Book review

Shari‘a As Discourse: Legal Traditions and the Encounter with Europe

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This book makes a fine addition to a growing body of post-orientalist literature on Islamic law. It will be of interest to both the general public and experts. The non-expert reader should not fear: all chapters are written in such a way that key specialist terms are briefly explained before used (on page 4 alone I counted fiqh, usul al-fiqh, mu‘amalat, hadith, qiyas, ijtihad, ijma‘, ‘ulama). The volume arises out of an interdisciplinary discussion on the interaction between European legal systems and Muslim communities in which ‘customs related in some way to Islam … remain so persistent that for the legislator and the judge to ignore them is tantamount to institutionalizing injustice’ (p. xiii). This book, however, accomplishes more than this, even if the ‘extra’ elements are not always fully elaborated and explained. The tone for this unassuming ‘extra’ is set in Chapter 1 where J. S. Nielsen brilliantly turns first to Western legal perceptions of Shari‘a through a short discussion of the Refah Partisi case at the European Court of Human Rights (ECtHR). The non-expert reader may be surprised to discover that the ECtHR and the Turkish Constitutional Court agreed with fundamentalist Islamist bodies, such as Hizb-al-Tahrir, that Shari‘a is ‘the antithesis of democracy’ and ‘essentially a non-negotiable code whose authority lies outside the human plane’ (p. 2). In this regard the scholarly authors of the book under review beg to differ both from the defenders of universal human rights and from the self-appointed defenders of the Muslim faith with questionable knowledge of Islamic legal history.

Nielsen, an erudite professor of Islamic Studies, perfectly illustrates the complexity obscured by this assumption; he does not, however, aim to explain this coincidence of orientalist-secular legal and Islamist views of Shari‘a as a stagnated, medieval, code of law. Similarly, in Chapter 2, on ‘classical fiqh and the issue of logic’, Mona Siddiqui concludes with an almost apologetic remark in passing: ‘[I]n contemporary discourses on fiqh, we are aware that colonialism and the expansion and influence of legal positivism on Muslim-majority countries have had a profound influence on Muslim law’ (p. 27). Afsaruddin’s Chapter 3 notably goes further: through juxtaposing the positions of reformists and Islamists, it joins the literature that uncovers as false the premise that political Islamism ‘restores’ pre-modern Islamic legal and political values and educates us on the modernity of politicised Islam, the cornerstone of which is the ideal of an ‘Islamic state’—essentially a version of European nationalism/statism. In all, insofar as these and the other chapters in this volume point to the deconstructibility of the ‘otherness’ of political Islam but are not always minded to perform it, my advice to the reader is to supplement the reading of this book with others from the expanding body of literature on post-colonial Islamic law’s interaction with Western legal positivism, state law and sovereignty.3

What Nielsen, and most other authors in this volume, do aim to—and amply manage to—achieve is

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, at para. 71; as quoted on p. 2.
2 ‘It could be said, at its simplest, that the Shari‘a expresses God’s will for human behavior. This is what is immutable. Fiqh is the process of human interpretation of that revealed will, the extrapolation of the Shari‘a into the rules of everyday living’ (p. 4).
3 There are many brilliant monographs. An early one is Talal Assad (2003), while a recent one, focusing on the reception of occidental jurisprudence in Egypt, is Esmeer (2012). See also collections such as Diamantides and Gearey (2012) and Diamantides (2006).
to educate the reader about what the Shari’a can be taken to mean once its misunderstanding as an ossified code is lifted and it is, rather, understood as a ‘framework of 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’ (p. 3). Nielsen achieves this through a meticulous analysis of the wide range of discursive techniques and discipines both from within and without the Shari’a discursive bounds. He is particularly interested in the extent to which renewal and reform are possible within the tradition’ (p. 7; emphasis added) because:

‘[E]ven in Europe, where one might expect that the depth of the encounter between Muslim populations and Western traditions and structures would lead to a process of broad fusion, the resilience and flexibility of aspects of Muslim cultural traditions is a source of regular surprise to expert observers.’ (p. 7)

Later, in Chapter 9 by Prakash Shah, we get a similar formulation. Shah quotes a social psychologist, Günther Bierbrauer (1994), who understands Islamic and Western laws as:

‘cultural products like language, music or marriage arrangements and as such they form a structure of meaning that guides and organises individuals and groups in situations of conflict. Thus, legal culture refers to the layman’s conception and knowledge of legal rules and duties and the way in which people solve their disputes in a particular culture … cultural norms, values and practices are internalised during socialisation and they become part of a person’s identity. Legal culture is one aspect of a person’s ethnic or cultural identity.’ (p. 122)

Similarly, in Chapter 10 Manni Crone, a political scientist, argues that ‘Shari’a is not a static system of law, but a flexible normative system that possibly assumes the form of law’ (p. 156). Focusing on present-day France, Crone finds that the reformulation of Shari’a in effect revolves around two poles: ‘a renewed Islamist discourse framing Shari’a as a morality “oriented towards an ethics” and a rising Salafi discourse framing Shari’a as a morality “oriented towards a code” (Foucault, L’usage des Plaisirs’ (p. 156). Both these discourses are secularist: the former, or ‘minority’ Shari’a, in the sense that it ethicises and relativises the Shari’a into a ‘flexible ethics that must respect the laws of the secular state’ (p. 156); the latter ‘because it uses an absolute moral code as an individual technique for self-governance unfolding outside the political sphere’ (p. 156). She concludes that:

‘[E]verything seems to indicate that Shari’a-based practices increasingly bypass the sophisticated knowledge of classical fiqh, and that the evolution of the Shari’a is increasingly driven not by legal knowledge of classical fiqh or intellectual constructions, but by social practice.’ (p. 156)

Chapters 4 and 5, written by legal academics, will be of particular interest to the readers of this journal. The former, on ‘Islamic Jurisprudence and Western Legal History’, invests in legal comparativism with all the advantages and risks this entails. Intriguing parallels are drawn: between human rights treaties – the end result of the evolution of natural law in Western legal thinking from God’s law via rational law– and Islamic law ‘being both natural law and directly binding positive law at the same time’ (p. 48); between the sunna – based initially on the orally transmitted customs and life of Muhammad but then ‘written down in authoritative texts and rearranged by legal scholarship’– and nineteenth-century European legal codes which were ‘a synthesis of customary law, long lasting legal scholarship and newly introduced principles’ (p. 48); between ‘analogy’ in Shari’a and the use of ‘unwritten general principles of law [such as the good faith principle, which] became popular in the second half of the 20th century’ (p. 49); between the respective trajectories of Western and Islamic laws, respectively from ‘universalism to nationalism, with, more recently trends towards new forms of globalisation’ (p. 49) and from a universal Islamic law – ‘be it with several schools, each of them dominating some regions in the Islamic world’ followed by the development of national legal systems in the course of the twentieth century (p. 50). In the case of Islamic law, the passage from the universal with regional variations to legal fragmentation along nation-state lines caused a tension that Islamists nowadays want to end by restoring ‘the unity of a universal Islamic law, which would be interpreted uniformly all over the world’ (p. 50). What perhaps could be emphasised more is the extrinsic nature of the creation of centralised national legal systems in colonial and post-colonial settings and the fact that in pre-colonial times the universality of Islamic law was not premised on an equivalent of the Catholic European appellate
jurisdiction over local laws. In the height of Islamic civilisation there was never a pope, nor did the different schools of law, still operative, follow a jurisdictional logic. To date a Muslim in a country where one school is prevalent can, in an Islamic court, where these exist, claim the right to rely on one of the recognised schools of law prevalent elsewhere.

Particularly successful is the comparativism of Chapter 5, ‘Is Shari’a Law, Religion or a Combination? European Legal Discourses on Shari’a’. Here Public Law Professor Christoffersen delivers a text that avoids the pitfalls of comparing ‘chalk and cheese’. First, she dismisses the divide between rational-universal secular law and irrational particularistic religious law. The Western legal tradition—national and international—does not deserve its self-description as secular-rational nor its accusation as neglecting elements of law that transcend secular rationality, for the secular rational legal model is not empty of religious elements:

‘[Harold] Berman has showed [sic] that the legal and religious thinking of the West shares the concepts of rituals, of tradition, of authority and of universality … the very distinction between the concept of secular and the concept of sacred could and maybe should be seen as Christian – at least neither Islamic nor Jewish.’ (p. 72).4

Second, Christoffersen reveals:

‘[D]eeper normative structures or lines of thinking beneath European jurisprudence, structures that are basic to some of the difficulties regarding Shari’a as such in a European legal context.’ (p. 57)5

What Western jurisprudence must understand is that:

‘The basic difference between Islamic legal culture and European legal culture might … not be the question of the rule of or rule by law … rather [it is] the question whether law is personal or territorial – and here there is no doubt: current European law is territorial, not personal.’ (p. 71)

Comparativists should heed Christoffersen’s advice and avoid classifying Shari’a as a territorial religious legal system analogous to medieval occidental equivalents. Only thus, for example, can we properly understand the inter-faith legal pluralism of the Ottoman millet6 system, or indeed the intra-Muslim legal pluralism whereby a litigant can rely on different schools of Islamic jurisprudence for different aspects of the same case. The same classification makes us less able to understand the reality of Muslims living as minorities in the West, for whom it is ‘neither necessary nor relevant to think in fixed terms of religion in order to get access to Islamic rules for their family life’ since they avail themselves both of the international private law system allowing for the precedence of the law of nationality over the law of the country of residence and of other more or less ‘ unofficial Muslim systems for legal advice which they feel themselves bound by’ (pp. 62–63).

Chapter 9 is another chapter on comparativism written by a lawyer, P. Shah. Taking stock of recent scholarship (such as K. Vikør’s Between God and the Sultan and W. Menski’s Comparative Law in a Global Context), Shah examines legal pluralism in the British Muslim Diaspora. He argues that Western ‘state-centric and basically nationalist’ visions of law make us focus almost entirely on the activities of bodies like parliaments or the official courts and tribunals; moreover, these have ‘actually developed in such a way as to reinforce the position of a political elite, hardly representative of the wider social sphere, but speaking and ruling on the latter’s behalf, while simultaneously denying its freedom to operate by autonomous value systems’. As a result ‘we are rarely able to acknowledge that other actors – individuals or different components of society – have legal agency’ (p. 121).

Against this background, the author criticises the tendency to expect the outright assimilation of Muslim minorities into the dominant legal order of their European states. What is effectively denied is that, in the words of a quoted social psychologist researching Kurdish and Lebanese immigrants in Germany, both Western legal systems and Shari’a-based ones are relevant, whereas:

4 Refers to Berman (2007).
5 For a similar effort, see Diamantides (2006).
6 Millet is a term for the legal system applicable to the confessional communities in the Ottoman Empire. It refers to the separate legal courts pertaining to personal law under which communities (those abiding by Muslim, Christian and Jewish law) were allowed to rule themselves under their own system.
do operate within a framework today composed, not only of European laws, but also laws derived from other aspects of their cultural heritage. In the social and legal reality on the ground, however, it is evident that such laws have for some time now come to be part of the European legal landscape.’ (p. 122)

Shah goes beyond diagnosis. On page 123 we get effectively the manifesto for a new kind of comparative law re-conceived as the domain of the individual living under conditions of legal pluralism. But do the conditions exist within the state? Shah quotes Lucy Carroll (1997):

‘In the modern world, Islamic law exists only within the context of a nation-state; and within the boundaries of any particular state it is only enforced and enforceable to the extent that, and subject to the reforms and modifications that, the nation-state decrees.’ (p. 124)

This is quite different to the situation of medieval Islam. Shah here quotes K. Vikør:

‘The domain of the state appears to be fairly limited in a classical Muslim society. Political changes have fairly little effect on trade or economy, nor do they greatly affect the community of the learned, the ulama. Both tend to continue their activities within their own networks where towns, trade routes and centres of learning are crucial, but the identity of the ruler or the borders between states matter relatively little.’

Thus, sums up Shah, in classical Islam the Shari‘a, being in the hands of scholars, also remained unaffected by political changes, and can reasonably be said to belong to a civil society of scholars, within the limits of the four schools, but all crossing state boundaries (p. 124). Shari‘a is essentially ‘the domain of scholars who are not necessarily dependent on any state for their existence and activities’ (p. 125). In classical Muslim societies therefore:

‘the Shari‘a is thus an apparatus of the state, but based on a law that is outside the state’s domain. This leaves the qādi in a divided situation, partly the state’s man, partly as a scholar, a member of a Muslim legal pluralism. The availability of qadi courts according to different madhabs led to “forum shopping” among litigants.’ (p. 124; emphasis added)

Whereas, in this sense, classical Muslim legal pluralism operated ‘both in and outside of the state’ and despite the fact that, today, the nation-state centred law prevails globally, Shah is nevertheless optimistic that a new Islamic legal pluralism is possible within the confines of the nation-state:

‘Applying Vikør’s central observation about the autonomy of Shari‘a from political leadership in pre-modern times allows us to appreciate that, to the extent that it continues to depend on scholarly output, Shari‘a can very well enjoy a trans-state existence, despite the claims of modern states to have delimited its scope.’ (p. 125)

Is this optimism for a renaissance of Islamic, practice-driven, legal pluralism along the lines of classical Muslim societies justified? Have not post-colonial Muslim majority nation-states effectively adopted ‘national’ codified versions of Islamic law? Have they not exercised enormous pressure on clerics and ‘ulama‘ (e.g. the scholars of Al-Azhar in Egypt have been paid by the state since Nasser, not to mention Saudi Arabia’s official Salafism)? Do not national citizenship rules in and of themselves exclude and discriminate against fellow Muslims of different nationalities in disregard of Shari‘a’s umma principle? And do they not therefore practically hinder the cross-fertilisation of Muslim legal cultures and the rise of Islamic legal pluralism?

Chapter 11, by Dorothy Bramsen (PhD Islamic Studies), shows how Saudi ‘ulama’ oscillate between a theoretical hermeneutical openness and a practical deference to state legal ideology. They tend to be:

‘Optimistic when it comes to identifying and defining an all-comprehensive law derived from the Qur’an and the sunna of Muhammad. The theological and legal theories underlying this optimism are that the Qur’an contains no allegorical speech and renders certain knowledge about the divine law. The same goes for the

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7 Ulama (also spelled ‘Ulama’) (singular ‘Ālim, ‘scholar’) refers to the educated class of Muslim legal scholars engaged in the several fields of Islamic studies. They are well versed in legal fiqh and are considered the arbiters of law, being Islamic lawyers.
Contemporary state-bound ulama such as the Saudi, therefore, only theoretically distinguish between the ‘inner’ core of Shari’a as the divine law, and the human understanding of it, which requires the practice of ijtihad in all cases. In reality, however, the Qur’an and the sunna are interpreted in daily life in on the basis of medieval Hanbali fiqh manuals. Thus, the debate on whether Saudi law should be codified or not appears less important since the principles of flexibility and practicability of Shari’a are already ‘only theoretically’ embraced (pp. 177–178).

Insofar as Muslim minorities in European cultures are concerned, most chapters are pessimistic about the inroads made by legal pluralism. M. Arvidsson’s analysis of judge-made discourse on Shari’a in Swedish courts (Chapter 8) sets the tone:

‘[W]hen the case involves a legal culture where language and terminology have meanings which are different … the result might be that the judge ignores or misinterprets the information and arguments submitted by the parties.’ (p. 114)

Similarly, Chapter 7, ‘Shari’a and Nordic Legal Contexts’, argues that:

‘As long as … nation states are upholding their monopoly regarding territorial jurisdiction there will be ongoing conflicts with different forms of religious jurisdictions … There is … the possibility that there will be a renaissance of the conglomerate state which ruled during the early modern times of 17th and 18th centuries [and] … there are those who argue that the plural legal systems within the late-modern multi-religious societies are giving the lawyers and the judges new alternatives for decision-making.’ (p. 94)

State law’s territorialism may not be the only problem for legal pluralists. In Chapter 6, on gender in secular and religious laws, H. Petersen argues that the problems of establishing what W. Menski calls ‘global legal realism’ (the term implies an acknowledgement that both religious and secular norms constitute the normative pattern of a global world society, together with mixed legal traditions, norms, customs and practices emerging from different sources, centres, groups and schools) require not only the displacement of ‘Western, monist, positivist state law–emphasising the national expressions of common law and civil law traditions’, and of Islamist fundamentalist readings of Islamic law as a positive code. The problem lies also with various civil society human rights / feminist organisations that do not always seem to understand that ‘the situation in Morocco and Tunis is clearly different from the situations and conditions in Syria and Yemen’ (p. 85). As examples of those refraining from preaching the universalist secular sermon of human rights / feminism, Petersen cites ‘religious feminists’ like Safa Mahmod, and networks like ‘Women Living Under Muslims Laws’; both pay attention to the ‘differences and varieties of Muslim law, and, thus, the different practices, customs and interpretations women experience’ (p. 85; emphasis added) – this is more than can be said of both Islamists and their liberal opponents …

References


sunna when it has been transmitted by a “large number” of people.’ (pp. 177–178)

8 Ijtihad (Arabic ‘diligence’) is an Islamic legal term that means ‘independent reasoning’ or ‘the utmost effort an individual can put forth in an activity’. As one of the four sources of Sunni law, it is recognised as the decision-making process in Islamic law through personal effort (jihad), which is completely independent of any school of fiqh.

9 One of the four established schools of thought within Sunni fiqh.