to Islam in the inception and organisation of the law, and to minimise those specificities of each country which had proceeded from the historical and social circumstances of their recent development. In other words, Islam’s influence was overemphasised, while the impact of socio-political transformation was neglected.

The main symptom of this tendency is the exclusive attention given to family law. Because it is by far the sole domain where the inspiration of the Sharia and the *fiqh* (doctrine) is still obvious, family law

is the focus of most of the research. Per se, this does not constitute a problem, and the present volume testifies to the relevance of this theme. However, two things must be kept in mind. First, the domain of family law represents only a tiny minority of these countries' body of regulations. Second, family law, although often presented as the 'last bastion' of Islamic law, has in fact been transformed from 'divine' into 'man-made law' (Peters): it has gone through the process of 'positivisation' that followed the specific evolutions of every country's legal system.<sup>1</sup>

Focusing on the theme of Islamic law, researchers forgot to consider that the law is a daily and ordinary activity, with litigants trying to settle their problems and professionals carrying out their jobs. Legal activities are performed for all practical purposes, and therefore their study must primarily consist of the description of what people do when using legal provisions and institutions. To put it bluntly, law is first of all a conflict-resolution or guarantee-setting device, not the symbolic reflection of society's unconscious. Contrary to 'mirror theories' (Tamanaha), which do not consider the law for what it *does* but for what it *symbolises*<sup>2</sup>, a realistic approach to the law in MENA countries is interested in what is in practice achieved by the many protagonists. In that sense, it does not look for *interpretation* – at least in Geertz's 'thick' sense – for this would mean that what is said and done by these protagonists cannot be accessed, and therefore needs some additional explanation drawn from the researchers' knowledge of the underlying culture. Rather, the realistic approach assumes that the observer does not understand the observed activities better than those he/she observes performing them. They share the same world of meaning, which is fundamentally made up of the 'technicalities' and 'practicalities' of everyday life, including legal life.

The prime benefit of such a realistic, pragmatic description of legal practices is that, contrary to an ironic stance *vis-à-vis* people and what they say and do when engaged in their actual life – assuming for instance that they behave irrationally because of some hidden cultural pattern – it details the ways in which they act to realise their goals. In other words, it replaces the question of *why* people do something by asking *how* they seek this realisation. In this process, we might

have lost some understanding of metaphysical issues, but returning to law as an object of analysis in its own right, looking to the empirical as the only object of research, and paying attention to practice as the only area where the law is to be seen at work, represents a step towards understanding the workings of our mundane world.

## II

The second aim of this introduction is to clarify the meaning and use of terms which traditionally occupy a central place in research on so-called Islamic law. Once a descriptive approach is chosen, these terms lose their theoretical and scholarly weight and 'thickness': they tend then to correspond to what 'lies open to view' (Wittgenstein), not to the depths of a mysterious world that needs to be overseen by scholars for its interpretation.<sup>3</sup>

Among these terms, 'Islam' and its adjective 'Islamic' occupy a central role. Since these countries and societies are assumed to be mainly characterised by their adherence to a specific religion, the inner and essential nature of the latter becomes paramount. From this point of view scholars must define *what Islam is* in order to understand what happens in this cultural framework. By contrast, the descriptive approach is not interested in any substantive definition, but restricts itself to the task of examining *how* Islam is invoked and referred to by those people who, at some point in their daily life, orient their talk and actions towards it. In that sense, Islam cannot be found outside its practice, and describing something as 'Islamic' is to ascribe to it the quality of being closely related to Islam, whatever the 'something' in question. Thus 'Islamic law' corresponds to what people consider as specifically Islamic in the law, independent of any consideration about the truth of such a claim.<sup>4</sup>

One observes the frequent use of terms imported from other languages which remain untranslated because of the ineffable meaning they are supposed to carry. This implies that cross-cultural communication is impossible, since languages are impervious to each other. If we take this one step further, people would not be able to talk to one another at all, since the meaning one person attributes to a word would

never exactly correspond to the meaning the interlocutor attributes to it. This gives language a metaphysical dimension that any proper attention paid to the workings of the social world directly contradicts. Words are vehicles of communication, and the meanings they convey are the object of constant, pragmatic adjustments for the practical purpose of mutual understanding.

A frequent problem with the use of foreign-language terms is that, instead of keeping the denotative sense they have in that language, they acquire a connotative dimension in the cultural context into which they are imported. Thus, the usage of words like 'Sharia' testifies to the slippery process which necessarily characterises the referral to supposedly alien cultures. Per se, there is no reason not to speak of 'law', 'leader' or 'God'. Of course, it can be convenient at some point to know the terms used 'on the ground', although not in order to give them any non-translatable sense. Here again, the descriptive approach we advocate tries to understand how people refer to concepts and use words in action, independently of the abstract sense native and non-native scholars ascribe to them on the basis of doctrinal sources and outside any real-life context. In that perspective, for instance, Sharia would be what people refer to as such in context and in action, notwithstanding its orthodox (or deviant) use with respect to the Grand Tradition.

In a slightly different way, there are other terms where caution is indicated – for instance concepts in the social sciences which, although having their origins in ordinary language, have acquired a theoretical dimension to which the social world is assumed to conform. There is a strange looping process at work here, where ordinary notions are invested with a theoretical load that eventually gives them their meaning. The problem is that often these concepts are not deduced from close observation of what is going on in action and context, but are assumed *a priori*, and therefore serve as the lens through which further observations are interpreted. This is the case, for instance, with terms like 'patriarchal' and its extension 'patriarchalism'. The patriarchal nature of some legal relationships might be derived from empirical data concerning divorce in (for instance) Iran. However, some researchers 'know' *in advance* that the Iranian legal system is patriarchal instead

of deducing it from their observations, although the latter offer a much more nuanced picture. The net result of this process is that research imposes its interpretations on the world, rather than the world finding in research an adequate description.

### III

People address the issue of Sharia for very different purposes. When demanding its implementation in a country, activists address a legal theme for political purposes. When assessing whether a law is in conformity with Article 2 of the Egyptian Constitution, which stipulates that 'the principles of Sharia are the main source of legislation', the Egyptian Supreme Constitutional Court deals with the same theme for judicial and constitutional purposes. And when the heading of a Western newspaper states that the stoning of an Iranian woman 'is a symbolic issue, but it is at the same time the whole Sharia that is questionable' (*Le Soir*, 28 August 2010), it is clear that the journalist's purpose is related to the ongoing debate in Europe on the so-called 'clash of civilisations'. An adequate description of how different people address the issue of Sharia shows that the latter is not seen in the same light – or as 'the same thing' – simply because the same word is used. To put it in a different way, people are oriented towards the notion of Sharia in a way that is sensitive to the context in which it is used and to the practice in which they are engaged.

Such contexts are, broadly speaking, of two types. On the one hand there is the context of ongoing public debates, where the issue of law is a theme and a resource for addressing a matter that is not specifically legal. On the other hand, there is the legal context as such, where law is a textual source, an achievement and a practice. In other words, there is a discourse *on* the law and a discourse *of* the law, i.e. law as a *topic* and law as a *performance*: and there is a huge gap between these two conceptions of law. This gap is not related to a difference in the substance of what is at stake, but to a difference in the goal-orientation of the protagonists, i.e. what we call their practical purposes. Doing politics is very different from adjudicating; writing an open editorial aims at something other than formulating a plea; claiming

that Sharia is a kind of Pole Star of a regime's legitimacy is technically and consequentially different from the search for *fiqh*-based solutions in the formulation and implementation of a ruling; and so on. When not taking these fundamental differences into account – an omission that comes about merely by sticking to the words people utter without looking at what they are doing when they utter them – research misses the phenomenon it purports to explore. It remains fascinated by the power of terms endowed with an intrinsic, essential meaning, independent of their practical uses. Thus, for instance, the Arabic word *tasbiri*<sup>5</sup> is supposed to convey a reference to the divine<sup>5</sup> on the sole basis of its etymology – ‘referring to Sharia’ – while a competent look into contemporary legal systems shows that the word has the direct, obvious sense of ‘legislation’. Similarly, it is supposed that the Islamic state is intrinsically unstable, because the etymology of the Arabic word used to capture this institution (*dawla*) conveys the notion of a cyclic change (see Bernard Lewis)<sup>6</sup>. Phrased in an anthropological way, the same cultural concept has resulted in attributing intrinsic meanings to words such as *haqq*, which are deemed to convey the power of their supposed linguistic ‘origins’ (see Geertz)<sup>7</sup>, instead of simply expressing ideas related to the context of their uses (e.g. the ‘right’ to do this or that, or one of God’s names, or the ‘truth’ of a statement).

Instead of deriving the meaning of words from assumptions about their etymology, research should arrive at a description of what people do in actual contexts. However, this does not mean that words are devoid of any importance, that talk is opposed to action, or that, in the sphere of law, there is a conflict between ‘living law’ and state law. Indeed, there is a classical dichotomy in socio-legal studies that opposes the law set out in codes, rulings and jurisprudence to the law as it can be observed in action, that is, when performed by flesh-and-blood human beings. Although this distinction stems from a positive intent – that one should not merely stick to legal formulations in order to study the law – it queers researchers’ pitch by artificially severing legal practice from one of their main resources, i.e. legal texts. The law is mostly performed through direct or indirect references to formal sources, which protagonists use to orient themselves in choosing a way forward. This issue of rule-following, which has been much debated

in philosophy, can be dealt with, when turning to more empirical contexts, through the notion of ‘instructed action’.<sup>8</sup> Instead of considering that legal rules and legal practice each work autonomously, it suggests that they can indeed be distinguished analytically, but empirically function in an interdependent way: a rule is always a rule-instructing-an-action (since a rule alone has no existence but on paper) and the action is always an action-as-constrained-by-a-rule (since an action cannot be characterised as legal if it has no connection to a rule). This mode of describing the law has the double advantage of doing justice to the teleological formulation of legal rules – i.e. which aim at being implemented – and to the legal protagonists’ systematic referencing of them – whether to apply or evade them.

#### IV

This book resulted from a wish to bring together academics working on family law and its practice in the Middle East and North Africa. The same motive led to the organisation of two panels at the World Congress for Middle East Studies (WOCMES, Barcelona, 2010), where the idea for this publishing project emerged.

All contributors to this volume address the topic of family law in the MENA from different angles. First, on the geographical level – contributions range from Tunisia to Syria and from Lebanon to Iran. Second, on the disciplinary level, as some contributors have a legal background, whereas others are specialists in anthropology or political science. Third, the contributions differ as to the perspective from which the topic of family law is addressed. Discourses *on* the law are addressed by discussing public, political and religious debates, while discourses *of* the law are described by examining the practices of judges, lawyers and litigants.

Part one of this volume is made of contributions which try to capture discourses on the law. Dahlgren, in chapter one, describes the discourses on morality in Yemen against the background of the family-law reforms that took place in the southern part of the country in the 1970s and 1990s. Specifically, she looks at how Islam is played out as a discourse both to promote and to limit women’s rights. The analysis

of these debates is conducted in the light of the difficult unification of the tribal North Yemen and the modernising South Yemen.

In chapter two, Osanloo examines the contemporary legal, social and religious (jurisprudential) debates over the current revisions to Iran's Family Protection Act. By highlighting the varying tenor of these debates in different sectors of Iranian society, she reveals the tensions over women's status and rights, the role of law in shaping that status 'from above', and finally the disparate groups claiming authority to define women's roles in the Iranian social order. The chapter will connect such debates to the broader contests over legitimacy and authority in governance, in an Islamic republic that is moving closer to a consolidation of power within particular groupings.

In chapter three, Di Ricco addresses public debates on Druze family law in Lebanon, focusing on the ways in which Druze organisations for women's rights go about enhancing the protection of those rights in the field of personal-status law. In the autumn of 2006 the Lebanese Druze community introduced important reforms in its institutions; inspired by these reforms, a group of Druze women started to claim changes in the Druze personal-status law. This article analyses the claims, forms of actions and achievements of these activists.

In chapter four, Sonneveld contrasts discourses on and discourses of the law, in this way linking part one of this volume to the second part. Focusing on informal marriages in Egypt, Sonneveld contrasts public images of informal marriages with everyday practices observed in Cairo. Publicly perceived as a means for young people to have pre-marital sex without the knowledge of their parents, in this chapter, Sonneveld shows that informal marriages are also practised by men who do not have the financial means to marry, and by women who hope that marrying an already married man will enable them to keep their freedom and independence. As such, she argues that informal marriages are reflective of changing gender roles.

In chapter five, Hegel analyses court delay as a particular object of concern in recent court-reform initiatives in Egypt. Although delay is often configured as a failure to progress and as an inert temporal space in which something is *not* happening, Hegel posits that it is productive to see the ways in which delay draws litigants into

peripheral and focal legal spaces that provoke specific types of interaction and enable participant-observation in/of the work of law. Socio-legal and anthropological theory is used to analyse ethnographic data (collected in Port Said) that focuses on litigants' experiences of court delay in two primary peripheral legal spaces: lawyers' offices and the Office of the Experts (an office under the administration of the Ministry of Justice that provides technical expertise to judges on evidentiary matters).

In chapter six, Van Eijk draws a comparison between Catholic and Muslim family courts in Syria, focusing on divorce practices. She studies judicial practices in these courts from the viewpoint of 'reconciliation', as judges in the different religious courts generally aim to reconcile the disputing parties.

In chapter seven, Grosso addresses judicial practices in Tunisia, focusing on evidential requirements in divorce cases – since evidence plays a crucial role in enabling litigants to access their divorce rights when the law is translated into practice. This is especially true in cases of divorce on the grounds of harm (*darar*). Grosso's chapter draws on one particular case study to illuminate how evidence underpins the litigant's experience of such divorces.

In chapter eight, Voorhoeve examines how Tunisian courts deal with their discretionary powers in so-called 'delicate fields of law'. On the basis of court decisions, Voorhoeve finds that the law concerning some delicate topics is applied in a very consistent way by the various Tunisian courts, while the application of other topics is characterised by casuistry. Voorhoeve examines how both the uniformity and the casuistry can be explained, describing the factors that curtail judicial discretion but are allowed under the legislation.

## Notes

- 1 Peters, 1988.
- 2 Tamanaha, 1997.
- 3 Wittgenstein, 1967.
- 4 Dupret, 2011.
- 5 See the Encyclopaedia of Islam, 2nd edition.
- 6 Lewis, 1988.

7 Geertz, 1983.

8 Livingston, 1995, and Dupret, 2011.

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