Legal Pluralism in the Arab World

Arab and Islamic Laws Series

Series General Editor
Dr. Mark S.W. Hoyle

This book will be published
as the eighteenth volume in the Series.

The titles published in this series are listed at the end of this volume.

Legal Pluralism in the Arab World

by

Baudouin Dupret
Maurits Berger
Laila al-Zwaini

Kluwer Law International
The Hague • London • Boston

Published by Kluwer Law International
P.O. Box 85889
2508 CN The Hague, The Netherlands

Sold and distributed in the USA and Canada by
Kluwer Law International
675 Massachusetts Avenue
Cambridge, MA 02139, USA

Sold and distributed in all other countries by
Kluwer Law International
Distribution Centre
P.O. Box 322
3300 AH Dordrecht, The Netherlands

Library of Congress Cataloging-in-Publication Data

Dupret, Baudouin.
Legal pluralism in the Arab world/by
Baudouin Dupret, Maurits Berger, Laila Al-Zwaini.
p. cm.--(Arab and Islamic laws series; 18)
Includes index.
ISBN 09041111050 (hb)
1. Law--Arab countries. 2. Legal polycentricity--Arab countries.
I. Berger, Maurits. II. Al-Zwaini, Laila. III. Title. IV. Series.
KMC105.D87 1999
349'. 14927--dc21 98-47380
CIP

Printed on acid-free paper

Cover design: Robert Vulkers bNO

ISBN 90-411-1105-0
© 1999 Kluwer Law International

Kluwer Law International incorporates the publishing programmes of Graham & Trotman Ltd, Kluwer Law and Taxation Publishers and Martinus Nijhoff Publishers.

This publication is protected by international copyright law.
All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

Table of Contents

Preface, *John Griffiths* vii

Introduction xi

Biographical Notes xix

PART I – LEGAL PLURALISM, NORMATIVE PLURALITY, AND THE ARAB WORLD 1

Chapter 1– The Idea of Legal Pluralism, *Gordon R. Woodman* 3

Chapter 2– Norms, Law and Practices: The Practical Obstacles That Make It Impossible to Separate Them, *Jean-Noël Ferrié* 21

Chapter 3– Legal Pluralism, Normative Plurality, and the Arab World, *Baudouin Dupret* 29

Chapter 4– A Critical Survey of Western Law Studies on Arab-Muslim Countries, *Jörn Thielmann* 41

PART II – A COMPARATIVE PERSPECTIVE 55

Chapter 5– Contrasted Identity Claims Before Egyptian and Belgian Courts, *Marie-Claire Foblets and Baudouin Dupret* 57

Chapter 6– Palestinian Law: Social Segmentation Versus Centralization, *Bernard Botiveau* 73

Chapter 7– Legal Pluralism and Cultural Unity in Morocco, *Lawrence Rosen* 89

Chapter 8– Legal Pluralism and Public International Law: An Analysis Based on the International Convention on the Rights of the Child, *Murielle Paradelle* 97

Chapter 9– The *Shari'a* and Legal Pluralism: The Example of Syria, *Maurits S. Berger* 113

Chapter 10– The Treatment of Unfair Terms in Arab Countries: An Investigation into the Effects of Legal Pluralism, *Hassan Gemei* 125

PART III – LEGAL PLURALISM AND EGYPT 133

Chapter 11– An Administrator's Nightmare: Feuding Families in Nineteenth Century Bahariyya Oasis, *Rudolph Peters* 135
Chapter 12– The *Haqq al-'Arab*: Conflict Resolution and Distinctive Features of Legal Pluralism in Contemporary Egypt, *Sarah Ben Nefissa* 145
Chapter 13– The Anarchy of Egyptian Legal System: Wearing Away the Legal and Political Modernity, *Nabil 'Abd al-Fattah* 159
Chapter 14– Legal Pluralism and the Closure of the Legal Field: The *al-Muhajir* Case, *Nathalie Bernard-Maugiron* 173
Chapter 15– Legal Plurality: Reflection on the Status of Women in Egypt, *Nagla Nassar* 191
Chapter 16– Formal and Informal Finance in Egypt: The Significance for Legal Pluralism, *Ziad Bahaa-Eldin* 205
Chapter 17– Legal Plurality and Legitimation of Human Rights Abuses: A Case Study of State Council Rulings Concerning the Rights of Apostates, *Ahmed Seif al-Islam Hamad* 219
Chapter 18– The Secular Reconstruction of Islamic Law: The Egyptian Supreme Constitutional Court and the "Battle over the Veil" in State-Run Schools, *Kilian Bälz* 229

Bibliography 245

Index 265

Preface

J. Griffiths
Faculty of Law
University of Groningen

It is an honor to be asked to write a short preface for a collection of essays on legal pluralism in the Arab world. Reading these essays has been gratifying, partly because something I wrote almost twenty years ago apparently affords insights that people writing now still find useful, and more importantly because the essays show how attention to the pluralist character of the legal order continues to bring forth interesting scholarship.

Since I am quite ignorant both of Islamic law and of the Arab world, it would be impertinent to use this space to comment on the many specific issues raised in these essays. Suffice it to say that the findings reported seem on the whole to offer useful confirmations of generalizations that have been made on the basis of research in many other parts of the world. In that sense these essays enrich the international literature on legal pluralism.

What I would like to do here is to reflect briefly on the intellectual change that the past twenty years have seen with respect to the whole idea of "legal pluralism". I should begin by saying that while the intellectual struggle for recognition of the idea of legal pluralism was frequently waged in terms of the definitions of terms, in particular the term "law", that is not, in my opinion, what the struggle was really about. What was at stake was how social order, and in particular the place in social order of more or less law-like forms of social control, should be conceived. The problem with the traditional views of lawyers (and of many social scientists) was not that the word "law" was restricted to social control exercised by the state, but that it was claimed (mostly implicitly and without further thought being addressed to the matter) that "law" in this sense is – if it can be considered a sort of social control at all – a very special sort, autonomous from and dominant over the rest. Law, it was supposed, can sensibly be studied and understood as a social phenomenon by itself and on its own terms. Legal "monism" is thus not merely a preference for a particular terminological practice (in which "law" is reserved for social control by the state). Far more importantly, it is a particular, and untenable sociological view, one

associated historically with Austinian legal positivism and nineteenth century bourgeois liberalism.

It is that view – a view of the social world, not of the word "law" – that was the object of the attack launched by Vanderlinden in the 1970s. A small but rapidly growing group of people began insisting that if you look at social life in that "law"-centered way, you will never be able to understand the three fundamental questions to be asked about social order: (1) how do rules of behaviour function in social groups? (2) what are the relationships between rules of different provenance in this connection and, in particular, what is the role of the rules of state-law in social life? (3) when and why do disputes about the application of rules arise and what happens to them? The alternative view that these upstarts propagated they called "legal pluralism" But it could just as well have been called "normative pluralism" or "pluralism in social control". The term "legal pluralism" was never really consciously chosen, it just emerged form the context in which the debates took place.

The context was that of the final years of European colonialism. Lawyers and anthropologists who had worked in (former) colonies were familiar with the phenomenon of formally-recognized "customary law" and the term "legal pluralism" had for a long time been generally and uncontroversially used to designate the situation in which substantial parts of the law applied in the state courts (especially rules relating to the family) consisted, at least for the indigenous population which had not converted to Christianity or Islam, of "native law and custom" (as it was called in English colonies). This was assumed to be a body of law existing before and independently of the colonial state. But not all of "native law and custom" received such "recognition" and was treated as "law". Generally, for example, this did not occur in the area of criminal law nor (depending on the extent to which "indirect rule" was adopted as the technique of colonial administration) too much of public law. "Native law and custom" was also not recognized as "law" if it was "repugnant" to European legal values. And finally, it had become increasingly apparent that even if the "native law and custom" was recognized by the state, there was much of it that was not. Implicit in the very idea of "recognition" and of (colonial) "legal pluralism" was the acceptance of the existence of law *not* recognized as such by the state. And in the colonial setting, at least, people were generally aware of the fact that a great deal of actual social behaviour (rule-following and disputing) was actually taking place pursuant to such non-recognized "law".

I think, looking back in this way, that the essence of the idea of legal pluralism, not just as a way of looking at peculiar (post)colonial legal arrangements but as a fundamental way of looking at all legal order, consisted of taking two simple and rather obvious steps: (1) explicitly acknowledging what was implicit in the very idea of "recognition", namely that non-recognized "law" is every bit as much "law" as recognized "law" is (in other words, that it cannot be the fact of recognition that determines what is "law"); (2) that the whole approach

is applicable not only in the (post)colonial setting, but every bit as much in European (and other) settings.

Within two decades, the new idea had become pretty generally accepted. There are some mopping-up actions still going on, but so far as I can see these concern only matters of conceptualization. Considerable energy is (I think wrongly) devoted to the question whether we should call all (or at least all "law-like") social control "law" and within this generic category recognize different varieties or dimensions of "law", or instead call the inclusive category something like "social control" and refer only to that part of it associated with the state as "law"? Should we use the term "legal pluralism" for the situation in which much social behaviour is effectively regulated by social fields other than the state, or should we rather use a term such as "normative pluralism" for that (normal) state of affairs? I must confess that I cannot get very excited about this terminological issue, although in retrospect, to avoid misunderstanding, I think it might indeed have been better to call the new idea "normative pluralism". The issue is a moot one, since given the way in which the whole idea emerged from the Context of colonial legal pluralism there was never really any question of it being called anything else.

Too little intellectual energy, by contrast, has been devoted to conceptualizing the differences between varieties of social control. On the whole, few people go beyond primitive folk-taxonomies: "state" law, "local" law, "folk" law, "indigenous" law, "religious" law etc. Such categories may be relevant if we are concerned with the *provenance* of a particular rule. But they tell us essentially nothing about the *sort of social control* involved, nor about such other questions that have often been thought important, such as the degree of morally binding force generally attributed to a rule and the choices actors make between rules of different provenance. When used in the comparative context of comparative law or of anthropological and sociological research and theory, all such taxonomies are also open to the objection that they tend to lead to "false comparisons" between different socio-legal settings.

I argued some years ago (Griffiths 1984) that the most important dimension of variation in social control is the degree of specialization, an approach that lends itself to further theoretical development in which the degree of specialization in social control is explained as a function of social relationships in the social field concerned, and itself in turn explains such things as the choices litigants make between the fora available for dealing with disputes. Doubtlessly there are other and perhaps better ways of conceptualizing the variation we are interested in. But as I look at the recent literature, it seems to me that too little attention is being paid to such fundamental theoretical questions. The authors of this book have taken the first steps toward a systematic exploration of legal pluralism in the Arab world. Let us hope that more will follow, and that this will lead not only to accumulation of ethnographic knowledge, however important this is, but also to renewed attention for the theoretical issues involved.

Introduction

Baudouin Dupret
CNRS/CEDEJ
Maurits Berger
University of Amsterdam
Laila al-Zwaini
University of Leiden

This book is the result of a seminar which was held in Cairo, on 18 and 19 December 1996. It was supported both by the Centre d'Etudes et de Documentation Economique, Juridique et Sociale (CEDEJ) and the Netherlands Institute for Archeological and Arabic Studies in Cairo (NIAASC).

The subject of this seminar was *legal pluralism*, a notion known to both lawyers and social scientists.

From a lawyer's point of view, it denotes the recognition by the state (the legislator) of the existence of a multiplicity of legal sources which constitute its legislation: international treaties, customary law, religious law, etc. The concept thus assumes a more or less "ideological" dimension, by which the state wishes to assert its pluralistic orientation.

In socio-legal studies, *legal pluralism* means a plurality of social fields, producers of norms which are in partial interaction with each other. It entails depriving the state of its capacity as social actor (as opposed to its multiple constituents), and, consequently not considering it merely as the monopolist of legal production, be it directly or indirectly.

The sociological theory of legal pluralism was most completely and radically formulated by John Griffiths (1986). His seminal article consists of two parts: a systematical critique of any sort of theory which assimilates law to the state, and which supports – explicitly or not – a centralized and hierarchic structure of the legal system; and, secondly, a reconstruction of the legal system by taking into consideration the various legal sources. This involves a refutation of the prescriptive approach commonly used by legal theoreticians. The theory of legal pluralism advocates a break with this model by attempting a description of the law from a sociological and anthropological perspective.

In his article Griffiths elaborates on the works of E. Ehrlich (1936) and S.F. Moore (1978). First, in Ehrlich's view, a society consists of various "social associations" – i.e. a plurality of human beings. He defines law as a prescription cor-

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, xi-xxiii
© 1999 *Kluwer Law International. Printed in the Netherlands.*

responding to each social association which in their mutual relations acknowledge certain rules of conduct as binding, and which regulate their conduct according to these rules. The merit of Ehrlich's writings is that he develops a descriptive concept of law, which is related to rules of conduct as well as to issues of individual conduct and acknowledgement by the group.

Secondly, Griffiths' theory of legal pluralism is also based on the notion developed by Sally F. Moore (1978) of "semi-autonomous social fields" (SASF). These are social fields which possess their own normative and regulatory capacities, and are capable of enforcing these on their members. At the same time, however, these SASF's are integrated into a much larger social frame, which can affect them by an action originating from either inside or outside the SASF itself. From this perspective, any idea of an all-embracing social perspective is abandoned, as well as the idea of a hierarchic concept of relations between the different normative fields. The conclusions of Moore's approach are the following. First, external legislation has not and cannot have the impact that it presumes to have. Secondly, Moore's theory thus implies that an analysis of fields and normative ranks requires before anything else an analysis of social structures (i.e. reversing the perspective, which leads to an investigation starting from the social field and not from the legislator). Law in this theoretical context becomes the auto-regulation of each semi-autonomous social field.

The organizers of this seminar wanted to develop an approach to the legal phenomenon in the Arab world which, from a sociological perspective, takes into consideration the complex of social fields to which the individual adheres, as well as the normativity and the type of interaction they develop. By presenting different case-studies an attempt was made to construct an approach to the plurality of social fields where norms are produced.

It will become apparent from these case-studies that the theory of legal pluralism is a handy tool for analyzing socio-legal activities. At the same time it will become apparent that there is not "one" theory of legal pluralism. Legal pluralism is a model for analysis, which seemed to need modification according to each specific case. For instance, Botiveau discusses the concept of "internal pluralism of state law", Paradelle uses the approach of "sociological pluralism", Peters makes the assumption that law is essentially dealing with settling conflicts, and Sayf al-Dawla addresses the "plurality of legal sources". Or, from another perspective, Rosen emphasizes the cultural aspect of law and norms, and Berger their emotional dimension. All these different approaches constitute the richness and usefulness of the theory of legal pluralism.

Our point of departure was a statement: the existence of semi-autonomous social fields, as defined by Sally F. Moore. We thought we could elaborate on this postulate, having in mind certain studies in the past such as the description by Bernard Botiveau (1993) of the regulation in Upper Egypt of conflicts related to blood feuds: an archetype of the semi-autonomous social field that is not only producer of binding norms, but also able to resist the intrusion of the state's legal order.

However, a comprehensive study about the multiple places of normative production is yet to be awaited. It seems worthwile that such a study would focus on both the situations totally outside the state's framework, as well as those institutions of legal nature placed under the umbrella of state structure. In both cases, this means that emphasis should be put on the study of the actors of the normative phenomenon, whether they *qualitate qua* belong to the state or not.

This collection of articles is the first attempt of a comprehensive approach to the phenomenon of legal pluralism in the Arab world. The seminar was attended by contributors from various disciplines: sociologists, anthropologists, political scientists, legal theoreticians and practicing lawyers.

The book is organized in three parts. In the first part (chapters 1 to 4), definitions are presented of the notion of legal pluralism from a sociological, anthropological and theoretical perspective, and its particular relation with Arab societies. In the second part (chapters 5 to 10), different Arab countries are highlighted, as well as societies where one finds Arab migrant communities. The third part (chapters 11 to 18) deals with Egypt, which, because it is the place where the seminar was held, takes the lion's share.

Part I: Legal Pluralism, Normative Plurality, and the Arab World

Gordon Woodman, in chapter one, presents the idea of legal pluralism. He gives an overview of terminology and views of various of theoreticians, and presents a refinement of the concept of legal pluralism. His argument is that the concept of legal pluralism may provide a defensible and useful social scientific account of the social form of law. He criticizes legal centralism, which asserts that all legal rules emanate from the state, and which is the traditional account of lawyers. It draws a distinction between state laws and non-state normative orderings, which falsely assert a high degree of unity within every legal system. Closer observation shows that varieties of laws coexist, frequently without mutual contradiction. Legal pluralism, Woodman continues, is not confined to definite, large "fields", such as independent nation-states, since almost invariably some laws exist across the boundaries between such fields. A general overview of law from the viewpoint of legal pluralism sees the legal world as a vast, complex mix of clusters of norms, rarely confined within clearly bounded fields, sometimes in competition, but only rarely in unresolvable conflict.

Jean-Noël Ferrié, in chapter two, attempts to demonstrate why it is pragmatically impossible to sort out norms, law and practices. He argues that norms, law and practices are the various stages of a same process. Practices are conducts proceeding from the reference to other norms equally considered as valid. Law cannot be considered as a limited set of singular norms, owning its own epistemic status. On the contrary, legal norms have formal properties that cannot be understood and have no function but inside a system of transforma-

tions which constitutes the public sphere. Following such a conception, legal pluralism is not a relevant concept, since it stems from the active contiguity of separate legal orders defining in itself pluralism. According to Ferrié, there is only one monistic legal order, pluralism being the attribute of normative systems. So, and despite Geertz's opinion, law is something less and something more than a cultural system or a shared reference.

In the third chapter, Baudouin Dupret deals with legal pluralism, normative plurality and the Arab world. In his discussion of the concept of legal pluralism, he suggests that a good deal of the difficulties of this concept originate from terminology, and especially in the reluctance of lawyers to give legal and/or political concepts (i.e. law, custom, the state, etc.) a sociological and anthropological dimension. He argues that there are advantages in adopting a sociology of normative plurality, rather than a theory of legal pluralism. In the second part of his chapter, Dupret argues that the analysis of the normative phenomenon in the Arab world has been confronted with a double deadlock: law and religion. Here, more than anywhere else, there is a pressing need to develop an anthropology of the actors of the norm, which has to be considered in its entire plurality.

Jörn Thielmann, in chapter four, elaborates on Dupret's second part in sketching a critical survey of Western law studies on Arab-Muslim countries. Thielmann reviews the main currents and paradigms which have in the past determined, and nowadays still determine, Western research on legal systems in Arab countries. Nineteenth century studies focused on local legal systems and resulted in handbooks which enabled a more efficient colonial administration. Access to local material stimulated editions and translations of classical legal texts which had been largely unknown and allowed the understanding of traditional concepts of Arab-Islamic law. Thielmann points out that the plurality of legal systems in Arab countries remained largely ignored. Therefore, the author suggests that a multi-disciplinary approach would be most fruitful for future research on legal systems in the Arab world.

Part II: A Comparative Perspective

In the first chapter of part two(chapter five), Marie-Claire Foblets and Baudouin Dupret put the court systems of Belgium and Egypt in a comparative perspective. For many historical and sociological reasons, courts of these two countries have to deal with questions concerning acceptance and interpretation of norms presented as Islamic. In their handling of these questions, the courts refer to multiple normative and judicial orders. This chapter investigates the mechanics of this reference. It describes the legal sources the many actors of these two legal arenas have at their disposal and describing judicial competences, and attempts to give a comparative reading of the way courts deal with the question of legal belongings and identities.

In chapter six, Bernard Botiveau discusses Palestinian law which he calls a "clear case of internal pluralism of state law". Palestinian law itself is the result of historical sedimentation of customary, Ottoman and Jordanian law. In addition, there are the normative practices of Palestinians in diaspora, especially in refugee camps. Botiveau then continues by highlighting two special features of Palestinian law. First, the duality of the legal order due to the formal and geographical partition of Gaza and the West Bank. Secondly, the internal difficulties of the Palestinian Legislative Council in its attempts to homogenize Palestinian State law. On top of all this, there is the dichotomy between Palestinian and Israeli legal authorities and regulations within the Palestinian and occupied territories themselves.

Lawrence Rosen addresses in chapter seven the conflict between legal pluralism and cultural unity in Morocco. He argues that, although the concept of legal pluralism has allowed to shift the emphasis from using state-based and state-sanctioned legal norms as the baseline for analyzing diverse legal systems, it has left us with several dilemmas. The chapter consists of several interconnected arguments about these issues as they relate to an understanding of the status of contemporary law in Morocco, arguments that others may find of some use in thinking about law elsewhere in the Near East and beyond. If one views law as part of culture and culture as a set of orientations, we may be able to account for some of the commonalities that pluralism might seem to undercut. It can lead us to ask in what ways common sense assumptions are themselves intertwined with and integral to the process by which one tests the scope and validity of assessments of fact and person in a variety of cultural domains. It can also lead us to consider how the individuals in particular cultures may retain as non-contradictory those propositions that may appear to others as incapable of simultaneously occupying the same space.

Murielle Paradelle studies in chapter eight the conflicts between international and Islamic law with the regard to the Convention on the Rights of the Child and the reservations formulated by Muslim states on the name of Islamic *shari'a*. Understood as the existence of multiple normative repertoires intervening within the same social field, legal pluralism assumes that legal actors (producers as well as addressees) are submitted to contradictory imperatives or, at least, are confronted to choices while mobilizing the repertoires they have at their disposal.

In chapter nine, Maurits Berger, addresses the question whether legal pluralism is a convenient approach for the study of *shari'a*. He bases his article on the practice of *shari'a* in Syria, where he attended Friday sermons in various mosques, and studied *shari'a* at the *shari'a* faculty, as well as with a group of orthodox Muslims in a mosque. He first distinguishes between the formal and informal application of *shari'a* in Syria, and then continues to analyse the authority and mechanisms of informal *shari'a*. He concludes that the application of informal *shari'a* is much more widespread than one would suspect at

first glance, which proves the value of a legal pluralistic approach. However, according to Berger, this approach is not sufficient when one limits oneself to a description of the *shari'a* and its application. He argues that for a clear understanding of the *shari'a*, one needs to address motivations and emotional value. One of his conclusions is that *shari'a* is fundamentally different from other sets of rules due to the fact that it is a highly charged subject.

Hassan Gemei focuses in chapter ten on the treatment of unfair terms in the United Arab Emirates and in Egypt, making a comparative study of the effects of legal pluralism. Legal pluralism influences Arab legislations and their interpretation because of their duality (*shari'a* and positive law). The chapter shows the impact of this pluralism on the legislature and legal texts, then on interpretation as given by jurisprudence and courts. While Arab legal texts are often quite identical, a careful examination leads to observe that they hide huge differences, something which can only be explained by the presence of legal pluralism.

Part III: Legal Pluralism and Egypt

Ruud Peters describes in chapter eleven the case of feuding families in 19th century Egypt, involving statute, Islamic and customary law. The case is quite complicated, involving an open fight between two families in the Bahariyya-Oasis, where one person was shot and died, followed by the killing of the perpetrator by the victim's father. The case was first investigated by the local administrator and then referred to the judicial council of Asyut. Finally the case was reviewed by the *Majlis al-ahkam* in January 1864. On the basis of the records of this case Peters analyses the events and the trial. He examines the relevance and usefulness of the concept of legal pluralism for the nineteenth century precolonial legal history of Egypt.

In chapter twelve, Sarah Ben Nefissa discusses *haqq al-arab*, i.e. customary arbitration in Upper Egypt. As in the previous chapter, a feudal case is used as illustration. The settlement, however, is entirely in the hands of the families involved. Ben Nefissa gives a detailed analysis of the case, and discusses its interaction with two other legal institutions: state law and Islamic law. She draws from this example of conflict resolution to assess the difficulties of an anthropological analysis of legal pluralism in Egypt. Legal anthropology of Islamic societies comes up against the dogmatical dimension of classical Islamic legal discourse. Then, it strikes another dogmatical discourse, the one of the state.

In chapter thirteen, Nabil 'Abd al-Fattah addresses the question of legal pluralism and its responsability in the setback of modernity in Egypt. After introducing some aspects of modern Egyptian law, he describes its many legal and political factors, trying to understand how positive law has caused so much and so diverse opposition. The author argues that the existing legal duality, i.e. religious law and positive law, has not been favourable to Egypt in achieving modernity.

Nathalie Bernard-Maugiron addresses the Youssef Chahine case in chapter fourteen. She draws from this affair to describe the enclosure of the Egyptian legal field. In October 1994, an Egyptian lawyer called on a Cairo court to halt the showing of Chahine's film, "The Emigrant", arguing mainly that it was a sin to personify one of the prophets. The case demonstrates the way in which a number of actors reacted to forms of behaviour which they saw as deviant, how they felt that personal interests had been offended by such behaviour, and called for sanctions against this violation of the ban. Legal actors first of all used the internal dysfunctionings of positive law in order to benefit from the organizational inadequacies of the Egyptian legal system. They also seaked to play off the positive codes and the Islamic one, the one against the other, and did not hesitate to use them alternatively to their own advantage.

In chapter fifteen, Nagla Nassar discusses Personal Status Law No. 100 of 1985. This law introduced some novel regulations such as divorce by the wife because of a second marriage of her husband, raising of custody age, and the right of the family house. These rules were introduced in response of social needs, but have been heavily criticized. Here there is an interplay of three sources from which the current solutions are derived. These are *shari'a* rules, family law and social concepts and customs. Of these three sources it is only "family law" which may be classified as the "law of the state". The other two factors which greatly affect the outcome of juridical dispute are merely what one may call normative rules or paralegal norms. Attention is given to the role of social concepts and customs in formulating judicial decisions which disregard or enlarge a state-acted rule.

In chapter sixteen, Ziad Bahaa-Eldin focuses on financial law and practices in Egypt. Current legislation concerning banking and finance was enacted during the 1940s and 1950s, but its roots may be traced back to the legal and judicial reforms which took place in the second half of the nineteenth century. Since the introduction of European-based financial legislation, certain informal and quasi-formal financial practices have either persisted or have come into existence and they remain operative until today. These practices exist either parallel to, or in conjunction with, formal financial behaviour. The prohibition of usury in Islam adds an overreaching dimension to the whole matter by threatening with illegality, in the practical as well as the religious sense, both formal and informal financial practices. The chapter discusses the relation between Islamic law and the current Egyptian legal system, usury prohibition in Islam, and how current legislation has dealt with such prohibition. It further discusses some of the informal and quasi-formal financial practices which exist in Egypt, and again the effect of the Islamic usury prohibition on them. It concludes with a discussion of the significance of the study of financial law and practice to the debate concerning legal pluralism.

Ahmed Seif al-Islam deals in chapter seventeen with the use of several sources of law in Egyptian courts. Drawing from Egyptian jurisprudence

regarding the rights of apostates, Seif al-Islam shows that plurality of legal rules within the same society has many sides. It is viewed quite positively by some commentators, since it grants some groups of society the right to chose the norms and rules which are appropriate to them. The aim of this chapter however is to give concrete evidence of how plurality of legal systems may lead to legalizing human rights abuses. In fact, the conjecture implicit here is that the probability of the occurrence of such abuses increases in pluralistic systems, as long as one of the components of this pluralism is a relatively archaic system that was developed before the present awareness of human rights. On the other hand, the danger inherent to such a system is increased by the fact that it usually commands strong social acceptance due to its social and historical weight, and to the fact that in most cases it is deeply-rooted in religious beliefs.

In the last chapter (chapter eighteen), Kilian Bälz addresses the way the Egyptian Supreme Constitutional Court dealt with the case of the veil in state-run schools. This case is an illustration of his argument that there is a secular reconstruction of Islamic law. At first sight, Article 2 of the Egyptian Constitution, which stipulates that the principles of *shari'a* are the major source of legislation, appears to be a paradox: on the one hand, Egyptian positive law, that is a body of legal rules enacted by the Egyptian legislature through a specific procedure; on the other hand, *shari'a*, that is a body of legal writings by Islamic jurists. In this article, Bälz argues – based on the the legal reasoning followed by the Egyptian Supreme Constitutional Court ruling on the veil –, that this court is actually defending the autonomy of the secular legal order. The Supreme Court does so by trying to gain control over the interpretation of Islamic law: while formally recognizing the authority of its rules, it reserves the exclusive right to their interpretation.

The seminar and this publication was only possible with the help of many people. Our special thanks go to Cécile Insinger from Kluwer Law International for her constant support. Nathalie Bernard-Maugiron has read the complete manuscript thoroughly and made very useful remarks. Han den Heijer, director of the Netherlands Institute for Archeological and Arabic Studies in Cairo (NIAASC), was the initiator of this joint operation and provided its library for the meeting. Philippe Fargues, director of the Centre d'Etudes et de Documentation Economique, Juridique et Sociale (CEDEJ), was the second initiator and the supporter – in practice and financially – of this European joint-venture in Cairo. Finally, many thanks to Kim Davies for her very proficient translation.

Biographical Notes

Baudouin DUPRET

Educated in Law, Arabic and Islamic Sciences at the Catholic University of Louvain, Louvain-la-Neuve, Belgium. He earned his Ph.D. in Political Sciences from the Institut d'Etudes Politiques, Paris. He is currently Research Fellow at the French National Center for Scientific Research (CNRS), working in Cairo, Egypt, at the Centre d'études et de documentation économique, juridique et sociale (CEDEJ). He recently edited *Droits et sociétés dans le monde arabe: perspectives socio-anthropologiques* (together with G. Boëtsch and J.N. Ferrié, Presses de l'Université d'Aix-Marseille, Aix-en-Provence, 1997) and a special issue of the review *Droit et société* devoted to a non-culturalist approach to the norm in the Arab context (No. 39, 1998). His book *Au nom de quel droit: répertoires juridiques et référence religieuse dans la société égyptienne musulmane contemporaine* (Paris, L.G.D.J.) is forthcoming.

Maurits BERGER

Maurits Berger studied Dutch Law and Arabic Studies with specialization in Islamic Law at the University of Utrecht, the Netherlands. He practised as a lawyer in the Netherlands and is currently working on his Ph.D. in Cairo, Egypt.

Laila AL-ZWAINI

Laila al-Zwaini studied Dutch Law and Arabic Studies at Leiden University, the Netherlands. She specialized in Islamic and Middle Eastern Law at the School of Oriental and African Studies (SOAS, London). She is currently writing a PhD thesis on legal pluralism and judicial authorities in modern Yemen at the Research School CNWS, Leiden University.

Gordon WOODMAN

Professor of Comparative Law at the University of Birmingham, Britain, editor-in-chief of the *Journal of Legal Pluralism* and a past President of the Commision on Folk Law and Legal Pluralism (International Union of Anthropological and Ethnological Sciences). He holds the degrees of B.A., LL.M. and Ph.D. from the University of Cambridge, Britain. He has written extensively on legal theory, customary law, and the reception of common law in the Commonwealth. His recent publications include: *African Law and Legal Theory*, Aldershot, Dartmouth Publishing Co. (1995) (edited, with A.O. Obilade), and *Customary Land Law in the Ghanaian Courts*, Accra, Ghana

Universities Press (1996). He is currently working on a book on legal theory and customary law.

Jean-Noël FERRIÉ

Ph.D. in Political Sciences (Institut d'Etudes Politiques d'Aix-Marseille), he has since 1997 held the "Habilitation à diriger des thèses" from the Institut d'Etudes Politiques de Paris. Lecturer at the University of Aix-Marseille, senior Research Fellow at CEDEJ, Cairo, Egypt, he currently belongs to the Group of Political and Moral Sociology (GSPM/EHESS), Paris. He is the co-editor, together with G. Boëtsch and B. Dupret, of *Droits et sociétés dans le Monde arabe: perspectives socio-anthropologiques* (Aix-en-Provence, Presses de l'Université d'Aix-Marseille, 1997).

Jörn THIELMANN

Holds degrees in Oriental languages, Islamic sciences, Philosophy and Law from the Universities of Würzburg and Bochum, Germany. He just completed his thesis on "Hisba in Egypt: An example of the invention of tradition?". He is currently Research Assistant at the Development Studies Institute, The London School of Economics and Political Science, Britain.

Marie-Claire FOBLETS

Honorary attorney at the French-speaking Bar of Brussels. Professor of Law, Anthropology and non-Western legal cultures at the Universities of Louvain (KUL), Brussels (KUB) and Antwerp. Her book *Les familles maghrébines et la justice en Belgique: anthropologie juridique et immigration* (Paris, Karthala) has been published in 1994. She also directed researches on law in African urban contexts (special issue of the *Journal of Folk Law and Legal Pluralism*) and on Moroccan family law and its applications before Belgian courts. She currently works on the judicial treatment of Islam in Belgium.

Bernard BOTIVEAU

Researcher at the French National Center for Scientific Research (CNRS). Professor at the University of Birzeit, Palestine, and the Institut d'Etudes Politiques, Aix-en-Provence, France. He holds a Ph.D. in Political Sciences. His main interests are legal anthropology, law and politics, the process of nation-building in Palestine. Among his recent publications are *Loi islamique et droit dans les sociétés arabes*, Paris, Karthala, 1993; *Géopolitique des islams* (avec J. Cesari), Paris, Economica, 1997; *La Palestine d'Oslo: les avatars d'une construction nationale* (ed.), Monde Arabe Maghreb-Machrek, No. 161, 1998.

Lawrence ROSEN

Professor and Chair of Anthropology, Princeton University, and Adjunct Professor of Law, Columbia University. He earned his Ph.D. in 1968 from the

University of Chicago. Among his recent books are *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge University Press, 1989); and, as an editor, *Other Intentions: Cultural Contexts and the Attribution of Inner States* (School of American Research Press, 1995). His scientific interests are Islamic and comparative law, the rights of indigenous peoples and theories of culture.

Murielle PARADELLE

M.A. in Private Law and M.A. in Political Sciences (University of Aix-Marseille, France). She recently completed her Ph.D. in Political Sciences on the incidence of *shari'a* on the international practice of Muslim states. She is currently Research Fellow at CEDEJ, Cairo, Egypt. She is mainly interested in Islamic law from a sociological and a legal pluralistic point of view.

Hassan GEMEI

Professor of Law, Cairo University. Formerly Professor of Law in the United Arab Emirates. Director of the Center for Legal and Practical Study, Research and Training on Consumption and Consumer's Protection. He is currently Cultural Attaché to the Egyptian Embassy in Germany. Among his last books are *Consumer's Protection* (Cairo, Akhbar al-yawm, 1996) (in Arabic); *The Incidence of Unequality Between Contractors On the Conditions of Contract* (Cairo, Dar al-Nahda al-'arabiyya, 1996) (in Arabic); and *Introduction to Law* (Cairo, Faculty of Law, 1997).

Rudolph PETERS

Professor of Islamic Law, University of Amsterdam. He studied law and Arabic at the Universities of Amsterdam and Leiden, Ph.D. from the University of Amsterdam. Former Director of the Netherlands Institute of Archaeology and Arabic Studies in Cairo (1982-1987). Among his main publications are *Islam and Colonialism: The Doctrine of Jihad in Modern History*, The Hague, Mouton, 1979; *A Bibliography of Islamic Law, 1980-1993*, Leiden, Brill, 1994 (with L. al-Zwaini); *Jihad in Classical and Modern Islam*, Princeton, Markus Wiener, 1996. He also wrote extensively on political Islam, the 19th century legal history of Egypt and on the present-day application of Islamic law.

Sarah BEN NEFISSA

She holds her Ph.D. in Law from the University of Paris 1. She is member of the Laboratoire d'Anthropologie juridique de Paris, associate researcher at the Center for research on cities and urbanism in the Arab world (URBAMA). Researcher at the French Institute for Scientific Research in Cooperative Development (ORSTOM). She writes on political Islam, charity associations, and political and legal regulations in contemporary Islamic societies. Her last book (with A. Kandil) was *Associations in Egypt*, Cairo, al-Ahram Center for Political and Strategic Studies, 1995 (in Arabic).

Nabil 'ABD AL-FATTAH

Lawyer and advocate (1974-1979). Director of the Unit of Social and Legal Studies and Director of publications at al-Ahram Center for Political and Strategic Studies. Editor-in-chief of the *Report on the Religious Situation in Egypt.* Among his recent publications are *The Text and the Bullet: Political Islam, the Copts and the Crisis of Contemporary State in Egypt,* Beirut, Dar al-Nahda, 1997 (in Arabic); *Veiled Violence,* Cairo, Dar Sechat, 1994; *Politiques législatives: Egypte, Tunisie, Algérie, Maroc,* Cairo, CEDEJ, 1994.

Nathalie BERNARD-MAUGIRON

Research Fellow at CEDEJ, Cairo, Egypt, and teacher at the Cairo University's French Legal Department. She is completing her LL.M. degree at the University of Paris X-Nanterre on the Egyptian Supreme Constitutional Court and the protection of fundamental rights. She worked for many years in Geneva for NGO's and published articles on human rights protection in the United Nations system. She is now writing extensively on the Egyptian S.C.C.

Nagla NASSAR

Attorney at Law, Cairo, Egypt. She holds her degrees in Law from Cairo University, the Harvard Law School (LL.M.), Trinity College Dublin, Columbia University, the University of Geneva (Ph.D.) and the Academy of International Law of The Hague. She worked with the International Labour Organization, Geneva (1987-1988), and The World Bank, ICSID Secretariat, Washington, D.C. (1992-1995). Among her publications are *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions* (Martinus Nijhoff Publishers, 1995) and *Letters of Guarantees* (al-Ahram Publishers, 1997) (in Arabic).

Ziad BAHAA-ELDIN

Currently Advisor for Legal Affairs to the Egyptian Minister of Economy and Lecturer at the Faculty of Law, English Section, Cairo University. Formerly Attorney in Washington and Cairo, Associate with Hashem, Ibrahim & Tawfic law firm in Cairo, and legal advisor in the Export Development Bank of Egpyt. He received his degrees in law and economics from Cairo University (LL.B.), the American University in Cairo (B.A.), King's College (LL.M.), and the London School of Economics (Ph.D.). He wrote extensively on banking regulation and economic issues in Egypt. His book *Banking Regulation in Egypt* (Kluwer Law International) is forthcoming.

Ahmad SEIF AL-ISLAM

Lawyer, affiliated to the Cairo Bar. Currently advisor at the Center for Human Rights and Legal Assistance, Cairo, Egypt. He extensively wrote on human rights and religious and political freedom in Egypt. Among his last

books are *Law and Preventive Detention* (Cairo, Amideast, 1995) (in Arabic). His recent research focusses on the role of the Egyptian Supreme Constitutional Court in promoting the rule of law and human rights and he is director in the CHRLA of the program on the S.C.C.

Kilian BÄLZ

Researcher and Lecturer at the Department of Commercial and Economic Law, Johann-Wolfgang Goethe-Universität, Frankfurt am Main, Germany. He earned his degrees in Law, Arabic, and Middle Eastern Studies from the Free University of Berlin, the London School of Economics and the American University in Cairo. He wrote extensively in the field of Arab and Islamic law as well as legal theory. In 1997 he published a book on insurance law and Islam in Arab countries: *Versicherungsvertragsrecht in den Arabischen Staaten. Der Versicherungsvertrag im islamischen Recht und den modernern arabischen Zivilrechtskodifikationen. Unter besonderer Berücksichtigung des aegyptischen ZGB (1948) und des jordanischen ZGB (1976)* (Karlsruhe, Verlag Versicherungswirtschaft, 1997).

PART I

Legal Pluralism, Normative Plurality, and the Arab World

CHAPTER 1
The Idea of Legal Pluralism

GORDON R. WOODMAN
UNIVERSITY OF BIRMINGHAM

INTRODUCTION

The concept of legal pluralism has been found helpful for understanding a wide variety of legal phenomena, and for the evaluation of certain legal policies. This paper attempts to set out the elements of the concept in terms which may be helpful to the study of law in the Arab world, referring to some of the leading literature. Its specific applications in this field are for those with the requisite expert knowledge.

The concept is normally used in the social scientific study of law. For this purpose a body of law exists if, and only if the norms which compose it are observed in social life. The social scientific viewpoint does not exclude from consideration the bodies of doctrine developed by those who expound or administer the law. The use and observance of those doctrines by legal specialists, and so in indirect ways by lay subjects of the law, are also social facts. However, this viewpoint accommodates less easily the doctrines on which religious laws are based, which assert that these laws exist by virtue of divine origin, not social observance. The issue arising from this is discussed later.

Stripped of the restrictive qualifications proposed by some writers, legal pluralism may be defined as: *the condition in which a population observes more than one body of law.*

This paper seeks to explain and elaborate the premises and terms of this definition.

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 3-20
© 1999 *Kluwer Law International. Printed in the Netherlands.*

1. LEADING LITERATURE OF LEGAL PLURALISM[1]

1.1. Vanderlinden; Hooker

The first work to contain a sustained examination of the idea was *Le Pluralisme Juridique* [Legal Pluralism], edited by John Gilissen (1972). The most important contribution to this volume is by Jacques Vanderlinden (1972). He defines legal pluralism as

> "*the existence within a particular society of different legal mechanisms applying to identical situations.*" (Vanderlinden, 1972: 19)[2]

He gives many examples, of which a small selection may be quoted:

> Thus the merchant who sells goods is subject to a different contractual mechanism from the ordinary citizen who conducts the same operation; thus in the middle ages the cleric who committed a wrong was held to account by different mechanisms from the layman guilty of the same wrong; thus at Rome the patrician who wished to marry was bound by different mechanisms in the marital field than the plebian in the same situation; thus in Africa during the colonial period the African found the essence of his personal status governed by a so-called "customary" law, the personal status of a European who had settled in the country by a so-called "written" law; thus the diplomat, under the protection of his "immunity", benefits from legal mechanisms other than those which apply to the inhabitants of the country in which he performs his duties when the latter are in an identical situation; thus sovereigns are governed by numerous rules of law which distinguish them from their subjects even when the acts of social life which they are obliged to perform are in all respects identical to those which the latter perform daily.

Vanderlinden refers also to the different legal mechanisms which apply to adults and minors (Vanderlinden, 1972: 23); and to special laws designed to protect minorities who are subject to discriminatory treatment by the majority (Vanderlinden, 1972: 24). He writes of the law of the insurgent group engaged in military conflict with the state and its law, including here both the case where the state is controlled by the majority of the population, and that where it is controlled by an external occupying force (Vanderlinden, 1972: 25-26).

1 I attempt a fuller discussion of this literature in Woodman (1998).
2 This and all other quotations from French have been translated by the author.

Vanderlinden suggests various ways of categorizing the instances of legal pluralism, and examines their implications. There is much more that is worthy of study in his paper, but cannot be summarized here.

Barry Hooker's book *Legal Pluralism* (1975), is likewise wide in geographical scope and in the range of families of law considered. However, it has a particular focus. Its subject is stated to be

> "... the systems of legal pluralism in the contemporary world which have resulted from the transfer of whole legal systems across cultural boundaries" (Hooker, 1975: 1).

Hooker defines the term "legal pluralism" as referring to

> "*the situation in which two or more laws interact*" (Hooker, 1975: 6).

The book is thus a study of those instances of legal pluralism which have arisen from legal transplants, or receptions. This is the process by which a developed body of law is brought into force in a territory where it has not previously been observed. (On reception see also Doucet and Vanderlinden, 1994.) In the instances in question the received law does not altogether replace the preexisting laws of the territory of reception. Hooker examines the cases of: territories in Africa and Asia colonized by Britain, in which the common law received during the colonial period coexists with religious jurisprudence or customary law; territories colonized by France, in which similarly received Civil Law coexists with religious or customary law; Indonesia, colonized by the Netherlands, where a reception of Dutch law and a subsequent development of an Indonesian national law have been added to a plurality of laws, some of them resulting from earlier receptions; territories in North America and Australasia colonized by Britain and settled by large numbers of British subjects, where the indigenous peoples' laws have remained in subordinate positions on the national stage; Turkey, Thailand and Ethiopia, territories which were not colonized but received western laws; and the USSR.

The many instances of legal pluralism given in these works fall into two general categories. The first consists of those instances in which there are two bodies of norms within the law of a state. An example is the laws of many African states which provide for Africans to be governed by African customary law, and Europeans by a body of received law. This will be referred to as *state law pluralism.* The second category consists of instances in which the elements are, respectively, the law of the state, and normative orders not directly associated with the state. Such is, for example, the case given by Vanderlinden of the normative order of a group of separatists at war with the state. This will be referred to as *deep legal pluralism.*

This second category is formulated on the assumption that there exist bodies of law with no necessary relationship to the state. This view arises from a sociological, rather than a technical legal notion of law. We need to notice some writings by sociologists and anthropologists which support this view.

1.2. Works in the Sociology and Anthropology of Law

Eugen Ehrlich (1936), as a result of his historical and sociological research, distinguished between two types of law. The law for decision was used by judges in deciding disputes. The "living law" [lebendes Recht] was the rule of human conduct. Living law was not necessarily associated with the state:

> "It is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision. A fourth element remains... i.e. the law is an ordering... [Consequently] ... we... find law everywhere, ordering and upholding every human association" (Ehrlich, 1936: 24-25).

Georges Gurvitch in a chapter on "pluralist theory of the sources of positive law" (Gurvitch, 1935: 138-152), argued that the formal sources of law, such as statute and judicial practice, received their authority and effectiveness from "normative facts". The state was a normative fact which might, and normally did validate a number of different formal sources of law, and provide the means of settling conflicts between norms derived from them. But the state was not the sole normative fact. Every-day experience, legal history, and theoretical considerations showed "the existence of innumerable generative centres of law, autonomous homes of law" (Gurvitch, 1935: 146-147).

Anthropological research traditionally consists in the intensive study of social fields which are normally much smaller than that of the state, but which have a distinct character and autonomy to a degree that allows them to be taken as discrete subjects of research. Many anthropologists have reported on the "laws" generated and enforced within, and distinctive of the social fields in which they have conducted research. It may suffice to quote from two anthropologists who provide observations on the nature of law in the societies they have investigated.

Malinowski, in his study of the Trobriand Islanders of Melanesia, devoted attention to distinguishing the rules of law from those of custom, and to explaining the reasons for the general adherence to law. Thus:

> "'Civil law', the positive law governing all the phases of tribal life, consists then of a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other, kept in force by a specific mechanism

> of reciprocity and publicity inherent in the structure of their society..." (Malinowski, 1926: 58).

Bohannan, much of whose fieldwork had been among the Tiv of central Nigeria, argued:

> "Law is... 'a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other' *which has been reinstitutionalized within the legal institution so that society can continue to function in an orderly manner on the basis of rules so maintained*" (Bohannan, 1965: 36. Emphasis in the original).

The significance of the views of both Malinowski and Bohannan is that, while they differed in their precise identifications of law, they had no doubt that there existed laws other than those of the modern State. (See also especially: Hoebel, 1954; Gluckman, 1965; Pospisil, 1971.)

1.3. Subsequent Discussion of Legal Pluralism

Once non-state law is recognized, it becomes obvious that deep legal pluralism must be very common.

Sally Moore in an important article which draws on *inter alia* her own research among the Chagga of Tanzania, characterizes the type of field in which non-state laws exist (Moore, 1973). Today, she argues, such fields are autonomous to the extent that they generate and enforce their own laws, such as Chagga customary law. But that autonomy in legal matters is always limited by their subjection to some extent to externally generated laws, such as the law of the Tanzanian State. Thus the subject of research for the legal anthropologist is the semi-autonomous social field. A further theme runs through Moore's discussion. She argues that attempts by the makers of the external law to bring about social change within the semi-autonomous field are likely to be ineffective if their legislation conflicts with the principles of the local law. Here is one instance of the ways in which a recognition of non-state law and legal pluralism may be helpful to the development or evaluation of legal policies.

In addition to her account of the semi-autonomous social field of the Chagga, Moore gives an interesting, even startling example from a Western, industrialized society. She claims that those who work in the garment manufacturing industry of Manhattan, New York, follow a normative order which enables the production demands of the clothing trade to be met, to the economic advantage of all. There are, for example, accepted practices whereby in seasons of peak demand workers work for longer hours and in poorer conditions than are permitted by the New York State labour law, on the understanding that they will be paid at other seasons when they do no work; and whereby

trade union representatives do not insist on the rights of workers under New York law, on the understanding that employers from time to time make gifts to them and their wives. This notion of a newly developed customary law in a modern sector of a developed country opens considerable possibilities for the understanding of law in society and legal pluralism generally, although it may not be immediately relevant to a large aspect of legal pluralism in the Arab world.

Other implicit discussions of legal pluralism by sociologists or anthropologists have been referred to frequently in discussion of the nature of legal pluralism, but need not be discussed for the present purpose. (See especially Pospisil, 1971; Smith, 1974. These are helpfully discussed in relation to the theory of legal pluralism in Griffiths, 1986.) Some further distinct trends need mention.

While the writings mentioned see legal systems primarily as bodies of norms, some give prominence also to disputing processes (e.g. Hoebel, 1954, showing the influence of his mentor and collaborator Llewellyn, a lawyer of the American realist movement, usefully discussed in Twining, 1973a, 1973b; Bohannan, 1965, in which the second "institutionalization" described is through dispute-settlement institutions). Other writers have gone further, and have seen situations of legal pluralism as essentially situations of plural disputing processes. Thus Galanter has examined the existence in the USA of non-state disputing forums (Galanter, 1981; also Galanter, 1985). Other writers have argued that analysis should be directed exclusively to disputing processes, and that it might be preferable to cease talking about "law" and debating the meaning of that concept (e.g. Abel, 1973: 221-225; Roberts, 1979). It suffices to note here that the investigation of state and non-state disputing processes may well be fertile. For the present purpose it may be more helpful to pursue the notion of legal pluralism which sees laws as bodies of norms.

We may now return to the first type of legal pluralism mentioned above, state law pluralism. One sub-type has been the subject of considerable discussion on the part of lawyers. It arises when a state law is composed in part of an elaborated body of norms first developed as state law, and in part of another body of norms which has been developed outside the context of state law and given "recognition" by the state law in question. One example already given is that of the legal systems set up in British colonial territories and continuing today. These contain the common law imported from England, where it had been developed to serve as a form of state law. But they also generally recognize and give effect to the customary and religious laws of the peoples.

Two aspects of this sub-type are of particular importance for the present purpose, and have been the objects of detailed study in the literature. First, state law pluralism entails regulation of the relations between the different laws. This has usually been explicitly provided, because most state laws have been elaborated, are administered by professional specialists, and place stress on the

avoidance of contradictions. The norms of a plural state law which specify the circumstances in which each constituent body of law is to take effect were given the name of the law of "internal conflict of laws" by Antony Allott (1960, 1970). Hooker (1975) has also examined it, as have other writers, most of them lawyers (e.g. Pearl, 1981). Secondly, this sub-type of state law pluralism has been studied to analyse the nature and techniques of "recognition" of one law by another. This will be mentioned again below.

The state law pluralism which arises when state law recognizes a previously non-state law has given rise to discussion in another context. In some countries where immigrant settlers have greatly outnumbered the indigenous populations, in particular Canada, the USA, Australia and New Zealand, there has recently developed a large literature on the recognition by state laws of the customary laws of indigenous minorities. This has been associated with movements of protest by these minorities against discrimination and other mistreatment. There have also been world-wide movements asserting the rights to self-determination which ethnic minorities are said to have by virtue of their minority status, and which indigenous ethnic minorities are said additionally to have by virtue of being indigenous. (A full, if slightly dated introduction to the literature and the arguments is Allott and Woodman (1985).) This literature has not only added to the understanding of the forms and techniques of legal pluralism but has contributed to the ethical arguments for and against the acceptance of legal pluralism.

2. REFINEMENT OF THE CONCEPT

A number of debates over the nature of legal pluralism have arisen from the writings referred to in the last section, and the suggestion that there are two main types of legal pluralism. The more important of these debates are considered in this section.

2.1. Legal Pluralism Within State Law

John Griffiths wrote in the late 1970s and published in 1986 a paper entitled "What is Legal Pluralism?" (Griffiths, 1986). This focuses on the distinction between the two types of legal pluralism set out above, and argues that legal pluralism "in the strong sense" consists only of the second type, called here deep legal pluralism, or that in which state law is one body of law among others. State law pluralism was, he argued, no more than a statement of legal doctrine, not a sociological fact.

Griffiths' definition of legal pluralism is:

> "*that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs*" (Griffiths, 1986: 2).

This may not appear on the face of it to differ significantly from the other definitions which have been noted. Thus Vanderlinden also refers to the existence of more than one legal order (or "legal mechanism") in a social field ("a particular society"). But by "legal orders" Griffiths means complete orders, of which state law is no more than one. Vanderlinden's "legal mechanisms" are more limited in scope, and state law can contain a number.

The difference between these concepts of legal pluralism is not merely a difference between prescriptive definitions. Griffiths claims that subdivisions within state laws are matters of legal ideology, not of social fact, and so irrelevant to sociological investigation. He criticizes Vanderlinden's notion of different mechanisms "applying to identical situations" on the ground that "the concepts of 'difference' and 'sameness' are not empirical..." (Griffiths, 1986: 13). We have seen, for example, that Vanderlinden gives as an instance of legal pluralism the application of different rules to the sale of goods by a merchant and by an ordinary citizen. Griffiths argues that there can be no empirical grounds for determining that these situations are "identical". Thus state law pluralism is merely "a feature of the arrangement of state law". It reflects only the "'categorising concepts' of a particular normative order" (Griffiths, 1986: 13, quoted Fallers, 1969: 20).

It is suggested that this view should be rejected. There would appear to be a practical usefulness in identifying instances where the law of a state classifies situations as identical and provides two different sets of norms to regulate different instances of this class. Although it is legal doctrine which selects particular features of these situations to classify them as identical (and then another feature to subdivide the class), the formulation and operation of legal doctrine are empirically observable and socially significant. When Vanderlinden's definition refers to different mechanisms applying to identical situations, it might perhaps be added that these are situations categorized as identical by the legal order or orders to which the mechanisms belong. Alternatively, a less cumbersome solution is to recognize that the crucial aspect of legal pluralism is the application of two or more legal mechanisms, or bodies of law that apply to the members of a single group of subjects, or population. So, in the example, the population of a state law is generally subject to one body of law, but for certain purposes, including the sale of goods, two or more bodies of norms apply.

It may therefore be argued that the only difference between the two types of legal pluralism is that the different bodies of law in state law pluralism are branches of one larger body of norms, whereas in the case of deep legal pluralism state law and the other law or laws have separate and distinct sources of content and legitimacy.

This carries an implication which broadens the range of instances of legal pluralism. Like state law, a developed body of customary law or a religious law may contain different sets of norms to regulate different sub-categories within one class of situations. The first type of legal pluralism should be regarded not

as state law pluralism alone, but as pluralism internal to any legal order. It is referred to here as *internal legal pluralism*, state law pluralism being a sub-type.[3]

2.2. Non-State Law?

Griffiths identifies and argues powerfully for a controversial central tenet of theories of legal pluralism: that, for the purpose of a social scientific description of law, normative orders unassociated with the state are just as much law as those which are part of the state's system.

This proposition is explained by Griffiths by reference to the contrary concept of *legal centralism*. That is the view that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions" (Griffiths, 1986: 3). That view claims that the state has a monopoly of the legal world: no normative order other than that of the state is truly law.

Griffiths' argument is that empirical observation shows clearly that there exist in many – probably in all – societies normative orders other than those of the state. The claim that the normative order of the state is the only true law is thus an ideological assertion, not a statement of fact. This argument is necessary for the maintenance of the concept of deep legal pluralism, Griffiths' "legal pluralism in the strong sense". It is the basis of a large part of each definition of legal pluralism propounded by the writers referred to earlier, and to the entirety of Griffiths' own definition.

As Griffiths acknowledges, his view on this matter is contrary to that of much current legal theory, which associates the law with the state, and asserts that only one legal system can be effective for one population. Some of the literature of sociology and anthropology adheres to that view. Thus Moore in the paper discussed above examines two non-state normative orders, but prefers to attach the title "law" only to the normative order of the state and its legislation. Griffiths' argument has been directly and vigorously disputed by Brian Tamanaha, who argues that, while various normative orders may exist within a population, only that of the state should be classed as law (Tamanaha, 1993).

A claim that a word such as "law" should be limited to a certain category of social phenomena entails the claim that this category can be distinguished by characteristics which are important for the purposes of the discussants. Perhaps for some discussants in some circumstances this is true of state law.

[3] It is possible to develop a further argument which challenges the notion of well-defined legal orders on which the distinction between two types of legal pluralism is premised. If the legal universe does not consist of relatively extensive, discrete legal orders, but rather of a vast mass of changing, ill-defined bodies of interrelated norms of relatively limited scope, the two types cannot be separated. It is unnecessary to develop this argument here.

When legal professionals engage in work which is concerned exclusively with advocacy or adjudication in state tribunals, they may find it useful to confine "law" to norms observed in these tribunals.[4] But for most subjects of state law there is no significant distinction between this and other normative orders. State law seems not to be distinguishable from other normative orders by virtue of its effectiveness as a form of social control, its institutional enforcement, its degree of doctrinal elaboration, its precision, its unity,[5] self-consistency or inflexibility. State laws, moreover, contrary to some theories, do not in practice have single or hierarchically ordered, non-contradictory sources.

Tamanaha advances another argument. Non-state normative orders, he claims, cannot be distinguished from "other forms of normative order, like moral or political norms, or customs, habits, rules of etiquette, and even table manners..." (Tamanaha, 1993: 193). Therefore, if we do not distinguish the state normative order, as law, from other normative orders, we lose the possibility of distinguishing law from social order in general (also Tamanaha, 1997: Chap. 4, especially 95-96). There are two possible replies. First, it may be possible to show that there are in reality distinctions, either absolute, taxonomic distinctions, or distinctions of degree, between non-state laws and other non-state normative orderings (see Tamanaha, 1997: Chap. 4, especially 101). The second, more conclusive reply is that Tamanaha's argument is irrelevant to the empirical question. That it would be convenient to distinguish between law and social ordering in general has nothing to do with the question whether a distinction exists. If empirical investigation shows that there is no distinction between law and social order in general, it is hardly persuasive to argue that this cannot be true because it is awkward for our scheme of analysis.

2.3. The Field of Legal Pluralism

In analysing a social phenomenon such as legal pluralism, it can be helpful to locate it in a wider frame, or field. Vanderlinden defines legal pluralism as existing "within a particular society". Griffiths defines it as a certain state of affairs "for any social field". There is a marked tendency to see it within the frame of a state, a view which may be appropriate when state law pluralism is under dis-

4 Even with this restriction there may be difficulty. There are strong grounds for holding that, in the adjudication of cases, state courts habitually derive decisive normative principles from orders other than the formal law of the state. This would suggest that the norms of state law are not distinct from those of other normative orders.

5 Much of the discussion of legal centralism has overlooked its claim, indicated in Griffiths' formulation, that state law is internally uniform. It thus not only claims a monopoly of law for the state, but denies the desirability and existence of state law pluralism. The ideals of the rule of law and equality before the law as propounded in the context of legal positivism do indeed seem to be opposed to state law pluralism. This problem raises further issues which are touched upon in Woodman (1989, 1996).

cussion, although in other cases it may be another manifestation of the fallacy that states are somehow eternal, all-important constituents of the legal universe.

For the purpose of a definition which aims to identify the characteristic features of situations of legal pluralism, a different approach is needed. The field *within which* an instance of legal pluralism may be located is not the same as the field of that instance. The field of an instance of legal pluralism is no more than the sum total of human activity which is affected by two or more bodies of laws. That sum total may be a "society" constituted by other factors; it may even be the whole population of a state; but it may be neither. One region alone of a state, or one fraction alone of a society may be subject to two bodies of laws.

In this respect Hooker's definition assists clarity. It merely states that legal pluralism exists when different laws "interact". A minor amendment may be suggested. To describe laws as "interacting" seems to signify that each law is changed in some way as a result of the presence of the other. It is possible in principle that there may be no such interaction in a situation of legal pluralism. The distinctive characteristic of such situations seems to be rather that certain social activities are within the scope of operation of more than one law.

In some more recent writing Vanderlinden (1989, 1993) has noted this, and has repudiated his earlier definition. He argues that legal pluralism should be seen from the viewpoint of the subject of law, the individual. From this perspective legal pluralism is the situation, for a given individual, to which different legal mechanisms are susceptible of application. It may be suggested that it is only in the rarest and most exceptional cases that one, isolated individual will be in the situation of legal pluralism designated by Vanderlinden. For a general definition it may be preferable to take a broad view of social order generally. For this reason it is suggested that legal pluralism may be defined as the situation in which a number of persons, or a population, is subject to more than one body of law.

It has been seen that Vanderlinden's earlier definition specified that the bodies of law (or legal mechanisms, in his terminology) must be applicable to "an identical situation", a qualification which would further reduce the field. Griffiths' objection to this has been noted, and it has been argued that it is answerable. Nevertheless, it seems preferable not to complicate the definition by including this provision. There are likely to be few instances where two bodies of law apply to one population, but apply in two areas of social activity which never coincide. If such instances appear, we may have no interest in studying them. But there seems little to be gained by excluding them from the definition.

2.4. Conclusion

The terms and implications of the proposed definition of legal pluralism have now been explained in outline. A few issues remain.

The terms "law" and "body of law" have been used here to refer to the elements of instances of legal pluralism. Some have referred to these as "legal systems", but most writers have avoided this, so as not impliedly to claim that the bodies of law in question must be highly systematic (e.g. Griffiths, 1986: 12). Similar difficulties can arise from the use of the expression "a legal order". The notion of "a law" or "a body of law" means no more than a number of norms which refer to each other.

This notion of bodies of law enables us to accommodate internal legal pluralism as well as deep legal pluralism. A body of law need not comprise the totality of the norms constituted by a particular source of authority. For example, many state laws contain several distinct sets of marriage laws, derived from different customary and religious laws. Each set may be regarded as a body of law, in the sense that it contains a number of interrelated norms, but is complete in itself. According to the law of the state, each set of norms is constituted part of state law through endorsement by the state authority. But it can still be said that each is a distinct body of law. Thus legal pluralism exists within this state law of marriage.

A body of law regulates the social activity, or some of the social activity, of a group of persons. Whenever the group subject to a particular law contains members who are also subject to another law, a situation of legal pluralism exists. The persons in that situation do not necessarily comprise the totality of those subject to one or the other of the laws. The field of each law may coincide with the other for a part only of its total. Since the term "group" could suggest that the members have some collective identity independently of their subjection to the same laws, the term "population" is proposed.

Any such population may be said to constitute the field of the particular instance of legal pluralism. This usage of the term "field" seems reasonable. But the field of legal pluralism is not the same as the semi-autonomous social field. The latter, as we have seen, is the "society" or field in which a particular law operates. The function of the term "field" as Moore uses it is to focus attention on one particular body of law. The function of the term in the proposed definition of legal pluralism is to focus attention on the situation in which a number of people are subject to two or more laws.

3. VARIETIES OF LEGAL PLURALISM

The idea of legal pluralism has the potential to enhance legal understanding by enabling us to see more clearly certain situations, and to clarify the possibilities open to lawmakers who seek to redesign the legal environment in certain ways, such as by reforming state law so that it recognizes another body of law. Some indication of the ways in which this potential may be realized can be seen by noticing some varieties of the phenomenon.

3.1. Types of Law in Situations of Legal Pluralism: Legislation, Customary Law, Religious Law

The distinction between state and non-state law has already been discussed. Here we consider another typology. Each constituent element of a situation of legal pluralism is one of three types, or a combination of two or all of them.

Legislation becomes law at a moment in time as a consequence of the completion of a certain institutional procedure. The conditions required for its making are often provided for in the constitution of a modern state, and this type of law is commonly a form of state law. It is usually in writing at the moment of its making. However, legislation can be made in non-state law, and it may be proclaimed orally. The extent of popular participation in legislative procedures varies widely.

Customary law is created by a consensus within a community, reached over a period of time in a relatively informal manner. It is not normally written, although some customary laws have been recorded in writing. It is given an apparently insignificant role in modern state laws. However, it may be argued that the customary laws of legal professions and of society at large have a considerable effect in determining the manner of functioning of state laws. It should not be assumed that the norms of a customary law are closer than those of legislation to the desires of the bulk of the population. The process of formulating customary law may be controlled by a minority interest group within a society, and that group may be subject to an external domination (Chanock, 1985).

Precedent as known in common law systems of state law appears to be a combination of legislation and customary law. It is not necessary to investigate it here.

Religious law is clearly of importance in the Arab world. It has received relatively little discussion in the socio-legal literature. (An illuminating discussion of the treatment of Islamic law in socio-legal literature relating to Indonesia is K. and F. von Benda-Beckmann, 1993.) It is usually discussed from the perspective of the believer. From this viewpoint, it gains its authority from its divine origin. From this viewpoint it may be questioned whether it can be an element of situations of legal pluralism, for that requires it to be classed as one species law among others. Because of its divine origin, it does not, unlike other types of law, owe its existence to the fact that it is observed.

The perspective of the believer is, however, of a different type from that which has been adopted for most discussion of the idea of legal pluralism. The social scientific perspective seeks to understand laws as empirically observable phenomena. The adoption of this perspective for a particular purpose is not incompatible with religious belief, which may provide guidance for other purposes. The social science perspective does not encompass questions about the validity of faith. It is not claimed that the social science perspective is superior to any other, but that it may perhaps be fruitful for the present purpose.

From this perspective a law, whether identified with a religion or not, exists if it in fact receives social observance. "Observance" of norms is more than the performance of the conduct which the norms specify; it is the performance of this conduct because the norms specify it. This perspective then requires observation of the state of mind of the subjects of a law. Religious law differs from the other types of law in that its observance is typically accompanied by the conviction of the subjects that they have a religious obligation to act in this way. The motive for the observance of legislation, in contrast, is concerned with the legitimacy of the human lawmaker, while that for customary law is conditional on an acceptance of the norms within at least a significant portion of the population. However, from the social science perspective, the fact of observance provides a common factor which allows for informative discussion of legal pluralism.

3.2. Relations Between the Constituent Laws in Situations of Legal Pluralism

The different situations in which members of a population may find themselves through their observance of more than one law may be classified according to the relations between the bodies of legal norms constituting the situation.[6]

Agglomeration is the type of legal pluralism in which there are no ordered relations between the constituent laws. When two bodies of legal norms refer to the same specific situations, some consistency in their mutual relations, even if only consistency of mutual contradiction, is almost certain to exist. Agglomeration is likely to exist only where the laws relate to separate fields of activity. It is, for example, possible for a population to observe both a customary law governing a sport and a different customary law governing a particular profession, while no fact situations are subject to both.

The constituent laws of situations of agglomeration are unlikely to include the entirety of a state law. The law of the modern state, following the legal centralist ideology, usually claims the authority to regulate every aspect of social life. If however the law of a State contains a number of bodies of law, each consisting of closely interrelated norms, but having no relationship to the other bodies of law except derivation from the same, state lawmaking order, then that state law pluralism is a case of agglomeration. Such will be the case if, for example, the state regulates a sport, and also, quite separately, a profession some of whose members engage in that sport.

6 Vanderlinden (1972) provided a classification of types of legal pluralism. No attempt is made to improve on that here. The object is merely to elaborate the definition of legal pluralism which has been given.

There is a tendency, visible in many bodies of law, for the field of jurisdiction claimed for a law to expand. The laws of a sport and a profession may, for example, both begin to concern themselves with larger fields of activity. It may come to be believed that the manner in which an individual carries on a sport may reflect upon the reputation of the profession to which he or she belongs, and *vice versa*. Thus situations of agglomeration tend to give way to other varieties of legal pluralism.

The relation of *conflict* exists when the laws in a situation of legal pluralism contain norms which impose mutually contradictory requirements upon the population. For example, one law may require its subjects to engage in certain ceremonies or formalities on particular occasions, while the other law requires its subjects, some of whom observe both laws, not to participate in such ceremonies. Or one of such laws may give to a specified formality a certain legal effect (such as the creation of a marriage, or a disposition of property), while the other specifies a different formality as necessary to produce the same effect.[7] This state of affairs may seem unstable. But it can continue for a long time if particular situations of conflict do not arise frequently or are avoided, or the population chooses not to eliminate the conflict, or is unable to do so, or if the powers of the effective normmakers of both bodies of law are evenly balanced, so that neither can be induced to reduce the claims of their law or to change it.

By *integration* the inconvenience and possible injustices of conflict are avoided. In this form of legal pluralism the norms of each body of law are so designed that, while they impose different requirements on the population, these requirements are not incompatible. For example, one body of law may require certain ceremonies to be conducted on specified occasions, whereas the other body of law may neither forbid nor require this. Although there is a difference in that one law requires conduct which the other declares to be optional, there is no conflict in the sense that it is impossible for subjects of the laws to comply with both. Similarly there is integration of two laws' provisions for formalities if each accepts that the formality prescribed by the other also creates, for example, a valid marriage, or effects a disposition of property. Another possibility of integration is for the two laws to have their own, distinct bodies of marriage law, or property rights, and for each to recognize that of the other. Thus it may be provided that a subject may enter either of two forms of marital status, each created by its own ceremony and each carrying its own body of normative regulation.

However, in this case, if the status is, like marriage, of farreaching importance in an individual's legal relations, it is almost certain that for some pur-

7 Some of the possibilities of conflict have been more fully analysed in Morse and Woodman, 1988.

poses it will be deemed necessary for one law to accept the norms of the other. For example, where one marriage law allows polygamy and the other enjoins monogamy a question will inevitably arise whether a person may contract a polygamous marriage during the subsistence of a monogamous marriage, or *vice versa.* Integration entails that, whatever answer is given to this case, each body of law should give the same answer.

3.3. The Termination of Legal Pluralism

Separation occurs when distinct populations emerge, each observing one only of the laws which were constituent elements of a situation of legal pluralism, whether of agglomeration, conflict or integration. This occurs if, for example, an ethnic group which has observed its own customary laws as well as the laws of a dominant state with a larger population, gains self-determination and becomes an independent state. If the process is gradual, it passes through phases in which one or both bodies of law apply to progressively wider varieties of activity, engaged in by progressively smaller populations. The norms providing for integration become progressively more general and simpler, tending merely to distinguish between the two populations which are subject to the respective bodies of law.

Unification terminates legal pluralism in the opposite way, by a merger of the different bodies of law. In this process one may be extinguished. Alternatively, selected portions of each law are eliminated. Partial unification, in which portions of a situation of legal pluralism are terminated, is a common objective of law reform.

3.4. Recognition of One Law by Another

Recognition of one law by another means nothing more than that the recognizing law makes some reference to the existence of the other law. This may amount to no more than an adjustment of the scope of the recognizing law to take account of the fact of observance of another. Thus agglomeration may include this form of recognition. More important forms of recognition are those in which one body of law includes provisions requiring its own institutions to give effect to the norms of another law (normative recognition), or incorporating the institutions of another law within its own institutional structure (institutional recognition).

Recognition frequently arises through the reception of laws. It has been seen that reception of a law may result in internal legal pluralism, as when a state law adopts as parts of its corpus both the indigenous law and the received law. Reception may result in deep legal pluralism, since the indigenous and received laws may obtain observance through different sources of authority effective in different populations. In that case it is possible that neither law may recognize

the other, although it is possible for them to do so. Reception may also produce a combination of internal and deep legal pluralism. This has happened, for example, in African territories colonized by the British. There, when the colonial state was established, its courts were required to apply both received English law and "native laws and customs", or indigenous customary laws. Thus the state legal system was internally pluralist. But a distinction then developed between the normative order applied in the state courts under the name of native law and custom (lawyers' customary law), and the customary laws which continued to be observed in practice outside the courts (sociologists' customary law). The relationship between the state law and sociologists' customary law was a situation of deep legal pluralism (Woodman, 1969, 1985).

Normative and institutional recognition most frequently occur in situations of internal legal pluralism involving integration of the constituent laws. For example, a state law may be developed to make provision for all aspects of social life, and its lawmakers may then resolve to receive a body of customary, state or religious law already developed within another population. The receiving state lawmakers may then effect normative recognition by providing that the institutions of the state are to apply the norms of the received law in certain classes of cases, while continuing to apply the previous norms in other cases. Alternatively, institutional recognition may occur, the receiving state providing for the setting up of institutions of a type that exist in the received law in its place of origin, and excluding certain matters, which are deemed appropriate for those institutions, from the operation of its existing institutions.[8]

A study of past instances of recognition can provide a practical guide for the planning of new instances by revealing various options in the process. These include the creation of either internal or deep legal pluralism, and the possibilities of agglomeration, conflict (which is unlikely to be desired) and integration of laws. Examples of all of these are examined in the literature of legal pluralism.[9]

8 A well-known case of institutional recognition in colonial history is the British policy of "indirect rule". Under this the colonial power sought to govern through traditional customary authorities and their institutions.

9 In addition to the publications listed here, a good deal of helpful writing has emanated from two institutions: the Commission on Folk Law and Legal Pluralism has sponsored congresses and publications, including for example Allott and Woodman, 1985. The Journal of Legal Pluralism publishes papers on the entire range of issues related to the idea of legal pluralism.

CHAPTER 2
Norms, Law and Practices
The Practical Obstacles That Make It Impossible to Separate Them

JEAN-NOËL FERRIÉ
CEDEJ, CAIRO

INTRODUCTION

My purpose in this paper is to present an ordered, and I hope simplified, conception of normative pluralism, founded on the non-opposability of norms, law and practices. I shall attempt to show that norms, laws and practices are in fact nothing more than different points in the same process. I shall explain in detail why it is impossible to consider a practice as anything else but behaviour stemming from a reference to other norms also considered valid. I shall contend that it is impossible to establish law as a finite group of individual norms endowed with a special epistemic status and I shall strive to demonstrate that legal norms possess formal properties which can only function and be understood as part of a system of changes forging the public sphere. There is no place in this conception for legal pluralism which defines pluralism as the contiguity of different and separate legal orders. My contention is that the opposite is true: there is only one monist legal order, and pluralism is the attribute of normative systems only. Thus, in spite of Geertz's view (1986), I consider law to be a little less and a little more than a cultural system or a shared reference.

I shall explain my view – attempting to do so as clearly as possible, although perhaps not as exhaustively as I would have liked – by discussing Simona Cerutti's fascinating and stimulating article (1996) on the opposition of norms and practices.

1. THE OPPOSITION OF NORMS AND PRACTICES

It is generally accepted that norms can be opposed to practices in the same way as practices can be opposed to discourses. According to this view, not only do actors not necessarily do what they say or say what they do, but they do not necessarily do what they believe or believe in what they do. The theory of com-

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 21-27
© 1999 *Kluwer Law International. Printed in the Netherlands.*

pulsive action (or *akrasie*, weakness of the will) contends that one can believe that an action is good and desirable and yet act against one's own better judgment by opting for (or allowing oneself to be forced to adopt) another course of action.[1] Traditional theory on the subject of marginality also considers marginal forms of behaviour as practices opposed to, or, at best, external to, norms.[2] Common ethics refer to the enunciation of principles while freely pursuing one's own interests and passions under a gentlemanly facade as "*tartufferie*", or hypocrisy. Sade's libertines, particularly those of the *Histoire de Justine*, are perfect examples of the separation of public virtue and private vice. But whereas Molière's Tartuffe presents only one discourse (that of virtue) and we glimpse his practices through the chinks in his fine words, Sade's libertines use a discourse which corresponds to their practices amongst themselves in private or for the edification of their victims. In other words, they affirm that interests and passions, however shameful, are underpinned by a justificatory discourse founded on norms which are (also) intangible, transcending individual action. Thus the Sadian interpretation of norms and practices proves to be perfectly normative and, in its own way, moralistic, assuming as it does that practices contradicting public norms are in fact based on norms which, although they may not seek publicity, nonetheless aspire to universality.

This profoundly modifies the perception of the opposition of practices and norms. In this new light, practices are not linked to the norms they supposedly contradict, but refer to other norms, to which they conform. From an ontological point of view the latter are similar to the norms the practices contradict, but the modalities of their existence are very different.[3] Thus, behind the apparent fragmentation of individual practices we find normative plurality, an adversary – "to use Thévenot's terminology" – both of the community-based conception according to which the norms serving as reference points for action are part of one (single) shared culture and the liberal conception according to which references are strictly and solely a matter for the individual (*cf.* Thévenot, 1992). Practice is always the consequence of adjustment to norms – the norms that inspire it and the norms that shape the social sphere in which it occurs. The actors who do not necessarily do what they say must be doing what they think, and those who act against their own better judgment are adjusting to a structure of preference rather than surrendering to their passions. As for those who do not respect the currently valid public norms regarding virtue and vice, they are still conforming to other norms. In a way, the opposition of norms and

1 This classic question in the philosophy of action – posed by Aristotle in his Ethics – was put into a new light by Davidson (1980), who pointed out that the weakness of the will can be interpreted in terms of structures of preference, as option A in absolute terms is different from option A in a given context. Jon Elster (1986) also addresses this issue in terms of choices.

2 A presentation and what I feel to be the definitive critique of this theory can be found in Becker (1985).

3 I deal with this issue in Ferrié (1995).

practices is an "error of focus" dissimulating (consciously or unconsciously) the normative origin of all practices.

2. SIMONA CERUTTI'S POSITION

Simona Cerutti's position differs considerably from the one I have just presented, as well as from classical conceptions. Her idea is that we need to "analyse the legal spaces which are created through practice" (Cerutti, 1996: 134). By examining the operation of "summary justice" in Turin in the seventeenth and eighteenth centuries, she shows how, in the sphere of law, it is possible for norms to be constructed on the basis of factual judgments. But let us start by examining the nature of "summary justice" in Turin.

Summary justice is not iniquitous but equitable. When dealing with commercial disputes, it accords non-Turinese the same rights as Turinese or, to be more precise, it submits the Turinese – otherwise privileged subjects of the law – to the same procedure as foreigners. What it does is exclude all the parties that are not essential to the judgment (lawyers and public prosecutors alike), all paperwork apart from the text of the sentence, and all precedents and testimony unrelated to the establishment of the facts. This last point is probably the most important, as Simona Cerutti underlines, because it excludes testimony about the integrity of the parties. This type of evidence could only really benefit Turinese parties. They could easily bring along relatives, neighbours or colleagues, whereas circumstances made this impossible for foreigners. Thus the means of proof admitted – oathes, documents including accounts, registers and testimony bearing on the facts – were not overdetermined (or underdetermined) by the social status of one of the parties.

The judgment was supposed to be formed on the basis of "factual truth" and the "nature of things". Simona Cerutti establishes the genealogy of these two expressions, showing they are not vague or redundant formulae, but refer to a legal epistemology founded on induction, i.e. where the facts of the case were evaluated not according to pre-established legal categories but according to existing practices in the milieu in which the facts had occurred and opinions expressed with regard to those practices. Thus, in the example of a dispute between a mule driver and a merchant, the witnesses' role would be to give their views on the "intrinsic" nature of the relationship between the two and the rights and duties required in this type of contract (Cerutti, 1996: 146). In other words, summary justice did not attempt to categorize the facts according the legal provisions, but edicted the law on the basis of a contextual categorization of the facts. Or, to be more precise, rather than edicting the law (rule or regulation), in absolute terms, it decreed what was just, or fair, on the basis of the categorization used by the actors involved in the conflict. The witnesses' role was not to attest the moral rectitude of the parties, or even simply to establish the facts, as was the case under the normal procedure, but to categorize the facts (Cerutti, 1996: 146-147).

For us, this conception of justice goes against the grain because the idea that the same categories should apply in all cases, irrespective of context, and that these categories should arise not from the knowledge of "locally" competent experts (the "witnesses" in the summary justice system) but from the impersonal will of the "legislator" is more or less embedded in our common sense. Simona Cerutti rightly observes that the division between the universe of norms and the universe of practices resulting from the latter assumption is "the result of a battle for legitimation" by a group of legal professionals (Cerutti, 1996: 147-148). The same group was responsible for formulating the narrow, monist conception of the legal order according to which that order is its own sole normative reference and "expertise" or "competence" reside not in knowledge of the practices incorporated in the facts under consideration, but in the command of a language of categorization extrinsic to the practices. The relationship here is quite clearly one of authority, because the categories used to perceive and to classify the practices are imposed from above. To impose the norm is to appropriate power (and *vice versa*).[4] As for the opposition of norms and practices, it is in no way natural or necessary, but is the consequence of a precise historical development, the result of a battle for legitimation with its winners and losers.

3. THE DIFFICULTY OF SPEAKING OF PRACTICES

Simona Cerutti's point of view is stimulating because it clearly historicizes something I feel jurists have a tendency to take for granted, that is to say the imperial status of law when it comes to defining appropriate means of arriving at factual judgments. However, I also feel that by continuing to see norms and practices in opposition to each other she reproduces that same juridical mode of thought. What Simona Cerutti does is simply to invert the terms and show that "law" can be built upon practice.

It is my belief that we ought to be more radical, and rigorously avoid a type of description that confuses the apodictic recognition of a norm with the transformation of a practice into a norm. Let me explain what I mean. By allowing the "norms-practices" sequence to subsist, we forego the opportunity to observe the origin of practices, or, to be more precise, the normative origin of practices. We admit the said practices to reasoned acts, meaningful in a local context, perhaps even incorporated into normal social relations and regulated, if not codified, but we do not consider that they can be described as relating to "points of reference claiming general validity".[5] Such an approach appears to

4 On this issue, *cf.* Dupret and Ferrié (1997b).

5 Wording borrowed from Laurent Thévenot (1992: 1282-1283): "repères prétendant à une validité générale".

take it for granted (or to imply) that the sphere of the norm and the sphere of law coincide, and that it is only permissible to speak of a norm within the sphere of law. (Incidentally, it is worth noting that "legal pluralism" theories make the same mistake when they assume that to obtain proper recognition of the plurality of the normative references influencing action, it is necessary for those references to be accorded a legal status.) In fact it is (or it ought to be) self-evident that normative reference points exist outside of law and that practices are linked to "orders of justification", as is demonstrated by Boltanski and Thévenot in their work on justification (1991). In other words, an action is never purely an action, awaiting external assessment, but is linked to the conception of justice and, more generally speaking, to the nature of the world in which it occurs, i.e. to a general mode of evaluation impossible to subsume in individual rules or technical know-how (Thévenot, 1992: 1287).

Let us now return briefly to the dispute between the mule driver and the merchant – which I am not acquainted with in detail and shall therefore interpret very broadly, as an illustration. To decide between them, one needs more than the knowledge of a single rule (such as what a mule driver has to do and what a merchant's obligations are). The case requires one to draw on conceptions of mutual obligation (or contract), trust, responsibility to determine where the fault lies, fault itself, redress (i.e. the idea that someone who has suffered a loss as the result of another's action ought to be compensated), etc. If they are to be operable, these conceptions have to be shared, and if they are to be shared, they cannot be solely linked to the context of the conflict. Local actions cannot simply be seen as local idioms. In reality they are embedded in general evaluation systems encompassing a huge range of activities, each of which occuring in different places. Thus, to use the terms employed by Boltanski and Thévenot, the dispute between the mule driver and the merchant would very probably take place in the "world of commerce" (*monde marchand*) rather than in the tiny world of the merchants and mule drivers of Turin (1991: 241-252). What differentiates evaluation systems is not a variation in their degree of reference to general or metaphysical principles but their area of relevance, since general principles whose application is perfectly just in one situation can create injustice in others (Turin, 1991: 28; also, *cf.* Walzer, 1983, and Elster, 1992). It would be easy to find any number of examples. I think that it has now been established that just as the rule, according to Taylor (1992), is set against the backcloth of a socially-constructed cognitive framework (without which it would have no meaning), the practice is set against the backcloth of a configuration of points of reference claiming general validity, i.e. norms. Thus what occurs during conflicts (i.e. the need to explain the justification of practices which have been challenged) is simply a consequence of the fact that people do not act in a particular way (especially in the public sphere) without having the feeling that they have the "right" to do so, which means that what they do relate, if only "by means of a word", to points of reference claiming general validity (Boltanski and Thévenot, 1991: 48).

In other words, a "practice" does not turn into a norm – practices are already part of the normative order, and norms only exist as much as they are taken up in practices. I shall not dwell on this elementary fact of the anthropology of the norm[6] (which is fundamental and therefore always treated with a degree of reticence, at least as far as its implications are concerned). Some of these implications do enter the legal sphere – to use the expression employed by Simona Cerutti – but this does not imply any ontological change. Their normative content is only recognized apodictically, i.e. ratified by the system of authority which the law represents.

4. NORMATIVE PLURALITY AND LEGAL MONISM

First, a brief recapitulation. In discussing Simona Cerutti's position, I contended that the normative sphere was not confined to law, or in other words that law did not have a monopoly of normativity (1). Normativity is linked to the plurality of the universes (or worlds) in which action occurs and is therefore also plural in nature (2), as has been established by Boltanski and Thévenot.[7] Thus the phenomenon of normative plurality is external to law, and its incorporation into the legal sphere via a notion like "legal pluralism" can only be obtained by sleight of hand and disregard for the nature of the backcloth against which practices are set (3). However, this does not mean that questions about types of interaction between normative plurality and the legal order are unjustified. In fact, Simona Cerutti's article encourages us to ask them, emphasizing as it does that jurisprudence (but I think it is admissible to broaden the statement and to say law) is "a form of power founded on a principle of authority", (Cerutti, 1996: 145).

I would now like to suggest that we ought probably to examine "law" less as a content (i.e. a set of specific reference points aspiring to general validity) and more as a form (i.e. a mode of structuring and imposing contents which, in themselves, have no force or unity).[8] This would mean considering it not as a metaphysics of general principles, and even less as a science of normative phenomena (which is how many jurists have portrayed it), but as something humbler, though more effective, that is to say as a mode of officializing norms.[9] Seen in this light, the legal order could never be anything else but monist. The link between the normative systems in their plurality and the legal system could then be described as an operation of codification, releasing the norm from the

6 There is no shortage of literature on this question, starting with Malinowski (1926). Also *cf.* Becker (1985).

7 *Cf.* the very instructive report by Dodier (1991).

8 It is useful, in this connection, to look at the analyses of P. Bourdieu (1986b, 1987).

9 Bourdieu, P., "La codification", Art. cit., p. 101.

"indecision" to which plurality condemns it and raising it to the status of an "obligation",[10] The analysis of law (or, to be more specific, the imposition of norms) in terms of power and authority enables one to account for both of the plurality of normative references and the dominance of one particular order. It also makes it possible to account for the "combat for law", which would be difficult to explain if the situation were really one of legal pluralism. The only (tacit) explanation for the combat for law and, in a far broader sense, "political uses of law",[11] lies in law's recognized capacity to impose an obligation. After all, in the final analysis, what one tries to do through law (as a mode of officializing norms) is to impose one's views on others. It is therefore hardly suprising that "summary justice" was eventually marginalized and that the doctrine of "the nature of things" suffered the same sorry fate. They were not sources of power. Thus the move away from normative plurality and towards legal monism is not a legal phenomenon but a political action – avowedly political in the case of those who campaign to get into power in order to change the law, and unavowedly so in the case of those who attempt or use law to acquire a position of power (even though some of these may genuinely not regard it as such).

10 This is the "formalization effect" observed by Bourdieu (1986b: 101).
11 Bernard Botiveau's expression (Botiveau, Cesari, al-Ahnaf, 1994).

CHAPTER 3
Legal Pluralism, Normative Plurality, and the Arab World

BAUDOUIN DUPRET
CNRS/CEDEJ

INTRODUCTION

In this introduction I would like first of all to suggest that many of the theoretical problems associated with legal pluralism are actually terminological in origin or, to be more precise, stem from the desire to give legal and/or political concepts (such as law, tradition, the state, etc.) a socio-anthropological dimension. It is for this reason that I shall begin by indicating the analytical advantages of a sociology of normative plurality. I shall then attempt to demonstrate that the study of the normative phenomenon in the Arab world has hitherto been hindered by two types of obstacle, and that the need for a move towards an anthropology of the actors of the norm, fully respecting the plurality of the latter, is even greater here than elsewhere.

1. ADJUSTING THE ANGLE OF ANALYSIS

Griffiths, in his founding article (1986), explicitly identified the ideology that the theory of legal pluralism set out to challenge. It was the ideology of legal centralism. He considered the latter as an emanation of the moral and political pretensions of the modern Nation state which complicated any attempt at understanding the phenomenon of law. Thus, from the very beginning, the new approach – which saw itself as resolutely non-exclusive rather than deconstructionist – took issue with state law. While the state portrays itself as sole lawmaker, legal pluralism highlights the multitude of partially autonomous and self-regulating social fields also producing legal rules. In a later article (1995), Griffiths implied that the state itself was nothing more than an aggregate of social fields. His later works intimate, if only peripherally, the transition which I myself would like to advocate. I feel that there is a strong case for mov-

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 29-40
© 1999 *Kluwer Law International. Printed in the Netherlands.*

ing away from the present dichotomization of the analysis of the phenomenon of law between state law and legal pluralism, and adjusting our angle of analysis so as to divest the state and its lawmaking activities of any analytical value.

I acknowledge the merit of Tamanaha's article (1993) in revealing a weakness in the reasoning of the proponents of legal pluralism (the desire to seek law outside the context of the state, while using state law to define the criteria of law in general). It seems obvious to me that defining a phenomenon on the basis of the categories it establishes is a vicious circle, and that using the same categories to assess the nature of presumedly related phenomena is even worse. If a relationship does exist, it will certainly not be found in those categories, since they have been created by the actors in the arena (of state law in this case) for the sole purpose of guaranteeing the internal coherence of the performance in which they are involved (that of state law).

Does this mean that Tamanaha is justified in stating that, "lived norms are qualitatively different from norms recognized and applied by legal institutions because the latter involves 'positivizing' the norms, that is, the norms become 'legal' norms when they are recognized as such by legal actors" (1993: 208)? It seems obvious to me that this is where the relevance and the import of his critique of legal pluralism ends. By attempting to recreate a tight link between law and the state, Tamanaha does not solve the problem he raises, but only displaces it. By denying the status of law to phenomena unconnected with the state and upholding a strict definition of law distinguishing it from all other modes of social control, he simply confronts himself with a question that a hundred years of legal sociology and anthropology have been unable to settle – the question of the boundaries of juridicity.

I would argue that this question is insoluble because it is devoid of sociological relevance. The argument that law is the domain of jurists and that the study of law is therefore the study of what asserts itself as such and other directly comparable elements is a circular argument. It is surely more fruitful to adopt an externalist attitude, or, as Ost and Van de Kerchove (1991) have put it, to move from the stage up into the balcony. The latter type of approach, which considers itself detached from law, leads to a realization of the elusive character of law and a refusal to acknowledge a uniqueness (Assier-Andrieu, 1987) evidenced only by its self-affirmation. This in no way precludes an anthropology of self-proclaimed law and its institutions, but relegates them to the position of one subject and one *locus* in a more wide-ranging anthropology of the normative sphere (Dupret, 1996b).

From an epistemological standpoint, this problem of definition (be it of the law or of the state), is fundamental. The real danger of speaking of "law" when dealing with all forms of norms is not so much that of equating them with something supposedly totally different (state law) but more that of creating confusion and ambiguity, or, worse still, artificially restricting their study by

focusing on the categories of state law. On the other hand, to say that "law" can only refer to state law is to fail to understand the conceptual difficulties involved in the notion of state. It is to confine and contain where empirical observation reveals fluid mechanisms and, of course, it is to take a product of political theory for a social object. And what is to be done with the rather woolly categories of arbitration, international law, the common sense of law (even state law) and the legal assessment of common sense? Are we to deny any legal relevance to what individuals believe to be law? (Vanderlinden 1993: 575).

From a more general standpoint, these issues of definition raise the question of the ascription of models to which the social sphere is required to conform. Once again we find ourselves confronted with the conflict between macro-sociological and micro-sociological analysis, between an evolutional image of the processes, which are presented as being determined mainly by macro-social, extra-individual factors (the macro-sociological analysis) and an open-ended, perpetually shifting image determined by interactional micro-social mechanisms (Gribaudi, 1996: 113). It is expedient, however, to distinguish between form and content, and to avoid clinging to any formal definition to encapsulate the infinite variety of human action and interaction. The aim of the analysis must not be to "individualize typical forms of behaviour to illustrate norms or models", but, on the contrary, to "discover mechanisms which make it possible to account for the variation and the differentiation of types of behaviour" (Gribaudi, *1996*: 123).

I therefore suggest that in our attempt to analyze the phenomenon of norms we should move resolutely away from legal categories and towards social categories, and that we should do this both at a conceptual level and at a methodological level. This is a shift from the law to the norm, with all that such a move implies in terms of assimilation with social constraints. I am therefore advocating the firm acceptance of what Tamanaha reviles. Law must be stripped of its conceptual status and returned to the fold of general normativity, so that there is no longer any *ex post facto* distinction between it and other types of norms such as moral injunctions, political rules, traditions, habits, etiquette and even table manners (Tamanaha, 1993: 193).

Perhaps we would be well inspired to consider Malinowski's view – not his idea of sanctions but the broadness of his conception, so broad in fact that it is virtually indistinguishable from a study of the obligatory character of all social relations (Moore, 1978: 220). This will not prevent us, at a later stage, considering how a process of codification can result in the mutation of norms (Bourdieu, 1986a) or how a complex of norms can acquire a more integrated and institutionalized form. I would therefore be tempted to invert Woodman's proposal (1998) that it should be "accepted that all social control is part of the subject-matter of legal pluralism". I believe it should be accepted that the category of "law" – whether it be state law, traditional law, folk law, informal law or anything else – is devoid of sociological value and can only be conceived of and

apprehended (in its self-proclaimed form) outside of the category of norms or (in its infra-, supra-, para-, or non-state forms) in terms of something we need to detach ourselves from.

A first step in the direction of a shift towards the consideration of "norms" has already been taken by Carol Greenhouse. This author believes that when individuals are confronted with an object, they are induced, by their interaction, to label, typify and qualify it, and that each new confrontation causes an adjustment of existing categorization and classification patterns. Thus knowledge of an object proceeds from principles peculiar to the social structures within which the interaction occurs. These principles are not so much prescriptive rules of behaviour as forms of knowledge (Greenhouse, 1982: 68). Norms can therefore be perceived as "assumptions" (Kapferer, 1976), "meanings" (Cohen and Comaroff, 1976) or as "instruments of evaluation" (Paine, 1976: 65; *cf.* Greenhouse, 1982: 68). They become models for reconstructing reality, imbedded in regularization and situational adjustment processes attached with a high indeterminacy factor (Moore, 1978: 39). The function of norms is therefore to freeze in their frame and so to preserve them from indeterminacy, and yet they fail to accomplish this completely (Moore, 1978: 41). This means that in any discourse which has recourse to them, norms become a rationalizing rather than a motivating force – their role is that of justification. Consequently, the study of norms has more to do with the analysis of a stock of arguments than with the analysis of a structure of motivation (Bailey, 1973: 326, quoted by Greenhouse, 1982: 61). This is what, in Greenhouse's terms, distinguishes norms from rules. While rules prescribe or proscribe particular acts or groups of acts, norms classify acts by categorizing them as normal or abnormal.

The only personal addition I would like to make to this theoretical explanation is a proposition relating to language, which I would make for convenience's sake. I feel that the term "norm" is of a generic nature, encompassing normality and normativity, justification and prescription. "Norm" means both, "the abstract formulation of what ought to be", and "the usual condition, encountered in most cases" (definitions from Le Robert dictionary, quoted by Lochak, 1993: 393). Perhaps it would therefore be expedient to go on using the single concept of the "norm" but to make a distinction between justificatory and prescriptive norms. That ought to enable us to observe the interplay between these two aspects of the norm. The actors in the legal sphere, i.e. the professionals of the self-proclaimed legal system, often tend to "conventionalize" what they consider to be normal and wish to have accepted as legal (and *vice versa*) or, in other words, to make justificatory normativity and prescriptive normativity coincide.

It is obvious that this approach implies the inversion of logical and demonstrational constructions. In the words of Gribaudi, "social forms and social behaviour are directly engendered by the dynamics of interaction between

individuals" (Gribaudi, 1996: 122). We therefore need to examine the ways in which individuals apprehend their environment and act within it with the impression of conforming to a norm. Two questions arise here – firstly, what is the advantage of starting with the actors, and secondly, what norms do they feel they are complying with?

Starting with the actors must be viewed in instrumental terms, for the actors are the seat of the quintessentially human activity of apprehending, interpreting and constructing "reality". As Gribaudi remarks on reading Levi (1989), this activity is once individual and social. "It is individual because it is marked by the limited and particular perception of each social actor. It is social because it is developed through interaction and negotiation with an entourage stretching from the next of kin to the image of the sovereign, encompassing the whole range of (symbolic and economic) resources and other actors the individual encounters along the way" (Gribaudi, 1996: 123). The individual is not valued for his or her own sake (as an individual), but as part of an interactive mechanism continuous with its human and social environment. The goal is not to construct a typical or ideal profile to illustrate an analytical model, but to expose the mechanisms of differentiation. This leads us to the idea that, "variation is the norm for a series of behaviours", that are described and classified in a zone of (dis)continuities, and that the contents have to be individualized "beyond the formal level of the phenomena" (Gribaudi, 1996: 123).

I do not consider the norm to constitute "solid ground" or to be a bedrock commanding our acceptance without our being able to hope to understand it. I see it more as what Taylor (1995) calls, "a backcloth of understanding". The fact that we have mental representations of things does not necessarily mean that we explicitly explain them to ourselves. Comprehension precedes representation in as much as the way in which we imagine things is conditioned by our understanding of them, and this affects not only patterns of justification but also patterns of action, based on a sense of what is right and what is just. A norm does not exist independently and is not complied with simply because it is there. A norm exists as an incorporation (internalization) of an understanding which is felt to be in harmony with others. This means that the existence of a norm is not determined by its formalization, any more than the form of a territory is determined by the map that represents it. Norms exist as collections of practices forming a background or backcloth. They can be, but are not necessarily, objects of mental representation. On the basis of their consistency, we internalize them in such a way as to reproduce them without feeling the need to explain this to ourselves otherwise than as the act of conforming. Practice first determines the norm, and it is only then that the norm can determine practice. Of course, as Bourdieu (1986a) points out, codification objectivizes, publicizes and formalizes. But this in itself cannot justify its reification. The strength of a norm increases with formalization, but this can only occur if the social conditions required for the norm's effectiveness are in place, and these

depend on the practices of the actors. In saying that norms originate in practice, we should remember that we are doing no more than to espouse an idea broached long ago by Malinowski (1926), and more recently by authors such as Roberts and Comaroff (1981), Moore (1971), Gribaudi (1996) and Cerutti (1995).

We have to acknowledge that actors generally claim to act on the basis of existing norms. But in what capacity do those norms exist? They serve first and foremost as resources available to actors in a primarily rhetorical context – they are elements of what I would call rhetorical repertoires. The fact of their being available resources does not in any way imply that norms precede practice. Quite simply, in this case, norms are traces of the formalization of past practices. To paraphrase Bernard Le petit (1995), they owe their existence to past practices, but can be endued with different practices. This implies that in addition to owing their existence to practice, norms have no real substance outside of the use people make of them, either explicitly or implicitly. A norm is an empty shell until it is used as an argumentative resource in a process of communication, whereby it acquires the meaning resulting from this interaction.

Having said this, it is not because a norm as such denotes nothing that it connotes nothing. What I mean by this is that although a norm has no substance apart from that with which it is endued, it still refers, when invoked, to a range of discursive resources liable to have meaning in a given social context. They have meaning because they relate back to "authorized languages", to clusters of norms based on legitimizing principles, accepted at a given time in a given place. It is naturally possible to have several legitimizing principles, each with its own repertoire.

The normative repertoire is a cluster of formal resources around legitimizing principle. One is reminded of Boltanski and Thévenot's "cities" (*cités*) (1991). The notion of a normative repertoire makes it possible to call upon a multitude of justifying principles and to use them according to the needs of the situation or context of interaction. However, the normative repertoire does have one particularity (which makes it somewhat similar to what Veyne (1983) calls a "truth programme") and that is that its principal aim is to account for the discursive forms used in the construction of an action claiming to be founded on a norm (a justificatory norm) and expressed in a norm (a prescriptive or regulatory norm). Thus, in a single interactive process, several repertoires may be called into play, and several people, pursuing different arguments, may have recourse to the same repertoires. The repertoire is determined not so much by the circumstances but by the argumentative tactics chosen by its user. The number of repertoires any individual can use will be influenced by the individual's own choices and the constraints of the social environment. It follows that a single individual can draw upon a number of repertoires, a single repertoire can be interpreted in a number of ways, and the same group of repertoires can be rated in various ways, or, conversely, many individuals can draw

upon one same repertoire, many repertoires can be interpreted in one same way, and various groups of repertoires can be rated along one same principle of hierarchization (Veyne, 1983: 53, 65-67). My conception of normative plurality is founded on this standpoint.

From one same reality, beliefs can be multiple, since the angles of perception are as many as there are perceiving actors. Such a coexistence, rather than creating insolvable problems, allows the actors to play on all counts, the opportunity determining the belief of the time being (Veyne, 1983: 53, 65-67). In any case, the individual, in each new set of circumstances, adopts a "point of view", i.e. a perception defined on the basis of their particular standpoint. Thus we have the idea of the coexistence of a multitude of worlds, none of which are more real or more fictitious than the others. Veyne employs the notion of "truth programmes". Truths are legion, and their multiplicity engenders the plurality of their programmes (Veyne, 1983: 96). In this context, actors make arrangements and establish hierarchies which are not necessarily institutionalized or even stable (Vanderlinden, 1993: 581) because contexts of interaction require them to do so. They are doing what is now often referred to as "forum shopping".

"Truth programmes" and truth itself lead us straight back to the notion of normative ideas. Norms are closely linked to the idea of values, and values tend to be situated in hierarchical frameworks in which ideas are also present (Dumont, 1983: 254-299). Thus the cognitive (ideas) becomes associated with the normative (values) and the resulting value-ideas have a natural propensity for hierarchism and hegemony. The hegemonical bent of these "orderings" (to use the term dear to Vanderlinden) is pursued both within each individual normative repertoire and in relations between normative repertoires, which cannot help but compete with each other. Normative repertoires have a tendency to claim exclusivity. They disregard their own underlying multiplicity and rivalry and engage in holistic and exclusive self-affirmation. To borrow De Sousa Santos' terms, "ignoring the plurality of normative orders we detect within society, each of them individually aspires to exclusiveness and to the monopoly of the regulation of the control of social action within its own legal territory" (1987: 344). Thus the plurality of normative repertoires cannot be taken to signify their pluralism. A situation of plurality in no way implies that each of the normative components is engaged in happily pursuing the goal of continued pluralism. Quite to the contrary, each one of them cherishes the ambition of achieving hegemony, while tolerating some degree of plurality depending on the degree of autonomy it enjoys or can, strategically speaking, lay claim to.

One current of legal anthropology has attempted to identify different types of law systems used by groups with differing interests (Rouland, 1988: 364), on the premise that the different repertoires stem from different lawmaking sources. Roughly speaking, this school of thought distinguishes between the law

systems of the dominated (traditional law, customary law, local law, people's law) and those of the dominators (state law). Without denying the relevance of such a distinction, we would like to signal another possibility. It is quite possible for a normative order to escape the ownership of any clearly defined social group, and instead to be one of the major normative resources available to all of the actors in the social sphere. In this hypothesis we do not have alternative repertoires, and the different *loci* of norm production do not produce different repertoires but different substantializations and instrumentalizations of the same repertoires. In this connection I employ the notion of the closure of the normative field, indicating that although the plurality of normative repertoires is a fact, it is limited by the requirements of political interplay (Dupret, 1996: 40), some repertoires being considered permissible and others out of bounds. The actors are obliged to restrict the range of repertoires on which they draw (although this does not mean that those repertoires are only substantialized and instrumentalized in one way).

It is easy to link the content of the last few paragraphs to the notion of the semi-autonomous field developed by Moore (1978) and taken up by Griffiths (1986, 1995) and the proponents of a deep form of legal pluralism. This notion, which confirms the obvious facts of the multiplicity of actors' social embedment and the simultaneous operation of a large number of networks (reticularity of actors' social involvement), has the obvious advantage of not implying any *a priori* hierarchy of the different *loci* of norm production. Needless to say, therefore, I have no wish to reintroduce the notions of law and state at this level. It is worth noting that multiplicity of actors' roles can be understood in both synchronic and diachronic terms. For me, diachronic multiplicity implies that actors are receptacles of normative memory, which cannot fail to influence contemporary practices and representations. We could speak of "normative layering" or "normative sedimentation", although the actor always interprets and employs the norms of the past in context of the present. Synchronic multiplicity is the classic principle that the actor is simultaneously subject to several clusters of norms. It might also be useful to remember that the multiplicity of actors' social involvement is in no way static. I would go as far as to say that its mobility is a basic principle. This being so, is it necessary to make a strict definition of the notion of a semi-autonomous social field? I think not, since it is more important to reflect, in a metaphorical form, the multiplicity of the individual's involvement in a web of loosely-defined social structures. Any attempt at definition might easily recreate segmentation, when it is much more important to emphasize the permeable and gradated nature of the affiliations. We doubtless still have much to learn from the organization of fuzzy subsets which permits an individual to have, to a greater or a lesser extent, an awareness of belonging to a class (Bouchon-Meunier, 1993: 7, quoted in Ireton, forthcoming).

As we approach the end of this theoretical presentation of the case for a sociology of normative plurality, it is time for some remarks on the economy

of the proposed operation. Instead of legal pluralism's radical opposition to the state and state law we have the total dissolution, in sociological terms, of the terms "state," and "law." While Griffiths (1986) is obliged to found legal pluralism on a critique of legal centralism, while Tamanaha (1993) accuses Griffiths of diluting the notion of law in such a way that it no longer does justice to the unique position of the state, while Woodman (1998) – responding *inter alia* to this criticism – accepts that the study of state law (within the framework of pluralism) ought to be considered legitimate, and while an emerging current turns its attention to the study of the concept of the "polycentricity of law", (Bentzon, 1992) the sociology of normative plurality has no problem with the selection for study, from amongst the range of observable normative forms, of the topic of the products and practices of self-proclaimed law, or of what certain actors declare to be law. Its specificity is now confined to those elements which the tools of sociological analysis can identify, and the question of the adoption of categories peculiar to the subject under study and its privileged actors no longer arises.

2. STATE, LAW AND NORMATIVE PLURALITY IN "ARAB-MUSLIM" STATES

I would now like to demonstrate that the study of normative plurality in Muslim societies is faced with two major obstacles, one relating to legal positivism and the other to religious dogmatism. Given this situation, our need for an approach starting with the actors of the norm is becoming ever more acute.

But first of all, is it justifiable for researchers studying the Arab-Muslim world to use disciplines, analyses and theories developed in (and for) other parts of the globe? I do not think I am taking any risks in saying that the theoretical, sociological and anthropological approach to legal and religious norms appears to have been hitherto largely neglected when dealing with "Arab-Muslim" societies. But there are at least two reasons for asserting that this state of affairs is completely unjustified. First of all there is the total refusal of any idea of "Arab-Islamic exceptionality", and the ensuing deconstructionist approach to Islam, to use the title of an article by Jean-Noël Ferrié (1991). We should mark our distance from the studies of Arab countries of Islamic tradition which have made the mistake of essentializing Islam and societies of Muslim tradition. Any approach aspiring to a theoretical status claims some degree of methodological and conceptual universality, and it is the very essence of this claim which is at stake in the exceptionality issue. In addition to this, it is no longer possible to address an issue like "modernity", in the Arab states or elsewhere solely in terms of "importation". What is important is not to demonstrate the accession of these countries to modernity and the changes it entails, but to demonstrate the predominance of those changes and the effects they have induced. Furthermore, it can hardly be considered that all the manifestations of this modernity are necessarily pathological.

Drawing inspiration from Bruno Latour (1988), I shall therefore advocate the application, in the treatment of social facts, of the principle of the need for symmetry of time and place. As Grignon and Passeron (1989) have stated it, cultural relativism could only really make sense in situations of total difference or otherness, whereas the situations we actually encounter are always situations of intertwined otherness. Historical starting points and watersheds are illusions created by retrospective examination (not to be confused with the regressive approach) seeking to identify a particular trend. But no moment ever gives rise to exact sameness, or indeed to complete otherness. Historical relativism is impossible because it precludes the overlapping of historicities. As far as determinism of place is concerned, it attempts to use the local to explain the local. Such an explanation would only be feasible in a situation of watertight geographical compartmentalization, and we do not need to consult the literature on globalization and "world time" to realize that such a postulate is untenable today – as indeed it was yesterday.

What we need is to develop a theoretical, sociological and anthropological approach to norms and their modification within a relatively defined timespan and geographic area. I believe that it is appropriate to take a disciplinary approach developed (at least partly) in the Western academic context and to confront it with the legal practices observed in what are commonly referred to as Muslim societies. Both the issue and the approach have been hitherto unjustifiably neglected when dealing with areas of the globe with "different" traditions. For any theoretical structure to claim that its methods and concepts are valid, they have to be usable in settings other than the one in which they were created. Looking at and developing views about "otherness" is considered perfectly natural for anthropologists (so much so that it is difficult for us in the present case to renounce the attractions of exoticism and redirect our gaze towards our own social sphere) but the process much less easily acceptable to practitioners of law and its "ancillary sciences", who often look with reticence, not to say disdain, on "trial by export", despite the well-established efforts of Claude Lévi-Strauss (1958) and Michel de Certeau (1990) to show that voyages (through space or time) have the virtue of helping us to discover what nearness and familiarity have hidden from our eyes.

We should therefore distance ourselves from legal positivism and focus instead on the actors of what I term "self-proclaimed law" and the signification of their action. This precept applies equally to any study of the religious dimension. When dealing with religious matters we should avoid the "essentialist" or "monolithic" approach which attempts to explain social phenomena via religious norms, and adopt a socio-anthropological approach examining the relationship between actors and norms. At the risk of becoming repetitive, I will reiterate my suggestion that in both of the above cases (law and religion) we should approach our subject from quite the opposite angle, starting with a deconstruction of the norm and developing a mode of examination which con-

cerns itself with the plurality of *loci* of norm production. The actors we find at these *loci* tend to develop their action within areas of meaning which are not determined by the ontological content of justificatory and/or prescriptive norms (e.g. legal or religious norms) but are probably shaped by the actors' representations of them (Dupret, 1996).

To illustrate the need to move away from legal positivism and towards a sociology of the norm, I will take the example of the reference to the *shari'a* in the Egyptian constitution (Dupret, 1995). In the contemporary Egyptian legal system, a gradual integration of religiously-inspired norms can be observed. It is clear that the study of positive law alone cannot clarify the modalities, or, most importantly, the content of this integration process. It is therefore expedient to begin by identifying the mechanisms which permit the interpenetration of the different normative orders acknowledged by the legislator and the constitutional judges. Of course, that will also be insufficient mainly for reasons pertaining to legal sociology and anthropology. As I have said before, the issue of social constraint cannot be analyzed with sole reference to one law-making *locus*, such as the state, for example. There are a large number of semi-autonomous social fields, and each of them picks up the religious normative referent in its own way. These fields are found both inside and outside the state apparatus (the word apparatus emphasizes the fact that the state is nothing more than an aggregation of different fields). The very nature of the *shari'a* places it, today, at the crossroads between common sense and technical knowledge. Furthermore, without prejudice to its content, the fact that it presents and combines a conception of the world and a system of values, and is perceived to do so, makes it fertile ground for ideological exploitation. Just as it is the nature of norms to contribute to ideological constructions, it is the nature of the *shari'a*, in its present *oikumene*, to be consubstantial with them. Every (or nearly every) protagonist in the political arena projects his own representation of it and the use he intends to make of it in that arena, where it is supposed to be seen as the expression of a self-evident fact. In reality, of course, this is anything but the case – each actor's relationship with the norm is highly strategic in nature. It remains that it is difficult, in the present situation, to position oneself outside of the area thus defined.

There are no works dealing with normative plurality in contemporary societies of Islamic tradition as such. One can find articles on traditional law (e.g. Serjeant, 1991; Botiveau, 1988) and works on legal sociology and anthropology (e.g. Messick, 1993; Botiveau, 1993; Rosen, 1989; Dwyer, 1990; Mir-Hosseini, 1993; Starr, 1992; Bleuchot, 1994; Abd al-Fattah and Botiveau, 1995; Hill, 1979). But the overdetermination of Islam remains undeniable. To my knowledge there is no work addressing the normative phenomenon and normative pluralism in the Arab world from an anthropological standpoint which does not assign a decisive role to Islam. The extent of the importance attached to Islamic normativity doubtless reveals how difficult it is to wholly detach one-

self from the language of the actors, for whom it is a key reference. But we should not allow this to mask the emergence of a strong new current which aspires to throw light on the mechanisms of the Islamic reference and to incorporate them in a broader vision of norms. We would like to feel that the papers contained in this publication are part of that current.

CHAPTER 4
A Critical Survey of Western Law Studies on Arab-Muslim Countries*

JÖRN THIELMANN
RUHR-UNIVERSITÄT BOCHUM

INTRODUCTION

The purpose of this article is to provide a survey of Western approaches to Islamic law or to legal systems in Arab countries. In view of the wealth of studies on these topics, it is not my intention to be exhaustive.[1] Instead, I will only review the main currents and paradigms which have in the past determined, and nowadays still determine, Western research on legal systems in Arab countries.

Following the colonial rule in this area the first systematic studies on law in the Arab-Muslim world appeared in the 19th century. These studies focused on local legal systems and resulted in handbooks which enabled a more efficient colonial administration. In some cases these handbooks have contributed to the codification of indigenous law, e.g. the Anglo-Muhammadan Law or the *Droit musulman algérien.* Access to local libraries and archives stimulated editions and translations of classical legal texts which had been largely unknown. These texts have served as a basis for Islamic studies to investigate traditional concepts of Arab-Islamic sciences and the origins of Islamic law.

The article will cover the following areas: Islamic studies, ethnosociology, comparative law studies, cultural anthropology, anthropology of law, and systems theory approach. Needless to say it is not always possible to draw clear lines between these approaches, since particularly from the 1980s onwards research on Islamic law has often been a mixture of paradigms and methods.

---

* Note: I would like to thank Dr Liès Maïri and Frieder Wöhrmann for their critical remarks.

1 Bibliographies of scholarship on Islamic law will be found in *Handbuch der Orientalistik* (1964, 1994) and Schacht (1964).

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 41-54
© 1999 *Kluwer Law International. Printed in the Netherlands.*

1. ISLAMIC STUDIES AND LAW[2]

At the end of the 19th century the Dutch scholar Christiaan Snouck Hurgronje (1857-1936), working for the colonial administration in Indonesia, began to systematically study the foundations and rules of classical Islamic law (*shari'a*) and Islamic jurisprudence (*fiqh*). For Snouck Hurgronje the *shari'a* is an ethics of duties (Pflichtenlehre) which covers religion, morals and laws, is infallible and projects the ideal Islamic society (Snouck Hurgronje, 1957: 256-259). Based on Arabic texts on the *usul*,[3] the sources and principles of Islamic jurisprudence, he developed a history of the emergence of Islamic legal sciences. He argued that the *hadiths* in the classical compilations are not only reports of words or acts of the Prophet (*al-sunna al-nabawiya*) and of his Companions, but equally reflect the political and religious views of later generations (Snouck Hurgronje, 1898: 9). He also claimed that Islamic law developed to a large extent without any contact with real life (Snouck Hurgronje, 1898: 192, 1957: 262*f.*). Questioning the authenticity of the *sunna* and conceptually separating theory and practice within Islamic law has become a pattern which has informed research on law in Arab-Muslim countries up to the present day.

Ignaz Goldziher (1850-1921) arrived at the same conclusions as Snouck Hurgronje, based, however, on a different point of departure. While Snouck Hurgronje focused on *usul*-texts from the third century A.H., Goldziher returned to the conflict between the *ahl al-ra'y* (the rationalists) and the *ahl al-hadith* (the traditionalists) in the second half of the second century A.H. in order to describe the history of Islamic legal sciences. He argued that the emergence of Islamic jurisprudence resulted from *ra'y* (independent reasoning, personal legal opinion) and not from an application of the Qur'an and *sunna*, which contain little as regards legislative issues (Goldziher, 1890: 33, 77-83, 1941: 131). But the higher religious reputation of the knowledge of legal rules derived from the Qur'an and *sunna* (*'ilm*) led to the use of the *hadith*-form to cover the *ra'y* which was at this time still common practice among legal scholars. The aim of this operation was to avoid attacks of the *ahl al-hadith* against the application of *ra'y* which they considered contradictory to their interpretations of the Qur'an and *sunna* concerning legal matters (Goldziher, 1890: 47-52, 176*f.*, 1941: 131). Therefore, the *hadith*-literature followed the earliest *fiqh*-texts which contain the opinions of the first *ahl al-ra'y* (Goldziher, 1890: 208). C.H. Becker summarized the central ideas of Goldziher in the following way: "The words of the Prophet are not to be used as historical sources for the life

[2] Motzki (1991: 8-49) gives an overview on the development of research concerning the beginnings of Islamic jurisprudence.

[3] I.e. the Qur'an, *sunna* (the sayings and doings of the Prophet, and his Companions, later established as legally binding precedents), *ijma'* (consensus), and *qiyas* (analogy).

of Muhammad, they are symptomatic expressions of the doctrines of the collectors and transmitters" (Goldziher, 1925: 5). Reflecting on the customs and religio-scientific discussions of the first two centuries of Islam is useful with regard to a historical analysis of this period. From the third century A.H. onwards, legal scholars have turned to an increasingly sophisticated casuistic, a "*geisttötende Kleinkrämerei*", and subsequently paralyzed the Islamic jurisprudence. The result is a gap between a theoretically very elaborated system and legal practice (Goldziher, 1925: 67-70).

Probably the most influential scholar of Islamic law studies in this century is Joseph Schacht, a pupil of Snouck Hurgronje, whose central patterns Schacht tried to verify.[4] He departs from the writings of al-Shafi'i[5] for reconstructing the development of *fiqh*, since it was al-Shafi'i who for the first time tried to lay down the methodological principles of the *fiqh* (Schacht, 1950). By comparing al-Shafi'i's perception of older "schools of law" with the texts of the earlier Medinese school, Schacht concluded from the higher number of *hadiths* of the Companions of the Prophet found there, that they have to be anterior to the prophetic *hadiths*. From the frequency of appearence of the *hadiths* of the Companions, he deducted an equality of both forms of *hadith*. He found that the traditions of the successors, the second generation, were considered to be equal to the prophetic tradition and that they were even more often used as sources for legal decisions (Schacht, 1950: 28-30, *cf.* Motzki, 1991: 23). Based on that he was able to construct an inverted line of development (for the second half of the second century A.H.) which starts from the second generation and goes back through the Companions to the Prophet. Stating that *hadiths* were used immediately for legal matters after they are formulated and become known, he concludes in a *conclusio e silentio* that *hadiths* could not have existed as long as they did not figure in the texts (Schacht, 1950: 140-151). The same process of development is then postulated by Schacht also for the so-called preliteracy period (i.e. before the second half of the second century A.H.). He declares that all *hadiths* of the Prophet and of his Companions are fictitious and that the *hadiths* of the successors are mostly non-authentic, too (Schacht, 1950: 149). The better the *isnad*, the chain of transmitters of a tradition, the later the *hadith* (Schacht, 1950: 169).

In his remarkable book on the beginnings of Islamic jurisprudence Harald Motzki demonstrates that Schacht's assumptions are too general. He points out that a *conclusio e silentio* is always problematic and finally led Schacht to conclusions which are not entirely consistent with the material (Motzki, 1991).

---

4 The importance of scholars such as Noël J. Coulson or Chafik Chehata should not be neglected. Although both, though critical of some of Schacht's views, nevertheless shared his general assumptions.

5 Lived from 767 to 820 A.D., the founder of one of the four orthodox sunnite schools of law.

In "An Introduction to Islamic Law" Joseph Schacht delivers a description of the rules of classical Islamic law (Schacht, 1964). Moreover he is interested in the gap between theory (*fiqh*) and practice of law. According to him this gap has existed since the early Abbasids (Schacht, 1964: 77) and resulted from the freezing of theory which has been provoked by the principle of consensus (*ijma'*) (Schacht, 1935: 229, 1980: 170, 178*f.*). After the theoretical foundation of the *fiqh* by al-Shafi'i and following the conviction that all important questions had been answered, the "gate of independent reasoning, of *ijtihad*" was closed, around 900 A.D. As a sacred law, heteronomous and provided by God, the rules of the *shari'a* were considered eternally valid and unchangeable. The result is the permanent transmission of rules which have lost any relation to practice (Schacht, 1935: 222*f.*). Changes in the legal system were few and observable only in theoretical parts and not in positive law. Legal scholars simply followed the older opinions of their predecessors (*taqlid*) (Schacht, 1964: 71*f.*, 1980: 170).

Nevertheless, it has been shown that *ijtihad* was reclaimed and practiced by different scholars until the 20th century, e.g. Henri Laoust for Ibn Taymiyya[6] (Laoust, 1939), Robert Brunschvig for Averroes[7] (Brunschvig, 1976: 167-200), and in the articles of Rudolph Peters (Peters, 1980) and Wael B. Hallaq (Hallaq, 1984). Working on Hanafite law of land property, land tax and rent, Baber Johansen was able to demonstrate that substantial changes in positive law occurred in the Mamluk and Ottoman periods (Johansen, 1988a). Furthermore, it is possible to fill the gap between theory and practice by analyzing written legal documents (e.g. forms, official documents) as laid down in the *shurut*-works (Udovitch, 1970, Hallaq, 1995). It was Schacht himself who saw this opportunity, together with the recommendation to look at the *hiyal*-books on legal devices (Schacht, 1964: 80-85).

Another possibility of shedding light upon the relationship between theory and practice is the analysis of *fatawa*, the considered legal opinions of a *mufti*. These legal opinions do not only reflect very sophisticated and highly theoretical issues but also practical questions which have contributed to the development of positive law (e.g. Hallaq, 1994, Johansen, 1988b, Krüger, 1978). Again, Schacht, in some way contradicting his own thesis, equally considered this possibility (Schacht, 1935: 224, 1964: 73-75). A general overview of this field has been given in the recently published book "Islamic Legal Interpretations: Muftis and Their Fatwas" (Masud, Messick and Powers, 1996) which contains case studies from different periods, countries and legal materials and a theoretical framework.

---

6 Lived from 1263 to 1328 A.D., a Hanbalite legal scholar (*faqih*) and adviser (*mufti*).
7 Ibn Rushd in Arabic. Lived from 1126 to 1198 A.D., a prominent philosopher (*faylasuf*), legal scholar and judge (*qadi*).

All the patterns mentioned above are durable: they contain the positivistic idea that it is possible to describe Islamic law as such or the idea of the specific "nature", "*caractère*", "*Wesen*" of Islamic law. The Arab-Muslim countries are perceived as a homogeneous unit subject to the same revealed law.[8] Starting with the classical texts an ideal-type of *fiqh* and *shari'a* will often be reconstructed and described as static[9] and casuistic. Research is mainly historical. If Islamic studies look at legal issues in contemporary Arab-Muslim countries, interest is limited to identifying classical Islamic legal rules within new codes and to nailing their "Islamic" content.[10]

Until now, the integration of sociological approaches into Islamic studies and the development of critical typologies within Islamic studies are still lacking (*cf.* Crone, 1987b: 294) – despite Schacht's efforts (Schacht, 1935) to transfer Weber's sociology of law to Islamic law, and those of Brunschvig (Brunschvig, 1955) to disclose through sociological reasoning, the social reality behind the *fiqh*.

2. ETHNOSOCIOLOGY

Inspirated by Marcel Mauss' and Émile Durkheim's notion of the societal implications of legal systems, French scholars and colonial administrators like Jacques Berque, René Maunier and others undertook research on the legal systems of North Africa, which increased the scope of comparative law studies by introducing ethnosociological methods (Berque, 1944, Bousquet, 1944: 155-167, 1947, Charnay, 1965, Maunier, 1932). Their compilation of inventories of legal practices and customs, of the study of archives and judicial documents was linked to enhancing French colonial administration. Following Mauss they understood law as an all-embracing social phenomenon.[11] Thus law offers explanations of the society in which it exists. Further research resulted in ethnological studies on Berber tribes (e.g. Berque, 1978, Bourdieu, 1979) which were often rooted in the analysis of classical Islamic texts (e.g. of Ibn Khaldun).

In an article Berque traced some critical problems of a sociology of law in the Maghreb (Berque, 1953). Due to the high heterogeneity of the Maghreb he encountered difficulties in isolating and defining determining factors, and therefore argued for a pure phenomenology of differences and similarities (Berque, 1953: 143). According to him the French term "*coutume*" as used in French scholarship is ambiguous: it means "folklore" in a broad sense and "custom" (in the sense of customary law). The undifferenciated use of the term "*coutume*" (Berque,

8 Critical on this point: Botiveau (1993: 162).
9 *Cf.* e.g. Crone (1987a: 18): "...the *shari'a* is immutable".
10 *Cf.* e.g. Bonderman (1968); Handbuch der Orientalistik (1964), and Schacht (1933, 1959, 1960).
11 *Cf.* Mauss (1978: 12).

1953:152) led Berque to develop classifying principles with the help of which a differentiation between Islamic and customary law would become possible. The main criterion is the degree of organization within legal systems and their symbolic representations (Berque, 1953: 152ss.). "*L'antithèse entre un fond local et des apports orientaux est suggestive, certes. Mais elle vaut surtout comme mythologie*" (Berque, 1953: 160).

3. COMPARATIVE LAW STUDIES AND ISLAM[12]

Islamic law was integrated into the discipline of comparative law thanks to Édouard Lambert (1866-1947), professor of law at Lyon. Basing himself on Snouck Hurgronje and Goldziher he dedicated a part of his *La fonction du droit civil comparé* (Lambert, 1903) to Islamic law. It was only in 1906 that he started his own research while a director of the *École khédiviale de droit* in Cairo. He radically changed the perception of legal practice and customary law, so far neglected in Islamic studies. A large group of Egyptian students, for example Sanhoury, the later reformer of Egyptian legal codes, followed him when he returned in 1907 to Lyon. Lambert required his students to apply French concepts of law in the analysis of *fiqh*, but to publish their results in Arabic as well.[13]

Many authors published manuals of Islamic law, compiled in European style and terminology (e.g. Milliot, 1953, Morand, 1921). In 1899 David Santillana compiled a draft code of civil and commercial law for Tunisia which was partially enacted in 1906;[14] and Marcel Morand prepared in 1906 a draft code of the *Droit musulman algérien* (Morand, 1916) which never became law but was quite influential.

A good example of the comparative approach is the article "*Le droit musulman comme élément de refonte du code civil égyptien*" of Sanhoury (1938), the father of the modern Egyptian Civil Code of 1948, compiled from more than 20 legal systems. Step by step taking legal rules from this code, he attempts to demonstrate the flexibility of Islamic law which contains for him the rules and principles able to meet the demands of the 20th century and be compatible with other legal systems. "*Le Droit Musulman peut servir, même dans son état actuel, comme source de législation*" (Sanhoury, 1938: 624). Sanhoury shows how loop-holes in the law can be filled with Islamic law and which of its rules had survived outside personal status and inheritance law, normally considered the kernel of Islamic law,[15] and which are to be found in the new Egyptian Civil

12 *Cf.* Hill (1978) for an overview.
13 *Cf.* Botiveau (1993: 87*f.*).
14 *Cf.* Schacht (1964: 108).
15 For this point *cf.* Botiveau (1990: 163), Hill (1978: 292*f.*).

Code he was thinking about. He proclaimed that the whole Civil Code would be inspired by the *shari'a.*

Yvon Linant de Bellefonds supported Sanhoury's view in his article "*Immutabilité du droit musulman et réformes législatives en Egypte*" (Linant de Bellefonds, 1955). He claimed that this new code adopted in 1948 is not only inspired by the four orthodox sunnite schools which have survived until now but also by others within the Islamic legal tradition. Following Linant de Bellefonds, it is worth noting the existence of a diversity and dynamism within the Islamic legal tradition, a fact which far too often fails to come through.

Of course, comparative legal studies do perceive the variety of legal systems. However, this variety is usually reduced to a mere dichotomy between Islamic law and the mainly French influenced positive law. From there scholars tend to look for remaining Islamic legal rules and traces of European influence in the laws of contemporary Arab countries. Even the consideration of customary law follows this pattern. Adopting a classical Islamic point of view, comparative legal studies argue that the *shari'a* has integrated and transformed these different types of law. It remains unclear to what degree a Western-style codification of Islamic law led to substantial changes within it (Botiveau, 1990: 163): French colonial rule in North Africa guaranteed for the first time the general application of Islamic law on the whole territory (Schacht, 1964: 97*f.*).

Until the 1970s comparative studies of law dominated research on contemporary legal issues in Arab-Muslim countries. An example for the persistence of this kind of study is S.H. Amin's "Middle East Legal Systems" (Amin, 1985) which contains overviews about several Arab countries (legal history, legal system, laws, legal sources). A recently published book claims to contribute to the debate on theory and practice of Islamic law, but in fact follows the old patterns of delivering a classical comparative sketch of legal systems in different Arab countries (Ebert, 1996).

4. CULTURAL ANTHROPOLOGY ON ISLAMIC LAW

In the 1970s anthropology discovered law in Arab-Muslim societies as a topic. In particular, Ernest Gellner (Gellner, 1985) and Cliffort Geertz (Geertz, 1968, 1973, 1983) developed this approach but in this context it is Lawrence Rosen, an American lawyer and anthropologist, who is to be mentioned.[16] Geertz's central point is that law is "part of a distinctive manner of imagining the real" (Geertz, 1983: 184). Law is local knowledge and not a placeless principle.

[16] Rosen's contributions, first of all his *Anthropology of Justice* (1989), provoked a lively debate (*cf.* Botiveau, 1996: 32-35).

Moreover, law is constructive for social life, and not a reflection of it. For Geertz, and for Rosen alike, scientific research means cultural translation (Geertz, 1983: 218) by abstracting "legal ideas" (e.g. *haqq*) from the society in which they are used.[17] It has been argued by Moore that this linguistic approach analyzes the conceptual elements of a legal system but that it does not help to understand social practice, why something happens in a particular place or at a particular time (Moore, 1989: 278).

Rosen views law as an expression of culture and culture as an integral part of law (Rosen, 1989a: 15), or put differently, like Geertz, Rosen understands law as a system of representations of the real. While doing field-work, mainly carried out in the small Moroccan town of Sefrou, he observed proceedings at the *qadi*-court,[18] read the records and spoke with the litigants and court personnel.

While observing these proceedings, Rosen tried to disclose representations of Moroccan society in the interactions between the legal actors. He tried to find the actors' system of categories, and its representation in their social and cultural activities. Operating in this way raises difficulties in determining the border between "law" and "custom" (Rosen, 1995: 197).

Moroccan society is in a constant process of negotiating the position of the individual in a network of obligations within his community. The purpose of this process is the construction and preservation of interrelationships: to position oneself with regard to others. The same happens before the *qadi*: he asks who these people are; where they come from; to whom they are related or known. "The aim of the *qadi* is to put people back in the position of being able to negotiate their own permissible relationships without predetermining just what the outcome of those negotiations ought to be" (Rosen, 1989a: 17). This is the very kernel of Rosen's perception of the functioning of Islamic law as represented in the courts.

All convictions and practices are locally determined. Therefore, the *qadi* although invested with high judicial discretion and autonomy has to respect these local convictions and practices for the acceptance of his decisions (Rosen, 1989a: 20). This, together with the above-mentioned importance of the creation of the ability to negotiate relationships, is the reason why the *qadi* focuses on the consequences of his decision rather than applying abstract legal rules (Rosen, 1989a: 31).

Rosen's view of the *qadi* and his discretion are influenced by Weber's dictum of "Kadijustiz" which is problematic as such.[19] Rosen underestimates the differ-

---

[17] *Cf.* the essays of Geertz (1973) and his definition of culture there (p. 4); Rosen (1989a: 12*f.*, 19, 21).

[18] As Rosen points out, the importance of this access is far too often underestimated by scholarship (Rosen, 1989b: 302*f.*).

[19] Critical on Weber: Powers (1994) and Schneider (1993). Both show that the *qadi* is well integrated in the Islamic legal doctrine and that his decisions are grounded in reasoning. The critique of Gerber (1994) of Weber (and of Rosen as neo-Weberian) is in itself Weberian.

ence between a *qadi* in the past and the modern Moroccan *qadi* who is integrated in a judicial system which operates within codified laws. The secularizing influence on the *qadi* resulting from these codes is not negligible.[20] Though Rosen himself (Rosen, 1984) warns against overgeneralizations, he speaks in "The Anthropology of Justice" (1989a) of the idea of justice in Muslim society as such. Focusing on localization while at the same time speaking of the Moroccan society which he claims to explain, is self-contradictory. And even more so when he extends his conclusions from the Moroccan context to North Africa, the Arab world and to Islam in general. Rosen fails to give an example for the high local bindings of legal decisions as postulated by him (e.g. the treatment of a similar case in different communities). Possibly, an observation of law suits before Christian or Jewish courts in Morocco would make visible what is particularly Moroccan or Islamic in these legal procedures. Furthermore, the principle of negotiation to settle legal conflicts does not seem to be typically Islamic.[21]

5. ANTHROPOLOGY OF LAW

In a special issue of the French journal *Droit et Société* (1990), an approach to legal systems in Arab-Muslim countries is presented, which attempts to put forward an anthropology of law with regard to the Arab world. It is worth mentioning that many authors offer an explicit reflection on the methods and paradigms employed in previous studies on legal systems in Arab countries.

Following the French tradition, Jean-Robert Henry (1990) views the legal discourse as one central social discourse. According to him, law is a performative discourse, speaking only about things in order to govern them; law is a powerful language and the language of power (Henry, 1990: 140). In Henry's opinion, Islamic law is neither fixed nor static. Going back to the Islamic legal sources (in Western scholarship and in Islamist demands alike) veils the changes in Islamic law over time and neglects its variety in the different regions of its applications (Henry, 1990: 142). Law is perceived as a possibility to confirm visions of the world[22] and as an instrument for the defence of identity against internal or external threat (Henry, 1990: 142). That means that a fundamental ambivalence exists between law as culture and law as an instrument (Henry, 1990: 143). Based on the observation of legal situations in the Maghreb, Henry develops the idea of "variance": according to concrete circumstances, it is possible for the actors to utilize different legal registers, adapted to their social and

20 *Cf.* Botiveau (1993: 144). It is not plausible that the *qadi* should act in autarchy from the Moroccan judicial system (*cf.* Botiveau, 1996: 33).

21 It is also found in Europe, e.g. in the German institution of the "Schiedsmann", *cf.* also Botiveau (1996: 34). A fundamental critique of any specificity of Islam is developed by J.-N. Ferrié (1991).

22 *Cf.* for this point also Geertz (1983: 184).

political strategies. The term of "*variance juridique*" enables an analysis which differs remarkably from that resulting from the term of "*systèmes juridiques composites*",[23] because the different systems are used by actors, and their relationship is therefore interactive and interrelational, and cannot be described by a juxtaposition (Henry, 1990: 143*f.*). Thus, Henry argues against any kind of legal monism (Henry, 1990: 144). Law is always embedded in a social dialectic in which images of society are transformed into legal (and societal) changes. For that reason, a legal language is necessary which is accepted or at least tolerated by most actors (Henry, 1990: 147). Finally, Henry mentions the importance of a pluridisciplinary occupation with legal changes in Arab countries (Henry, 1990: 148*f.*).

In his contribution Bernard Botiveau (1990) outlined the main paradigms and related problems of previous approaches to Islamic law (Botiveau, 1990: 161-164). He shares Geertz's and Rosen's idea that Islamic law, like any other law, is a system of representations of the real (Botiveau, 1990: 164). Islamic law[24] serves as a normative model accepted by very different societies as a representation of the world, and creates, as a unifying force, a legal community (Botiveau, 1990: 165). Botiveau stated that the Islamic scholars (*'ulama*) function as transmitters between the political power and society in defining the contents of the law (Botiveau, 1990: 167).[25] In his opinion, an exclusively "textual" analysis fails to raise the question as to what extent such a concept of law penetrates society; therefore, a parallel "contextual" analysis is necessary (Botiveau, 1990: 168). In this way, an analysis of law must consider the societal conditions of law, the political strategies of the actors and a normative pluralism which enlarges the possibilities of conflict resolution (Botiveau, 1996: 28-30). Botiveau decribed the roles of the main actors (judges, lawyers), illustrating them with examples taken from the jurisdiction related to personal status law (Botiveau, 1990: 168-170), because jurisdiction is "*lieu central de l'affirmation du droit*" (Botiveau, 1996: 27). In his "*Loi islamique et droit dans les sociétés arabes*" (1993) Botiveau demonstrates this kind of analysis.

In a more recent publication, he sketches the course of development of current anthropological research on these topics (Botiveau, 1996). He argues that it is difficult to separate anthropological from sociological or ethnological research.

Inspired by Henry and Botiveau, Baudouin Dupret devotes his work to the theoretical development of an anthropology of law (e.g. Dupret, 1996a). The Arab countries function only as an empirical example for an anthropological

[23] This term was coined by Maunier (1932) and is very static: the changing utilization of legal registers (the "forum shopping" of Legal Pluralism) cannot be explained with it.

[24] Botiveau pointed out the difficulties of differentiating between *fiqh* and *shari'a* today (Botiveau, 1990: 165*f.*).

[25] In his "*Loi islamique...*" (1993) Botiveau offers an extended description of this process.

theory of law on a global scale (Dupret, 1996a: 12*f.*). Because Dupret presents his approach in chapter 3 of this book, I will mention only some important points: he argues against a supposed exceptionality of Islam and of Islamic law, and for a deconstructivist approach to law (Dupret, 1996a: 11). The trap of essentialization is to be avoided by the analysis of a multiplicity of materials[26] in order to show the variety of terms used in legal debate. According to him, a diachronic approach would be able to shed some light on the transformations in the legal concepts in use (Dupret, 1996a: 11, 14, 18).[27] Where Botiveau, for instance, is more interested in a politico-sociological analysis of different groups of legal actors, Dupret tries to find out how the interactions of different legal actors result in substantializations of normative forms, how overlappings between legal systems occur and how legal changes take place.

6. A SYSTEMS THEORY APPROACH TO ISLAMIC LAW[28]

A singular example of a systems theory approach to Islamic law and to the problems of legal pluralism in Arab countries is offered by Kilian Bälz (Bälz, 1996). He follows the systems theory approach to law which was first formulated by Niklas Luhmann and developed further by Gunther Teubner.[29]

According to the systems theory, society is fragmented into various functionally differentiated and autonomous subsystems (e.g. political system, economy, legal system). These subsystems are operationally closed but cognitively open.[30] Teubner proposes three hypotheses on law: (1) law, as an autonomous cognitive subject, constructs its own social reality; (2) law is not produced by individuals through their intentional acts as a cultural artefact but produces human actors as semantic artefacts as a communication process through its legal operations; and (3) law oscillates between cognitive autonomy and heteronomy while it is simultaneously dependent and independent from other social discourses (Teubner, 1992a: 1150). Luhmann and Teubner are interested in the relationship between law and society, and in the problems of legislations, but have not provided a in-depth account of the relationship between different legal systems.[31] Bälz proposes to look at the relationship between the *shari'a* and positive law (*qanun*) in Egypt as an intersystemic conflict between two

26 E.g. Dupret uses Qur'an exegetic literature, legal decisions and written documents of litigants, legal codes, interviews with different legal actors, monographs on legal dogmatic, etc. (Dupret, 1996a).

27 *Cf.* Moore (1989: 279).

28 In this chapter I follow Bälz's presentation of the approach without testing against the texts of Luhmann and Teubner. For a critique of Luhmann and Teubner *cf.* Dupret (1996a: 98*ff.*).

29 *Cf.* e.g. Luhmann (1993); Teubner (1989).

30 *Cf.* e.g. Teubner (1989: 21-35); Bälz (1996: 40).

31 *Cf.* Teubner (1992b).

legal subsystems. For this reason, it would be possible to escape from the "influence"-paradigm of comparative approaches to Islamic law (Bälz, 1996: 40).

A subsystem consists of communication, produced and reproduced by the subsystem itself (*cf.* Teubner, 1992a: 1153). These operations follow a single binary code. This code makes possible the reconstruction of the environment (consisting of other closed autopoietic subsystems) inside the subsystem as well as the self-reproduction of the subsystem (Bälz, 1996: 40*f.*). The societal subsystem "law" follows the binary "legal/illegal" code. Therefore, legal pluralism needs to be defined as the coexistence of several legal systems with their own "legal/illegal" codes (Bälz, 1996: 41).

Bälz emphasizes that Islamic law is seen as a sacred law, dominated by religious considerations, and as partially autonomous (Bälz, 1996: 42).[32] However, he postulates that Islamic law is not a religious law proper, because it is a jurists' law. Its *corpus iuris* is *fiqh*, and not Qur'an and *sunna* which accordingly do not serve as legal sources in a technical sense for the judge.[33] Thus, the development of Islamic law took place in the form of legal debate. Therefore, Bälz argues that it is possible to describe Islamic law as an operationally closed system. According to him, operational closure does not mean empirical isolation. For this reason, extra-legal influences (e.g. religious prescriptions) on Islamic law do not contradict the concept of operational closure (Bälz, 1996: 43).

In Islamic law two scales of evaluation coexist: one concerning religious considerations (from "obligatory"/*wajib* to "forbidden"/*haram*), and one concerning legal validity (from "valid"/*sahih* to "void"/*batil*) (Bälz, 1996: 43).

In 19th-century Egypt, the adoption of French law, the enactment of new French inspired codes, and the creation of Mixed Courts (foreign-Egyptian) and National Courts, parallel to the *shari'a*-Courts now restricted to personal status and inheritance law, resulted, according to Bälz, in a fragmentation of the existing legal system into two legal systems (Bälz, 1996: 44*f.*).

First, Bälz takes inheritance law as an example of "tensions" between the two systems. The Islamic rule that debts of the *praepositus* have to be settled before the property of an estate could pass to the heirs, is taken over by the secular system of the Mixed Courts.

Life insurances are considered in Islamic law as aleatory contracts and therefore as void. Thus, the life insurance sum is not part of the estate. The

32 Bälz refers here to Schacht (1964: 1-4) and Wichard (1995: 81) who, in my opinion, is misunderstood by Bälz. Following Johansen (Johansen, 1988b) Wichard argues that pure legal considerations consciously disregarded religious prescriptions. According to Johansen, it is precisely this conflict-laden interactional field between moral and legal provision that characterizes Islamic law. Johansen shows that it was the *mufti* who was forced to integrate religio-moral evaluations of action into his *fatwa*. And Schacht considered Islamic law to be both heteronomous and sacred law (Schacht, 1935: 222*f.*).

33 Following what has been said above on *ijtihad* this point is not generally tenable.

interpretation of life insurances as contracts *sui generis* which are concluded for the profit of a third side allows for the total exclusion of any influence of the Islamic law of inheritance within the secular legal system. Both, the reconstruction of the other system within the system, as well as the exclusion of any significance of the other system, are the two ways by which a system maintains operational closure (Bälz, 1996: 45-47).

Then, Bälz looks at the codification of Egyptian civil law by Sanhoury, especially the law of contract. He argues that Sanhoury applied the methods of European legal sciences to Islamic law and generated general principles which rendered the rules of classical Islamic law compatible with the needs of the modern economy. The newly generated principle of freedom of contract does not exist in Islamic law which accepts only those contracts figuring in the *fiqh*-books. According to Bälz this is an indication of the cognitive openness of the system of Islamic law (Bälz, 1996: 50).

Bälz's next example are the regulations concerning insurances in the *Islamic Draft Code of Civil Transactions* of 1982. Referring to the Islamic concept of partnership in profit and loss (*sharikat al-mudaraba*), insurances are perceived here as "cooperative contracts". Bälz understands this as a reconstruction of an Islamic legal principle within the system of secular law and a transformation of Islamic legal principles. He states that the political pressure calling for an islamization of positive law, allows the system of secular law to integrate Islamic legal principles for the protection of its own binary code. Following Bälz, Islamic legal principles within positive law are pure internal constructs of the system of secular law (Bälz, 1996: 52*f.*).

The fundamental critique against Luhmann and Teubner (*cf.* e.g. Dupret, 1996a: 98*ff.*) applies to Bälz as well. Even if Dupret is not exactly right in stating the total exclusion of human actors by Teubner and Luhmann (*cf.* Luhmann, 1996: 346, Teubner, 1989: 37, 59*f.*), the construction of individuals only as "psychic systems" ("*psychische System*") is problematic. The foundations of system theory are willingly circular and not empirically founded: e.g. the origins, producers and places of legal operations inside an operationally closed legal system remain unclear (*cf.* Luhmann, 1993, 1996). Being interested in "how the law thinks" (Bälz, in this volume, note 8), Bälz looks for the contribution of legal actors to legal discourse. And, for instance, his example, the codification of the Civil Code, shows that it was a human actor, Sanhoury, trained in European comparative law studies, who generated the principles and formulated new rules, and not a system. In this context Dupret has demonstrated for which reasons and in which forms, actors returned to Islamic legal principles (Dupret, 1995, 1996a, 1996b).

7. CONCLUSION

I have attempted to show the durability of some paradigms implicit in the various approaches surveyed above. Briefly stated, some of the contributions to the research on legal systems in Arab countries may be sketched as follows: (1) The text-orientated discipline of Islamic studies offers a basis for research through historically orientated studies on and critical editions of primary sources. (2) In ethnosociology and anthropology, scholarship is interested in actors and legal practices and opens the access to the possibility of contextual analyses. Furthermore, the long-time ignored plurality of legal systems in Arab countries becomes visible. Therefore, from my point of view, a multi-disciplinary approach seems to be most fruitful for future research on legal systems in the Arab World.

PART II

A Comparative Perspective

CHAPTER 5
Contrasted Identity Claims Before Egyptian and Belgian Courts

MARIE-CLAIRE FOBLETS
CATHOLIC UNIVERSITY OF LEUVEN
BAUDOUIN DUPRET
CNRS/CEDEJ

INTRODUCTION

Our research will examine two social areas which, at first sight, might appear difficult to compare. For a number of reasons, the Belgian and the Egyptian legal systems have been called upon to pronounce judgments on similar problems related to the acceptance and the interpretation of so-called Islamic norms. In dealing with these issues, these jurisdictions consult a diversity of normative and legislative codes. It is this interaction which we wish to study.

For a number of years now, Belgium has been a country of Muslim immigration, whereas, traditionally, Egypt has been a multi-religious country. Nevertheless, these two countries have in common their legal systems of Romano-Germanic origin. On the other hand, the attitude of the authorities (including the legal authorities) in dealing with institutions and legal pluralism, and more especially the role of Islamic norms seen as a source of law, cannot be explained in the same fashion. In Belgium, recourse to the protection of basic rights (religious freedom, liberty of expression) enables the tribunals, on a case to case basis, to apply the rules of a form of legislation put forward as Islamic. In Egypt, on the contrary, an internal situation which superimposes Islamic law (*shari'a*) on positive legislation, enables both those brought before the court and the judges to act on different normative levels.

Let us first establish the context within which the actors (both Belgian and Egyptian) on the legal scene take recourse to the Islamic origins of law. By so doing, we should like to offer a comparative reading of the way in which the courts and the tribunals in the two countries have handled legal adherences and identities. This comparison will be supported by a concrete example taken from recent case law: the issue of whether headscarves may be worn in state schools.

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 57-71
© 1999 *Kluwer Law International. Printed in the Netherlands.*

1. THE LEGAL CONTEXTS OF REFERENCE TO ISLAM

1.1. Belgium: A Hybrid and Uncertain Status, Dependent on Legal Practice

With regard to the integration of Muslim communities, legal *démarches* in European societies today are going through a turbulent time. Our first question is to see how the judges find themselves confronted by the legal status of Muslims living in Belgium.

The issue of the integration of Muslim communities into the Belgian legal system is, today, at the very heart of the dilemma: "culture in plural terms, or culture in the singular". This dyad, which involves a very political option, represents a real challenge to the legal authorities. Belgian courts, for a number of years now, have found themselves confronted by difficult legal questions which have put judges in a position to arbitrate between the relationship between the laws of the country of residence (Europe) and respect for the Islamic culture imported by the immigrant Muslim communities. Belgian courts deal with this dilemma in a number of different ways.

Some courts opt for the equivalence of lifestyles of different cultures, accepting the differences; others, on the contrary, support the principle of equivalence within uniformity. Faced with this difficult choice, Muslim immigrants occupy a very special place, given that to this must be added the fact that Islam expresses a given identity (Dassetto, 1996). The choice is all the more difficult given that a great many Muslims, despite the fact they have settled in Europe, tend to retain a very close contact with their country of origin (e.g. Boulahbel-Villac, 1994).

On the legal level, the dilemma may be presented in simple terms, but it is in fact very complex. There are two possible options: either the judge opts for the solution of a multicultural society which respects the identity of each and every individual, their languages and their cultures. Historically, this is the attitude taken by Belgian law with regard to foreigners in the field of personal status. This is the technique of the rule of the nationality of foreign citizens in all issues with regard to family relationships and civil status (e.g. Rigaux and Fallon, 1993: 290 *f.*). Along the same lines, some of the international conventions ratified by Belgium (and in particular the Convention on Human Rights and the International Convention on the Rights of the Child) stress the need for the signatory states to respect the culture and the religion of all. Here we find a beautiful ideal of tolerance and reception which nevertheless carries with it a danger which should not be underestimated, that of the "cultural isolation" of Muslim communities who find themselves pushed to the margins of the societies which have taken them in. Out of respect for the imported Muslim culture, a community finds itself hemmed in within a system of norms which socialize its members within a group of the same origin and which separates them from the majority society. We shall give some examples later in this article.

On the other hand, there is the second option: to avoid the pitfall of fragmented development, the judge opts for the possibility of a society united on a given number of common values: immigrant communities are systematically subjected to Belgian law, by considering that the concepts used (such as equality of the sexes, the rights of men and women, the rights of the child, etc.) by the national (Belgian) legislator can only be defined in terms of the disposition of the laws which he lays down. This represents an option for the ideal of equality in the light of a wider conception of integration into the values and the model of the majority society. This second option is traditionally the one followed when it comes to matters of public law: social and economic rights, rights to movement, administrative rights, etc. On such issues, Muslim communities in Belgium are therefore, as far as the principle is concerned, subject to Belgian law. Such an option, since it effectively applies to all Muslims appearing before the courts, suffers from a lack of flexibility with regard to those dispositions that resort to what we might call "Islamic legal culture". Here we think, to mention one example which we shall deal with later, of the problem of the regulations with regard to clothing for migrant women who are forbidden to wear headscarves in the work place, or the huge problem of statutory holidays and, in particular, those holidays which do not coincide with the feasts of the Christian calendar, or the problem of clandestine abattoirs.

The option of the immediate application of Belgian positive law also plays a large role in the field of personal status (family relationships, the individual's civil status), regardless of nationality or religious adherence, on every occasion that the courts hand down a judgment against a foreign legal or religious law or institution, which runs contrary to the maintenance of public order and accepted standards of behaviour. Here we automatically think of the growing number of cases in recent years where courts have rejected requests for the effective recognition under Belgian law, of divorces by repudiation (Ballion, 1989, Foblets, 1997); or yet again, the court's refusals to comply with requests for the recognition of polygamous marriages between a Muslim husband and his co-wives (Lagarde, 1993).

The fate of Muslim communities under Belgian law is, to some extent, divided between the first and the second option. Torn between two quite different logics, and logics which are largely incompatible, it varies not only depending on the legal domain, but also according to the legal juridical conscience of the legal authorities. This is particularly true when it comes to implementing the concept of public order (Lagarde, 1993, Heyvaert, 1995).

Put in legalistic terms, the issue of the status of Islam within Belgian legal order is deceptive. Islam enjoys no status which would enable it to define a defined area within which a "Belgian Islam" could work effectively. To raise the question on the basis of principles would mean looking at the issue from the wrong point of view.

It is in practice that, for a number of years now, the place of Islam has become apparent in the Belgian legal order. The repetition of similar situations, and the emergence from time to time of forms of public behaviour inspired by Islam, has led to the development of a number of *de facto* situations, without, however, making them into precedents. The wearing of headscarves, which we shall look at in greater detail later, was tolerated for a long time. Yet for some time now, it has been the subject of strict bans, usually upheld by the judiciary. There are any number of examples.

Moreover, adherence to Islam is perceived differently depending on the point of view: of private law on the one hand, and public law on the other. International private law permits a bond to a person's national law of origin. A foreigner's personal status enables a Muslim man or woman who has retained the nationality of his/her country of origin to obtain, on the part of Belgian courts, the recognition of legal decisions handed down in the country of origin, or indeed, and this might seem a true privilege, the right to organize his/her family relationships in Belgium in line with the laws of the country of his or her nationality.

In public law, the concept of "Muslim identity" generally has to do with religious behaviour, within, for example, the framework of the protection of freedom of conscience. Or yet again, by looking at a totally new trend, the cultural minority as defined in Article 27 of the International Covenant on Civil and Political Rights, which contains prescriptions other than those already contained in the principle of equality and non-discrimination.

Up until now faced with Islam, Belgian courts and Belgian judges have done little more than reuse *grosso modo* the mental and legal frameworks which existed prior to the post-colonial emergence of Muslim communities within its borders (Foblets, 1994).

The Belgian experience with regard to Islam is composed of hesitations and complexities arising to some extent from the difficulties the authorities in the country of origin encounter, in accepting the new social reality created by the stable presence of a Muslim minority within the national boundaries, and resulting also to some extent from the Belgian authorities' abysmal ignorance of Islamic culture. This ignorance became clear, among other things, from the way in which the Belgian state itself, at the beginning of the 1970s, sought to play a leading role in trying to entice Islam into its own legal space.

In its constitution Belgium does not recognize any official state religion, nor even a majority religion. According to Belgian law, belief is a purely private affair. In order to protect the mutual independence of the state and the religious communities within its boundaries, the Belgian State – curiously enough – takes responsibility for what it refers to as the "temporal aspects of worship", in other words, part of the infrastructure and running costs of "recognized religions". This represents an original solution, and one which is relatively unique, that is the outcome of a long history of rivalry between the power(s) of

the state and the Church. Following the example of the legal framework drawn up to guarantee the protection of long-standing religious communities in Belgium, the law which protects the independence of Islam under Belgian law, takes as its starting point a clear demarcation between the zones of intervention between the religious and the political spheres. As far as Islam is concerned, we can, to a certain extent, condemn Belgian legislators for acting as automatons, without waiting for an explicit and clear protest from the Muslim communities established in Belgium. Today, 25 years after the law came into effect, it would appear that the means foreseen in order to protect the temporal aspects of Islamic worship in Belgium are not adapted to the special needs of the Muslim communities in Belgium and their vast internal heterogeneousness (Bastenier and Dassetto, 1990: 179 *f.*). As a result, with the sole exception of the establishment of the teaching of Islam in state schools throughout the country, the law has had no effect until now.

We shall not look here in detail into the problem of the integration of the Muslim community under Belgian law (e.g. Verwilghen and Carlier, 1992). We shall, by examining the very controversial issue of the wearing of headscarves, try to sketch out some of the questions which the ordering of the relationships between the Belgian state and the Muslim community within its boundaries raise on the legal level, at the crossroads of two legal systems: Belgian law as a Western construct on the one hand, and the law of the country of origin which to a certain extent takes Islam into consideration, on the other. We shall, more specifically, seek to demonstrate the lack of determination of Belgian legislation with regard to this issue of the Islamic headscarf, by demonstrating that this lack of determination, in its turn, reflects a general difficulty facing European society today, namely that of considering, dealing with and granting a specific status to Islam within the context of a secular society.

Via this illustration, and going beyond the concrete questions with regard to the originality and the practicality of the solutions developed, we arrive at the question of the legal and cultural pluralism of Belgian society and, with it, that of European society. The gradual settling of Muslim communities in our countries which took place beginning in the 1960s and 1970s, and the irreversible effects it has had on the younger generations emerging from this immigration, represents a new challenge to legislation: creating a maximum degree of compatibility between the original legal system (or systems) of the immigrant communities and the legal system of the country of reception.

1.2 Egypt: A Single Law with a Multiplicity of Sources

Whatever the importance which might have been given to Islamic laws and to its norms in the establishment of contemporary pragmatic Egyptian legislation, here we need only look at what continues to exist as an explicit reference to Islam. Indeed, it is not our aim to examine the Islamic relationship of the

rules of law, but simply to look at the referential plurality with which the Egyptian judge is confronted. We can distinguish three areas: penal law, civil law and constitutional law.

In Egypt, Islam is the state religion (Art. 2 of the Constitution) and its public administration is governed by a triangle composed of the *Shaykh al-Azhar*, the Mufti of the Republic and the Minister of *waqf*, under the direct authority of the President of the Republic (*cf.* Luizard, 1995, Paradelle, 1995, Zghal, 1997). As far as penal issues are concerned, the only explicit reference to Islam consists of the obligation to consult the Mufti of the Republic with regard to the pronunciation of the death penalty by the Criminal Court (Paradelle, 1995: 77).

Civil law contains a number of more substantial references to Islam. With regard to procedure, the issue has recently been raised of whether the *hisba*, i.e. action in order to preserve Islam for all Muslims without them necessarily being directly involved, is still acceptable under Egyptian law. Law No. 3, of 1996, ratified this procedure while restricting its implementation. Moreover, under civil law there are a number of explicit measures, the most important of which are to be found in Article 1 of the Civil Code of 1948 which lays down the principle of the exclusive competence of legislation on all issues it regulates and, "in the absence of an applicable legislative measure", the competence of the judge to make a ruling "on the basis of custom and, should this be lacking, on the basis of the principles of Islamic *shari'a* (C.C. Art. 1). Thus Islamic law is endowed with the role of a second subsidiary source of legislation. In addition, Islamic *shari'a* and its principles are given an explicit place in various parts of the Code, particularly with regard to rights of succession (Art. 875) and inheritance (Art. 915). As far as personal status is concerned (marriage, divorce, separation, alimony, guardianship of children, inheritance, etc.), this is totally dependent on the religion of the individuals involved, since all religions recognized in Egypt are endowed with specific legislative texts and competent legal chambers at all levels of jurisdiction. As far as Muslims are concerned, a whole series of texts has codified the *hanafite* judicial tradition.[1] In family matters, this is dealt with principally in the Laws No. 25 of 1920 and No. 25 of 1929, both of which were amended by the Law No. 100 of 1985 (El Alami 1994: *cf. infra*). In parallel, the Laws No. 77 of 1943, No. 71 of 1946 and No. 25 of 1944 were brought in to regulate inheritance law in detail. We also note that, quite naturally, the reference to Islam is no longer to be found within these texts, given that they are applicable solely to Muslims, with the exception of the hybrid situation of inter-religious marriages which bans a Muslim woman from entering into marriage with a non-Muslim.

[1] For the Coptic Orthodox, personal status with regard to marriage and divorce is regulated by a law dating from 1938.

The Constitution certainly has a central place in the role of Islam in Egypt. This is basically due to Article 2 which stipulates that "Islam is the state religion, Arabic is the official language and the principles of Islamic *shari'a* are the principal source of legislation". This article was the subject of an amendment in 1980, which elevated the principles of *shari'a* from *a* principal source of legislation to *the* principal source of legislation. Moreover, this measure constitutes the base of the claim to unconstitutionality brought before the Egyptian Supreme Constitutional Court (*al-mahkama al-dusturiyya al-'ulya*).

To take up Bernard Botiveau's propositions: "the legal system today, in its general principles and its configuration, offers a number of fundamental characteristics usually to be found when defining the legal organization of a modern State" (Botiveau, 1986): the separation of legal and administrative judicial systems, of civil and repressive jurisdictions, the independence of the judiciary, etc. The present system is unified and close to the legal organization of those countries of the French legal tradition. There is no longer any specifically Islamic jurisdiction, since the religious tribunals were abolished and replaced in 1955 by special sections of the state courts and tribunals. Civil justice is divided into partial tribunals (for issues of minor importance), county courts, courts of appeal and the Court of Cassation. Administrative justice is handed down by the Council of State, an institution made up of three sections (judicial, consultative and legislative) whose highest authority is the Administrative High Court (Kosheri, Rashed and Riad, 1994). Egypt also has a constitutional court, the Supreme Constitutional Court, established by the Constitution which has been active since the promulgation of its organic law (Law No. 48 of 1979) and the adoption of its internal regulation (*cf.* Jacquemond, 1988 and 1944). The Supreme Constitutional Court is competent in issues with regard to the interpretation of the law, monitoring constitutional issues and deciding conflicts of competence between the courts. At the request of a judge it can be called upon to decide on the constitutional status of a law.

Having looked at the sources of the law and the role played by Islamic principles and judicial competences, we can then go on to examine the attitude of Egyptian judges on issues referring to Islamic law.

First of all we would like to look at the interpretation given by the Supreme Constitutional Court to Article 2 (amended) of the Constitution. An examination of its jurisprudence demonstrates that, initially, when it comes to dealing with issues of unconstitutionality, it has tended not to become involved in interpreting *shari'a*; rather it has followed a strict technical principle (SCC 4 May 1985). In another decision, taken on the same day, the Supreme Constitutional Court formulated a principle which has become law, that of the non-retroactive implementation of Article 2. Thus the Court rejected the right to pass judgment on the constitutionality of texts pre-dating 1980. One might therefore think, initially, that the Supreme Constitutional Court was trying to avoid the danger of interpreting *shari'a*, preferring to limit its decisions to "arguments of pure,

positive law" (Jacquemond, 1994). Nevertheless, if we examine the Court's more recent judgments, we see that this is no longer the situation, for the simple and excellent reason that, whereas a number of years ago all the legislative texts predated the 1980 reform, the material has accumulated and, as a result, the possibility of appeals about unconstitutionality referring to texts which post-date this reform, are on the increase. Thus, in a decree dated 15 May 1993, the Court made explicit reference to *shari'a* and its interpretation. Making a distinction between the absolute principles and the relative principles of *shari'a*, the Court specified that its control is exercised solely on absolute principles, without the latter necessarily being clearly defined.

The jurisprudence of the Supreme Constitutional Court does not, however, represent the only case in which reference is made to Islam in Egyptian legal decisions. We would like to offer a typology (of necessity brief) of the four categories of decisions. The first category is that which objectivizes the content of Islam as a recognized religion and possibly a privileged one, or of *shari'a* as a legal point of reference. The second type consists of those arguments which use Islam as a basis for decisions which have, first and foremost, to do with the institutional form of the state or a certain concept of public order. The third category of decisions consists of an over-valuation of the rules of positive law in which the wording itself is self-sufficient and therefore cannot justify any such recourse. Finally, the fourth type, a number of legal decisions which, in the name of *shari'a*, went so far as to invalidate positive law.

The objectivizing category focuses on those situations in which reference is made to Islam as a religion, and its claims to the free exercise of that religion. This is true, for example, of the issue of wearing headscarves in school, and we will come back to this later. In such a case, the definition of the Islamic norm constitutes the very object of a dispute brought to court and in which there can be recourse to measures having a bearing on religion, liberty of conscience and the right to practise religion in substantive law. The decisions of the Supreme Constitutional Court, handing down a verdict on the nature of *shari'a* as a legal point of reference, also belong to this category (*cf. supra*).

The "instrumentalization" category has to do with those situations in which Islam is used as a basis for a decision dealing with a certain concept of public order. In this case, an attack on Islam is used either by the judge or by the parties concerned to another end. A number of motives can be invoked. Either it is claimed that there has been an attack on Islam as the state religion and the foundation of the state institutions, or it is a question of Islam as the religion of the majority, and the calling into question of which is seen as an attack on public order. It is within the framework of such judgments that the decision which defined the Baha'i religious sect as heretical can be classified.

The hypothesis of "over-validation" involves recourse to motives which, in themselves, are not the object of legal dispute. As his basis the judge takes general principles such as that of religion and the law which emanates from it in a

state which has made Islam its religion. This as such would not seem to arouse any specific problems. Recourse to such principles serves to confirm positive law. It is merely seen as a stylistic quasi-formulation to which nothing can be opposed. Bernard Botiveau speaks of a recourse to *shari'a* as a support (Botiveau, 1993: 225).

Finally, when it comes to the "invalidity" hypothesis, the issue takes on a very specific character once it becomes a matter of turning to *shari'a* and its normative formulation in order to deny any validity of positive law. This is true of certain judgments handed down by Judge Ghurab, in which he hands down a sentence which he describes as Islamic and which runs contrary to the positive law in force and which, he, at the same time, describes as illegitimate (Ghurab, 1986). As a result, the legal and judicial system finds itself confronted with a proposition which is, of course, unacceptable, and which leads it to react in consequence (judicial reprimand and administrative measures which second the judge to a non-contentious court). What sets apart Judge Ghurab's position is his explicit invalidation of positive law, whereas the fact of having recourse to the principles of the Islamic religion as a subsidiary basis for a legal decision, is not unusual.

2. THE LEGAL HANDLING OF THE ISLAMIC POINT OF REFERENCE: THE CASE OF THE HEADSCARF

2.1 Belgium: The Manifestation of a Religious Conviction?

Our illustration is taken from the growing phenomenon throughout Europe of the headscarf worn by an ever-increasing number of women – of all generations – who look to Islam in order to demand the right to express and demonstrate their (religious) identity in public.

The response outlined in the number of decisions on this issue in Belgium (Blaise and De Coorebyter, 1992, Verstegen, 1994-1995, Van Loock, 1994) has to do largely with the pluralist state school system. The response can be summarized fairly easily: for girl pupils to wear symbols as a means of demonstrating their membership of a religious community is not, in itself, incompatible with the governing principle of a plurality of opinions within the public education system, to the extent that it constitutes the exercise of the liberty of expression and the manifestation of religious beliefs, on condition, however, that this liberty is exercised while respecting the liberty of others.

By laying down this rule, the courts were simply applying the general principle of all public liberties: liberty is the rule, possible limitations are the exception.

This interpretation of the limitations and the fact that the latter reveal different degrees of tolerance on the part of school governing bodies and the courts, may explain why a specific form of clothing has assumed such importance and has come under the coverage of the media and symbolic spotlight to such an extent.

For some this recognized liberty should not enable girls to wear symbols which, given the conditions under which they are worn individually or collectively, or by their ostentation or protesting nature, (1) represent a form of pressure, provocation or propaganda and, as such, attack the liberty of other pupils or teachers or, to an even greater extent, other members of the same religious community; (2) would compromise their health or safety (long distance identification); (3) would disturb teaching activities (e.g. physical education) and the educational role of teachers; or, finally (4) would create a disturbance and, as a result, upset the normal functioning of public order.

Thus a distinction is made between the different standards laid down as alternatives or cumulatively as conditions for the respect of the exercise of the public liberty of these young women: the health and the security of the pupils; the normal functioning of educational activities; the educational role of the teachers, the problems caused within the college or the school.

Implicit within the jurisprudence, we can see the problem of the compatibility of certain manifestations of collective identity and the objectives of teaching. Up until now, only the facts of a given situation, on a case to case basis, can enable us to judge the problem.

In France, for some time now, the fear has been of a development similar to the one that has taken place in a number of Islamic countries with regard to women's dress: women find themselves pressured by their environment. In order to avoid precipitous developments, the courts are careful not to base the authorization to wear a symbol such as a headscarf on practices which are essentially religious and external, because this might well represent a threat to the liberty of conscience of those who, while belonging to the same community or the same religion, have no intention of adopting the same practices (Gaspard and Khosrokhavar, 1995).

In its conclusions, under a decree handed down by the French Council of State and dated 2 November 1992, the Commissioner of the (French) government, summarized the position of the latter in a manner which offers food for thought. It responded to the claim by some people that the headscarf should be banned in the name of the dignity of women. In the eyes of the Commissioner, such an approach "(...) is not based on the symbol itself but on the way in which it is perceived. What is at issue is not the headscarf as such, but the symbol it represents and the interpretation given to the place of this symbol within the Islamic religion". Refusing to intervene in what the Commissioner would have considered to be interference on the part of the French authorities in the internal affairs of a religious community, he concluded that the symbol at issue is not, in itself, contrary to the principles which the educational system in France is called upon to protect, thus its wearing was permissable, as long as provocation or incitement to proselytism was excluded. Thus it is all a question of interpretation.

One would try, in vain, to provide a better résumé of the present state of affairs. There is, in fact, no objective symbol. Any symbol has a meaning only to the extent that it represents something and, moreover, it is because of this representation that it is worn. The headscarf, worn as a symbol, does not represent the same thing for those women who wear it voluntarily, out of religious conviction or as part of a search for a personal and collective cultural identity, or even through pressure from their surroundings, and for those who see it on the streets or in the schools. In the West the headscarf or the veil is often seen as the symbol of young women in Muslim society, or, at least, in a certain vision of Islamic society. The discussion with regard to the clothing imposed on women in the name of religion is, today, very much alive in the countries of origin. For some women, who object to the respect demonstrated by Western courts when it comes to the wearing of veils by Muslim women, the headscarf, unlike those symbols which have an inherent religious significance, such as the cross or the kippa, has no inherent religious meaning. Islam calls for modesty, not the veil.

The refusal of the French government Commissioner to become involved in such a delicate debate is understandable. While waiting for the whole debate to cool down, in France and in Belgium the problems are dealt with case by case. In the long term, the problem remains.

In short, wearing a headscarf in school represents only one aspect of a vast question, and a much older one, which has to do with the role and the visibility of religion in the public sphere in a secularized society.

2.2 Egypt: "The Ways and Customs of an Islamic Society"

Here we shall only briefly summarize the interpretation given by the Egyptian Supreme Constitutional Court of the ministerial decree governing the wearing of uniform and of the headscarf in state schools. The article by Kilian Bälz in this volume provides a detailed study of the issue.

In summary, the facts are the following. Mahmud Wasil, as the guardian of his two daughters Maryam and Hagir, brought a court case against the Minister of Education calling for the suspension and the dismissal of the decision which banned his two daughters from attending secondary school. When he went to enrol them in the school he was informed of their rejection on the basis of a ministerial decree which banned pupils wearing the full veil (*niqab*) from attending school; this decree states that pupils must wear a uniform which conforms to the description laid down in the decree. According to Mahmud Wasil this was in violation with Articles 2 and 41 of the Egyptian Constitution which stipulate, in the case of the first, that Islam is the state religion and that the principles of *shari'a* are the principal sources of all its legislation and, as far as the second is concerned, that individual liberty is protected and that any attack on this is forbidden. In an emergency meeting, the administrative tribunal recog-

nized the validity of the request and ruled a suspension implementation of the decree while waiting for the Supreme Constitutional Court to hand down a judgment with regard to the constitutionality of the law under discussion.

In its decision of 18 May 1996, the Court began by reiterating its interpretation of Article 2 of the Constitution and the principle it establishes, according to which interpretative opinions with regard to issues of controversy do not, of themselves, have any direct power on persons other than those directly involved. It is up to the judge to pronounce judgment with regard to the objectives of *shari'a.*

The decree in question requires all girls to wear the uniform of the school they attend. According to the Court, the logic behind the uniform is to ensure respect of modesty and the customs and ways of society. The legislator can only impose certain restrictions with regard to apparel, without these being contrary to the principle of the respect of individual liberty, if it is done in order to preserve identity. In the view of the Court, Islam has improved the condition of women, which is why it encourages them to protect their modesty. Islam orders them to wear the headscarf because this constitutes a protection against immodesty. As a result, when it comes to clothing and with regard to God's law, women cannot make arbitrary decisions. On the contrary, a woman's clothing should express the responsibility which she takes upon herself in the world.

The form of women's clothing is not, however, laid down absolutely in Koranic texts. The door is therefore left open for interpretation. As a result, the judge can rule on vestimentary custom, as long as it respects the habits and ways of Egyptian society. Clothing should be both modest and practical. The canonical texts do not force women to veil themselves completely: there is no religious obligation to wear the *niqab*. In the view of the Court, communication is essential socially and uncovering the face meets this necessity.

The ministerial decree stipulates that all students should be free to adopt the veil if they so choose, as long as it does not hide the face and their guardian can certify that this decision has not been taken under duress. The clothing must, moreover, respect the customs and ways of society. As a result, the Court affirmed that the decree did not contravene Article 2 of the Constitution.

With regard to the respect of religious liberty as laid down in Article 46 of the Constitution, the Court made a distinction between liberty of conviction and liberty of religious practice. Liberty of religious conviction is defined as the liberty of an individual not to be obliged to accept a religion in which he does not believe or to deny a religion he has made his own. Moreover, the Court stressed that religions must show tolerance for one another with mutual respect, and that the role of the state is to promote this. As for liberty of religious practice, it is defined as the right of the individual to give concrete expression to an internal conviction in such a way that it is materialized in daily life. This liberty can be limited by the pursuit of higher interests such as public

order and good behaviour. Education is part of these higher interests which the State is required to protect and which authorizes restrictions on religious liberty. In this sense, the Ministerial decree, which does not attack liberty of conviction but merely restricts the liberty of practice, does not run contrary to the Constitution. Moreover, it involves an issue which is open to interpretation, and in which the legislator is sovereign.

Since, in the view of the Supreme Constitutional Court, the decree handed down by the Minister of Education did not contravene Articles 2 and 41 of the Constitution, it decided to reject the request. In practical terms, this means that girls cannot attend school wearing the full veil.

3. THE NATURE OF THE REFERENCE TO ISLAMIC NORMS

It is, among a few other issues, through the issue of the headscarf in Belgium that the legal and effective status of Islam has become a most controversial topic in the jurisprudence. When it is applied to the legal identification of the Muslim community, the controversy with regard to Islam as a source of rights and responsibilities, in Belgium and more or less throughout Europe, finds itself confronted, on the one hand, by the champions of cultural assimilation and, on the other, by the fiercest defenders of immigrant culture. In Belgium, for a number of years now, the issue of Islam has led to a kind of ideological cleavage, rather like that which the country experienced, and to a certain extent continues to experience, with regard to integration, to the extent that the adversaries of any assimilation of the Muslim communities will reject it in the name of the (immigrant) cultural identity, whereas its supporters will deny this identity in order to make the policy of assimilation more credible. Here, quite clearly, we are offered an example of the two extremes.

For a clear understanding, one has to make an inventory of the principal issues which have been regularly encountered recently in legal practice. Here we think, for example, of the jurisprudence with regard to the effects of repudiation, the handling of polygamous relationships, the dowry as a precondition for the validity of a marriage, the institution of matrimonial guardianship, the women's right of succession, etc., each of which in its own way organizes and determines the architecture of legal investigation into the status of Islamic law within the legal systems of secularized states. Such an inventory would enable us to see more clearly some of the consequences of an implementation of legal techniques, where such techniques are called upon to define the legal status of ordinary people who find themselves falling between the two different culturally opposite legal models.

The example of the veil enables us to demonstrate the degree of uncertainty, the context of "trials and errors" in which certain courts are working towards a system of attitudes which can be developed with regard to Muslim immigrants, a system which reinstates all its complexity depending on the individuals and the groups involved, and the rights and the interests concerned. Similar illustra-

tions have been worked out in a research that was carried out in The Netherlands in the 1980s, under the title "Moslims in de Nederlandse rechtspraak" (Muslims in Dutch jurisprudence) (Rutten, 1988). Some judges appear to fulfil a role abandoned by the executive power and the executive legislator. Thus it is their decisions which, to a certain extent, structure the approach to legal and cultural conflicts between the Islam which has taken root in Europe and the legal system of the host society.

Egyptian law, for its part, offers the illustration of yet another expression of the search for a definition of the State religion and the role to which it is entitled within a totally positive and modern legal system. As in Belgium, it takes into account a search for what, in short, can be described as identity, with the difference that in this case it is not a desire to affirm oneself in an alien context but rather to define oneself within a majoritarian context. Just as in Belgium, the Egyptian courts must ask themselves what is legally enforceable within the religious precepts. Thus religion, as such, has no legal power: it can only play a role in the legal field on condition that a legally enforceable text opens the door, or a judge allows it to play a role. We should not, in any case, underestimate the extent and the impact of the positive aspects of Egyptian law. This does not mean to say that religion has no normative impact on the decision of Egyptian judges, but simply that this norm can only be exercised on condition that it is moulded in a positive form which makes it acceptable, without, of course, ignoring the vastness of the interpretation which the judge might give it.

The difference in contexts nevertheless results in this major difference, in that the Egyptian judge passes sentence in terms of definition, whereas the Belgian judge makes a judgment on the basis of the level of acceptability. When faced by the interpretation of the religious norm, the Egyptian judge will seek to endow it with a religious status, one which has an historic base and is socially sanctioned, which he alone would be able to apprehend both as a norm imposed on society and as a social norm to be translated into law. To go back to our example, the veil belongs to those practices which have left a trace, albeit sedimentary, in a normative form. Integrated today in a legal context, the formal obligation to wear the veil (the norm of which is recognized), is sanctioned legally and morally by a judge imposing his form of interpretation as a contemporary and cultural interpretation of an a-temporal desire. Constitutional justice, in its search for a morality to match its vision of the religious and social normality has, as a result, given substance to a formal norm inherited from history. It is here that we see that, while claiming to interpret the natural norms, the judge has in fact created one.

We can now draw some conclusions from this attempt at a comparative approach. First of all we should state that the differences which have become apparent between Belgium and Egypt in their ways of referring to Islam, can be explained by differences in context. Given this fact, we can also see that this reference can, on occasion, take similar forms. This is true of any reference to public liberties. Moreover, it is this common reference to public liberties in Belgian

and Egyptian cases with regard to headscarves which originally inspired us to carry out this comparative study. In addition, we should note that the Islamic order plays a different role in the two contexts, something which can be explained by their different sociologies. Thus Belgian law respects the foreigner's right to self-expression through the instruments of private international law and the definition of public liberties, whereas Egypt tends to re-attribute to a pseudo-autochthonous legal order (but which, juridically speaking, is foreign) that central role in the legal system which it claimed to enjoy in the past (since the present legal system is sometimes itself defined as foreign). It is true that it also makes use of the techniques of legal conflicts – we shall therefore describe it as private internal law – or of the definition of public liberties. Likewise, in both cases, the limits of any recognition of a foreign order are related to a desire to maintain the homogeneity of the existing legal system. In Belgium, therefore, it is a matter of the limits of public order and, in Egypt, a question of the open definition of *shari'a* to limit the dangers of upheaval. The two countries adopt a contrasting attitude towards the incorporation of identical norms. In the one case it is a question of accepting the plurality of the system whereas, on the other, it is a question of maintaining its homogeneity. Thus Belgium rejects the idea of a religious law, but ensures the protection of religion on the basis of public liberty. Egypt, for its part, seeks to offer a religious legitimation to the concept of public liberty and to affirm the religious foundation of state law.

This leads us to raise questions with regard to the various logics which govern the decisions of Belgian and Egyptian judges in relation to Islam. We see that different contexts, different logics, different forms of interaction and the implementation of different decisions can lead to similar consequences: to give substance to religiously referred legal norms. We can, in this case, question to what extent Islamic norms would not exist but as resources available to the various actors until the time the context (eventually the legal context), would lead some of these actors to mobilize them. It would then be this mobilization which would lead to the substantialization of these norms. This would mean that, no matter what the context, there would be no Islamic law as such, the rules of which would naturally impose themselves. On the other hand, there would be normative traces, normative memories, bits of norms, more or less sedimented, within a necessarily reconstructive process: in a way, repertoires whose mobilization would be defined by the context. The substance of such repertoires would be brought about by the interaction of these memories (normative patchworks) and the strategies of the actors (which might eventually take the form of a normative "shopping").

CHAPTER 6
Palestinian Law
Social Segmentation Versus Centralization

BERNARD BOTIVEAU
CNRS/CERMOC

INTRODUCTION

Using the example of contemporary Palestine to contribute to reflection on legal pluralism in the Arab world might appear to be something of a challenge. In so far as one of the main concepts involved in this reflection, that is to say law, lies in a force-field between what are normally considered to be conflicting categories (such as law and non-law, state law and extra-legal norms or "Western" and "non-Western" law), the choice of Palestine would not seem to simplify the task. After all, it is patently obvious that the context in which Palestinian law operates is characterized by diversity and resistance to unification. However, despite the apparent fragmentation of the legal field (a consequence of Palestinian history, compounded by the present "transitory" political situation), most researchers working in Palestine would see no reason for treating this situation as exceptional in comparison to the Arab world and other societies – despite the undeniable existence and influence of a "cultural area" (Botiveau, 1997).

The purpose of this article is not so much to establish a distinction between state law and other legal or normative manifestations (however relevant such an exercise might be) as to argue that the distinctions we observe between these categories are evidence that a multitude of normative fields may exist within a society, in a constant flux between unity and diversity. This does not however diminish the need to examine the significance of state-produced law, and, I would add, the specific nature of that type of law, meaning the elements that make it different and perhaps separate from other systems. I shall therefore be examining this question in keeping with a current of legal anthropology which considers the political dimension to play a decisive role in the dynamic process of law creation and the normalization of social practices.

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 73-87
© 1999 *Kluwer Law International. Printed in the Netherlands.*

We shall doubtless be obliged to hold the perceptions predominating in law faculties at arm's length. Their predominance stems from the fact that they have been developed by academics, theologians, lawyers, politicians and all those who had, or still have, a vested interest in fostering monism in legal studies. The effects of this ideology – the exclusion of all elements non-identifiable with the state – are all too familiar to us. But in the case of Palestine it is particularly obvious how widely legal doctrine and political analysis diverge when one addresses subjects such as the state. On the basis of solely legal criteria one could advance the simple sophism that there is not, and cannot be, any state law in Palestine, because territorial instability, the scattered nature of the population and the lack of international borders prevent it from being a state. Taking a socio-political approach, on the other hand, one could argue that the state is only one of a number of manifestations of political power, and that even where it is imperfectly established, it remains a political form of social organization capable of producing its own law. Thus the field of state law does exist, and in actual fact it often benefits, in terms of the relative value accorded to it, from the quest for a Palestinian identity. These identity issues are highlighted by the historical and political dimension of law, revealing the tensions inherent to the human experience of law.

In my attempt to cast some light on these issues I shall be looking at why, for a proper discussion of legal pluralism, we need to investigate what is legal; how the "legal" experience of Palestinian society illustrates the above, and how the nation-building process now under way in that country reveals a situation of pluralism where the state, although only one of a number of forces at play, is nevertheless an important key to the understanding of a broad range of social facts and merits examination for its role both in the normalization and the legalization of social facts.

1. THE QUESTION OF WHAT IS LEGAL

The questions raised by Kirchmann, Kantorowicz, Gurvitch and the other founding fathers of legal pluralism command respect for opening up breaches in the conception of the inseparability of state and law, but in themselves they were not enough to shake the dogmatism of the law faculties. For that we had to wait until jurists like Vanderlinden, Hooker and a handful of others paid heed to ethnologists' work and created room for doubt. Anthropologists, for their part, paid scant attention to state law (Woodman, 1995) because it seemed to them self-evident that it was only one category of the legal phenomenon. They thus failed to dent the self-assurance, not to say the arrogance, of jurists scorning socio-anthropological approaches to law. In fact it was through an epistemological conflict that, in the 1970s, legal anthropologists began to impose the view that legal pluralism was the "norm" for the analysis of the legal field.

The legal field contains a galaxy of normative systems which correspond to a multitude (and potentially infinite number) of social fields. In this galaxy state law is perceived as one of many elements, and is certainly not considered to play a predominant role. Furthermore, according to Griffiths, it cannot be subdivided into state sub-fields, but we shall be returning to that issue later.

Of course this model, like all models, is open to question. One of the reproaches levelled at it (e.g. Tamanaha, 1993) is that it adopts a state law approach in order to dispute that very same approach. Employing the rationale of legality (what can be considered legal, and on the basis of what criteria) implies the acceptance of a certain number of consequences, including the utilization of certain arguments emanating from legal doctrine, even if only to invalidate those same arguments. For example, the separation of the public and the private spheres (in terms of legal theory) can be extremely instructive when stripped of the artificial character jurists have given it, i.e. if one disregards the separation between private law and public law to concentrate on the nature and functioning of the public sphere. One could probably identify many relatively independent sub-fields, with the degree to which they could be considered "public" depending on their implications for the overall social order.

This is not solely a question of norms – it is also, and perhaps more importantly, the question of the protagonists who use the norms. Things are not necessarily always political, but a lot of things are. A strike at a company may or may not have strategic implications with regard to public order and a solution may be found by way of negotiation, but such is not always the case. In certain cases, for example, strategies for using a norm to serve the interests of a particular group or even a particular individual will be affected by the fact that they are set in a broader social framework, established independently of the group or individual, in which the rules of the game are known and accepted by a large number of individuals because they relate to a particular form of organization in the society concerned at a particular point in its history.

In culture of the modern nation-state we have grown accustomed to considering norms enshrined in law as different and separate from other norms governing the lives of various groups. We accept the predominance of the all-encompassing knowledge of state law over a collection of local knowledges which we consider to be of secondary importance. The principle of state education may sometimes be flouted, but it still governs a huge range of activities. The state may choose to delegate the task of organizing some of these activities to other bodies without surrendering its power of regulation, as is the case in the private education sector in France. Compulsory military service, although varying in form from one country to another and having recently undergone considerable changes in many European countries, including France, was long considered, like school, to be a central social value and an essential element of national integration mechanisms. These examples may make it easier to understand why jurists in France in particular have more difficulty than their Anglo-Saxon counterparts

in accepting the idea of the coexistence of "levels", "fields" or "orders" specific to bodies, villages, associations and other social groups – and this in spite of the fact that French history teems with examples of conflicts between legal orders. They are the very examples cited by early legal sociologists when speaking of "customs", "free law" or "living law".

However, the difficulty of jurists in accepting the diversity so easily admitted by anthropologists does not remove the problem of the pressures for unification at work within societies. While accepting that a single society contains a multitude of normative fields and that an individual may, at any one time, be involved in several of those fields, we cannot hope to maintain that these fields coexist peacefully. In fact each of them is constantly vying with the others for greater legitimacy, in the continuous combat of order against disorder. Many researcher's analyses of this situation do not disregard the concept of hierarchy, as we see in Ehrlich's vision of law as "the organization of ever larger social groups, culminating in the largest of groups, that is to say the state" (Treves, 1995: 110), or Pospisil's identification of "legal levels" ranked according to the social norms they bring into play (Rouland, 1988: 85). The hierarchy depends on each group's ability to persuade the others that it is the best fitted to guarantee security and equity, through which it legitimizes its claim to speak on behalf of all the groups.

No analysis of the legal field can afford to ignore social diversity or the way in which social groups pit their normative orders against one another. Competition is a reality. Any individual can, in certain circumstances, draw on more than one normative register. But in some cases he or she will be obliged to conform to the dominant order because it is universally recognized as a reality (even though it may not be universally recognized as a necessity). In the words of George Balandier who attempts to chart the position of politics in societies, "power can be understood as a force generating cohesion. Firstly it brings about a relative unity between the 'segments' and secondly it provides a mechanism for the creation of the 'unitary effect', i.e. the appearance that a society is a coherent whole" (Balandier, 1985: 314). This relative unity and the appearances that accompany it are doubtless prerequisites for the development of the normative dynamics in which the dynamics of state control (or any kind of political power) is just one aspect of a broader dynamics of legalization (i.e. the definition and establishment of what is legal). If we look at the formation of law in Western societies we perceive the same dymanics at work in the intellectual efforts of scholars and interpreters to arrange and organize the norms. This has then been capitalized upon in institutional terms to reinforce the "discourse of truth" which is the carefully staged foundation of the legitimacy of any society (Legendre, 1993: 107 ss.).

It is in the light of such socio-historical constructions that I would like to examine a paradox of the nation-state – on the one hand the myth that it is the sole creator of norms, and on the other hand its frequently observed ability to

establish its hegemony over law. The political element described by Balandier is not confined to the side of order but is also present in a unifying dynamics, a dynamics which generates "relativity" and "appearances" without which the unity would not be recognizable as such.

It is possible that our understanding of the nature of law is obscured by the strength of links between normative constructions (which historically speaking have been produced largely, although not exclusively, by states) and relationships of domination and subordination between social groups. However, legitimate preconceptions of an ethical nature and reservations regarding the relevance of these relationships for the subject under investigation cannot detract from the value of understanding the practical procedures and institutionalization processes used by state law to develop its influence and acquire the trappings of legal status.

2. THE PALESTINIAN EXPERIENCE OF LEGAL DIVERSITY

There is no point in repeating here how difficult it is to situate the Palestinian State and Palestinian law today. But it is worth specifying how Palestinian jurists see their legal history and how they link it very closely to their political history, which they perceive as a source of pluralism rather than unity. A recent seminar on law in Palestine at the Law Center at Birzeit University reiterated this common description of the Palestinian legal field (Bourlond, 1997).

Contrary to what I presume to be the situation in Egypt and other Arab countries where a tradition of centralization inherited from the Ottoman Empire and from France has overshadowed the contradictions of the legal field and the multiplicity of its practices and actors, Palestinian law is described first and foremost in terms of diversity. However, the study of the different legal orders established temporarily or on a long-term basis during the successive waves of political occupation, which is being conducted with a view to harmonizing the methods and programmes of the four existing law faculties indicates a perception that the state of unification of the law is insufficient. The Palestinian Authority (P.A.), provisionally representing the State, has the task of setting such a law.

Jurists make no bones about the fact that acculturation to models imposed from outside is part of the Palestinian legal experience. It is, after all, one of the factors which shapes their legal practice. But this perception is also shared by society at large. Social groups have developed their practices regarding the law in the knowledge that their strategies had to take account of the multiplicity of repertoires inherited from the past, because although they could exploit these different orders in the defence of their interests, they could not easily circumvent them. The Ottoman Empire is considered to have played a determining role in this respect. The Ottoman occupation of Palestine and its neighbours in the sixteenth century was a turning point from a historical point of view

because Ottoman law introduced regulations governing "customary" practices. This was particularly the case with regard to land ownership (Shehadeh, 1993) and official interpretations of Islamic law. At a later stage, Ottoman law rationalized the interpretations of Islamic law through the *Tanzimat* codification, opening up the way for the secularization of many areas of legal conduct.

The extent of the Ottoman Empire's grip on the legal field can be seen in the fact that while new norms based on common law and equity were gradually introduced into the court system under the post World War II British Mandate, no provision was made for the automatic replacement of Ottoman legal practices. Ottoman practices remained in use in the courts until circumstances led to their replacement or amendment, and this did not necessarily occur. Of course, the creation of the State of Israel in 1948 considerably changed this situation. The 1400 or so military orders issued by the occupying administration from 1967 onwards on the West Bank and the Gaza strip added to the already complicated inheritance without systematically destroying existing legal practices in those territories. One reason for this was that the law already in force in Palestine as a whole could be manipulated to suit the new political situation, especially with respect to land ownership. Control of the land was of decisive importance for the realization (and legitimation) of the colonization process. In most cases the law of the occupiers was used to justify the confiscation of lands whose owners were "absent" (according to Israeli law) and the expropriation of "public" lands (*miri* lands under Ottoman law) but sometimes Ottoman law was perverted to the same effect, despite opinions issued by the Israeli Supreme Court (Dumper, 1994: 89).

The inventory of legislation, which the Law Center of Birzeit University began in 1994, provides a systematic overview of the legislative strata which can be considered part of the Palestinian legal landscape. It is intended for the use by Palestinian jurists and administrators. It lists Ottoman law in its different phases; common law (familiar to jurists in the West Bank, and even more so to jurists in Gaza where it was maintained in force by the Egyptian administration until 1967); Jordanian law, which was applied in the West Bank until 1967; Israeli military orders, the application of which was forbidden in Palestinian courts by Yasser Arafat's decree of 1 May 1994 but which may still be considered to "inform" the practice of jurists. The latter need to be familiar with these orders in order to gauge their long-term effect on case law practice, particularly in the many competence disputes arising from the Oslo agreements and the three zones system.[1]

[1] These are A zones (autonomous territories), B zones (theoretically areas of joint (shared) sovereignty) and C zones (areas like East Jerusalem which remains for the moment under Israeli sovereignty).

The aim of this brief reminder is not to describe the pluralism of the wider legal field but to underline the fact that the field of state law, the subject of this analysis, is itself fragmented and constitutes a particularly clear case of internal pluralism of state law. Although Griffiths' reticence to recognize the existence of this type of internal pluralism (Woodman, 1995: 9-10) is doubtless justified in many societies where, although the construction of a nation-state has resulted in the coexistence of a number of legal orders, one of those orders is homogenous enough to be viewed in its own right as an element of the broader, overall pluralism, this does not seem to hold true for Palestine. There may be specific historical reasons for this, but those reasons nevertheless merit examination. The Palestinian case would seem to be in contradiction with the image of a state legal order homogenous and centralized enough to resist definition in terms of diversity (justified as such an image may be for other cases such as France, Egypt, etc.) Actually, the legal order that has gradually been taking shape over the last few years under the authority of the P.A. institutions (the Legislative Council, the Ministry of Justice, the legal profession) does tend towards centralization – one recent illustration being the attempt to unify the legal profession through the creation, in July 1997, of a single council composed of equal numbers of representatives from the Gaza Lawyers' Association, lawyers from the West Bank and the Committee of Arab Lawyers.[2] However, this system is still a matter of theory rather than practice, since the *de facto* Israeli-imposed separation of the two main parts of the autonomous Palestinian territories continues to prevent West Bank and Gaza lawyers from meeting.

This emphasis on the legal order of the P.A. is a methodological choice, its purpose being to clarify the impact of this order in a general context of pluralism. The aim is not to exclude other normative practices that may be considered legal to the extent that they are binding and recognized as legitimate by at least part of the population. Elsewhere (Botiveau, 1997a) I have considered various hypotheses concerning, amongst other things, the conflict settlement structures developed during the years of occupation in response to the absence of recognized Palestinian authorities (to deal with family disputes, for example) and individuals' use of existing Israeli jurisdictions to their own advantage (e.g. the successful use of Islamic law of which there is a wealth of examples relative to personal status). These examples would tend to create the impression that individuals are not overly concerned with the need for a law emanating from a political authority, but other cases may demonstrate the contrary.

It is not sufficient to confine ourselves to the Palestinian population physically present in Palestine during the occupation period. The Palestinians of the

2 A group of West Bank lawyers who, a few years after 1967, started practicing again in the framework of the system set up by the Israeli administration, unlike their fellows ("the strikers") who ceased all activities until 1993 (the Oslo agreements) or even longer.

diaspora have developed specific practices outside their country. Some of them are back in Palestine today and their legal experience contributes to the collective memory that influences contemporary legal practice. To give an example, the observation of certain Palestinian refugee camps has shown that, over time, the fragmented legal field has been subject to countervailing centralization. An investigation carried out in a number of camps in Lebanon (Peteet, 1987) examines the hypothesis that events in these camps demonstrated a concern to reconcile different models of society resting on different foundations and to establish the authority of the state. The hypothesis was based on three separate cases of physical violence which brought into play such considerations as the Islamic personal status, the traditional system of blood feud and the equilibrium between communities (the Druze community and the Palestinian community). While in one case a P.L.O. court allowed the compensatory system of *diya* to take its course, it did so only after giving the protagonists the choice, and ruling accordingly. In another case the court chose to run the risk of violating Islamic law by ruling that there should be a divorce, and in the third case, where a death sentence was issued, the subsequent execution was followed by a death confirmation ritual destined to quench any latent desire to rekindle the conflict. There are no secrets here concerning the goals pursued. The Palestinian authority of the camp had to secure a political consensus between the different political organizations represented and avoid upsetting notables favouring the application of Islamic or customary law, while at the same time seeking to impose a "national" solution, i.e. a solution in conformity with revolutionary goals, which included combatting the feud-system and protecting women's rights.

This may sound like squaring the circle, but the facts do imply the presence of a certain dynamic – a dynamic of levelling-out of norms, or "depluralization" (Rouland, 1988: 84-85). This does not mean that the development of "national" law is a fatality or even a necessity – in fact there are certain other cases of camps in Jordan where camp norms seem to have been repeatedly established and violated (Jaber, 1977) or where the application of camp norms expresses a weakening of national feeling (Farah, 1997). Nevertheless, the model in which individuals seek a normative definition for an important element of their identity (the Palestinian element) persists, and such a definition can only be provided at a relatively broad normative level.

All of this underlines the fact that competition between norms affects the legal solution of conflicts and can produce counter-unifying momentum, a fact which is often deplored. Of course, there is no moral reason why in certain social circumstances in a modern society a conflict cannot be "rightly" and "equitably" resolved without invoking a generalized and "superior" normative order. But the tendency to invoke such an order is a sign that a unifying effect is at work, and must therefore be taken into consideration when analyzing the equilibrium between (and the specificities of) normative fields and their specificities. What of the situation in post-Oslo Palestine?

3. THE HANDLING OF THE POST-OSLO PERIOD

The following observations are no more than an outline of a possible analysis of the contribution of the legal field to the process of nation-building and the consequences in terms of the production of law, particularly with regard to the application of experience gained elsewhere. My aim is to show how the centripetal and centrifugal forces of national law impact the constitution of a dominant institutional arena in an unpredictable fashion, while at the same time demonstrating its necessity. I shall draw on a number of local empirical studies carried out by social sciences research centres and on my personal observations to argue that although pluralism exists everywhere, it becomes much more visible when it coincides with plans for centralization, and that it is therefore necessary to examine the latter phenomenon in its own right. Partially espousing Woodman's proposition (1995), we might adopt a heuristic method and, instead of attempting to define state law, the borders of which are notoriously blurred, pinpoint social facts associated with the unifying dynamic of the modern state to illuminate state law and its specific position within legal pluralism. This requires an examination of the political dimension of these social facts in relation with the logic of state control.

There is of course a relationship between law and truth. The resolution of small problems (neighbourhood disputes, simple contracts) may not always require underpinning with widely accepted social truths, which is why solutions to this type of problem may vary considerably from one place to another. But when it comes to the normative formulation of central social values such as freedoms and political rights, truth is a central and contentious issue and can only really be laid down by a body which is universally recognized, i.e. which compels recognition even from those who are loath to concede it. From this point of view national jurisdictions are more effective than local authorities, even when they are denigrated as they are in Palestine. Different subjects may require different degrees of authority from the bodies or institutions handling them. The public/private dialectic and the resulting recognition of a "civil society" can be helpful in defining this problem. To clarify these issues I shall examine a series of four points based on evidence from Palestinian society in its current stage of nation-building.

3.1. The Question of Whether or Not Pluralism Can Exist Within State Law

The rightful criticism of monist and centralist legal theories levelled at jurists by anthropologists such as Griffiths probably owes a great deal to the ideological strength of legal doctrines forged in a particular historical context (particularly in the cases of France and Germany). When transposed into the Arab world such criticism becomes less effectual because although Arab jurists trained in

accordance with the centralizing model have had no problem in accepting its ideology, they are also the first to admit that pluralism is one of the organizing principles of state law in the Arab world, an example being when family law, which is subject to various influences, is administered in state jurisdictions. But, despite their recognition of "customs" (*'urf, 'adat*) as a source of law, they do not go as far as acknowledge the effectiveness of non-state normative solutions. This observation may be further developed with reference to modern Palestine if we adopt a sociological mode of reasoning, i.e. if we accept that the Palestinian State does exist, regardless of its weaknesses (Whitbeck, 1997).

The internal pluralism of Palestinian State law has two special features, the first of which is accentuated by the present political situation. The state legal order is a dual order, in both formal and geographical terms, given the *de facto* partition of the Gaza strip and the West Bank. It is worth remembering here that the enforcement of this partition would have been gradually relaxed if the Oslo/Washington agreements of 1993 had been properly applied by the Israeli authorities. However, such has not been the case and a good number of Palestinians are virtually forbidden to travel from the Gaza strip to the West Bank or *vice versa*. To give some examples, a lawyer from the Gaza strip is unable to plead a case in Nablus, and although the top officials of the Gaza Lawyers' Association are indeed able to travel to the West Bank, they are dependent on special V.I.P. cards enabling them to make the crossing at Erez (in particular when they have to attend the sessions of the Legislative Council, which usually meets in Ramallah). One could argue that this situation, which is clearly not viable, will hopefully be replaced by more favourable circumstances, but the fact is that even though Palestinian lawyers from the three existing associations (see above) finally managed, in July 1997, to set up a provisional Council with the task of unifying their legal profession, the situation of pluralism has barely been affected. Furthermore, the partition has roots in earlier events, the most obvious (if we wish to avoid going back too far) being the creation of the State of Israel in 1948. It was from that date onwards that the differences between the two regions began to grow. Prior to 1948 they had been more similar, having been subject first to Ottoman law and then to common law (during the British Mandate). After 1948 the West Bank, under Jordanian control, began to familiarize itself with Jordanian law, while the Gaza strip, under Egyptian supervision, continued under common law while also acquainting itself to a limited extent with Egyptian law (because Egypt did little to modify the pre-existing situation). All of this means that the partition of the two areas can be considered as the present territorial norm, and a well-established norm at that. Even if the Israelis were to end their military closures, jurists' problems would not be resolved *ipso facto*.

The second element concerns the very hypothesis of a homogenization of Palestinian State law by the Legislative Council. The process is not likely to be

an easy one. The present state of political power-play seriously impedes the Council's legislative work.[3] Furthermore, the draft Basic Law demanded as a proof of the existence of the Palestinian State was adopted at its third reading at the beginning of October 1997, but has not yet been promulgated, and its long gestation period attests to the difficulty of producing a version acceptable to all the political forces. The sluggishness has been due not only to Yasser Arafat's reticence to provide for the political succession of the P.L.O., but also to the difficulty of combining the founding principles of the state law in a single text. This has required the reconciliation of at least three somewhat contradictory approaches, the first advocating a state based on the *shari'a*, the second favouring democratic, civil society principles, and the third, more diffuse, stressing the developmentalist objectives of an Arab nation state. But despite all these obstacles, the general cognitive framework of reference is still one in which the existence of several normative fields within a state legal order is recognized.

3.2. The Non-State Normative Sphere Generates Law

We have referred above to the various modes of social regulation which produce law, or, in other words, enjoy broad recognition and include sanctions (although not necessarily physical ones). By way of example we have considered the maintenance of public order in refugee camps and the resolution of minor land disputes or personal status conflicts by community jurisdictions (less subject to Israeli control than civil jurisdictions). More generally speaking, all the regulatory activities in Palestinian society which have taken place apart from the Israeli rule between 1967 and 1993 have constituted a non-state legal field. I am particularly concerned here with the role of NGOs in coordinating activities in the health, social welfare and education sectors (and sometimes in the economic field) during this period (Karamé, 1997). These NGOs were naturally constantly obliged to take Israeli law into account, but they often did so with a view to circumventing it, playing on their recognized international status, regardless of its rather shaky foundation in international law. It was possible for this very broad normative field within Palestinian society to generate law because the population was generally speaking ready to comply with that law, recognizing it as representative of their society's differences and divisions. So much so that in recent years and particularly since 1995, the P.A. has attempted to appropriate the whole system. A bill is currently in preparation

[3] The resignation as of 1 October 1997 of one of the eminent members of the Legislative Council, Haydar Abd al-Shafi, highlights the conflicts, one of which arises from the non-application of a large number of the decisions made by the Council since its election. This subject was discussed at an exceptional meeting of the Council on 8 October 1997.

but it has not yet been passed, despite the fact that the PENGO (the coordinating body of the Palestinian NGOs) does not refute the need for such legislation in principle. The fact is that the NGOs are aware of the extent of the role they have played in the fair regulation of society, and are intent upon preserving it, as they feel it provides a guarantee for the creation of strong and well-balanced civil society.

3.3. Central Values of Society and Law

The above examples confirm the importance of central values shared by the different sectors of society. The quest for the formulation of a Palestinian identity is an expression of such values, as we have just seen with respect to the values of public health and education. In this latter sector, NGO culture has also made its mark in the part of Palestinian territory which is still occupied. The repeated attempts of the Israeli administration to bring school curricula in Palestinian schools in East Jerusalem into line with Israeli curricula have regularly met with resistance which owes a great deal to this NGO culture. In the latest episode, in 1997, Israeli plans once again met with failure.

In these situations a general norm – a national law based on Palestinians' representation of their own identity – enters into play. There is a culture of resistance typical of situations of occupation. However, this same culture is apt to backfire on the P.A. whenever its behaviour threatens to encroach on the gains of internal Palestinian resistance. We seem to be witnessing the constitution of a public sphere governed, to borrow a statement made in another context, by "the tension between the guarantee of a 'legal peace' as can be provided by a state with a monopoly of power and the requirement for legitimation emanating from the democratic legal order" (Habermas, 1990: 93). This tension is particularly obvious when key democratic demands such as political freedoms are at stake. There is no shortage of examples. When, in September 1996, a court decision made Birzeit University students imprisoned for supposed sympathy with Hamas "releasable", Yasser Arafat refused to apply it. Other disputes have centred on the freedom of the press. Journalist Maher al-Alami, the director of the Al-Quds daily newspaper, was arrested by the P.A. on 25 December 1995 for having "relegated" news of the meeting between Arafat and Theodoras I, the Orthodox Patriarch of Palestine, to the inside pages of the paper. He was released a few days later. Daoud Kuttab, arrested on 20 May 1997, was released as a result of pressure from the U.S. The complaint against him was that he had organized live broadcasts, on Palestinian television, of the meetings of the Legislative Council. He had done this with the collaboration of the University of Jerusalem and USAID. The clamour of protests from the Legislative Council, NGOs and other institutions show that the legal resolution of affairs of this kind takes place on a global level, and it is at this level that clear legislation applicable to all Palestinians is demanded. A poll carried out in

Palestine in 1996 reveals that a large majority of Palestinians, regardless of their political leanings, want press freedom to be guaranteed by law, and this despite the fact that the people interviewed did not necessarily have faith in the independence of national jurisdictions (Hanf and Sabella, 1996: 124 *f.*).

3.4. The Dynamics of National Unification as a Key to Understanding Social Facts

In Palestine today we can observe that social facts associated with non-state normative systems (Islamic law, codes of conduct of local institutions) are easier to analyze when the above-mentioned dynamics of increased state control is taken into account. This does not prevent a multitude of negotiations from escaping observation by any central authority. It simply confirms the fact that in a certain number of areas, a large number of protagonists consider the intervention of a central power to be necessary.

In a case of theft in East Jerusalem – i.e. on territory which is not controlled by the P.A. but by Israeli authorities – the victim referred the matter not to the Israelis but to the P.A., entrusting the latter with responsibility for finding the culprit, recovering the money and, if possible, holding a trial in the Palestinian zone, in Ramallah. It may be that the Palestinian concerned took this line of action (apparently a frequent occurrence) because he felt it to be in keeping with his conception of himself as a Palestinian citizen. However, he could just as well have chosen discreet arbitration procedures which would not have involved the Israeli authorities either. It would appear that he was firmly convinced that the course he chose was the only viable one, and that he preferred the justice of the Palestinian State to other social procedures. For the same type of political reasons (political identity), the number of cases of direct blood feud is also decreasing, although in this case the responsibility for retaliation is not being placed in the hands of state systems – in many cases this would simply not be possible – but is being transferred to a broader, concerted system often covering an entire region. In the Golan Heights, where the Druzes avoid using the traditional feud systems for their conflict settlement negotiations to avoid any involvement of the Israeli authorities, there is a trend towards the harmonization of their practices which seems likely to continue given the duration of the occupation. Offenders can be ostracized from their society by denying them access to the community's sanctuaries.

Land issues (real estate) merit particular attention. In May and June 1997 the murder of three Palestinian real estate agents from Jerusalem was attributed by the Israeli government to "certain members" of the P.A. allegedly trying to dissuade Palestinians from selling land to Israeli settlers. These events rekindled a constantly recurring public debate amongst Palestinians. Since the 1967 war, the Palestinian real estate sector has been in disarray. Reasons for this include the stoppage of the Jordanian land registration project then under way

and the forgery or destruction of ownership deeds (Fischbach, 1997). The years of occupation have only made matters worse. At the time of these cases, which were never officially solved, public prosecutor Khaled Qidra announced that twelve Palestinian estate agents suspected of having sold land to Israeli settlers had been arrested by the P.A., while the Minister of Justice, Frei Abu Meddein, issued a warning that such practices carried the death sentence under Jordanian law, which is still in application in the real estate sector although new land legislation is currently under discussion in the Legislative Council. This dispute once again highlights the fact that although in Palestinian society land ownership is governed by widely varying local norms, the only solutions which it has so far been possible to apply are global ones whose legitimacy is recognized by Palestinian society as a whole. Such solutions may stem, as we have seen, from interpretations of Ottoman law and Islamic law relative to *waqfs* property, or, as is more frequently the case, from Jordanian or Palestinian legislation recognized as being legitimately applicable to Palestinian society.

This quest for legal homogenization is probably a product of particular historical circumstances and no-one can tell what future trends will be. However, the duration of the conflict between the Israeli and the Palestinians and the development of national Palestinian institutions lend a particular significance to these normative conflict management methods. In the real estate sector in particular, it would seem that little leeway is being allowed for the application of local conflict settlement procedures.

4. CONCLUDING REMARKS

The legal pluralism debate stems from the desire of analysts of the legal field to free themselves of monist philosophical postulates and ideological presuppositions used in the legitimation of the modern centralized state, the paradigm of which is the Napoleonic state. This critical stance has enabled them to distinguish between the analysis of social facts and legal doctrine and has had an undeniable impact on that doctrine, since more and more jurists are admitting that legal pluralism is a legitimate means of acceding to knowledge of law. However, the polemical aspect of this critical approach (so necessary for challenging pronouncements which, however questionable, were extremely deeply rooted) has its limitations. The case of Palestine shows that the systematization of an exclusive approach leads nowhere. The sociology of norms records the realities of social segmentation and legal pluralism but, taken in isolation, it cannot provide all the ingredients necessary for an understanding of law itself. And yet law, even underpinned by unprovable postulates, remains a subject of sociology because of the actors who use it and the places where it is produced. The key is to pinpoint where and when it is used and the social facts it affects and is affected by.

In a situation of nation-building like that of Palestine one can detect two types of situations where a political anthropology including law can prove to be relevant (without claiming to be the only relevant approach). The first is very much linked to the history of Arab societies and has to do with the study of cultural areas, which are not examined in isolation but as part of a changing world. Family law and land law contain contradictions which can only be understood through a good grasp of the dialectic between a multitude of local forms and the global imperatives defined by a central political power taking account both of local aspirations and of "global knowledges" emanating from interpretations of Islamic culture, the Ottoman heritage or borrowed cultural norms. The latter category brings into play considerations relating to the requirement for legitimation and political constraint.

The second is at quite a different level – it has to do with issues which are also topical in many other societies. One such subject is the Constitution and related question of political rights and their implementation. The importance of these issues and the international attention they command contribute to varying degrees (to a high degree in the case of Palestine) to the creation of a public sphere. This sphere may expand or retract as a result of political circumstances, but it is nonetheless considered by many as a necessity for the life of a society. It is a norm-producing place where sectoral perceptions and broader perceptions meet, without any need for local perceptions to be suppressed in order for global perceptions to be formed. Just as the construction of democracy requires the establishment of adequate rules to avoid bad leaders or at least limit the damage they can do (Hermet, 1988: 161), a juridical intermediary is needed, and the law, with its dimensions of singularity and plurality, fulfils this function.

The application of political anthropology to law makes it possible to grasp these issues by accepting the paradoxes on which law is based (Luhmann, 1993) rather than pitting the norms of social groups against each other as if they were irreconcilable. While centralism denies pluralism, pluralism contains and reveals the unifying dynamics that run through societies and form part of the analysis of law.

CHAPTER 7
Legal Pluralism and Cultural Unity in Morocco

LAWRENCE ROSEN
PRINCETON UNIVERSITY

The concept of legal pluralism, which has meant rather different things to different scholars, has done a great deal to shake comparative law out of its emphasis on using state-based and state-sanctioned legal norms as the baseline for analyzing diverse legal systems. Whether by stressing the multi-centric nature of law-like propositions and conducements, or by pointing to the social institutions through which multifarious aspects of people's lives may be structured according to rule-like orientations, or by demonstrating that common pressures may exist to work out relationships notwithstanding the structural independence of legal domains, the studies of legal pluralists have helped to wean comparative law from its centrist, statist emphasis.

At the same time such advances have left us with several dilemmas, dilemmas that, not surprisingly, animate many other domains of social and cultural theory. How, one is forced to ask, is it possible for people to interact in ways that give the state or nation some meaning as solidary units and not merely as containers – like sheets of glass bounding an active ant colony – if their separable social domains make no overarching claims on members' loyalty or attention? Can we be sure that we have not replaced our statist-ethnocentrism with a kind of locality-ethnocentrism inasmuch as there may still, at least to the western eye, be a logical contradiction between loyalty to multiple legal orders that claim the right to govern a single domain – a "contradiction" that may not appear as such to the subjects themselves? And if law, however characterized, is to be seen as part of life and not some exquisitely separable element of it, to which larger theories shall we attach ourselves to account for the similarities and differences of the law to religion, family life, economic ties, and other domains of one's existence?

In what follows I want to make several interconnected arguments about these issues as they relate to an understanding of the status of contemporary law in Morocco, arguments that others may find of some use in thinking about law elsewhere in the Near East and beyond.

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 89-95
© 1999 *Kluwer Law International. Printed in the Netherlands.*

First, I want to suggest that if one views law as part of culture and culture as a set of orientations which gains its very life by reverberating through numerous analytically separable domains so as to appear immanent in all of them, we may be able to account for some of the commonalities that pluralism might seem to undercut. Such a focus can lead us, secondly, to ask not only how the process of rule generation occurs but in what ways commonsense assumptions about features that cross-cut virtually all domains of law and life – assumptions about human nature, particular kinds of relationships, the "meaning" of given acts – are themselves intertwined with and integral to the process by which one tests the scope and validity of assessments of fact and person in a variety of cultural domains.

Focusing on process as a mechanism for generating not just rules but connections of commonsense among cultural domains can also lead us, thirdly, to consider how the individuals in particular cultures may retain as non-contradictory those propositions that may appear to others as incapable of simultaneously occupying the same space. By considering the implications of Weber's recognition that psychological as much as physical coercion may underlie a legal order[1] and by exploring Santos' (1987) stress on the phenomenology of diverse legal orders converging in the mind of the individual, we may be able to advance our consideration of how parallel orders of law may exist in Morocco. Indeed, we may also be able to ask how the cultural structuring of such convergences affects the presence or absence of a sense of alienation when religious and secular laws appear logically unable to occupy the same terrain.

Let us begin with the question of cultural orientations. Central to my approach is the argument that cultures are held together when common orientations and assumptions are present in a number of domains of social and intellectual life, such that their replication gives the appearance to adherents that these beliefs and relationships arise not from their own initiative alone but possess an aspect of reality so deep as to seem obvious. Examples range from those of classical sociology – Durkheim's analysis of effervescent images that run through elementary religious life, kinship, and economic exchange – to Weber's argument that the Protestant ethic ties together the belief in the salvation of one's soul in a non-sacramental environment and the secular sainthood confirmed by working successfully in one's calling – to those evident in our own societies – where, for example, medical science approaches illness through the same metaphors of competition that inform our approach to the marketplace, the battlefield, and the personal struggle for meaning in one's own life.[2]

---

1 "A 'legal order' shall rather be said to exist wherever coercive means, of a physical or psychological kind, are available; i.e., wherever they are at the disposal of one or more persons who hold themselves ready to use them for this purpose in the case of certain events" (Weber, 1954: 17).

2 See for example the work on AIDS and tuberculosis by Susan Sontag (1990) and Emily Martin (1991).

When law is looked at in these terms the emphasis falls not on the distinctiveness of law as a domain – the role of professionals, specialized language, and peculiar institutional history – but on the ways in which legal questions do – perhaps in very many instances *must* – partake of the same or recognizably similar assumptions prevalent in other domains of the culture. Thus, as I have argued elsewhere, in the case of Morocco assumptions about human nature (the play of passion and reason, differentially distributed in men versus women, children versus adults) makes comprehensible the law of personal injury or the process of determining the facts in a land dispute, precisely because without partaking of the reverberations of these orientations in religion, social thought, family life – in short, commonsense – it would not be possible to render meaningful consideration of the situations with which the law is presented (Rosen, 1984, 1989a, 1989b, 1995a).

Seen from this perspective some of the classic questions of legal pluralism take on a somewhat different cast. John Griffiths (1986) has rightly criticized both M.G. Smith (1969) and Sally Falk Moore (1978) for suggesting that, for the former, the legal order is congruent with a nested set of corporate-like social institutions bound together by an overarching structure, or that, in the view of the latter, an emphasis on semi-autonomous legal fields still assumes that each such field gains much of its form and content from its interaction with, even its repugnance of, state-centered law. By contrast, a cultural emphasis finds among different domains a process by which commonsense orientations are adopted, rejected, transformed, or reversed – but in every way gaining legitimacy and justification for their powers and their results by virtue of their engagement with these resonant orientations.

For example, take the issue of trust in Islamic law and Moroccan society. Moroccan social relations rest on the negotiation of bonds of indebtedness among persons who have gained control of their passions by the development of their reasoning powers through religious education, dependence on people who are themselves attached to others, and by demonstrating how reliable they are once they have given their word. To address the question, then, of when is a bargain made by solely emphasizing the use of a technical form promulgated by the courts would run counter to ordinary sense about what makes a person trustworthy. Instead the referential use of reliable witnesses – defined as people themselves so embedded in ties of obligation that they will not lie lest they lose their dependents – coupled with the religiously sanctioned use of oaths or the public indication of a bond that others may now rely upon all give coherence and comprehensibility to the legal emphasis on persons over forms and contractual obligation as present interrelation rather than speculative consequence.

Clearly rules do emerge from any institution addressing issues such as when does trust convert to binding agreement or when is a kinship tie implying generalized support worthy of concerted pressure aimed at achieving behavioural

conformity. But at a deeper level what may knit together different domains in which this may occur is a cultural process by which assumptions of human nature or human relations are rendered applicable, where the reasoning process itself partakes of the mode of fact creation and causal connection that are regarded as adequate for explaining events and actions in various domains. If, then, we see, as is the case in Morocco, that courts apply commercial statutes drawn from European models or criminal statutes almost identical to those of former colonizers, we must also ask whether the process by which facts are determined or persons are assessed are those not of the European style but distinctive to Moroccan ways of conducting these inquiries in other domains of cultural life. And when we do approach matters in this way we can see at once where the consonance and strain may occur, where the very challenge by one domain to another focuses attention on reconciling competing cultural orientations, where a challenge to existing assumptions forces many issues to be reconsidered – as has occurred with many fatwas in Islamic cultural/legal history – and where the power of leaders intercedes to move matters to the next stage of consideration or cover them over as largely unresolvable.

Legal pluralism has usually been characterized as "a situation in which two or more legal systems coexist in the same social field" (Merry, 1988: 870). Such joint occupancy may, of course, take a variety of forms: it may be a contentious struggle for the same space with each regarding the presence of an alternative as violative of some sociological version of the natural principle that two bodies cannot occupy the same space simultaneously; it may take the form of mutual disregard, where each acts as if the other is not really there or is tolerated only as long as some superordinate interest is not seen to be threatened; or it may constitute a kind of concurrent jurisdiction, in which either may be operative depending on context, personalities, or costs. The first often characterizes the position of strict Islamic fundamentalisms like that of the Taliban of Afghanistan, the second that of traditional Islamic deference to confessional laws of other "peoples of the book", and the third the semi-formal operation of those national legal systems where jurisdiction may be held simultaneously by religious or "secular" courts.[3] Whichever is the case some accommodation must be made in the mentality of the participants to account for the simultaneous presence of these multiple orders.

Santos (1987: 297-298) has characterized this aspect of legal pluralism as one in which "the conception of different legal spaces (is) superimposed, interpenetrated, and mixed in our minds as much as in our actions... Our legal life is constituted by an intersection of different legal orders, that is, by interlegality(,) ...the phenomenological counterpart of legal pluralism...". His position is

[3] For an example of how a person can choose between two official Moroccan courts that both have jurisdiction over land matters, see Rosen, 1989: 29-30.

not altogether unlike that of Jacques Vanderlinden, who argues that it is the individual alone who finds himself in a position of legal pluralism, which is thus "the condition of the person who, in his daily life, is confronted in his behaviour with various, possibly conflicting, regulatory orders, be they legal or non-legal, emanating from the various social networks of which he is, voluntarily or not, a member" (Vanderlinden, 1989: 153-154; see also Vanderlinden, 1971). I have already suggested that these different domains may be linked not so much by structural forms as by cultural orientations. But that issue to the side, the question in any specific context is how these diverse phenomenological realms cohere within the cultural and psychological domains. For this purpose let me return to the Moroccan case, as I see it.

Morocco has been described by one scholar as "a land of compromise" (Gallagher, 1963). In many respects this is a fair characterization. Certainly one of the distinctive cultural features of the country is the existence side by side of various institutions that could appear as incompatible. In law this shows itself in a variety of ways. Maliki Islamic law, Berber and Arab customary practices, former colonial law, confessional laws, and contemporary Moroccan codes exist simultaneously. For the moment it is the way these orders appear to exist in the mentality of Moroccans, rather than in institutional structure, that concerns me. In this regard it is noteworthy that informants express relatively few objections or sense of contradiction among these diverse elements. Litigants think nothing of looking to the choice of forums occasioned by the overlap of jurisdictions. They treat this choice as they do others in their social life – as strategic decisions to be made among the array of relational possibilities that life does, and commonsensically would, afford them. Just as ties to others are negotiated in an environment in which cultural postulates are not regarded as mutually contradictory but capable of being amalgamated into variant designs by different persons, so, too, they treat legal propositions and institutions as resources to be added to the process by which interpersonal relations are formed and transformed.

The result appears to be a very diminished sense of contradiction among identifiably distinct legal orders: however much preference may be expressed for one or another regime, individuals think nothing of using alternatives when it is pragmatically desirable. The colonial period largely withdrew commercial and criminal matters from Islamic jurisdiction in its promulgation of codes and its institutionalization of courts quite distinct from those of previous times. This pattern has been continued into the independence period. Yet it is remarkable to see not only the extent to which elites and ordinary people accept this jurisdictional/code differentiation. This may be, in part, due to the Moroccan habit of political accommodation but it is also part of the overall cultural style that treats institutions as resources while maintaining a common cultural emphasis on person perception and fact determination that runs through all of the different legal orders. Thus in a criminal court one finds

much the same modes of and emphasis on the assessment of persons as situated in networks of obligation that one finds in customary or Islamic domains; in commercial courts one finds the same assumptions about causality one finds in ordinary event analysis and historic explanation. It is these cultural features that make domains that might otherwise appear mutually incompatible so similar and hence mutually available.

Consider, for example, the case of the rural and community courts. In the 1970s, following a model from such countries as the Shah's Iran, Morocco instituted courts – mainly in rural areas – that were to follow no set code, to decide relatively minor disputes, and to be staffed by and responsive to local knowledge and hence be quicker and cheaper than the national courts. Visiting these courts and talking with people about them it was readily apparent that local administrators were picking the staff, that local custom was whatever the judge decided it was, and that the new courts were as subject to antipathy for corruption as any others. Nevertheless, Moroccans employed them and felt comfortable with the cultural assumptions they made in their procedures and evaluations, and have not treated them as violative of religious law or moral values any more than other "secular" courts.

Similarly, Moroccans have long treated "customary" law as part of Islamic law, not as something set alongside it (Rosen, 1995b). Indeed, when the French, in 1934, attempted to split Arabs from Berbers by placing the former under their own customary law and the latter under Islamic law, the Berbers revolted, arguing that Berber law *is* Islamic law, in the sense that Islam allows what is not clearly forbidden. The sense among Moroccans that custom continues to occupy a place in the law that is not apart from Islam but integral to it goes a long way toward retaining a sense of psychic unity among the diverse legal orders with which they live.

All of this is not to suggest that the culturally unifying aspects of Moroccan law exist without countervailing strains. Elites who at independence found themselves unable to go back to pre-Protectorate legal patterns or forward to wholly Europeanized codes tended to naturalize the divisions of legal realms, as if family law were "properly" dealt with by Islam and commercial law by European-styled codes. Their "as if" attitude contributed to the codification, along very traditional lines, of much of Moroccan family law, but it was still done – as it largely continues to be done – at the expense of greater equality between the sexes. Just as Moroccans have little difficulty wearing western clothes at one moment and traditional garb at another, or moving back and forth among languages, so too they may have accommodated these legal alterations in form only insofar as they also continue to embrace cultural commonalities in procedure and assumption.

The legitimacy of various legal domains may also rest on their utilization of these cultural commonalities such that alienation from the law is less severe than in some other parts of the world. Relatively few Moroccans feel that fun-

damentalism speaks to their needs since alienation from the law, where it exists, stems not from a contradiction with religion but with that degree of bureaucratization and incivility which makes people feel they are not able to use the various legal possibilities as vehicles for the formation and restructuring of their interpersonal ties. For all the discussion about revising women's rights there is little sense that Moroccans are encountering a moment of searching for new moral guidelines and hence rather little propulsion for rethinking the legitimacy of contending forums or sources of psychological constraint.

Marc Galanter has argued that as a sense of all-encompassing community has declined it has largely been replaced by "a world of loosely joined and partly overlapping partial or fragmentary communities" (Galanter, 1981: 22). Although this may be true for many countries, including Morocco, such a social structural emphasis may fail to give adequate consideration to the ways in which common orientations – about such ordinary matters as person perception, causality, the nature of human nature, and the criteria for determining truth – affect the unity or diversity of legal orders within a pluralistic context. Other countries of the Middle East, more seriously affected by colonialism or economic disruption, may display quite different patterns on a continuum of cultural unity than does Morocco, and each case needs to be considered in its own right from this cultural perspective. Only then will the contradictions of the one be seen as identities in another. Moreover, the theoretical challenges to cultural analysis – how much must people share common orientations in order to live together within a single social system; when divergence of orientation does occur through what mechanisms do they most readily express themselves – will be best addressed if comparative legal data is brought into consideration.

"Legal pluralism" can then be seen as an analytic tool rather than as a theory or an explanation. Just as a microscope does not explain anything about microbes, legal pluralism does not explain the subject of its concern. Rather, it lets us see what is there, in this case a living, seething field in which law shows itself to be a process of regularizing relationships – a process that involves competing approaches which may be bound together by their reliance on common cultural orientations. Such at least appears to be the case in Morocco. Moreover, such an orientation suggests where we may look for incipient strains among emerging legal alternatives, namely in those very cultural domains – of person perception and event analysis, of fact determination and differentiating ideas of causality, time, and consequence – that set a society apart from others. The case of legal pluralities in the Middle East affords an especially rich opportunity for rethinking the relation of legal alternatives at the same time that it challenges some of the most fundamental issues in social and cultural conjunction posed in the modern world.

CHAPTER 8
Legal Pluralism and Public International Law
An Analysis Based on the International Convention on the Rights of the Child

MURIELLE PARADELLE
CEDEJ

"It is the differences in the universe of reference
which make a norm difficult
to understand and difficult to universalise"
(Kouevi, 1995: 635-636)

INTRODUCTION

On 20 November 1989, the General Assembly of the United Nations, without proceeding to a vote, unanimously adopted the Convention on the Rights of the Child. Opened for signature and ratification by the member states on 26 January 1990 in New York, it entered into force on 2 September 1990, thirty days after the 20th ratification as agreed in the Convention itself (Art. 49).

A multilateral treaty with a universal bent and, as such, open to all states, the Convention represents an international legal instrument placing clear obligations on the signatories, unlike the Declarations of 1923 and 1959 on the same issue which were merely statements of intents with a purely ethical and political value in line with the very form of the declaration. Conceived as the keystone of all United Nations' action in the area of child protection throughout the world, the Convention seeks to set up a dialogue on delicate issues, given the subject which it must codify – the child, and the family viewed as the basic social nucleus – and matters which are controversial, given the diversity of the political, economic and social aspects which are at stake, and the cultural and regional particularities, all of which must be assessed in terms of the higher interest of the child established as the measure (Art. 3) in appraising the efforts, reservations and objections coming from the states-parties. Indeed, it took no less than ten years of negotiations to give body to this instrument, despite the fact that everyone agreed on the need for such a Convention, and whose first draft had been put forward in 1979, thanks to a Polish initiative. In other words, it was a difficult birth. The Convention is incorporated in the normative body of human rights, of which it represents an integral part and which it, indeed, consolidates by developing a set of rules adapted to the needs of a specific group of individuals who are especially vulnerable.

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 97-112
© 1999 *Kluwer Law International. Printed in the Netherlands.*

Thus it establishes the whole panoply of rights to which the child is entitled as a human being and which are recognized by international society, outside of any discrimination based on considerations of race, colour, sex, language, religion, nationality, ethnic or social background ...and covering civil, political, economic, social and cultural rights. Among the latter we can mention, briefly, a child's right to life, a name, a nationality, the right to healthy development (food, housing, medical care, leisure) and harmonious self-development within the family, the right to education, to freedom of expression, of opinion, of conscience and of religion, the right to be protected against any form of exploitation, be it sexual, economic or other, the right to an adequate standard of living... Rather than simply being an inventory of the rights to which children are entitled, the Convention lays upon states in particular and international society in general, the responsibilities inherent to the recognition of these rights, as well as the objectives to be fulfilled, all of which have been placed under the control of a body established for this purpose, the Committee on the Rights of the Child.

The authors of the Convention established a very close link between the well-being of the child and that of the family, "convinced (...) that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be offered the necessary protection and the assistance so that it can fully assume its responsabilities within the community" (Preamble to the Convention). By so doing, they were encouraged to intervene in an area which has always been jealously defended by the national laws of states, which had always maintained the right to do as much as possible sheltered from external interference, i.e. personal status as the receptacle for the regulation of the family nucleus as a whole – what Yadh Ben Achour refers to as "legal intimacy" (Ben Achour, 1992: 146) of the states. As a result, when the states came to sign, ratify, and accede to the Convention, we saw an explosion of reservations and other interpretative statements formulated on the basis of national internal repertoires – legal, religious and even traditional – which, for their part, sought to protect themselves from the excessive intervention of conventional law in what they considered their "private life". In the framework of this work, my interest is in the position of Muslim states *vis-à-vis* this international treaty and thus in the functioning of legal pluralism as it reveals itself in the conception and application of conventional international law.

By 10 March 1995, 170 nations had signed the text of the Convention. Of these 170 nations, 43 were Muslim countries which were also represented among the 53 nations making up the Organization of Islamic Conference (OIC). The major absentees were Saudia Arabia, the United Arab Emirates, Oman, Somalia, Upper Volta, Tanzania, Malaysia and Brunei. Of the 43 Muslim states that signed the Convention, 19 expressed a number of reservations with regard to certain articles of the Convention, while 15 did so by making specific

reference to Islamic *shari'a* law. It is true that the Muslim nations were not the only ones among the signatories to express reservations;[1] what set them apart from the others was the fact that these reservations were formulated, basically, on a common source of reference: Islam.[2] In other words, a whole series of objections, amendments and reservations were made, which the Convention's authors were forced to take into consideration at the time of preparatory discussions up to the elaboration of the final text such as at the time of its signature and ratification, if they were not to run the risk of making it inoperable over a vast area, namely the Muslim world, covering some one thousand million individuals.

Basically, the reservations focused on three articles of the Convention:

- Article 14, in terms of which "states-parties shall respect the right of the child to freedom of thought, of conscience and of religion". The Muslim states which expressed reservations all rejected any recognition of the right to freedom of religion, arguing that Islamic law forbade such an option; the child born of a Muslim father being automatically a Muslim could not, under any circumstance, change his/her religion.
- Articles 20 and 21 which put forward adoption as a remedy for the lack of a child in the family. Here, too, the Muslim countries took exception to these articles since *shari'a* does not recognize adoption, at least to the extent that it gives the adopted child the name of the adoptive family and thus offers him/her hereditary rights to the family property.

Noting the contents of these objections, the Convention's authors, in the course of negotiations to codify the treaty, modified the wording of the disputed articles, either by introducing an "opt-out" clause allowing the countries not to apply the article under dispute (e.g. Art. 21 which refers to "states-parties that recognize (...) the system of adoption"), or, much more clearly, by including the reference of the normative repertoire in terms of which the objection had been brought, that is the embedment in the text of the Convention of a provision directly originating from the Islamic legal repertoire, i.e. *kafala* (Art. 14).

In the long term, this expresses itself by the emergence at the level of formulation and application in international conventional law of different normative

1 Argentina, Australia, Austria, the Bahamas, Belgium, Canada, China, Colombia, Croatia, Cuba, Denmark, Ecuador, France, Germany, Guatemala, the Holy See, Iceland, India, Ireland, Japan, Luxembourg, Malta, Mauritius, Monaco, New Zealand, Norway, Poland, the Republic of Korea, Samoa, Slovenia, Spain, Thailand, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay, Venezuela and Yugoslavia all expressed reservations or offered interpretative statements at the time of signing, ratifying or acceding to the text of the Convention.

2 The Islamic countries, in formulating their reservations, referred to Islam in different fashions, speaking in turn of "Islamic *shari'a*", "Islamic ethics", "Islamic law", "Islam as a state religion", "Islamic laws and values", the "principles of *shari'a*".

repertoires,[3] which enables me to present an analysis of the way in which this law functions and of the systems which exist within international society in terms of legal pluralism. In so doing, I borrow from legal sociologists the socio-anthropological questioning of the norm which focuses on the legal actors and the significance which should be attributed to their action, "far from an essentialist and monolithic perspective claiming (to offer) an explanation of the social reality on the basis of a unique determination (Dupret, 1996d: 32)". This leads me, in the initial phase, to define the social field within which the mechanisms of legal pluralism are at work, namely, international society and everything which characterizes it in terms of diversity and plurality; and, in the second phase, I shall attempt to describe and analyze this legal pluralism in terms of the way in which it functions and interacts, by looking at the conceptual tools forged by the theoreticians of legal pluralism and legal sociologists.

1. THE INTERNATIONAL SOCIAL ENVIRONMENT, THE WORKING FIELD OF LEGAL PLURALISM

All societies, be they traditional or modern, and at different levels, are pluralist in sociological terms, in that they are made up of more or less autonomous secondary groups which generate regulatory orders which may be legal in character or more widely normative. No system can achieve full and total autonomy towards the other systems which surround it; no system can ever be completely "totalitarian" in the sense that it, on its own, constitutes a totality, impervious to the social environment in which it is submerged. Even more so we are dealing with the international system, a domain in which the various actors, interests and – often contradictory – logics come into confrontation. In this respect, the international system is more a component of international society than of an international community, given that the latter tends to refer to "a basic unity of humanity in search of a common organization under the pressure of the objective interdependence of its components" (Quoc Dinh, 1992), whereas international society, for its part, looks to the conflictual competition of national interests which must be rationalized, more specifically through international public law.

If we look at the principal actors in conventional law, namely the states, their diversity is obvious: more than 180 nations which differ geographically, politically, economically, culturally, religiously, philosophically and, of course, legally. Each state has developed its own system with regard to meaning and coherence thus enabling it to understand the world in terms of a universe of references inherent to it. This multicultural context which typifies internation-

[3] I prefer to speak of "normative repertoires" rather than of law, taking into account the vagueness in the way in which Muslim countries themselves designate the Islamic referent.

al society cannot be ignored because it refers back to a wider context of globalization, within which "specificities" are longing to resurface: disparities, or rather political, cultural, religious or legal specificities are claimed as rights within a vast process of recuperation of identity, to which the law, seen as a cultural construct, lends its authority. The growing visibility of the Islamic nature of Muslim countries on the international stage is part of this movement of self-affirmation *vis-à-vis* the Western world.

Thus there is a multiplicity of actors, but also actors themselves are multiple to the extent that the states are not homogenous entities, hingeing on a unique identity. By increasing the possibilities of adherence, the states are likely to find themselves in a vast diversity of situations which are not founded merely on cultural points of reference alone: power differences, the level of development, geo-political considerations, and economic interests will, in fact, govern a multiplicity of adherences all of which will be managed strategically. Thus a country such as Egypt can, in turn, find its place within diverse networks of identity: the Muslim countries (the religious factor), developing countries (the economic factor), or the Arab states (a regional factor), or the non-aligned countries (the political factor). As a result, each identity calls for a different reading of the context, and the mobilization of different normative repertoires: in one case the religious repertoire, in another the political repertoire, in others the legal repertoire, all founded on the basis of a logic to maximize personal interests. International paradigms do not always take account of this diversification of the models of action adopted in terms of events, nor of their inclusion – or otherwise – in the repertoires of a number of competing rationalities, which may be mutually exclusive or not, but which are always circumstantial.

This multiplicity is further highlighted by the determining influence of the concept of national sovereignty – the starting point of the conventional legal order – on international legislation as a whole. In other words, the vision of an international society ordered by regulations, founded basically on the free consent of the states of which it is made up, a consent which is, in turn, defined in terms of the functioning of multiple identities and multiple points of reference. Moreover, being aware that no real international legislator exists, the latter being composed of an entity of sovereign desires which are at one and the same time the transmitters and the receivers of the conventional norm; being aware, moreover, that the international legal system is structured according to a logic which is horizontal rather than vertical, and which is coordinated rather than hierarchical, which is relational rather than institutional. We can only conclude, like Griffiths (1990), on the necessary correlation between sociological pluralism and legal pluralism, since legal pluralism would seem to be not only the normal state of any society which is not entirely homogenous, but also a cognitive structure, the veritable *episteme* order capable of accounting for and above all explaining international events, by the side of the more commonly recognized cognitive orders, namely history, geo-politics, economy, ideology, religion.

This legal pluralism, the natural co-relation of sociological pluralism, is in evidence at all stages of the normative process, be it in the formulation of conventional law, or later, in its application, or, indeed, its interpretation. It merits particular consideration, especially concerning the formulation of conventional law with a universal authority, and here I shall deal with the multilateral agreements open to all states – whether or not they took part in the conferences on codification – and which promote the unification and generalization of international law. The international Convention on the Rights of the Child falls within this category of agreements.

To speak of legal pluralism and legal universality in a complementary perspective could, at first sight, appear contradictory. However, this statement arises more from the paradox than from the contradiction, once we examine the juxtaposition of the two terms in the light of two different factors.

- The first, which we have already mentioned, refers to the process of globalization taking place on the international stage. Careful examination of the international context highlights the two apparently contradictory propositions of a single logic which, in their interaction, are only paradoxical. These two propositions are, on the one hand, the intensification of the process of globalization and, on the other, the concomitant rebirth of particularities; the logic to which they refer accounts for the paradox in terms of which this excessive haste towards world unification leads the process of globalization, only to succeed in promoting singularity, which in turn feeds on the blockages and the resistance aroused by any process of cultural homogenization. Bertrand Badie formulates it as follows: "By seeking to bring history to an end, (the process of globalization) suddenly restores its multiple and contradictory meanings" (Badie, 1992). If we accept this point of view, legal pluralism, in what it assumes as defence in terms of the validity of repertoires other than that which it accepts as dominant (in this case positive international law), and in what it understands as claims in terms of identification, thus plays out, to the full, its role as *episteme* (certain knowledge) of international phenomena in general and the normative process in particular.
- The second element which needs to be considered, and which is of greater interest to us here, deals with the stated objectives of multilateral treaties which seek to universalize the application of their stipulations. The international "legislator", going beyond cultural, political, economic, social, religious and legal differences, seeks to produce a universally acceptable, mandatory legal instrument which sovereign states can sign, ratify and implement. Because we do not find ourselves in the field of application but in the much more diplomatic area of national sovereignty and because no super-state exists which has the role of defining what nations can desire in terms of agreements, international law in general, and conventional law in particular are, basically, founded on inter-state cooperation, which under the token of dialogue and compromise cannot ignore, at the risk of failure, the pluralism

of the international society, a pluralism which is both sociological and legal. This is inherent to its calling and to its effectiveness. The statement made by the Bangladeshi representative, during one meeting of the Commission on Human Rights where the draft convention was discussed, illustrates to this. "Muslim countries, whose legal systems, governed as they are by Islamic law, are amongst the most important in the world, have their own conception with regard to the wider nuclear family and the rights of the child within the framework of these concepts. It is essential that the draft Convention should be acceptable to the Islamic countries which form one of the major groups of nations within the international community. In these countries, children also represent a large proportion of the world population" (E/CN.4/1986/36).[4] There can be no doubt that this importance in demographic, geopolitical, social, cultural and legal terms certainly played a role in ensuring the inclusion of provisions of Islamic law within the provisions of the Convention. Any such multilateral convention, which is meant to be universally recognized and implemented, needs to be signed and ratified by the largest possible number of countries, for want of which it will be devoid of meaning, if not with regard to its content, then certainly with regard to its aims and objectives, i.e., that of bettering the position of children throughout the world, regardless of cultural, social, religious, political, economic and legal differences. By so doing, the existence of legal plurality, and, as a result, the recognition at international level of other sources of law, would seem to be the only way, taking into account the consensual and voluntary nature of contractual law, of widening the sphere of recognition of the latter, and, as a consequence, its sphere of application. By authorizing this admission of different legal orders which co-exist on the international stage, legal pluralism makes it possible to avoid direct confrontations between the "susceptibilities" of their supporters and thus ensure that the nations accept the measures. If I, in this context of international legal pluralism, take up and adapt the adage of "divide to rule", then I would be tempted to assert that the "legislator" has been led to "diversify" (the normative sources) in order the better to impose (the legal ordinance).

By participating in this process of the emergence of international law as positive law, the normative orders external to the system of conventional formation of the latter have their origin in the category of the "material sources" of international law. Opposed to the formal sources, and legally admitted and recognized as such by international law, which, on their own, can enable the norm to become part of positive law,[5] the material sources, on the contrary, refer back to sociological considerations founded on political, moral, religious and economic data pointed out by the subjects of law and taken into account

[4] Unofficial translation.

by law (Quoc Dinh, 1992: 109). If they, in themselves, like the formal sources, cannot necessarily produce positive law, they do, on the other hand, influence legal procedures which, in turn, result in the norm. Article 9 of the Statutes of the International Court of Justice, dealing with the latter's composition, states that the Court guarantees "the representation of the major forms of civilizations and the principal legal systems in the world". We find the same formulation when it comes to the composition of the Committee on the Rights of the Child (Art. 43). This led to the establishment of the universality of international legislation and the related United Nations bodies as a result of this acceptance of legal plurality.

The practice of reservations permits states to recognize the active influence of these normative orders external to the system of conventional formation of international law, especially when these reservations are made on behalf of them and accepted by the other states as such. In terms of Article 2 paragraph1 of the Treaty of Vienna, which takes precedence over the rights of agreements, "the term 'reservation' refers to a unilateral declaration, no matter its title or its designation, made by a state at the time at which it signs, ratifies, accepts or approves a treaty, and by means of which it seeks to exclude or to modify the legal effect of a given clause in the treaty in its application to a given state". This practice of introducing reservations has been subject to severe criticism. It is accused of modifying treaties, of endangering their integrity, of making them unbalanced, of destroying its regime, in short of introducing "à la carte law", with each nation choosing among those aspects it feels it must or need not apply. Going beyond the validity of such criticism, this practice of "opt-outs" has proved to be fundamental to contractual law, particularly with regard to multilateral treaties which are to be applied universally, taking into account the very structuring of international society as set out above in terms of plurality. "The problems of the legitimacy of 'opt-outs' is an issue of a choice between two objectives: bringing peoples closer together by extending the community of the parties to multilateral treaties or the standardization of law. By authorizing such opt-outs, international positive law has opted for the former..." (Quoc Dinh, 1992: 175).

[5] Four are expressly mentioned in Article 38 of the Statutes of the International Court of Justice (ICJ), namely: international conventions, international custom, the general legal principles recognized by civilized nations, and finally, legal decisions and, in addition, and as a secondary source, doctrine of the most highly qualified specialists in public international law of the states.

The Convention on the Rights of the Child also opted for the former interpretation which, in Article 51, authorizes the use of opt-outs; the only condition which it lays down is that they should be compatible with the aim and the objectives of the text. If it had opted for effort towards standardization of its law, demonstrating more voluntarism than realism, it would have denied itself a large area of action in terms of countries and peoples. The more so, since given the application of the majority process in the adoption of its provisions, the Convention inevitably contains provisions which are unacceptable to those states which disagreed with them and which, as a result, preferred not to sign the text rather than see the imposition of a law with which they disagreed.

While the Muslim states were certainly not the only signatories to have certain reservations with regard to the conventional text, they nevertheless are distinct in that, as we said in the introduction, on the one hand they base the majority of their reservations on the principles of *shari'a*, and, on the other, because they deal in recurring fashion, when they are not formulated in general terms, with the same dispositions: Article 14 with regard to freedom of religion, Articles 20 and 21 with regard to adoption, all of which are forbidden by Islamic law. To mention but a few:

a) Reservations formulated in general terms:
   - The Islamic Republic of Iran: upon ratification, reservation: "The Islamic Republic of Iran reserves not to apply any provisions of articles or the Convention that are incompatible with Islamic Laws and the internal legislation in effect".
   - Mauritania: upon signature, reservation: "In signing this important Convention, the Islamic Republic of Mauritania is making reservations to articles or provisions which may be contrary to the beliefs and values of Islam, the religion of the Mauritania people and State".
   - Pakistan: reservation made upon signature and confirmed upon ratification: "Provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values".
   - Qatar: reservation made upon signature and confirmed upon ratification: "(the State of Qatar) enter(s) a general reservation concerning provisions incompatible with Islamic law".

b) Reservations formulated with regard to Articles 14, 20 and 21:
   - Egypt: reservation made upon signature and confirmed upon ratification: "Since the Islamic *shari'a* is one of the fundamental sources of legislation in Egyptian positive law and because the *shari'a*, in enjoining the provision of every means of protection and care for children by numerous ways and means, does not include among those ways and means the system of adoption existing in other bodies of positive law (...) the Government of the Arab Republic of Egypt expresses its reservation with respect to all the clauses and provisions relating to adoption in the said

Convention, and in particular with respect to the provisions governing adoption in Articles 20 and 21 of the Convention".

- Iraq: reservation: "The Government of Iraq has seen fit to accept (the Convention ...) subject to a reservation in respect to Article 14 Paragraph 1 concerning the child's freedom of religion, as allowing a child to change his or her religion runs counter to the principles of the Islamic *shari'a*"
- Maldives: upon signature: reservation: "1. Since the Islamic *shari'a*, is one of the fundamental sources of Maldivian law and since Islamic *shari'a* does not include the system of adoption among the ways and means for the protection and care children contained in *shari'a*, the Government of the Republic of Maldives expresses its reservation with respect to all the clauses and provisions relating to adoption in the said Convention on the Rights of the Child. 2. The Government of the Republic of Maldives expresses its reservation to Paragraph 1 of Article 14 of the said Convention on the Rights of the Child, since the Constitution and the laws of the Republic of Maldives stipulate that all Maldivians should be Muslims".
- Morocco: reservation: "The Kingdom of Morocco, whose Constitution guarantees to all the freedom of pursue his religious affairs, makes a reservation to the provisions of Article 14, which accords children freedom of religion, in view of the fact that Islam is the State religion."

By granting states the right to express reservations accompanied with legal consequences, by so doing, international positive law recognizes a degree of primacy of internal national norm, be it legal or otherwise, over the international norm, to the extent that it can hinder recognition and implementation of a given provision. In addition, formulated prior to the Convention and at the time of its formulation during the codification conference, the state objections even led to a modification of its wording in certain cases. A modification occurred either by the addition of a paragraph, as in the case of Article 14 which was endowed with a third paragraph in terms of which: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others" (E/CN.4/1989/48, p. 45); or by simply dropping a provision initially included in the draft: for example, Article 21 which, contrary to what happened with Article 14, lost the responsibility laid upon states to "facilitate procedures for adoption" (E/CN.4/1989/48, p. 56); or finally by the introduction of a degree of relativity in the formulation of a contentious Article: that same Article 21, after recasting, opens with this introductory provision: "States-Parties that recognize and/or permit the system of adoption...", thus leaving aside those states, such as the Muslim countries, which do not recognize this procedure.

This practice of establishing reservations, in the light of what has just been said, is not only a perfect example of the basically "negotiated" nature of inter-

national law, but also of its ambivalent character falling between the two stools of accepted law and autochthonous law, at the intersection of qualifications because it lies at the intersections of the social and normative (internal and external) fields, the products and the producers of their interaction.

2. THE INTERACTION OF LEGAL PLURALISM WITHIN THE INTERNATIONAL SOCIAL SPHERE

Having thus described and analyzed the pluralist environment within which international norm is established, I should, in a second stage, like to examine the interaction of the mechanisms within legal pluralism. How do the "legislators" operate the recognition of normative repertoires external to international law? On the basis of what modalities and up to what levels are they taken into consideration by conventional law? Having done so, I should like to move on to analyze the terms and the operating models formulated by the theoreticians of legal pluralism and, where necessary, make certain adjustments to match the specificities of the social field in which I apply them. Developed basically to give account of the plurality of the origins of legislation within the national order, these models of analyses cannot be adapted to the international order without the introduction of a degree of bias.

Legal systems emerge from the multiplicity and form part of a competitive game which, in itself, offers many multiplicities. Legal pluralism, in my understanding, is not located so much at the level of the simultaneous existence of a number of normative repertoires, but rather at the level of their possible concomitant operation, to the extent that a norm, whatever it may be, does not truly exist until it is actually implemented. Legal pluralism, looked at in this way, refers back to an interactional and dynamic concept of law. By so doing, it does not limit itself to describing the diversity, or fitting together of the different legal orders, it also serves to organize the relations between the different orders and, above all, to facilitate the concerted development of their relationships.

As the aggregates of structurally interdependent social fields, international society experiences the co-existence within itself of multiple social normative repertoires produced by these fields, including two clearly distinct categories: on the one hand, a plurality of national legislations, orders and mirrors of society which are closely integrated and strictly hierarchized; on the other, international legislation addressed first and foremost to sovereign entities. Taking into account the structuring of international society, the logic of the way it operates, the normative repertoires which permeate it can only find their place in interaction the one with the other, with differing degrees of autonomy depending on the matter to be decided, and the social relationships which require regulation. In the case we are dealing with here, namely personal status and the family unit – extremely sensitive subjects – interaction must, of necessity, be high, while the level of autonomy is diminished. We should not forget that interaction always

occurs within a pre-existing environment that it does not define, even if it can finally have an impact on the environment. Thus it always occurs in a area of constraints, in other words, the actors are never offered a full range of possible options, because they find themselves within a structured environment, the limits of which, to a certain extent escape them, and which, as a result, itself represents a limitation. It is only in the specifications of this domain that the actors will be able to adopt those strategies which will optimize the legal resources available. This constraint, at the level of international society, also bears down on the "legislator" who is forced to take account of the pluralities of the normative universes surrounding him, with their specific coherence, as well as on the member states of that society which, caught up in this process of globalization and interdependence, cannot disregard such a structural logic in their actions. We no longer find ourselves within a context of isolated sovereignties but rather in a situation of interdependent sovereignties.

This structural limitation of the area within which the legal actors find themselves, in this case international society, also leaves its mark on the interaction of the mechanisms at work, the latter being forced to adapt to the specificities of the former. As a result, to speak of legal pluralism when it comes to the operation of international norms calls for certain further explanations with regard to the social field in which it is at work.

Indeed, at the outset the theories of legal pluralism were formulated in order to take account of the functioning of the internal norm of a society or a state. In this sense, legal pluralism is defined basically in relation to the state and in opposition to it, describing the plurality of normative orders present in terms of the state or non-state legislation. By so doing, legal pluralism should be seen as an alternative to the monist concept of law, according to which only one legal order exists for a given society. Transposed to the international domain, such an affirmation loses something of its relevance with regard to the preponderant role which the state continues to play in the process of laying down the norm. The more so, given that, in the absence of a supra-national legislator with the authority to decide on the content of the latter, the state again finds itself in the ambivalent position of being, at one and the same time, the issuer and the addressee of the norm it has laid down, in a "functional split" (Georges Scelle) of itself. To this extent, if there is indeed legal pluralism in the wider meaning of the co-existence of a plurality of legal repertoires within a given sociological whole (international society), involving the simultaneous subjection to this multiplicity of provisions, one can only reason in terms of a dichotomy which opposes state law to non-state law. Certainly, the norm that still comes from it, is no less external to it, to the extent that it is the product of several, concomitant state wills directed towards the same end. Nevertheless, because of the principle of sovereignty, it remains closely bound to this will, both with regard to formulation and with regard to application. While conventional law is "pluri-state-controlled" it is none the less "state-controlled".

Do we thus find ourselves faced with the hypothesis of "weak pluralism", in the sense attributed to it by Griffiths, namely a pluralism originating in the state, which is recognized and institutionalized by it, who places it opposite "strong pluralism", the only true form of pluralism – which creates interaction between those social entities which engender the norms of constraint beyond any recognition of the state? I do not think so, for a number of reasons.

Certainly we could talk with a certain relevance about weak pluralism in terms of conventional law, once we accept the hypothesis of the acceptance of international norms by the internal legal order of the state. Here, indeed, there is the recognition and the institutionalization by the state of the provisions originating in an external repertoire, and by the interaction of constitutional rules and procedures inherent to it. If, on the other hand, we take a stand on the hypothesis of the formulation of conventional law, then this affirmation becomes dubious. Certainly the state is involved in this formulation; certainly it is up to the state to accept or not that the norm thus established should be able to limit its sphere of action; nevertheless, two considerations call this oversimplified model into question. On the one hand, the fact that the norm comes from a plurality of wills, which are constitutive, in the long run, of a "legislative super-will", independent of the sum of the wills which compose it. Since consensus is not unanimity, and since unanimity is rarely to be found when one is confronted by multilateral treaties discussed within the framework of a vast codification conference, the outcome is the emergence of a new will, which should not be confused with the sum of the individual wills, however sovereign they may be. To be convinced of this we need only look at the procedure behind the adoption of the majority of the treaties under discussion: what are the wishes of those states which came out against adoption? Moreover, and this emerges unambiguously from an examination of the Convention on the Rights of the Child, when the international "legislator", taking into account the provisions of one or other national normative repertoire, integrates them into the provisions of his own repertoire, he automatically recognizes the existence of other sources of law and, above all, he recognizes their validity. Thus Article 20 of the Convention, dealing with the procedures for protection and replacement, makes express reference to the institution of the "*kafala* of Islamic law".[6] If legal pluralism consists of the multiplicity of laws represented within one social field, we can therefore conclude that it is relevant to analyze the functioning of conventional norm in the terms and the models of legal pluralism.

6 *Kafala*, a term referring to the idea of a guarantee, a security and which, by analogy, has been extended to include the protection of children without a family. It is thus similar to guardianship, and is seen as a means of protecting the child while granting those responsible for it only a limited degree of parental authority, and at the same time denying the child any legal rights within the family which has taken him/her in.

We must now look at the ways in which this is manifested. If we study the Convention on the Rights of the Child, we see that the inter-relationship between Islamic law and conventional law centres on a functional logic which Marie-Françoise Rigaux identifies in terms of interactional "heteronomy" (1985: 204-205, quoted in Dupret, 1995a). The interaction in the framework of the Convention takes place between two different normative orders (Islamic law and conventional law) having their roots in two different normative fields (the social field of the Muslim state and international society),[7] meaning the action of Islamic law coming from the Muslim state towards conventional law engendered by international society. Now, since the normative field and order at the point of departure (Islamic law with its roots in the Muslim state) – the issuers of a norm which requires to be integrated – are not the same as the normative field and order at the point of arrival (conventional law originating in international society) – the receivers of the norm which requires to be integrated –, the interaction between the two spheres is referred to as "heteronomous", in other words external to the receptive order. Article 21 of the Convention offers a perfect example of this legal mechanism: the *kafala*, an instrument of Islamic law, the normative issuing order of the provision which requires to be integrated, is expressly mentioned in the provisions of the Convention, the receiving normative order of the provision to be integrated.

By so doing, we find ourselves, to use M.F. Rigaux's terms, in a situation of "heteronomy by incorporation", in the sense that the receptive normative order (conventional law) is prepared to submit voluntarily to the norm rooted in the issuing normative order (Islamic law). The objective of the limitation (the *kafala* of Islamic law) is external to the receptive normative order (conventional law). On the contrary, however, the technique of incorporation by means of which the latter integrates the said norm is personal. By means of this technique, the external limitation (the *kafala* of Islamic law), which at the outset was heteronomous, becomes "autonomous",[8] as a result of its integration into the legal order of the point of arrival (conventional law). In other words, there is the voluntary submission of the international "legislator" to the provisions of a

7 Like M.F. Rigaux, I understand the normative field as "a more or less organized space which produces rules endowed with the power of enforcement"; thus the normative order is "a normative field whose structure is more highly structured".

8 Here the term "autonomy" is understood in terms of the identity of normative areas interacting the one with the other, in other words, when the normative field of the point of departure (the source) is also that of the point of arrival; we find ourselves in the framework of a common normative field from which one cannot escape. "The operation takes place within a single system of normative production (...) The latter thus formulates the material limits using its own sources" (Rigaux, 1985: 204-205, quoted in Dupret, 1995a).

normative order which does not originate with him. Through the interaction of the mechanisms of heteronomy by incorporation, the limit set by the third-party normative order (the *kafala* of Islamic law) becomes an integral part of the limited normative order (the Convention). In the long term, this leads to the existence of a single norm, the Convention on the Rights of the Child, referring back to other norms with their roots in other legal ordinances. Articles 20 and 21 expressly, and Article 14 in a more round-about fashion, thus incorporate into their terms the limit laid down by respect for *shari'a*, its provisions and its principles. By so doing, they thus become internalized, at least as far as the objective of the regulation is concerned, in the repertoire of conventional law. Nevertheless, at the end of the process of incorporation, we cannot speak of "mixed law" or "crossbreeding of law", given that this incorporation is limited to taking account of the existence of a plurality of procedures and institutions capable of regulating one and the same situation and having their roots in third-party normative orders, without leading to any alteration of the competing repertoires. We only face a juxtaposition of different normative orders, which are the outcome of the recognition of the multiplicity of the origins of law and thus the recognition that the law of the other is also law.

This incorporation merits recognition, not only of the provisions expressly integrated (the *kafala* of Islamic law), but also of the normative order which produced it (*shari'a*), and there is thus homologation by the receptive normative order (conventional law) of the issuing normative order (Islamic law). In this way, Article 20 of the Convention, by integrating a recognized, named and categorized institution of Islamic law into its provisions, results in the recognition of the latter, and through it, of the law which gave rise to it. Moreover, this recognition is not one-sided: it is two-fold, in the sense that it plays a reciprocal role in the case of the two orders which interact. Here, conventional law expressly recognizes Islamic law, which *vice versa*, and because it has received this initial recognition, recognizes conventional law. Here we find ourselves in a sphere of mutual interaction.

Through this agreed subjection, the international "legislator" has sought to guarantee the internal shape of the Convention, thus enabling him to ensure its wider acceptance by the various countries and, at the outset, to expand its field of application, in a two-fold effect of legitimizing justification: legitimization of Islamic law which legitimizes conventional law. In other words, and in concrete terms, its acceptance by 42 Muslim states out of the 53 which are members of the OIC.

Thus recognition of the international law comes via recognition of the validity of the Islamic law. This can be explained by the fact that the constraining nature of the limits laid down with regard to the normative role of the international "legislator" is derived from the validity of the external law which imposes on him. This is, of course, a validity not in the formal sense of the positivists, for whom a norm is valid once it has been enacted in conformity with

the conditions of attribution of competencies and procedures laid down by the normative field from which it emanates, but rather in terms of a socially recognized legitimacy attributed to it by the actors in the legal system. In other words, a law that makes sense, that is recognized and asserted by those who call for it and who, as a result, call for it to be recognized and respected.

With regard to the *kafala* of Islamic law, for example, its validity is affirmed two-fold: at the internal level, since the Islamic states vigorously defended its application in the preparatory stages (we need only refer to the opposition expressed with regard to Articles 20 and 21 as originally conceived and with regard to which they won the case); but also at international level, testimony of which is to be seen in its inclusion in the wording of Article 20 and the deletion of that part of the Article which recommended that states should promote adoption. These two levels of recognition in terms of validity are closely related, to the extent that the Islamic norm is recognized as valid by the international "legislator", because it is valid at the internal level of the Islamic states. By so doing, the recognition of the interacting legal orders leads to the creation of a certain unity of functioning between them, or what Clifford Geertz (1986) refers to as the "rationalizing homogenization", which makes it possible to avoid incoherence and contradiction. It is what I personally, since we are dealing with conventional law, would refer to as "compromise".

3. CONCLUSION

It would seem, in drawing conclusions, that recognition of a plurality of normative repertoires capable of mobilization within the framework of a common social field means accepting that law cannot be identified with one sole *locus* of production and, as a result, that the actors in the field of law, be they the issuers or the receivers of the norm, find themselves within a network of normative orders all of which interact. Here we move from legal pluralism to sociological pluralism with, in addition, the rediscovery of the heuristic value of law, seen as a method of cognition of international social reality, at least as far as its legal working is concerned. At the beginning of the presentation, we took as our starting point recognition of sociological pluralism to move to the recognition of legal pluralism. By taking the opposite path, we have come full circle.

CHAPTER 9
The *Shari'a* and Legal Pluralism
The Example of Syria

MAURITS S. BERGER
UNIVERSITY OF AMSTERDAM

INTRODUCTION

The theory of legal pluralism maintains that there are more norms and rules in society than the ones upheld by the state. The theory advocates that not only state law should be taken into account when the rules of that society are being studied. I fully agree with this view. In this article the theory of legal pluralism will be illustrated by the applicability of Islamic law – the *shari'a* – in Syria.

In the first two parts of this article it will be argued that *shari'a* is applicable on two levels, which I call "formal" and "informal". "Formal *shari'a*" is the term for those parts of the *shari'a* which are incorporated in the legislation of – in this case – Syria. "Informal *shari'a*" is all *shari'a* which is being applied, but which is not promulgated as law by the legislator.

The focus of this article will be directed at various aspects of the informal *shari'a*. This will all be based on my fieldwork in Damascus in the period 1995-1996. This fieldwork took place in a certain mosque where I studied with a *shaykh*, but also was involved attending classes at the *shari'a* faculty of the University of Damascus, and Friday prayers at the mosques of sheikh Buti and grand mufti Kuftaro.[1]

However, it will also be argued that focusing on the formal and informal applicability of the *shari'a* still leaves the observer with an incomplete picture of the essence of *shari'a* law. In the third part of this article I will therefore try to tackle certain characteristics of the *shari'a* which make it so very unlike any other legal system or player in the field of legal pluralism. The analyses of these characteristics will be of a comparative nature.

[1] See for similar studies in Egypt and Jordan respectively: Gaffner (1994) and Antoun (1989).

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 113-124
© 1999 *Kluwer Law International. Printed in the Netherlands.*

1. *SHARI'A* AND ITS FORMAL APPLICATION IN SYRIA

1.1. *Shari'a*: A Definition

According to orthodox Islam, the *shari'a* is the divine law as embodied by God's Word (the *Qur'an*) and the sayings and actions of His prophet Muhammad (the *Sunna*). With regard to legal matters, however, these two written sources contain very few rules. After the prophet had passed away, following generations of legal and theological scholars developed a methodology by which they elaborated a large corpus of legal rules based on the two original sources. This corpus is called *fiqh*.

The *shari'a* is usually translated as "Islamic Law". This term is too limited, since it implies that it concerns only legal matters in the Western meaning of the word. The *shari'a* is more: it is a code of conduct for all events, walks and ways of life. It deals with proper behaviour in the bathroom as well as the battlefield, on the market as well as in the mosque.

1.2. Law, *Shari'a* and Religion in Syria

Among its Muslim fellow countries Syria is an exception, because it is a secular state. In its latest constitution of 1973, the Syrian Arab Republic is called "a socialist and popular democratic state" (Art. 1/1). While the constitutions of most Arab states declare Islam the state religion and the *shari'a* "a" or "the" source of national legislation, the constitution of Syria only states that the religion of the president should be Islam (Art. 3/1), and that Islamic jurisprudence (*fiqh*) is "a" source of legislation (Art. 3/2).

As in most Muslim countries only a limited part of the *shari'a* is recognized and codified by the Syrian legislator: the rules of personal status, inheritance and – in a restricted way – religious endowment (*waqf*). The remainder of Syrian law is mainly derived from French law.

It is interesting to note that although Syria considers itself a secular state and makes no constitutional provisions for Islamic supremacy, the opposite is the case for its legal system of personal status. This becomes apparent in the mix of national and religious applicability of the laws relating to personal status. Muslims, Christians, Jews and Druze have their own laws of personal status. The last three religious communities are also granted legislative and judicial powers in this field of law. This is the religious component of personal status legislation in Syria. However, with regard to some issues of personal status, the Syrian legislator has decreed that they should apply to all Syrian nationals, regardless of their religion. On these issues the Muslim code of personal status applies (Berger, 1997).

The official authorities in Syria dealing with personal status law are state employees and judges. Whether these persons actually enjoy much authority

among the Muslims, I cannot assess. I do know, however, that non-official (mostly religious) authorities are often consulted in social as well as legal matters of marriage, divorce and inheritance. Their opinion is obviously considered more important than a state-appointed judge.

2. INFORMAL *SHARI'A*

2.1. Instruction in *Shari'a*

When I arrived in Damascus, I went straight to the most obvious place to learn the *shari'a*: the *shari'a* faculty of the University of Damascus. However, it was the dean of the faculty and one of its prominent professors, sheikh Burhani, who told me that the *real shari'a* was not taught at university but in the mosque, with a *shaykh*. At university the students learn *about* the *shari'a*, by means of modern books explaining the mechanics of the science of *fiqh*, *Sunna*, and other fields. With the *shaykh* in the mosque one studies the *shari'a* itself, by means of reading *fiqh*. Most students do both: they study at the university as well as with a *shaykh*.[2]

A Syrian student of *shari'a* is supposed to study with only one *shaykh*. This will be "his" *shaykh*: he will go to him for teaching, advise and counsel. He is supposed to stay with this *shaykh*, presumably for all his life. The choice of a *shaykh* is therefore an important individual decision. In my case, the decision was made for me: I was admitted to the circle of pupils of sheikh Nur al-Din, teacher in a small mosque west of the old city.[3] The mosque adhered to the Hanafite school of law, one of the four schools of legal thought in Islam.

2.2. The "*Shari'a* Group"

The students of sheikh Nur al-Din were composed of a small inner core of "followers" of the *shaykh*, and a varying number of visitors. The inner core was composed of a group of ten to fifteen students, in the age group of fifteen to thirty, who all lived in the neighbourhood of the mosque. Their lives revolved mainly around the mosque, where they spent most of their time. They did not participate in study groups other than those with sheikh Nur al-Din.

With his students sheikh Nur al-Din read a selection of *fiqh* literature on a variety of subjects, ranging from religious doctrine and philosophy to *jihad*, pilgrimage and alms tax. To me, this all appeared to be theoretical or historical. I was wrong. The lectures on pilgrimage and alms tax, for instance, attrac-

---

2 See for the curriculum and the developments of the *shari'a* faculty of the University of Damascus: Botiveau, 1993.

3 For reasons of privacy, I have changed the name of the *shaykh* and will not use the name of the mosque.

ted large audiences due to their practical value. In the case of pilgrimage this was not very surprising, since many of the students were planning to go on the annual pilgrimage to Mecca, and wanted to make sure about its rules and regulations. But also the alms tax was perceived by many as a duty that was still to be fulfilled according to the rules of the *shari'a.* The lectures on this subject attracted especially a number of merchants of the nearby market, who asked detailed questions about the ways the alms tax had to be levied and calculated.

Pilgrimage and alms tax are duties of the Muslim, but in Syria there is no authority enforcing them. The government authorities might have the means, but not the will to enforce these rules, since Syria is officially a secular state. The religious authorities on the other hand might have the will, but not the means. The students of sheikh Nur al-Din voluntarily subjected to the obligations laid upon them by the *shari'a.* The *shari'a* is the authority that obliged them, and sheikh Nur al-Din was the authority they had selected to explain this obligation to them.

Within the close Muslim community around the mosque, the student group of Nur al-Din formed a group that tried to live their lives according to the *shari'a.* Insofar as I can see, there are many of such groups of orthodox Muslims in Syria that adhere strictly to as many parts of the *shari'a* as practically possible. This goes beyond the fields of personal status and inheritance law, and behavioural and religious duties. As we have seen, it also covers fields like economics and trade. These groups, that I will call "*shari'a* groups", isolate themselves from the outside world, and will preferably interact with each other only. In this interaction the *shari'a* is their code of conduct, and their *shaykh* its interpreter.

2.3. Text and Authority

Sheikh Nur al-Din acted as the communicating link between the text of the *shari'a* and its believers. But he was more than a mere interpreter or instructor: he was an authority within the *shari'a* group. An authoritative interpreter[4] like sheikh Nur al-Din – whether a *shaykh,* or any man or woman of distinction within the religious Muslim community – does not derive his position from diploma's. Graduation from the *shari'a* faculty is nice, but not a prerequisite for becoming a person with high standing in the Muslim community. It is the personal example set by such a person, his personality and his knowledge which will determine his authority. In the religious establishment, knowledge is usually passed on from father to son: boys – but also girls – are being taught *Qur'an, Sunna* and Arabic grammar at a very young age.

---

4 In his discussion on the "authority of preachers" Gaffney distinguishes three categories of authoritative figures: the scholar (*'alim*), the saint (*wali*) and the warrior (*mujahid*) (Gaffney, 1994: 27*f.*). Antoun, in a similar study, discusses the role of preachers (Christian and Muslim) as "cultural brokers" when dealing with political and social divides in society (Antoun, 1989: 26).

It is up to the individual believer to consult or learn from a certain *shaykh* or not. The length of the line of petitioners and supplicants in a *shaykh*'s reception room determines his social standing and authority. Advice and *fatwas* are asked for, not given without question. It should be borne in mind, however, that an authoritative interpreter is to be sought by the believers, but that the authoritative code of conduct, the *shari'a*, is always there.

There are many kinds of authoritative interpreters. In Syria, I met a few. One was sheikh Nur al-Din, who would not give any revolutionary interpretations of the texts we read, but always followed a cautious path of orthodox Islamic doctrine. There are thousands like sheikh Nur al-Din. Most remain unknown, and their authority is limited to their small *shari'a* group. But some interpreters are well known, and their authority is being extended to large groups, from the pulpits in the mosques, in the lecture halls of the *shari'a* faculty, on television and in magazines. It is on this level that the interpretations of the rules and norms of the *shari'a* start to differ. To illustrate this, I will give examples of three authoritative shaykhs. All three speak in public, and by doing so seek a larger audience than the circle of students.

a) Sheikh Buti, a man in his sixties, had succeeded his father as a preacher in a small mosque in the Rukn al-Din quarter. He lectures also at the *shari'a* faculty, and has a weekly talk on Syrian television. In addition, he acts as a *mufti*, issuing *fatwas* in a monthly medical magazine. Judged by the large crowds that attend his Friday prayers and lectures at the university, he is immensely popular. His message is of the *shari'a* as a complex science which can and should only be practiced and interpreted by specialists. He loathes innovations, especially when they are justified with Qur'anic verses or prophetic Traditions without regard for their scientific and historical background and context. He therefore constantly scorns – in guarded terms – the fundamentalists as amateur scholars who put the *shari'a* to their own use.
b) The Grand Mufti Kuftaro was nominated by the Syrian government in the 60s. This grand old man – he is in his eighties – walks the tight rope between the secular and nationalistic ideology of the ruling Ba'th party and Islamic dogma. Kuftaro for instance uses the Ba'thist terminology, but colors it religiously by replacing the term "Arab" with "Muslim": he then speaks of "the community of Muslims", "the Muslims and the West", "Islamic values". Unlike Buti, Kuftaro is part of the complex Syrian state politics, in which he keeps his own Islamic agenda.[5]

[5] A German scholar at the University of Heidelberg, Annabelle Böttcher, has in 1997 written a (yet unpublished) doctoral thesis on the role of *muftis* in Syria.

c) The third authoritative interpreter is a young and influential *shaykh* from a reputed family of religious scholars.[6] He preached in a mosque and acts as a *shaykh* and councelor for many. He is a devote Muslim, and believes strongly in the authority and practical use of the *shari'a*. But this belief has made him very critical of the political situation in Syria. On the basis of the *shari'a* he advocates environmental consciousness, awareness of international relations, and basic principles of democracy. For these ideas he has been often in conflict with the Syrian regime.

2.4. The Fabric of Informal *Shari'a*: A Preliminary Conclusion

If we observe the Syrian legal system from the point of view of legal pluralism, it becomes clear that the *shari'a* is one of the many legal players in the field. Or, to be more precise: the *shari'a* is more than one player, since it applies in different forms on different levels. The "formal *shari'a*" is that part of the *shari'a* which is promulgated by the Syrian legislator. Here, the *shari'a* only applies to the laws of personal status, inheritance, and religious endowments.[7]

The "informal *shari'a*" is applied on a voluntary basis. Its application varies from the observance by the not-so-pious Muslim of (a few) religious rituals or marital rights, to the observance by members of "*shari'a* groups" of many or even most of the rules of the *shari'a*. The same voluntarism applies to the Muslims' choice of their authoritative interpreters of the *shari'a*. The influence of the informal *shari'a* is in general limited to the private domain, but may be extended to the public and even political domain.

The first conclusion we can draw, therefore, is that the application of "informal *shari'a*" is much more widespread than one would suspect at first glance. This proves the usefulness of the approach as advocated by the theory of legal pluralism: in Syria there are more rules and legal players than the ones of the formal legal system.

But a description of the formal and informal *shari'a* is not sufficient to understand the role of *shari'a* in Syrian society – and Muslim society in general, for that matter. When studying a legal system like the *shari'a*, attention should not only be paid to its rules and norms at face value, but also to the intentions behind them. In the following a description will be given of some features of the *shari'a* in which these intentions and motivations will become apparent.

6 For the sake of his personal safety, his name and circumstances will not be mentioned here.
7 For the interaction between the *shari'a* and positive law in Syria and Egypt, see Botiveau, 1993.

3. SPECIAL CHARACTERISTICS OF THE *SHARI'A*

3.1. Centralistic Nature

The *shari'a*, like state law, is centralistic by its very nature: it is supposed to be encompassing, and also to be the sole applicable law. "*Islam* (...) conveys rather an authoritative and all-embracing way of life, valid not only for those who assent to it and take it as their model, but for all humanity at all times" (Gaffney, 1994: 192). If a certain group in society claims superiority over other groups in that society, or even over state law itself, such claims should be taken into consideration in the analysis of their code of conduct, since that may be very explanatory for the way the group applies and interprets its norms and rules.

This centralistic nature of the *shari'a* can be detected in the attitude of the *shari'a* group of sheikh Nur al-Din. This group submitted voluntarily to the *shari'a* and its code of conduct. They deemed the outside world as inferior, or at least foolish for not submitting to the same code. Some *shari'a* groups may have the urge to tell the outside world otherwise. Some do so actively, or maybe even aggressively. The group of Nur al-Din was passive: they were right, the others were wrong, and so be it. But within their interactions there was always a certain anticipation; that their code of conduct will be everyone's code, someday.

This urge to "spread the word" is not unique for the *shari'a* groups. In most societies groups exist that promote ideas or interests. But the *shari'a* groups are unlike a pressure or lobby group. Such a group is merely promoting and defending certain vested interests. A union will defend workers' rights, an environmental organization will try to protect the environment. They will approach or attack those parts of society that may promote or threaten these interests. Their goals and means are specific, unlike a *shari'a* group which aims at every individual as well as at society as a whole.

Another comparison would be that of the *shari'a* group with a group that advocates a certain ideology. But this comparison also does not hold. Due to the centralistic nature of the *shari'a*, *shar'ia* groups claim that the *shari'a* has superiority over all groups and laws in society. In that sense, the *shari'a* can be compared with any other ideology that has a vision of how society should be ordened. The difference, however, is that most ideologies can only be put into practice once their supporters have the power to do so. This is not the case with the *shari'a* and its adherents. Muslims, however small their number may be, can live according to the *shari'a* without necessarily having to implement it first. This is exactly what the *shari'a* groups do. Their urge to "spread the word" emanates from a way of life already existing, not a model that has to be put into force first before it can be put to pratctice.

3.2. Authority of Morality

The *shari'a* is perceived by many (Muslims and non-Muslims alike) as a set of rules which is immutable because it has been promulgated by divine will. However, whereas most Muslims will agree on the normative value of the *shari'a*, its rules are very much debated. In my experience, nine out of ten Muslims in the street will answer affirmative when asked for his or her opinion on the *shari'a* and whether it should be implemented. But in most cases an answer will be lacking when asked what is actually meant by the *shari'a*, which rules should be applied and how.

The legitimacy of the *shari'a* is unchallenged, but no unanimity exists on the interpretation of its contents. The *shari'a* therefore has what I call an authority of morality: everybody agrees that it is the highest norm, but not everybody agrees on what these norms are. This phenomenon has also been called "solidarity without consensus".[8] Examples were given in the preceeding paragraphs of the various authoritative interpreters in Syria and their views and uses of the *shari'a*.

Outside Syria, the debate on the content of the *shari'a* has resulted in even more explicit views. Of the two Egyptian judges Tariq al-Bishri and Muhammad al-'Ashmawi, the first demands implementation of the *shari'a* (Bishri, 1996), while the latter maintains that Egyptian laws are already in conformity with the *shari'a* ('Ashmawi, 1996). The same Tariq al-Bishri upholds the view that the *Qur'an* and *Sunna* (sayings of the prophet Muhammad) may not be interpreted, while the Moroccan philosopher Muhammad al-Jabri argues that such interpretation is allowed and even necessary (Jabri, 1996), and whereby the Sudanese scholar Abdallah an-Na'im goes even further by showing how explicit Qur'anic rules on the position of women and non-Muslims could be changed (An-Na'im, 1992). These are just a few examples of a long list of views on the interpretation of *shari'a* rules.[9]

The seeming paradox between the rigid character of the *shari'a* and its fluid contents is a source of misconceptions. "Part of the difficulty of Westerners' understanding of the moral resiliency and continued social effectiveness of Islam in the twentieth century is an ignorance on the part of non-Muslims of the nature of Islam's enormous corpus of law and ethics, the derived capacity for diverse interpretations, and the possibilities of adaptation to various social structures in geographical and historical circumstances" (Antoun, 1989: 252). The inflexibility for which the *shari'a* is often blamed appears to be related to its moral authority only, not its corpus of rules. The *shari'a* would be done

8 The expression was coined by David Kertzer, who is quoted by J.-N. Ferrié (1996: 6).
9 Baudouin Dupret and Jean-Noël Ferrié have given quite a few of these examples by juxtaposing the views of modern Muslim jurists (Dupret, 1995b, 1996b, 1996c, Ferrié, 1995, 1996).

more justice if it were described in a transcendental way as "none else than God, the source of religious values" (Rahman, 1979: 100).

3.3. Religious Law[10]

A third characteristic with which the *shari'a* is often attributed is its religiousness. This refers to the belief that the rules of the *shari'a* are ordained by God. Usually, Muslim and non-Muslim scholars alike put emphasis on the divinity of the rules. What I find of much greater practical importance, however, is the *belief* in this divine legislation.

A simple example may illustrate this. Both a football club and a *shari'a* group might have the rule that one should wash his hands after using the toilet. When observed, we see hands being washed. When interpreted, we determine a rule of hygiene. But the members of the two groups have entirely different motivations when they abide by this rule. For the football player it may be something practical. For the member of the *shari'a* group, on the other hand, it is much more: he is fulfilling a duty from God, he is acting in accordance with the eternal code of conduct given by God. Naming the *shari'a* "religious law" seems therefore a good definition for the emotional charge of its norms.

However, the term "religious law" should be used with caution. "Religious law" is actually a very vague label for a law system which is unknown to Westerners. It is not an Islamic term, but used by Western scholars and lawyers to categorize laws such as the *shari'a* which are based on religion. Such laws are considered alien to Western legal systems and theories. Moreover, the term "religious law" illustrates the confusion of Western scholars about a legal system which to them is inherently contradicting because it is based on religion as well as on law (Ayubi, 1991: 35, 42, Coulson, 1964: 85-86, Gaffney, 1994: 203, Gellner, 1992: 6, Schacht, 1964: 203). Now that the term "religious law" is so easily used by Western scholars when discussing the *shari'a*, but appears to be incomprehensible at the same time, it might be useful to dwell on the implications of its meanings.

Religious law is not a clearly defined concept, but "morals law" with which it is often equated might provide us with a clue.[11] Here again, most Western Islamologists who use this term when describing the *shari'a* or Islam do not expound on its meaning.[12] We therefore have to refer to Western *legal* scholars.

---

[10] See on the concept of religious law also the articles of Woodman and Dupret in the first part of this volume.

[11] The only other two Western legal theories which qualify for comparison with the *shari'a* are Canonical Law and the theory of Natural Law. Canonical Law, which is based on Roman law and which is more the law of its Church than of the religion, has never been seriously considered for comparison with the *shari'a* (Schacht, 1964: 2-3). In comparing the *shari'a* with Thomas Aquinas' theory of Natural Law, Chehata observes quite some similarities, but concludes that these are outweighed by some essential differences (Chehata, 1965: 9).

[12] In the few instances where Western scholars give an explanation for the distinction between law and religion, they refer to the dual norms used by the *shari'a* to value human actions: a human action can be (in)valid in its relation to another person, and (in)valid in its relation to God.

It is interesting to note that these scholars hardly use the term religious law, but prefer the term "morals law". I will base the following paragraphs on two important legal theoriticians of the 60s and 70s, Hart and Rawls, and on George who recently published a comprehensive study on morals law.

Moral sentiments are very basic human feelings that refer to right or wrong (Rawls, 1972: 481, 489). Since most religions propose teachings about right and wrong, religion and morality are linked (George, 1993: 81). There is also a direct link between morals and law: Rawls equals morals to justice (Rawls, 1972) and Hart claims a "necessary connexion between law and morals" (Hart, 1961: 15*f.*). Following the argument of Hart, morals "occupy a higher place in the scale of serious importance than (...) most rules of law", and "maintain the fabric of a tolerable, orderly society" (Hart, 1961: 169-170).

There are also differences between rules and morals. According to Hart, "legal rules" are indifferent to the intentions of the one that follows them, and need only to be obeyed, whereas moral rules are based on conviction (Hart, 1961: 168). The example of the rule of washing hands comes to mind. Also, due to the fact that morals are deeply embedded in human emotion, moral rules cannot be introduced, changed or repealed as easily as legal rules (Hart, 1961: 171).

So far, from the perspective of a religious Muslim, these definitions seem to justify the labeling of the *shari'a* as "religious (or: morals) law". However, the main differences between morals and law are of a completely different – and of a surprisingly conjectural – nature. Morals are considered irrational and a characteristic of a primitive society (Hart, 1961: 197, Rawls, 1972: 490). Also, rules based purely on morals are considered arbitrary, because not the (general) legal rule is the guideline but the (individual) conscience (Rawls, 1972: 490). This lack of rule of law, this arbitrary justice is summarized by Max Weber in the famous notion "*qadi* justice", which assumes casual easiness in the practice of the Islamic courts.[13] The general assumption is that the Western world is a "well-ordered society" (Rawls) or part of "the legal world, with legislature, courts and officials" (Hart), which has moved beyond morality law, and has entered the next phase of "legal" law. And although morality rules are considered to be a fact of life, legal scholars prefer to keep them at bay since they are considered to be uncontrollable and a threat to free will.

Morality (or: morals law), it seems, is not a clear notion in itself, but only becomes evident when opposed to law. The relation between these two is that of an antithesis between passion (or faith) and reason, between (oppressive) prescription of norms and (liberal) regulation of a society, between *qadi* justice and equal justice for all. This negative preposition should be borne in mind when using the term religious or morals law.

---

[13] See also footnote 19 in Thielmann's article in this volume.

The conclusion is therefore paradoxal: *shari'a* is religious law, but it is not religious law. It is religious law in the sense that it derives its moral authority from a divine source. It is also religious law in the sense that its basic tenets are based on strong moral convictions. However, it is definitely not religious law when considering the definitions and assumptions attributed to that term by many Western scholars: the corpus of rules derived from *shari'a* is far from a irrational, primitive and arbitrary system of law.

CONCLUSION

A legal pluralistic approach reveals more of the workings of the *shari'a* in countries like Syria, situating it as one of the many legal actors in the field of rules and norms. The first part of this article shows that the *shari'a* does not only move at the level of (formal) state legislation, but also at the level of (informal) application on a voluntary basis.

However, the *shari'a* is more than a set of rules and norms that can be studied by means of its promulgated laws, its corpus of rules, or the teachings of its interpreters. The *shari'a* is a highly charged subject, for many Muslims as well as many non-Muslims. Mentioning the word alone invokes an emotional response, whether positive or negative. In this respect the *shari'a* is fundamentally different from other sets of rules or codes of conduct. This characteristic of the *shari'a* was the subject of the second part of this article.

I am fully aware that by trying to understand religious and emotional motivations behind the observance of rules we enter a difficult field of psychology and sociology, and maybe other sciences and fields of human behaviour. Some may argue that this has nothing to do with law anymore. But that is exactly my point: to understand the *shari'a* the way it is being advocated by its many and various champions, one has to try to understand their emotional motivations.

I have tried to describe three features of the *shari'a* in which these motivations are apparent. The first is the centralistic nature of the *shari'a*, which gives itself as well as its supporters a sense of superiority over other laws and people. The second feature is its paradox of being rigid as well as flexible. It shows itself in the claim of the Muslim to strictly adhere to the *shari'a* without actually knowing or even caring which are exactly the rules of the *shari'a*. I have tried to explain this paradox by distinguishing between the *shari'a* as a transcendent "authority of morality" on the one hand and its corpus of derived rules on the other.

The third feature is the most important one: the emotionally charged conviction of Muslims in following the rules of the *shari'a* could be explained by the fact that the *shari'a* is religious law. But the term "religious law" (or "morals law') proved to be a tricky one, since it is used by Western scholars who read meanings into it which cannot justifiably be attributed to the *shari'a*. By the Western definitions of religious law, the Muslim convictions in following the *shari'a* are

reduced to something primitive, irrational and arbitrary. Comparison of the *shari'a* to religious law is therefore tempting, but not tenable.

However, the difficulty from a Western (legal) point of view to understand the emotional motivations of adherents to the *shari'a* seems to be a matter of wording more than of concepts. If we take a more distant and abstract view, general attitudes may be discerned which are quite similar to both Westerners and Muslims. For instance, Western legal thinking revolves around abstract notions such as justice, legality and universal rights which are immutable concepts. Laws and legislators, on the other hand, are in Western legal thinking subjected to change. This appears to be in contradiction with the immutable laws of the *shari'a*, and its one and only Legislator. However, a different angle may shed another light. In Islam, both the *shari'a* as a transcendent concept and its Legislator are fixed and abstract notions: *shari'a* is the authority of morality. But, as we have seen, the interpretation of its corpus of rules may change. This changing interpretation of rules of divine origin has prompted Chehata to call Islamic law "positive religious law" (Chehata, 1971: 42). Seen in this way, the emotional value attributed to the *shari'a* can be equated to that of Western concepts like justice or universal rights. Both are immutable starting points for further positive legislation.

From this perspective, the emotional charge experienced by adherents of the *shari'a* may not be so alien to Westerners. Westerners have a similar emotional, perhaps even irrational, reaction when discussing universal rights or justice. To paraphrase the same example: nine out of ten Westerners in the street will answer affirmative when asked for his or her opinion on justice and universal rights and whether it should be implemented. However, in most cases an answer will be lacking when asked what is actually meant by these terms, which rules should be applied and how.

CHAPTER 10
The Treatment of Unfair Terms in Arab Countries
An Investigation into the Effects of Legal Pluralism

HASSAN GEMEI
UNIVERSITY OF CAIRO

INTRODUCTION

In matters of legislation, Arab countries can be divided into two groups. For the countries of the first group, the *shari'a* (Islamic law and doctrine) is only one of a number of sources of legislation. In the second group, on the contrary, legislation is founded almost entirely on the *shari'a* and the task of the legislator is to codify the legal rules and principles of the Koran, the *Sunna*, the consensus of Muslim scholars, the solutions put forward by the *mujtahidin* (practitioners of *ijtihad*, i.e. interpretation, provided they fulfil the conditions), etc. However, should problems arise which were not foreseen by the four great *imams* (scholars) the legislator is free to choose the most appropriate solution, irrespective of its source. Borrowing from the laws of other lands is permissible as long as it does not infringe on Islamic law and order or on the founding principles of Islamic law.

The way in which the issue of unfair contract terms is tackled in our part of the world is governed by these two legislative trends. Generally, the countries of the first group respond to new needs and changing legal phenomena by drawing on the legal experience of European countries (especially France). For this reason, the problems they encounter tend to be very similar to those encountered under European legal systems. The countries of the second group, characterized by their attachment to the *shari'a*, respond to the challenge of unfair terms by delving more deeply into the *shari'a*.

In the light of these conditions, we shall pursue our investigation of the treatment of unfair terms in the two legal currents of the Arab world by studying Egyptian law and the law of the United Arab Emirates.

The first part of this paper will deal with the definition of unfair terms and the analysis of the legal texts attempting to redress the inequitable contractual relationships they create. The second part will address the solutions arising

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 125-132
© 1999 *Kluwer Law International. Printed in the Netherlands.*

from Islamic doctrine, which has found in the *shari'a* the outline of a general principle opposing unfair terms.

1. THE POSITION OF THE LEGISLATOR WITH REGARD TO UNFAIR TERMS

In this section our task will be to define unfair terms and to examine the legislative texts used to redress the balance in contractual relationships.

1.1. The Definition of Unfair Terms

Before attempting to define unfair terms we must emphasize the fact that such terms are not illegal. Illegal terms are automatically invalid, irrespective of whether they are unfair, and their presence can invalidate a contract. Thus, for example, a *riba* clause (prescribing the payment of interest on a loan) is *fasid* (legally invalid according to the *shari'a*). A contract containing such a clause is also *fasid* and can only be revalidated if the contracting parties agree to eliminate the offending clause.[1] Unfair terms are not unlawful, so according to the principles of freedom of contract and free will, they ought to be permitted and complied with. However, these terms make contracts inequitable and thus undermine the above-mentioned principles. It is because one of the contracting parties is weaker than the other that he/she assents to a term that would never have been accepted by someone with a full grasp of its implications or the opportunity to dispute the provisions imposed by the other party, and it is the imbalance such terms produce that motivates our legal systems to strive for their attenuation or elimination.

The question of whether a term is unfair cannot be resolved by reading it in isolation. Some terms are obviously unfair at first glance, while others are only unfair in the context of a given contract. For instance, a clause granting the seller the right to dissolve a contract without the prior agreement of the buyer (*khiyar al-shart* – Articles 219-255 of the Civil Code of the Emirates), can only be termed unfair if it has been forced upon the buyer or if the complexity of the clause prevented the contractor from understanding its implications when entering into the contract.

We may therefore conclude that in a contractual relationship, a term which tips the scales in favour of the party who imposed it, is unfair when forced upon a co-contractor who is weaker in technical, legal or economic terms.

1 Art. 212 of the Civil Code of the United Arab Emirates.

1.2. The Legislative Texts Used to Combat Unfair Terms

In our legal systems legislators have taken account of the injustice suffered by parties forced to accept conditions dictated by more powerful partners.

Thus the Civil Codes (Art. 248 of the Civil Code of the Emirates and Art. 149 of the Egyptian Civil Code) enable judges to modify or even to refuse the application of unfair terms in contracts of adhesion.

The said articles guarantee the protection of the weaker party by declaring any agreement attempting to restrict the judges' powers in this area null and void. Furthermore, Article 266/2 of the Civil Code of the Emirates and Article 151/2 of the Egyptian Civil Code stipulate that ambiguous terms in contracts of adhesion should be interpreted to the advantage, rather than to the detriment, of the adherent.

In addition to the unlimited powers accorded to judges in the matter of contracts of adhesion, there are other texts designed to counter the rising phenomenon of unfair contract terms. For example, both Codes require certain types of contracts (employment contracts, rental contracts, insurance contracts) to be put into writing in order to ensure that the adherent is properly informed of the terms and their implications.

To compensate for the possible ignorance of the adherent or his inequality in technical or economic terms, the legislator also requires certain provisions to appear in large print[2] or to be written in Arabic ('Umran, 1986, and Gami'i, forthcoming).

Khiyar al-ru'ya

In the Emirates the legislator grants contracting parties the right to dissolve a contract unilaterally if they were unable to acquaint themselves with the object of the contract before concluding it. Articles 266 *f.* of the Civil Code accord this right, referred to as *khiyar al-ru'ya*, for a length of time to be established by the parties or by the judge deciding questions of merit. Any clause attempting to deprive the contracting party of this right is null and void.

This right, inspired by the *shari'a*, obviously provides contracting parties with a very effective means of escaping the consequences of unfair terms.

Although the *khiyar al-ru'ya* is comparable in some respects with the "time for thinking" (*délai de réflexion*) under European law, it should be remembered that this right applies only to contracts where a purchaser has been unable to acquaint him/herself with the object of a contract before concluding that contract.

2 Egyptian Trade Ministry Decree No. 180/1950 relative to consumer goods.

Khiyar al-'ayb

The Civil Code of the Emirates also grants the right of unilateral dissolution to purchasers of objects with "hidden" defects (Art. 237 to 242). This right is known as *khiyar al-'ayb.* The legislator requires the contracting party (e.g. the purchaser) to prove that he/she was unaware of the defect at the time of entering into the contract and that the said defect has affected the value of the object or made it unsuitable for the purpose for which it was originally intended.

Although the seller can insist on the inclusion, in the sale contract, of an exemption clause excluding his/her liability for hidden defects, such provisions become invalid if the seller has committed a serious transgression or is guilty of misrepresentation.

Furthermore, Article 545/5 of the Civil Code of the Emirates recognizes the relative nullity of the exemption clause if it can be proved that the buyer had neither the means nor the experience necessary to discover the defect at the time of the conclusion of the contract. It is therefore clear that this provision guarantees the buyer a high level of protection against unfair exemption clauses.

The time period within which the buyer has to institute an action for protection against hidden defects is six months from the date of reception of the object purchased (Art. 555 of the Civil Code of the Emirates). It should however be noted that the passage of this term does not result, for the buyer, in a limitation of action by lapse of time. The law of the Emirates does not provide for limitation of action by lapse of time – the only possibility that does exist in this respect is the filing of a demurrer on the grounds of passage of time. Even if this is successful, the resulting exemption can be overturned if the plaintiff proves the existence of a lawful excuse, "*al-a'dhar al-shar'iyya*", for his/her not having acted within the legal deadline.

Thus the demurrer system provides purchasers with an opportunity to institute action for protection from hidden defects however long it takes to discover the defects of the object. The seller can do nothing to deprive the purchaser of this possibility as the time lapse and the application of the demurrer are issues of public order.

The penalty clause in the Egyptian Civil Code

Article 223 of the Egyptian Civil Code provides that, "The contracting parties can fix the amount of damages in advance, by the inclusion of a clause in the contract or by subsequent agreement". However, since a penalty clause may be used to limit or exclude contractual liability, the same Article 223 requires the contracting parties (and the judges) to respect the provisions of Article 217/2 on this subject.

The interpretation of Article 233 in the light of Article 217/2 leads to the conclusion that penalty clauses purporting to limit the liability of a debtor, swindler

or serious offender with respect to the performance of a contract are null and void.[3] Furthermore, the Egyptian Civil Code grants judges extensive powers to change the amounts of damages fixed in penalty clauses if the latter clauses have been passed in bad faith or are unfair. Thus Article 224/2 permits judges to modify penalty clauses if the estimation of damages is obviously too high or too low.[4] But the power given to judges to modify penalty clauses in exceptional cases does not extend to the elimination of those clauses. The judge can change the amount of damages, but he cannot change its contractual nature.

It is clear from the above that the Egyptian legislator has no intention of eliminating freedom of contract but does not wish to see this freedom misused for exploitation of the weaker party.

The penalty clause in the civil law of the Emirates

Article 390 of the Civil Code of the Emirates provides that,

"1. The contracting parties may fix the amount of damages in advance by way of a clause in the contract or by subsequent agreement. However, they must take the other principles of the law into account.
2. In all cases the judge may, at the request of one of the parties, modify this agreement and impose an accurate estimation of damages. Any clause contravening this text shall be absolutely null and void."

A comparison of Article 390 of the Civil Code of the Emirates with Egyptian law brings to light considerable differences. In the Emirates the legislator has granted judges unlimited power to change the agreed estimation of damages fixed by the contracting parties. The judges' power is not confined to contracts of adhesion or to cases of abuse (as is the case in Egypt). What is more, in the Emirates the judges go further than simply redressing the balance the agreed estimate disturbed. They are required to make a precise estimation of the damages caused to the creditor by the non-performance or unsatisfactory performance of contractual obligations.

The text clearly marks the hostility of the legislator in the Emirates to unfair terms purporting to limit liability.

It is this same hostility which underlies the refusal of tighter provisions for the limitation of liability action by lapse of time and the annulment of all clauses attempting to interfere with the application of Article 390.[5]

---

3 Cass. civ. Egypt. 18/2/1973, Civ. Bull., Vol. 24, No. 221, p. 1275; 13/2/1980, Civ. Bull., Vol. 31, No. 10, p. 580.

4 Cass. civ. Egypt. 13/2/1980, Civ. Bull., Vol. 41, No. 10, p. 580.

5 We believe that the basis for the legislator's restrictions on clauses limiting or excluding liability lies in the Islamic rule of *al-darar yuzal* (no harm without redress).

1.3. Conclusion

As the purpose of our study is not to draw up a comprehensive list of the legal texts used to remedy unfair contract terms, we have confined ourselves to the most important texts.

These texts show us that despite the absence of a general principle regarding the need to prevent the use of unfair terms, the legislators (both in Egypt and in the Emirates) have taken energetic steps to tackle the phenomenon. However, in the absence of a general principle these measures have been insufficient, forcing doctrine and jurisprudence to delve deeper in their interpretations and to seize on any other available means of stemming the augmentation in the use of unfair terms.

This is why, in the second part of this paper, we shall turn our attention to the role of doctrine and jurisprudence in combatting this phenomenon.

2. THE ROLE OF DOCTRINE AND CASE LAW IN COMBATTING UNFAIR TERMS

In this section we will look at how jurisprudence and doctrine can compensate for the absence of a general principle and the insufficiencies of legislative texts in the struggle against unfair terms. On the basis of our findings we shall then attempt to identify some kind of general principle relative to unfair terms in the doctrine of the *shari'a*.

2.1. The Position of Doctrine and Jurisprudence

Both in the Emirates and in Egypt, doctrine and jurisprudence are used in many ways to eliminate unfair terms or to attenuate their effects.

For example, there is a tendency in jurisprudence to broaden the notion of lack of consent in order to release contracting parties from exorbitant or unfair terms.

Thus a seller can be judged to have committed a fraudulent action solely for omitting to inform a purchaser that an object might be dangerous or failing to provide precise instructions as to its use. The fact that an act of fraud has been perpetrated then enables the buyer to obtain the rescission of the contract irrespective of any clauses limiting or disclaiming liability. Once this has been done, the purchaser may claim damages from the seller on the basis of the latter's liability for damage due to misfeasance or non-feasance.

As another means of allowing the weaker of the contracting parties to escape the consequences of unfair terms, jurisprudence also allows the rescission of contracts on the grounds of insufficient information if the description of the object has not been precise enough.

In their efforts to restore equity, jurisprudence and doctrine in both countries go far beyond the application of the principle of good faith in the contract and the rules regarding the misuse of law.

But even though the positions adopted by jurisprudence in Egypt and the Emirates are very similar to those adopted by jurisprudence and doctrine in Europe (and especially in France), much ink continues to be spilled on the subject of the absence of a general principle for the elimination of all unfair terms. And yet just such a principle does exist in the *shari'a*. It could well play a key role in determining future developments in the countries whose legal system is based on the *shari'a*.

2.2. The Search for a General Principle Relating to Unfair Terms

Having considered both legislative developments and trends with regard to doctrine and jurisprudence, we may conclude that our legal systems are hostile to the expansion of the use of unfair contract terms and are searching for legal means to prevent the phenomenon. But for all of that we cannot claim that their intentions and solutions are resulting in the construction of a general theory on unfair contracts.

The law of the United Arab Emirates can help us apprehend this kind of theory in the principles of the *shari'a*. The Civil Code of the Emirates provides, in Article 1, that, "The judge must seek legal solutions to conflicts in the Articles (of this Code), but if he does not find a solution in these Articles he must base his judgment on the rules of the *shari'a*. In the latter case he must choose the most appropriate of the solutions proposed by the schools of Malik and Hanbal. If these two schools do not provide a solution, he must seek such a solution according to the schools of Shafi'i and Hanifa, taking due account of the interests of the parties".

The instruction to consult the solutions adopted on a case by case basis by the grand masters of the Islamic schools is not really comparable with the Anglo-Saxon system. Although the proposed solution does become a principle of Islamic law, there will be several different solutions designed by several different *faqih*'s (Muslim legal advisors). Having a range of possible solutions was an asset for the judge of old, who could choose the best and most appropriate for the case in hand.

As new legal systems emerged in modern states, the Arab-Muslim states began to draw on the Romanic system, but the resulting modifications were matters of form rather than substance. The legislator now requires judges to choose from a hierarchy of principled solutions, ensuring a harmonization of the rules of law. With respect to unfair terms a certain consensus has been reached and it is this consensus which underlies the judges' unlimited powers to modify or rescind unfair terms and the obligation to interpret ambiguous clauses in contracts of adhesion in the interests of the adherent.

But the theory resulting from the solutions provided by the *shari'a* is not confined to combatting unfair terms in contracts already concluded. The *shari'a* also intervenes prior to the passing of contracts – it prohibits the monopolies of goods and services that lead to unjustified price increases and unfair contractual relationships. Likewise, the principles of the *shari'a* forbid contracts with the propensity to exploit the ignorance of the purchaser.

This principle is perfectly suited to cases of sales to individuals with little or no idea of market conditions or market prices. Similarly, the *shari'a* grants seriously wronged purchasers the right to rescind contracts concluded far from the marketplace (in the desert or outside city boundaries) and accords the same right, under the same conditions, to sellers who, due to intense pressure from professional buyers, have not had time to check on market conditions.

The theory thus revolves around sales or purchases conducted in situations of urgency, where life or livelihood are at risk. Contracting parties who have passed contracts in such extreme circumstances are accorded the right to rescind them. Whether or not the other party was aware of their dilemma is unimportant, but they do have to be able to prove that the injury they suffered was a serious one.

One of the cornerstones of the general theory on unfair terms which we can see emerging is the right of unilateral rescission, or what the *shari'a* calls *'uqud al-istirsal*. This applies to contracts in which one of the parties informs the other of his/her inexperience, lack of technical knowledge, etc. In contracts of this type, Muslim doctrine (which is a source of the rules and principles of law) permits unilateral rescission if serious injury or inequity has occurred.

3. CONCLUSION

Through the examination of the role played by doctrine and jurisprudence in the *shari'a* we have shown that unfair contract terms are eliminated in a systematic way. Firstly, certain clauses are deemed unacceptable from the start, and ought not to find their way into contracts because their oppressive nature is obvious. Thus the *shari'a* prohibits monopolies, *riba*, and the sale or purchase of merchandise before it enters the market economy.

In addition to this the *shari'a* opposes unfair terms whose nature only becomes apparent after the conclusion of the contract. The *shari'a*-based legal system gives contracting parties the right to rescind contracts whose terms engender inequitable contractual relationships or result in serious injury. The *shari'a* also grants judges unlimited powers to rescind or modify unfair terms in any contract, making no attempt to confine these powers to contracts of adhesion.

This means that in this system, judges have considerable power – in the absence of legal texts, they may find themselves called upon to play the role of the legislator. We believe that in the next few years this theory and the principles on which it is founded will play a very important role in combatting misuse of law and unfair terms in countries with *shari'a*-based legal systems.

PART III

Legal Pluralism and Egypt

CHAPTER 11
An Administrator's Nightmare
Feuding Families in Nineteenth Century Bahariyya Oasis

RUDOLPH PETERS
UNIVERSITY OF AMSTERDAM

INTRODUCTION

In this paper I will present a legal case that was heard before Egyptian courts in the early 1860s.[1] My aim is to identify the different sets of norms that were at stake in this case, to clarify their relationship, and finally to draw some conclusions about the relevance and usefulness of the theory of legal pluralism for understanding the legal history of Egypt.

1. CASE SUMMARY

The case is set in the village of al-Bawiti, the administrative center of the Bahariyya Oasis situated in the Western desert of Egypt. It was just one episode of an ongoing conflict between two groups, to which henceforth I will refer as group A and group B. Because of the complexity of the case I shall first introduce the *dramatis personae*:
Group A consisted of the following persons:
A1. Khalaf Allah Salim (brother of A2 and A3)
A2. Husayn Salim (brother of A1 and A3)
A3. Tantawi Salim (brother of A1 and A2)
A4. 'Uthman Tantawi (son of A3)
A5. Sha'ban (full cousin of A1, A2 and A3)

To this group belonged also a number of further unidentified village sheikhs (*mashayikh*).

[1] Egyptian National Archives (Dar al-watha'iq al-misriyya), S/7/10/19, (Majlis al-ahkam, al-Madabit al-sadira), pp. 92-94, 9 Sha'ban 1280, No. 417.

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 135-144
© 1999 *Kluwer Law International. Printed in the Netherlands.*

Group B consisted of three subgroups, which, according to the record, belonged to one family:
B1. Ka'ban Ahmad Ka'ban (brother of B2 and B3)
B2. Muwaymin Ahmad Ka'ban (brother of B1 and B3)
B3. Husayn Ahmad Ka'ban (brother of B1 and B2)
B4. Nujaym Muwaymin Ahmad (son of B2)
B5. Yusuf Hallam (brother of B6)
B6. Abu Zayd Hallam (brother of B5)
B7. 'Ammar Abu Zayd Hallam (son of B6)
B8. 'Ali Ramadan

The two families had been at loggerheads for more than fourteen years. Both families laid claim to the functions of *shaykh al-nahiya* (head village sheikh, also called *'umda*) and *mashayikh al-hissa*, i.e. the sheikhs of the districts of the village. Originally the office of *shaykh al-nahiya* was in the hands of family A. However, after members of this family had killed Abu Zayd Hallam (B6) of family B, the then *shaykh al-nahiya* was dismissed and the office passed to Muwaymin (B2) of family B. The latter was killed two years later by the district sheikhs, acting jointly. Apparently these offices were still occupied by members of family A. Muwaymin was then succeeded by his son Nujaym (B4). Somewhere during Ramadan 1277 (March-April 1861), a new confrontation takes place. Khalaf Allah (A1) accuses 'Ali Ramadan (B8) of having burgled his house together with Khalaf Allah's slave 'Isa and of stealing about 1700 piasters from a box. The accusation is corroborated by a written document, certified by the *qadi* of Asyut, with the names of people who are willing to testify that the slave had been with 'Ali Ramadan and that the latter had wanted to sell him. 'Ali Ramadan was arrested by the police inspector (*mulahiz*) and put into prison.

Thereupon, the head sheikh, Nujaym Muwaymin (B4), together with Ka'ban Ahmad Ka'ban (B1) visited the police inspector and requested that he set 'Ali Ramadan free. Upon his refusal they went to the prison and released 'Ali Ramadan forcefully. Then they fetched Yusuf Hallam (B5) and the three of them threatened the accuser and four of his relatives: his brother Husayn Salim (A2), his nephew 'Uthman Tantawi (A4), and his cousin Sha'ban (A5). During the ensuing scuffle, which took place just after sunset, Ka'ban Ahmad (B1) shot 'Uthman Tantawi (A4), as a result of which he died. The perpetrator and his relatives then barricaded themselves in their houses, so that the police inspector could not arrest them. Later, the police inspector would complain that he could not do anything about it, because he was there alone (i.e. the only representative of the central government).

On 27 Ramadan 1277 (8 April 1861) six members of group B (Ka'ban Ahmad, Nujaym Muwaymin, Husayn Ahmad Ka'ban, 'Ali Ramadan, Yusuf Hallam and 'Ammar Abu Zayd) were arrested. Two guns were impounded. During the investigation, Tantawi (A3), the victim's father, produced three eye-

witnesses testifying that Ka'ban Ahmad (B1) had shot 'Uthman Tantawi (A4). One of them affirmed in addition that Khalaf Allah's brother Husayn (A2) and Yusuf Hallam (B5) had been fighting one another with sticks (*nabbut*). The victim's father and the district sheikhs (group A) later denied that anybody had been fighting with sticks. The district sheikhs confirmed that 'Uthman had been shot by Ka'ban. Further they stated that on the side of the accused also his brother Husayn and 'Ammar Abu Zayd (B7) had taken part in the siege and fired shots, without, however, hitting anybody. The accused claimed that all these testimonies were prompted by enmity against them.

Thereupon the suspected murderer and his helpers were transferred to the *mudiriyya* of al-Fayyum for further investigation and their trial.[2] Ka'ban Ahmad persisted in his denial. He contended that the district sheikhs had been put under pressure by the police inspector to testify against him and claimed that he had found two fellow prisoners in the local prison (*hasil*) willing to testify that they had overheard a conversation between some of the district sheikhs and Ka'ban during which they had said words to this effect. However, none of the other prisoners was willing to confirm this. Furthermore Ka'ban Ahmad maintained that he could produce four witnesses who would testify that the three witnesses against him had been bribed by the victim's father. Finally he alleged that one of these three witnesses had not been present in al-Bawiti during the events and that another had been the servant of the district sheikhs who had killed his uncle Muwaymin. The four witnesses were brought to the *mudiriyya* and affirmed that the victim's father, Tantawi Salim, and his two brothers had hired two of the witnesses against Ka'ban Ahmad for 600 piasters. Confronted with the testimony, Tantawi Salim and the district sheikhs answered that they could not accept these testimonies, as the four witnesses were relatives of the suspects. In the meantime, Khalaf Allah had submitted a petition to the *mudiriyya*, requesting that the burglary of his house and the theft be dealt with. The case was then referred to the *qadi* of al-Fayyum, who had to dismiss the case for lack of sufficient evidence.

In prison, Yusuf Hallam and Ka'ban Ahmad fell ill and died on 7 and 17 Rajab 1278 (8 and 18 January 1862). The remaining suspects were released on 4 Sha'ban 1278 (4 February 1862). Less than a year later, one of them, 'Ammar Abu Zayd, was killed and the first victim's father, Tantawi, was accused of

2 Between the abolition of the regional judicial councils in 1860, and their re-establishment in 1863, the provincial administration (*mudiriyya, muhafaza*) dealt with all criminal cases. Sami, 1928-1936: 3/1, 347. In this case the *mudiriyya* of al-Fayyum would be competent.

having committed this murder. Later the record mentions that Khalaf Allah was convicted for that murder. On 11 Jumada I 1279 (4 November 1862) the *qadi* of al-Fayyum heard the case of 'Uthman's killing. However, since the main suspect, Ka'ban had died in the meantime, he could not convict anybody for lack of a defendant. Another suspect, Nujaym Muwaymin died on 5 Jumada 1279 (28 October 1862) in a hospital. The two remaining suspects were arrested again on 20 Ramadan 1279 (11 March 1863), and imprisoned, this time in the *mudiriyya* of Bani Suwayf instead of al-Fayyum, since the case was referred to the *majlis* of Bani Suwayf, that had been established two months earlier.[3]

For all clarity I shall here give a survey of the clashes between group A and group B:

1. A → B: unidentified members of group A kill (B5) Abu Zayd Hallam. As a result the head village sheikh (from group A) is dismissed and Muwaymin (B2) is appointed;
2. A → B: district sheikhs belonging to group A kill Muwaymin (B2). His son Nujaym is then appointed head village sheikh. Members of group B start provoking group A (especially Khalaf Allah);
3. B → A: Nujaym (B4) allegedly beats up Khalaf Allah (A1);
4. B / A: 'Ali Ramadan (B8) steals from Khalaf Allah (A1) and misappropriates his slave. Members of group B release 'Ali Ramadan (B8) from prison by force;
5. B → A: Ka'ban Ahmad (B1) kills 'Uthman Tantawi (A5) during the ensuing scuffle;
6. A → B: Khalaf Allah (A1) kills 'Ammar Abu Zayd (B7)

The Council decided as follows:

> Regarding the murder of 'Uthman, it contented itself with the *qadi*'s sentence, since his suspected murderer had died.

With regard to Husayn Ahmad Ka'ban and 'Ali Ramadan, the Council was of the opinion that their presence during the fight has been established by the testimonies of the district sheikhs and other witnesses in spite of Husayn's denial. Therefore they have committed the offence of riotous assembly (*ta'assub*) as

[3] Decree of 27 Rajab 1279 (18 January 1863). Zaghlul, 1900: 207, Sami, 1928-1936: 3/1, 355-358. At the time of the offense, the judicial body to deal with it was the *mudiriyya* of Fayyum. After the re-establishment of the judicial councils of first instance (*majalis*) the council of Bani Suwayf was to take cognizance of the case, which had then to be prepared by the *mudiriyya* of Bani Suwayf.

defined in Section 12 of Chapter 4 of the Law.[4] Since Husayn had been imprisoned for 19 months during the investigation, the council sentenced him to 19 months imprisonment with deduction of the period of his detention awaiting trial.

With regard to ʿAli Ramadan, the Council viewed that there were aggravating circumstances and other offenses:

1. The circumstance that his forceful release from prison was the cause of the quarrel.
2. The accusation of having burgled a house and misappropriated a slave. Although the *qadi* in al-Fayyum could not sentence him on the basis of the available evidence, there existed a strong suspicion against him founded on the testimonies the witnesses who had seen him with the slave and had testified that he wanted to sell the slave and share the price (the record does not indicate with whom).[5]
3. The circumstance that he was not able to reimburse the stolen money and to indemnify the owner of the slave.

On these grounds, the Council sentenced ʿAli Ramadan to three years of forced labour in lowly jobs (*ashghal dani'a*) in the *mudiriyya* for theft as defined in Section 11, Chapter 3 of the Law.[6]

The Council's sentence was reviewed by the highest court in Egypt, the Majlis al-ahkam on 9 Shaʿban 1280 (19 January 1864). In the meantime, on 21 Jumada II, 1280 (3 December 1863) one of the two remaining convicts, ʿAli Ramadan, had died of a stroke.

The Majlis al-ahkam held that the remaining convict Husayn Ahmad Kaʿban had been given too light a sentence, since the Council did not take in consideration the circumstance that he was among the gang who caused ʿUthman Tantawi's death. Therefore the Majlis al-ahkam sentenced him to five years deportation to Fayzoghlu Camp in the Sudan,[7] on the strength of Section 12, Chapter 4 (riotous assembly) and Section 11, Chapter 1 (manslaughter).

---

4 This section reads: "If a village sheikh assembles with the peasants, or a peasant with other peasants rioting against the village chief (*nazir al-balad*) or the (head) sheikh, and attack him with sticks or other weapons, and if they only beat him and do not shoot at him with firearms, then it is necessary for reasons of public order that the sheikh or the peasant who is the leader of the gang receives two hundred lashes and the peasants who were with him, one hundred lashes. However, if they have shot with firearms, then they shall receive the punishment specified for their likes". The last sentence probably means that they will be prosecuted for manslaughter or malicious wounding.

5 A possible scenario may have been that ʿAli Ramadan shared the slave's price with the slave himself, who was planning to run away after the sale. At any rate, the slave had disappeared and was not brought to justice.

6 This section makes theft punishable with forced labour in lowly jobs being chained, from three months to three years according to the value of the stolen property.

7 This penitentiary had been in use since the 1830s and was closed in 1863 (Hill, 1959: 163). This sentence must have been pronounced just before its closure.

2. ANALYSIS

The record shows clearly that at least two sets of rules were at play in this case: state enacted criminal law and the *shari'a*. At several stages of the proceedings, certain aspects of the case were referred to the *qadi*. First some words on the relationship between statute law and the *shari'a* in criminal matters.[8] Until 1883, when French law was introduced, the *shari'a* was the law of the land. This law was applied by the *qadi*, a single judge. In criminal and commercial matters other jurisdictions existed, the judicial councils, *majalis*, which were part of the executive power and applied statute law, in our case the Imperial Code (*al-Qanunname al-sultani*) of 1852.[9] These councils were staffed not by religious scholars, *'ulama'*, – although a religious legal advisor, *mufti*, was attached to them – but by administrators without a formal legal training. In criminal matters this state of affairs fits in the framework of the theory of Islamic jurisprudence, *fiqh*, according to which state authorities have the discretionary power to punish sinful or undesirable behaviour. This power is called *ta'zir*. Statute law in criminal matters, such as the codes enacted in nineteenth centrury Egypt, must be regarded as instructions of the head of state to his officials restricting their discretionary powers and ordering them to apply *ta'zir* according to certain rules.

As a rule in criminal cases, and especially in cases of violent death, the *qadi* would first hear the case. In the *qadi*'s involvement with criminal cases, the private aspect was most prominent. His main task was the adjudication of private claims related to offenses, as evidenced by the fact that the proceedings are always based on a claim advanced by a plaintiff against a defendant.

These private claims could be either punitive or aimed at obtaining financial compensation. There were three kinds of punitive claims: the demanding of retribution in cases of homicide and wounding, the demanding of the application of *hadd* penalties (i.e. the fixed penalties for offenses named in the Koran), and the demanding of satisfaction in the form of *ta'zir*, discretionary punishment for sinful behaviour. In dealing with homicide, which could entail capital punishment, the *qadi* acted as a religious judge, sanctioning the taking of the murderer's life on the strength of religious norms. The *qadi* also heard complaints of persons whose honour was injured, usually because of beating and abuse during a quarrel or because of the unlawful defloration of a girl, and further complaints involving *hadd* crimes. Upon demand of the plaintiffs, he could sentence the defendant to flogging, based on *ta'zir* or, exceptionally, *hadd* punishment, or, to short terms of imprisonment on the strength of *ta'zir*.

8 For a detailed analysis of the *qadi*'s authority in criminal matters in this period, see Peters, 1995 and Peters, 1997.

9 Text in Zaghlul, 1900: *Mulhaq*, 156-178 and Jallad, 1890-1895: II, 90-102. For further details regarding this code, see Baer, 1969, Peters, 1990 and Peters, forthcoming.

The application of Islamic criminal law by the *qadi* was curbed by the fact that his sentences (except flogging, which was administered in court immediately after the verdict) were carried out by the executive. The *qadi's* death sentences did not pose a problem: after due revision, they would be executed by the government. Retribution for wounding, however, was a different matter. Since the government was apparently reluctant to administer such sentences, the *qadis* carefully avoided pronouncing them.[10]

Most often, however, these private claims heard by the *qadi* were of a financial nature, such as demanding bloodmoney, revendication of stolen property, or compensation for illegal defloration. In these cases the *qadi* acted as a civil court. However, since his jurisdiction was a general one, he did not and could not close his eyes to the penal aspects of such cases, which often led to a sentence of flogging or imprisonment based on *ta'zir* or *hadd*. As in the case of retribution for wounding, the government seemed to be averse to executing *hadd* penalties such as amputation or stoning to death, and the *qadis* therefore did not pronounce such sentences.

In our case the first involvement of the *qadi* was when the burglary and theft was referred to him by the *mudiriyya* of al-Fayyum. My impression from other material is that in the 19th century a victim of theft could follow two courses: he could bring the case before the *qadi* or he could report it to the police. The *qadi* would deal, according to the *shari'a*, with the revendication of the stolen property and with the criminal aspects of the case. However, since the *qadi* was dependent of the government for the execution of his sentences and since he would be aware of the fact that the government would not carry out the *hadd* penalty of amputation, he would always find grounds for not sentencing the defendant to this punishment. Only in 1880 did the Ministry of Interior expressly prohibit that cases of theft be immediately submitted to the *qadis*, instructing them that they were to hear such cases only after they had been dealt with by the police.[11] The latter procedure had been the more usual procedure. A victim of a theft would go to the police, who would investigate the matter and, if there was sufficient evidence, submit the case to the Council. During the same procedure the property claim would be dealt with. Only if the complaint did not result in criminal proceedings would the case be referred to the *qadi* to look into the property claim. This is what happened in our case. There was no proof of 'Ali Ramadan having burgled Khalaf Allah. Therefore the case was brought before the *qadi* to settle the property claim. As we have seen, the plaintiff's claim could be awarded.

The second instance of the *qadi's* involvement was when he was asked to try the killing of 'Uthman Tantawi. As a rule all cases of violent death would be

---

[10] For a discussion of this reluctance, see Peters, 1997.

[11] Decree of Ministry of Interior (*Nizarat al-dakhiliyya*) of 20 Muharram 1297 (3 January 1880). Jallad, 1890-1895: IV, 145.

investigated by the *qadi* in order to establish whether the heirs could sue anybody. For manslaughter, the procedure was laid down in the Imperial Code of 1852. Chapter 1, Section 3 stipulates that outside Cairo these cases be tried both by the *qadi* and by the Council in one session. If the *qadi* would not find grounds for capital punishment, the Council would try the case and could impose a sentence of maximum fifteen years of forced labour. In our case, the *qadi* could not pronounce a judgment as the defendant had died in the meantime.

Whereas the *shari'a* courts primarily dealt with private claims, the councils were more concerned with the public aspect and in trying criminal cases. Their primary aim was to preserve public order and security. The procedural rules were less strict than those of the *shari'a* courts and very much resembled an administrative investigation. From the records it is not clear to what extent the defendants were entitled to defend themselves during the trial. They certainly had no right to legal counsel. One gets the impression that they were only present, not to defend themselves, but rather to be there in case one of the members of the Council wanted to interrogate them. Moreover, the requirements for evidence were not as strict as those in the *shari'a* courts. Therefore it was easier for these councils to sentence defendants. It was not even required that an offense was proven beyond reasonable doubt: strong suspicion was enough and as a rule the punishment was more severe as the suspicion, corroborated by evidence, was stronger.[12]

The result of these arrangements was that in criminal matters statute law and the *shari'a* were mostly complementary. The two systems overlapped only occasionally, e.g. in theft related cases. This dual legal system was subordinate to the state for two reasons. First because the state had the power to define the relative competence of the courts (the attribution), either on the strength of legislation or because the police, to whom criminal cases first would be reported, decided on further steps to be taken. Secondly because the *shari'a* courts (with the exception of sentences of flogging) depended on the state for the execution of their sentences. However, although both systems were subordinate to the state, they differed regarding the source of the rules to be enforced and the authority to interpret them: for the *shari'a* this authority belonged to the *'ulama'*, whereas statute law was by its nature a matter of the state. So, the two sets of norms were different from each other in the following aspects:

[12] See e.g. a decree from 1275 complementing the Imperial Code, which in Section 2 imposes a prison sentence of five years or less for certain instances of manslaughter, whereby the length of the sentence was to be determined "in accordance with the measure of weakness or force of the evidence produced against the accused" Sami, 1928-1936: III/1, 295.

	origin of the rule	enforcement by	decision on attribution
shari'a	*'ulama'*	*qadi*	state
statute law	state	councils	state

Although not explicitly mentioned in the record, it is clear that another set of rules played a role in this case. We must be careful here, because the record of the case does not reveal the whole story of the relationship between the two groups involved. But a closer look at the course of the events mentioned in the record may clarify a few more aspects.

It is not clear what the origins were of this lasting conflict between the two families. We do not know what prompted the first murder. However, the overall picture is evident: it is a matter of vendetta (*tha'r*), retaliation for murder and aggression. Part of the conflict was a struggle between both groups for the office of head village sheikh. Feuding, a social phenomenon usually found in tribal societies, can provide a certain measure of public security in societies where there is no state or the state cannot impose its authority. However, feuding tends to persist even when the state becomes more powerful and can assert itself, e.g. by enforcing criminal laws. When this is the case, two competing and conflicting normative systems exist. However, as appears from this case, adherence to the customary rules of vendetta does not totally exclude any recognition of state authority. This is evidenced by the fact that both groups had village sheikhs among them and that the office of head sheikh was one of the stakes of the conflict. As in the case, these sheikhs are state appointed officials with important functions in enforcing state laws. However, with regard to vendetta, it would seem that customary practice was to keep state authorities out of it. This would explain the vehement reaction of group B, when group A had recourse to state justice after the burglary of Khalaf Allah's house (group A) by 'Ali Ramadan (group B) and his subsequent arrest. One cannot help feeling that group B regarded the reporting of the case to the police as improper.

Thus, in addition to statute law and *shari'a*, there were customary norms involved in the case. There is no dispute about labelling the first two sets of norms as law. But is it helpful to apply the term law to the rules of vendetta in the context of the case? One of the beneficial effects of the theory of legal pluralism is that it has made us aware of the existence of competing norm systems in society. And as I have said in the introduction, advocates of legal pluralism tend to call these systems law in order to emphasize their equivalence. Now, I have certain reservations in this respect. In my view, an essential element of the notion of law is that it gives procedures and institutions for settling conflicts and I am inclined to regard this as the foremost criterion for establishing

whether or not a given set of norms must be regarded as law. In the present case, the record does not give any information on whether the vendetta was just a concrete pattern of social ordering based on notions of individual and collective honour or that it involved procedures or institutions of mediation and arbitration aimed at settling the conflict. Present-day evidence from Egypt indicates that vendetta is still an accepted and wide-spread custom, especially in rural areas (Botiveau, 1987-1988, Ben Nefissa, in this volume; for the Sinai, see al-Hilw and Darwish, 1989). Studies of the phenomenon show that the norms governing vendetta include the possibility of setting up courts of customary arbitration (*mahkama ʿurfiyya ahliyya*) in order to put an end to the conflict and provide certain procedural rules to be followed by these courts. Therefore, there are strong reasons to assume that such norms also existed when our case took place. In this light, I do not hesitate to apply the term law to these norms of feuding.

CHAPTER 12
The *Haqq al-ʿArab*
Conflict Resolution and Distinctive Features of Legal Pluralism in Contemporary Egypt

Sarah Ben Nefissa
Orstom, Paris

INTRODUCTION

The purpose of this article is to describe one of the non-state-controlled forms of conflict resolution in modern Egypt, commonly known as the *haqq al-ʿarab*. A number of researchers have already recorded and attempted to analyze this arbitral form of jurisdiction. It is referred to by several names. Nicholas Hopkins (1995) uses the terms *jalsat al-ʿarab, majlis ʿurfi, majlis al-ʿarab*, etc.[1] These expressions actually designate the body or assembly that judges or arbitrates in a conflict and decides how the said conflict is to be resolved. The expression "*haqq al-ʿarab*", for its part, literally means "justice of the Arabs" or "Arab justice" and covers all the stages in this traditional form of administration of justice from the appointment of the members of the assembly to the final judgement, including the examination of the main parties to the conflict.

This paper will begin with a brief example of how villagers in the governorate of Qena in Upper Egypt used the *haqq al-ʿarab* to solve a serious conflict between two families in 1996. The second section will examine the rationale and the significations of this type of conflict resolution, highlighting its most distinctive features. The concluding part will address the issue of legal pluralism in Egypt today.

---

1 These expressions translate as (in order) "sitting of Arabs", "traditional assembly", "assembly of Arabs".

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 145-157
© 1999 *Kluwer Law International. Printed in the Netherlands.*

1. CASE SUMMARY

The case began[2] when a man proffered an insult to a woman in the village. Both of the protagonists belonged to families of local standing. There was a member of the woman's family on the village council, while the village *'umda* belonged to the man's family. Furthermore, a member of the man's family had stood in the previous general elections in December 1995. The two clans had a long history of antagonism. It should be noted that the woman's husband was working in Saudi Arabia and had therefore been absent for some years. Both families were Muslim, although the woman's family was known in the village to be of distant Christian ancestry.

The facts of the case were as follows. The man insulted the woman. The woman's family protested. The quarrel rapidly escalated. The man's family became involved. A brawl broke out between the two groups in which knives, revolvers and rifles were used. The police intervened, took thirty people to the police station and confiscated both sides' weapons. At this point, eight people unrelated to either family made an attempt to resolve the conflict. Among them, two advocates, a journalist of al-Ahram press group, one official from the Ministry for *waqfs*, one member of the Governorate council and the Regional Secretary of the ruling National Democratic Party (NDP). They went to see the police inspector and negotiated the release of the prisoners and the suspension of legal procedures for the settlement of the conflict in return for the holding of a *tahkim 'urfi*[3] and a *majlis al-'arab*. The negotiations lasted almost four hours and finished in the early hours of the morning. Most of the thirty detainees were released, with the exception of three against whom official legal proceedings had already been initiated. The police inspector was paid bail in the form of cash.

Once the protagonists had been released, the whole group proceeded to the house of one of the village notables. There, the *majlis al-'arab*, composed of the people who had negotiated with the police inspector secluded itself to question the twenty people who had played an active role in the conflict. Over two hundred people waited outside in the main reception hall. Five hours later the *majlis* delivered its decision to all present and, by common accord, the conflict was declared closed.

2. FEATURES

This type of justice has numerous interesting features but it would seem expedient to focus our investigation on those which appear most distinctive and

[2] My informant is one of the people chosen to constitute the traditional assembly that resolved the conflict.

[3] This expression means customary arbitration.

clearly depart from the official justice of the state court system. Four such features would seem to merit particular attention.

2.1. This Is Not an Insignificant or Informal Mode of Conflict Resolution

Firstly, the example in this article and information on other cases make it plain that the *haqq al-'arab* is no trivial, easily-invoked form of conflict resolution. There has to be a certain degree of gravity in the state of a conflict for it to be used at all. In the hierarchy of modes of conflict resolution and the "continuum" stretching from rapid resolution with or without the involvement of mediators to the involvement of state courts or the police station (*qism*), the *haqq al-'arab* lies somewhere in the middle of the range. Its "scandal rating" is also considered to be more or less equivalent to that of an official court case. In many cases the mere mention of holding it suffices to terminate a conflict or confirm its resolution. In other situations it is considered by those involved as a "lesser evil" than the official legal procedure starting at the police station and ending before the courts.

Furthermore, a number of conditions have to be fulfilled before a *haqq al-'arab* can take place. This is proof enough that we are not dealing with an informal method of conflict resolution. An examination of *haqq al-'arab* justice reveals not only recurrences of form and content but also the existence of elements of ritual in its implementation. *Haqq al-'arab* is only possible if the clans and parties to the conflict are of equal standing and if the protagonists can agree on the choice of the members of the *majlis.* The latter are chosen or at least accepted because they are felt by the parties to the conflict and the surrounding micro-society to have a reputation for respectability and impartiality.

A second formal characteristic worthy of note is the public nature of *haqq al-'arab* justice. It is administered openly, in the presence of all concerned. Another feature which marks both the form and the content of this type of justice is the evaluation of errors and wrongdoings in monetary terms. The final decision always involves the payment of a sum of money by the party judged to be at fault. This is invariably followed by the refusal of the party judged to have been wronged to accept the amount due to them. Should there have been deaths during a conflict, it is impossible to hold a *majlis al-tahkim* unless both sides suffered equal losses. Otherwise the protagonists feel it is up to the two clans to settle their differences and the rule of bloodfeud (*tha'r*)[4] generally prevails.

4 Further reference on *tha'r*, see Botiveau, 1988.

2.2. *Haqq al-'Arab*: A Form of Justice Without Individual Guilt or Explicit Pre-Established Norms

One of the most distinctive features of *haqq al-'arab* justice is the absence of the notion of individual guilt. The *tahkim* assembly is more interested in the disorder the conflict represents and the consequences it is likely to have than in the individuals responsible for it. Apparently this type of justice is not concerned with degrees of guilt, fault and individual responsibility. The personalities of the two protagonists completely disappear, as do the personalities of those who became embroiled in the conflict at a later stage. It is an "objectivist" form of justice rather than a "subjectivist" one. The *tahkim* is concerned with naked facts, with offences rather than their perpetrators.

In the case of the example covered in this article, this feature is clearly illustrated by the actions of the *tahkim* assembly after hearing and examining the people involved in the dispute. The committee drew up a list of the offences committed by each side, without indicating who was responsible for them. The offences were simply attributed to one or the other of the families involved in the conflict. Thus responsibility is considered to be collective rather than individual. The families, rather than their individual members, are responsible for the acts committed.

In the case of family X, the committee's inventory of offenses consisted of the insulting of a woman belonging to family Y, the wounding of two members of family Y and the use of firearms.

The inventory for family Y listed the following offenses: damaging a door belonging to family X, provoking a second fight when the first clash was over, telling the police inspector that certain members of family X had participated in the fight when they had not done so, and insulting the family of the *'umda* belonging to family X.

At no time were the names or personalities of the perpetrators mentioned. Neither were the circumstances in which the offences were committed. This contrasts with proceedings in the official courts, where such parameters play an important role in the administration of justice, attenuating or aggravating the original offenses.

Another characteristic of the *haqq al-'arab* is that the actions listed are qualified as offences or injustices without any reference to pre-established rules or norms forbidding them. Common sense is considered to suffice. This is not the case in the official courts, where legal decisions are, apparently at least,[5] founded on articles of written codes relative to different types of offences.

---

[5] In actual fact, the "official" judges operate in the same way as those of the *haqq al-'arab*. They judge the situations brought before them on the basis of common sense and strong personal convictions. However, they present their decisions in such a way that they appear to ensue from the articles of law and pre-established rules contained in legal codes. The purpose of this formal characteristic is obvious. It is to show that the character of the individual judge is irrelevant, and that the judge is nothing more than a mediator between the impersonal, abstract law of the state and the person on trial.

The second task carried out by the assembly was the evaluation in monetary terms of the offences listed – with, in this case, three exceptions. The exceptions were "traded off" against faults committed by the adverse party. For example, the insult proffered to the woman was considered equivalent in gravity to the damaging of the door plus the provocation of the second fight. A possible explanation of this kind of "trade-off" is that the assembly wishes to avoid putting a price on a woman's honour. It might also indicate the *tahkim*'s acknowledgement of the fact that it was the insult that triggered the conflict. It is worth noting that the *tahkim* made no attempt to identify the causes of the man's aggressiveness towards the woman. This is further confirmation of the objectivistic nature of this type of justice.

The other offences were evaluated as follows:

> Family X: the wounding of two members of family Y was estimated at 3,000 Egyptian pounds and the use of firearms at 20,000 EP.
> Family Y: the fact of having wrongly informed the police inspector that certain members of family Y had been involved in the fight was estimated at 2,000 EP and the insulting of the *'umda*'s family at 3,000 EP.

The third activity carried out by the committee was the evaluation of the material damages incurred by the two parties in the course of the conflict:

> The material losses suffered by family X were estimated at 11,600 Egyptian pounds (11,000 EP for an automatic, a rifle and three revolvers confiscated by the police and 600 EP for bail costs).
> The material losses incurred by family Y were estimated at 3,600 EP (3,000 EP for a rifle confiscated by the police and 600 EP for bail costs).

What this type of justice lacks in the realm of concern for the notion of the individual responsibility of the protagonists, it makes up for with its concern for the notions of justice, equity and balance between the parties. These parties are not individuals but groups or families. The main function of this type of justice is to re-establish the balance which existed between the two parties prior to the conflict. This function is clearly illustrated by the fourth and final task accomplished by the assembly. The members of the assembly draw up a two-column table, with a column for each of the families. They then totted up the sums of money representing the offences committed by each family, the material losses caused to their adversaries and the price of bail paid to the police.

In this case the total for family X was 26,600 EP,[6] and the total for family Y 16,000 EP.[7]

At the bottom of the table one total is subtracted from the other:

26,600 EP (family X) – 16,600 EP (family Y) = 10,000 EP

Family Y has suffered most in the conflict and in order for the balance to be redressed and for justice to be done, family X has to pay family Y the sum of 10,000 EP.

Having accomplished this final operation, the assembly returns to the main reception hall to announce its decision publicly.

2.3. *Haqq al-'Arab*: A Justice Without Sanctions or Punishments

The assembly chose an official from the Ministry for *waqfs*[8] to act as its representative and deliver the final speech before the 200 people who were waiting in the main reception room. The representative started by reciting the *Fatiha*[9] and verses of the Koran calling for reconciliation and leniency. Then he presented the members of the assembly, explaining who each one was and giving details of their social status. He summarized what had been learned by questioning the 20 people involved. He stressed the fact that the two parties had declared their readiness to accept the *tahkim*'s verdict. He gave details of the misdeeds committed and the monetary values attributed to them, then announced the final decision. After this he invited representatives of the two families to take the floor. The *'umda*, representing family X, announced the family's acceptance of the verdict and its consequent willingness to pay the sum of 10,000 pounds to family Y. The representative of the other side, a landowner, announced his family's readiness to accept the sum, on the sole condition that it would be donated to the Azhari[10] institute of the village. After these two speeches everyone recited the *Fatiha* and glasses of coca cola were distributed to one and all.

The wronged family's decision not to keep the money the other side was willing to pay merits closer analysis. It is not specific to this family, this conflict or even to this part of Egypt. All informants on such proceedings concur that it is a general rule rather than an exception. Despite the meticulous precision with which monetary values are attributed to the misdeeds of the two sides, the

6 3,000 EP (offence No. 1) + 20,000 EP (offence No. 2) = 23,000 EP + 3,000 EP (gun belonging to family Y confiscated by the police) + 600 EP (bail) = 26,600 EP.

7 2,000 EP (offence No. 1) + 3,000 EP (offence No. 2) = 5,000 EP + 11,000 EP (weapons belonging to family X confiscated by the police) + 600 EP (bail) = 16,600 EP.

8 *Waqfs* are mainmort property (religious endowment) in Islamic law. Today the Ministry for *waqfs* in Egypt deals with religious affairs in general.

9 First *sura* (chapter) of the Koran.

10 An institute attached to al-Azhar University of Theology.

party recognized by the *tahkim* as having been wronged will never agree to actually receive the money due to it. Either it refuses the money or it gives it away, generally to a charitable or religious institution which benefits the community at large. According to the protagonists, accepting the money would be a disgrace and a dishonour. It would imply that the family measures its dignity, prestige and honour in financial terms.[11]

What, then, does this practice, rule or custom actually signify? What is the point of ascribing such a precise monetary value to the offences committed by the two sides if the procedure is to terminate in the way described? To understand this we need to examine the logic underlying *haqq al-'arab* justice. This type of justice is more concerned by the social disorder caused by a conflict than by the people responsible for it. It is not concerned with attributing guilt, and it is certainly not concerned with delivering sanctions or meting out punishment. The aim is not to punish the person who breaks a law or a rule, but to close a conflict, to end social upheaval, to recreate or mend the broken links between the parties and to restore social relations. The consensus obliging the party at fault to pay a kind of a fine or compensation to the wronged party is counterbalanced and annulled by the consensus that the wronged party should refuse to benefit from the fine. The practice of handing over a symbolic sum of money representing the outcome of the conflict to the community at large may be indicative of the aim of *haqq al-'arab* justice to break the vicious circle of aggressive relations between the two families.

However, the attribution of a monetary value to the offences might also be construed as a palliative for one of the weaknesses of this type of justice, i.e. its inability to exert the same power of coercion as the official justice system. It seems paradoxical that the prevailing consensus takes the teeth out of the *tahkim*'s decision. Why, under such circumstances, is this type of justice still effective? What explains its popularity with parties involved in conflicts and the public authorities?

2.4. Factors Ensuring the Effectiveness of *Haqq al-'Arab*: Negotiation and the Pressure of Public Opinion

Michel Alliot (1984)[12] considers that without the power of coercion, the only effective decision is a unanimous decision. Unanimous decision-making requires consultation, negotiation and exchange, although these may in some cases be tacit. The aim is not to build a majority whose views will be imposed on the minority, but to find a solution acceptable to all, and to reconcile all par-

---

11 The consensus underlying this practice is so great that failure to comply can lead to reprisals by the other party and re-kindle the conflict.

12 Former director of the Laboratoire d'Anthropologie Juridique de Paris (LAJP).

ties. Michel Alliot's conclusions help us to understand that *haqq al-'arab* justice is not so much a process in the legal sense of the word as a conflict resolution procedure. All stages of the procedure contribute to the settlement of the conflict. In the case described in this article, the procedure started when the members of the *tahkim* committee interceded at the police station and ended when the final decision was made public. Negotiation and discussions were the key components of the procedure – negotiations with the police inspector to obtain the release of the detainees and the suspension of legal proceedings, talks on the composition of the *tahkim* to obtain both parties' agreement to its composition, discussions between the members of the committee on the evaluation of the offences, culminating in their agreement on the final decision and, finally, the consent of both parties to comply with the final decision.

Another of the main components of *tahkim* justice, in addition to the use of negotiation to achieve conciliation, is its public nature. The committee's questioning of the 20 protagonists was the only part of the procedure that occurred behind closed doors. All the other stages took place in the public eye. During the questioning, 200 people were waiting in the main reception hall. The verdict was announced in front of this audience and a microphone and loudspeakers were used to relay it to the rest of the village.

The publicity surrounding *haqq al-'arab* justice is not simply a formal requirement. Public opinion and the testimony of those present are prerequisites for this type of justice. Publicity and negotiation are the basic preconditions for ensuring its effectiveness. The "anticlimax" following the announcement of the final decision clearly reveals that the essence of this type of justice lies elsewhere than in the delivery of a verdict. In fact, the essence of *haqq al-'arab* justice runs through all stages of the conflict settlement procedure.

3. *HAQQ AL-'ARAB* AND THE EGYPTIAN STATE

The *haqq al-'arab* model for the settlement of conflicts is an example of the plurality of normative and jurisdictional orders in contemporary Egyptian society. Legal and normative plurality is a phenomenon shared by all societies and is in no way specific to non-Western societies or non-state societies. According to Professor Michel Alliot (1984), the real distinction between Western societies and traditional societies as far as the phenomenon of legal pluralism is concerned, is the presence, in the former, of a dominant legal discourse denying the existence of pluralism and portraying the uniformity of state-controlled law as the supreme virtue. In contrast to this, he says, traditional societies, and more particularly African societies, officially sanction their pluralism by according it legal recognition. This makes it all the more interesting to examine the discourse in contemporary Egypt, a country universally recognized for its long experience of statehood and strong state involvement in social regulation.

3.1. The State and Legal Pluralism

The work of Bernard Botiveau and the views of legal practitioners suggest that in contemporary Egypt the phenomenon of legal pluralism is currently being eclipsed as a result of the predominance of two normative rationales or legal dogmas, that is to say state law and Islamic law or the *shari'a.* Obviously these dogmas are different – both in terms of status and in the way in which they are used – but as far as the phenomenon of pluralism is concerned, their effects are similar – they overshadow it and undermine its legitimacy. It is clear that there is a tendency in Egypt to dissimulate the above-mentioned form of conflict settlement, either by portraying it as a phenomenon confined to a limited area of the country, or by dismissing it a quaint relic of *Sa'idi*[13] customs or the ways of the Arab tribes of Sinai or Marsa Matruh. However, the cases reported in the newspapers and those investigated by anthropologists show it is not a form of jurisdiction proper to rural Egypt, Upper Egypt or indeed Sinai.

The fact that this mode of conflict settlement is omitted from the official discourse does not mean that public figures do not invoke, utilize and administer it privately. Bernard Botiveau (1988) has demonstrated this. Nor is the practice rejected when such figures are exercising their official functions. In the case described in this article, not only was the police inspector informed of what was happening but, much more importantly, he agreed to release 27 of his 30 detainees to enable the *majlis al-'arab* to be held. He was also informed in a quasi official capacity of the solution adopted, as a copy of the decision was delivered to him. In fact, in many cases the solution adopted is officialized through the drawing up of a "conciliation agreement" at the police station.

Two other examples show that *majlis al-'arabs* often call on the services of important figures respected by the micro-society in conflict, and therefore, quite naturally, on representatives of the public authorities. Without going to the extremes of the case discussed by Bernard Botiveau in which the members of the *majlis* included the *shaykh al-Azhar,*[14] the Minister for Culture, representatives of the Ministry of Interior, elected members of the People's Assembly (*Majlis al-sha'b*) and of the Consultative Assembly (*Majlis al-shura*), the Mufti of the Republic,[15] the Governor of Giza, etc., we may note that *'umdas* frequently act as arbiters or mediators in these "courts". In the case in the village in the Governorate of Qena, the court was composed of two lawyers, a journalist, a *Waqfs* official, a member of the Governorship Council and the regional secretary of the ruling National Democratic Party (NDP).

---

[13] Term designating people of Upper Egyptian origin.

[14] Head of al-Azhar University.

[15] The *Mufti* of the Republic is the head of a religious administration, *Dar al-ifta'*, which is entitled to deliver advices on several matters related to religion.

Nicholas Hopkins (1995) explains this by referring to what he calls the "culture of deference and inequality" in Egypt and the respect which is considered to be due to people of note in the political, administrative and economic spheres. The high status of the people who make up a *majlis* and the respect they command induce the protagonists to accept the solution adopted, seek compromises and honour agreements, the idea being that having inconvenienced people of such high standing one is duty-bound to accept their views. In the same article, Nicholas Hopkins also considers that the non-involvement of authorities from outside the communities concerned is one of the things that makes *majlis al-'arabs* effective. And yet the same author recounts how he, an American anthropologist living in Egypt, was appointed a member of a *majlis al-'arab*. This example shows how a "community" can be formed in response to a particular situation, at a particular moment in time, to take account of particular interests. Although members of *majlis* may not belong to either of the two clans or parties involved in the conflict, they have to have witnessed the conflict or at least be aware of how it has developed. They have to be familiar with the background of the case. The fact that one occupies an official position and belongs to the state apparatus does not necessarily prevent one from being part of a community.

Bernard Botiveau (1988) quite rightly speaks of the public authorities' "implicit delegation" of cases to this type of justice, especially where there is no real threat to public order. In cases relating to property and conflicts between neighbours or small tradespeople, traditional arbitration represents no significant risk for the state. It actually lessens the burden of conflicts requiring resolution by the official authorities.

3.2. A Comparative Perspective

To pursue the examination of the attitude of the Egyptian State to this type of justice it is necessary to seek a comparison with other countries and more particularly with European countries such as France. A team at the Laboratoire d'Anthropologie Juridique de Paris conducted a comparative study (Ben Nasser and Jouan, 1993) into forms of mediation in conflict resolution in the towns of Valence, Nabeul in Tunisia, Rome, Algeria, Marrakesh and Barcelona.

The case of Valence illustrates the contradictory nature of attitudes to these modes of conflict regulation. It involved an experiment to relieve the congestion of the official state court system. In fact, the project was quite closely linked with the official system since it was founded by two magistrates, and the conciliators, although chosen from amongst the ranks of volunteer organizers in the neighbourhood concerned, were appointed by the State Prosecutor. Furthermore, in the project's early days, it was the Prosecutor who handed cases over to the conciliators and suspended the official legal proceedings. As time went by, parties to conflicts and local social workers began to bring cases to the conciliators of their

own accord, so the conciliators came to deal with an increasing number of incidents before any procedure had been initiated and defuse conflicts that might otherwise have escalated. An interesting feature of this case is that the parties soon began to request a written statement signed by themselves and the conciliators, to conclude each mediation process.

This data shows that in Valence the development of conciliation and mediation has been closely bound to the official court system, as if this were a precondition for its recognition and legitimacy. The researchers considered this type of system to be relatively unsuccessful because the 74 cases it dealt with were a drop in the ocean compared with the 42,000 court procedures initiated every year.

The Valence initiative shows how the French model of state-administered justice, in which a higher authority from outside the conflict-torn community imposes a solution by applying abstract, generalized and impersonal, rules not only the minds of legal practitioners (who have, after all, every interest in defending their own position as interpreters of the said law), but also the minds and the conceptions of all the other actors, including those on trial. The manner in which conciliation was conducted in Valence indicates that the effectiveness of the negotiated solution owed more to the institutionalization of the process (i.e. its official recognition) than to the quality of the procedures. In his contribution to the Dictionnaire Encyclopédique de Sociologie et de Théorie du Droit (Arnaud, 1993) on the subject of conciliation, Etienne Le Roy says that a preference for a particular mode of conflict resolution stems not only from legal policy choices but also from more general conceptions about conflicts and their resolution. Societies with a Judeo-Christian tradition tend to have the institutional and legal model of conflict resolution as their ideal.

3.3. Egypt

The situation appears to be considerably different in Egypt, and this in spite of the fact that the construction of a modern state and the process of political and legal modernization in Egypt antedated all other Arab states (being practically concomitant with French political modernization) and in spite of the fact that both legal practitioners and subjects involved in legal disputes clearly share the same legal ideology concerning the law and the responsibility of a senior, independent authority for its application. It is, after all, this very ideology which is responsible for the overshadowing or dissimulation of legal and jurisdictional pluralism. And yet, for a large number of reasons, many of which are historical, we feel that the ideology is not as powerful and stable as it is in France.

The Egyptian State acknowledges the existence of a phenomenon beyond its control. When, in 1895, it attempted to intervene by issuing a decree delegating certain tasks of the civil courts to the *'umdas*, it perverted the philosophy of the

tahkim, one of the fundamental principles of which is that the members should be chosen or at least accepted by both parties, and should therefore never be permanent. Consequently, the 1895 Decree was abolished in 1930.

Similarly, in Europe, and more particularly in France, the legal ideology portraying laws as sacred and extraneous to society because they supposedly emanate solely from the state did not develop overnight. According to the legal expert and psychoanalyst Pierre Legendre (1974), experts in canon law developed it in the twelfth and thirteenth centuries, drawing on Roman law, to serve as a foundation for Papal absolutism and the theory of Papal infallibility. The resulting concoction designated the Pope as the representative of the Unseen Source of Law, that is to say God. Legendre considers that the Western institution of the state should be viewed in the light of this canonical antecedent.

The work done by the experts in canon law to justify the Pope's power was turned to good account first by the King's experts to justify royal power (Ellul, 1982) and then by the state's experts to underpin the long process of expansion of state power within society and more particularly the state takeover of law and justice. Thus Western legal experts played a major role in developing a fiction or a myth portraying first the Pope, then the King and finally the state as the source of law. Why did they do such a thing? Quite simply to assert their own position as the interpreters of pontifical/royal/state law. Pierre Bourdieu (1994) captures the idea perfectly in the following sentence, "Men of Law became the nobles of the state by establishing the state and by producing the performative discourse on the state which, while feigning to describe what the state was, called the state into being by describing what it ought to be".

If we accept the interpretations of Pierre Legendre, Kantorowicks and Pierre Bourdieu we can perceive the difference that exists between the expansion of state control in French society and the expansion of state control in Egyptian society following the political and legal reforms initiated by Muhammad Ali. In the former case the process took place over many centuries, gradually securing a hold on people's minds and influencing their conceptions. In the latter case the process is actually a relatively recent one.

The third reason why the Egyptian situation differs from the French one is that in Egypt and other Islamic societies another legal ideology or legal dogmatism, that of the *shari'a*, competes with the legal ideology or dogmatism of the state. The discourse based on the *shari'a* has always existed in Egypt and in all the other Islamic countries. It was in existence long before political activists made it a platform for their demands, combining political objectives and the quest for identity. The vision it presents of law in Muslim societies is just as dogmatic as that of law proceeding solely from the state. Even more dogmatic, in fact, since it declares the supremacy of a law of divine origin, valid not only in a particular area (a nation) but throughout the whole of the Muslim community (and consequently in all societies claiming to be of Islamic inspiration)

and in all times (from the Revelation until the end of time). That is not the case for state law, which evolves over time.

Muslim legal dogmatism has not been dislodged by the dogmatism of law proceeding from the state but has continued to exist alongside it, gathering new strength from the success of contemporary Islam.

Let us therefore consider the following hypothesis. In a situation where Muslim legal dogmatism which considers its Law to be sacred because it is divine and emanates from beyond the state, is vying with an official legal dogmatism which considers sacred the Law emanating from the state, is there not a case for true pluralism, providing greater room for manoeuvre and freedom of action?

The fact that the members of the *majlis al-'arab* introduce their final decision with verses of the Koran calling for conciliation and harmony and the ceremony is closed with a recitation of the *Fatiha* are surely not devoid of significance in this respect.

CHAPTER 13
The Anarchy of Egyptian Legal System:
Wearing Away the Legal and Political Modernity

NABIL 'ABD AL-FATTAH
AL-AHRAM CENTER FOR POLITICAL AND STRATEGIC STUDIES, CAIRO

INTRODUCTION

Whether there is legal pluralism in a number of countries in the South, or legal dualities and contradictions in Egypt and in other States and societies, is, in my opinion, an important basic question. The first formulation may contain some positive implications hidden behind the neutrality of the formulation. The formulation itself is submitted within a context where the term pluralism carries many a positive significance, having three generations of human rights as a background reference. The term pluralism and the adjectives that usually follow it are welcome in vast social circles.

On the other hand and in some cases it would be more accurate to say that we are faced with legal dualities and contradictions, such as the case in Egypt. The Egyptian and Arab cases have had many such legal dualities and shortcomings historically, and still have. We dare not say pluralism lest it may imply a legal coexistence and peace among legal systems which are philosophically, referentially and functionally contradictory in so far as effectiveness and applicability to legal relations are concerned, not to mention their applicability to the contradictory legal centres in society.

There is a duality within the official legal system itself between secular, western references and purely religious references. Egyptian civil law is a striking example, and so is the personal status regime, with its origins and lineages that vary according to the different doctrines within one religion, and which reproduces social divisions and problems within the family system, both in Egypt and in some Arab countries where there are religious minorities. Moreover, this also causes divisions between, and discriminations against, citizens of different creeds and doctrines based on religion.

The researcher is faced with yet another set of dualities within the formal Egyptian legal system, such as that between normal law and laws of exception,

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 159-172
© 1999 *Kluwer Law International. Printed in the Netherlands.*

the latter dominating the legal and judicial systems; so much so that juridical exceptions, as opposed to the normal legal regime, have dominated contemporary legal history since July 1952, particularly where the penal code and the code of criminal procedures are concerned. This situation is also to be found in many formal Arab legal systems, and represents one of their most striking features.

The modern judicial system in Egypt – which is one of the most striking achievements of modern legal structure – is beset by yet another duality embodied in tribunals of exception and in special judicial systems, such as military courts, party courts and "courts of values", as well as in other administrative systems and committees endowed with judicial attributes, which have increased in Egypt since 23 July 1952. There exists yet another duality between formal law and the customary law that prevails in some of the peripheral areas of the country, such as Matruh and the Oases, where a system of customary rules and regulations prevails over formal or official rules, and where non-governmental judicial councils prevail over official tribunals.[1]

There is a great difference between a legal and judicial system burdened with millions of cases which drag on for long periods of time, and between a customary system and methods for solving conflicts which are much more efficient and functional than the official laws and judicial procedures.

The Egyptian situation and several Arab situations are riddled with dualities and shortcomings which are increasing to such an extent that we can expect a widening rift between the official and the unofficial, between order and disorder, both in the medium and in the long term.

Legal dualities and shortcomings maintain their existence and strength in a society and state full of shortcomings. There are dualities and shortcomings in terms of values that can be traced through the study of folklore and popular sayings, the latter being a source full of contradictions between purely negative examples and between others which are entirely positive. This is an expression of the dialectics of the apparent and the hidden in a society where traditional culture is ever present in daily reality, where it is present and absent in behaviour, where evasiveness permeates the very texture of the Egyptian personality (considered to be "*dodging*" by Hamid 'Ammar). Such psychological and behavioural characteristics are reproduced by the dominating culture. There is another source that produces the justification for resorting to a system of chaos as opposed to formal legal and judicial systems: the ambiguous language which bears more than one interpretation and which can be mysterious and contradictory, allowing for misunderstanding because of the ambiguity of its component words.

---

1 See Sarah Ben Hefissa's article in this volume [note of the editors].

There are also dualities and shortcomings in the cultural structures, in the ways of thinking and in the self-image and image of the world, separating the dominating traditional culture and the premature, modern culture living within it and depending on it for its legitimacy.

Dualities coexist, support one another and enter into conflicts with one another. Conflicts stem from many sources that can be traced back to the Muhammad 'Ali project, to the historical rifts between modern and traditional modes and between secular laws and customary laws, to the nostalgia for Islamic law, and to the rift between meta-positive laws and religious laws.

The state always produces such dualities through the elaboration of official constitutional and political laws which the state hastens to violate. One of the most striking examples thereof is the state's usage of the structures of local and traditional forces opposed to modern legal principles of equality, of the right to direct and free voting and of the right to nomination for judicial and local councils. The state makes use of the structures pertaining to traditional forces based on tribal and family hierarchy, using such traditional authorities, that repress the rights of citizens, as middlemen between the latter and between official state institutions and laws.

On the other hand, we can observe the ineffectiveness of modern law which is losing its credibility within vast social groups of people who are subjected to its provisions. This phenomenon has been, and is still, related to the negative image of the legislator and of those who formulate the rules of legislation, to the fact that they do not express the will of the electorate, that these legislators bow to the will of the executive power, not to mention the fact of the dubious membership of several of them as a result of dubious parliamentary elections. Undoubtedly, this, along with other reasons, has dealt a blow to the credibility of modern political and legal myths about the public will, about the prevalence of law and of the people; this is the major political and legal hypostasis used by the Egyptian political elite to introduce a modern legal structure in Egypt since the time of Muhammad 'Ali and Isma'il Pasha and up to the end of the semi-liberal era. To this we must add the myths of political development, of mobilization and development and of social justice pertaining to Nasser's era and to part of Sadat's era, up to the return of the myths of the free project, of market laws and mechanisms, of specialization, of democratization and of resistance to terrorism. All such myths, when applied, proved to be mere ideological slogans, since political, economic and social markets are governed by the law of the dominant socio-political minority. All these reasons, as well as others yet to be mentioned, have created psychological rifts and rifts of misunderstanding between the majority of Egyptians and between the modern legal system which is the equivalent of the modern state: hence the system of chaos or the law of anarchy. What we mean by a system of anarchy is a group of customary rules, habits and patterns of behaviour that are contrary to official laws, rules and

patterns that have become recurrent, that individuals repeat behaviourally and functionally because they consider them necessary for the gratification of their needs and interests, however removed they may be from the official legal and judicial systems.

The law of anarchy and that of customs arises from the fact that those who are subjected to the different legal rules are generally aware that submitting to the latter and to their complications, does not achieve their social interests, that it does not lead to a stabilizing of their legal positions, and as a conclusion that it is ineffective to submit to the rules of official law. This sense of the uselessness and ineffectiveness of official law is also due to the complexity of the modern legal phenomenon, of its multiple patterns and of the widespread infractions and violations of official laws by the state, by the ruling elite and by those who are politically and financially powerful. All of which leads those who are subjected to the rule of law of the state, to resort to other forms of customary laws, or laws based on traditional power, in order to achieve their purposes and interests; they also resort, in general, to the rules of bribery and corruption.

In contrast, resorting to the system of anarchy with its laws and habits leads to a rapid gratification of needs and interests, to a rapid solution of differences, as a substitute for the complicated mechanisms of the juridical system; it is a way of saving the time and the money spent on the procedures of the official judiciary system. The economics of juridical procedures – time, expensive charges, lawyers' fees, etc. – turn the public away from the modern legal structure, not to mention the illegal patterns of behaviour prevailing among judiciary assistants and ignorance of the legal rules governing litigations, where the prevailing rule is that there is no excuse for those who are ignorant of the law, and that in a society where illiteracy is still a serious problem.

All the above is an introduction to an attempt at a preliminary analysis of the phenomenon of the system of anarchy or the order of disorder in Egypt.

We can monitor and analyze the different factors that led to the weakness of the modern legal system as follows:

1. Second introduction regarding modern law.
2. Technical, legal factors.
3. Political factors.
4. The culture of chaos and emotional reactions.
5. Religious symbols as opposed to the symbols of modern law.

1. A SECOND INTRODUCTION REGARDING LAW AND MODERNIZATION IN EGYPT

Modern law was one of the most outstanding and basic gateways and tools for contact with modern civilization. It can even be said that the edifice of modern law was the bridge to a modern political structure – the state, the constitution, political parties and parliaments; the position of the Egyptian elite regarding

legal systems was not a negative one. The political and legal pioneers were not idle consumers of such legal concepts and values. In fact, Egyptian juridical circles succeeded in adapting these legal systems borrowed from a western frame of reference, and they reconciled these different existing legal rules with the problems of objective reality and other social relations; in so doing, they were helped by the fact that Egyptian jurisprudence was in contact with comparative jurisprudence and comparative law, between the end of the 1940s and the end of the 1950s.

A basic observation is to be noted here: despite the radical social developments which took place in Egypt after July 1952, there were no parallel changes in the legal field, the sources of the national legal structure and its secondary branches having remained the same. All amendments and judiciary as well as jurisprudential interpretations, remained partial, revolving within a series of formal, liberal legal structures and remaining within the framework of visions related to positive legal philosophy, since prevalence was given to technical approaches, to formal logic and to all pertaining methodologies and theories.

Modern law was subjected to many blows throughout the last few decades, among which the imbalance between legal rules and their charges on the one hand, and the different social forces and the problems they regulate on the other; not to mention the gap between the texts themselves and the changing reality. Moreover, the socially and politically powerful disregard the law, to which can be added the psychological and understanding gap that exists between the official law of the state and the different social groups ('Abd al-Fattah, 1997: 55-65).

The Egyptian situation in the second half of the 1990s can be described as one where customary laws – some of which contradict the formal law – are dominant in regulating social life, and where citizens often turn away from official law when they need to achieve their purposes within a framework of rules that they know and understand well, particularly at a time when the trend is towards shifting from the public to the private sector and to the mechanisms of capitalist markets.

2. TECHNICAL, LEGAL FACTORS

One of the striking aspects of the crisis of modern law in Egypt now is the backwardness of technical means, due to the fact that jurisprudence and the art of legislation are tied to political authority; also because some jurists have become tools for executing the legal and social desires of the high and mighty, at a time when the legislative machinery is being flooded with laws that, now and again, appear to be contradictory, and it is incapable of organizing legal interests and positions opposed to one another. On the other hand, the making of legal rules is fraught with mystery because of the weak technical formulation thereof, all of which results in legal and social instability and increasing litigation.

3. POLITICAL FACTORS

The law is the state's and the governing forces' direct tool for political control in any society and state of our Arab world and it is, consequently, irrevocably related to the question of politico-cultural legitimacy, because Arab political regimes are suffering from a crisis of legitimacy; in the case of Egypt, doubt has constantly been cast on the legitimacy of parliamentary formations throughout the last decade, the legitimacy of their legal constitution still being questioned and denied at both popular level and by the parties of the opposition, particularly since most of those who are in charge of legislation came to be where they are despite the will of the people (*'Abd al-Fattah, 1997*).

The law has continued to be a tool for achieving the petty interests of the political and economic elite, thus creating many problems of application, not to mention the hasty manner in which laws are formulated and promulgated, then amended and annulled, all of which casts doubt on the parliament as an institution as well as on its members, in addition to the inefficiency of parliament in carrying out its functions and in assuming its role in the process of political development, democratization and the achievement of political and civic freedoms. The law has been, and still is, both a tool of and an obstacle to, the process of democratization from the top, in Egypt and in the Arab world, or at the very least the law has remained isolated from such a process. The application of laws of exception – and that is the major obstacle – is a matter for the state and the political elite to decide; they apply them when they wish, and disregard them sometimes and in certain circumstances. This has widened the gap between the idea of the prevalence of law and the constitution on the one hand, and between socio-political reality and its different relations on the other. All the above phenomena and complications have produced a crisis of legal credibility. The intermediary institutions have failed in seriously expressing their interests and views of the legal regimes governing their affairs or those of relatively larger social groups falling within their purview, particularly vulnerable groups. Moreover, there are also the obstacles pertaining to values and awareness, which prevent the elite from understanding the law and its importance.

4. THE CULTURE OF CHAOS AND EMOTIONAL REACTIONS

Cultural factors play a crucial role in explaining the absence of law, or the wrong application thereof, or its ineffectiveness in everyday life with its intricate relations in Egypt. Such factors are not mentioned in the prevailing Egyptian socio-political analyses, because such a pattern of methodical analysis does not exist in our practical and intellectual life.

Legal and social anarchy, widespread criminality and the various forms of violating the law – be it in the relationship between the individual and the state

or among individuals or in the relationship between the internal and the external – led to the spread of a culture of criminality, a culture of bribery and corruption, a cultural pattern which now prevails in the life of social and political actors. The problem resides in the fact that even though the legal and judicial institutions attempt to play a minimal role in counteracting such a cultural phenomenon with its criminal patterns of behaviour, the prevailing collective awareness considers the judiciary, the administrative and the security personnel to be an integral part of the problem and one of its symptoms.

The culture of bribery and crime, of embezzling public funds, of theft and of all forms of violating the penal code, are but an expression of contempt for public function and for productive labour; they are a way of considering the salary of a civil servant as being charity given to him by the state, or a bribe to guarantee that he remains silent and refrains from raising any political problems.

All the above concepts are distorted forms of viewing public service, the honour of the civil servant and the relationship between remuneration and work, in Egypt and in the Arab countries.

We also believe that the complexity of the law and its rules has created a rift between citizens and the modern law with its many rules, its complicated procedures and the expenses to be incurred by any citizen who wishes to obtain his rights or to solve a legal problem. Thus, a psychological barrier prevents the citizen from respecting the law in our country, and he becomes alienated from modern law, is pushed into resorting to customary and local rules and justice, and is driven towards traditional culture or towards nostalgia for a legal culture of a religious nature.

The setback suffered by modern law, both in application and in its formal and official appearance on the scene of everyday life, led to a revival of customary law, and the law of the street. This was due to two tendencies which were apparent in collective awareness and behaviour: the resorting to a culture of bribery and to all the customary rules attached to it, and the seeking of compromise solutions for one's interests, away from the judiciary and the mechanisms of the law of the state, with the application of rules of customary origin, containing all the relevant arrangements pertaining to traditional thought and awareness which can lead to a rejection of the state's law, institutions and symbols as being opposed to traditional law.

For quite some time, some religious political groups have doubted the legitimacy of modern law, the law of the state. They have doubted both its political and cultural legitimacy, ever since the project of Muhammad 'Ali and Isma'il Pasha, because modern law was inspired from European sources, such as French and Italian, a fact which remains an area of conflict and tension in Egyptian society and culture.

The power of religious and customary law in traditional societies stems from the fact that it is an instinctive expression of the needs of these societies,

in the sense that it serves them easily and without complications, in addition to the myths attached to it, in the anthropological sense of the word.

Traditional, or customary law, draws its influence over social relations from a series of metaphysical myths or values, or even from the situation related to a balance of power, which confers legitimacy on its application.

Traditional law, or laws of religious origin in some societies, draw their power and influence from what Marcel Gauchet calls "the debt of meaning" or "the indebtedness of meaning", i.e. what humanity, or a group of humans, have recognized for thousands of years as their debt to the gods. Also, some of these societies have almost always believed that they owe such laws to the effort and decisions of invisible powers (Gauchet, 1985: 46-47).

The "indebtedness of meaning" refers to the fact that the state or the law is an extension of a primary submission which expressed itself as the firm conviction that humans owe the order of their world to the intervention of non-human forces.

This submission to powers other than human, is totally different from submission to the state and its laws, and to its capacity to issue orders, decisions and legislations. The separation of "the masters of meaning" – as Gauchet calls them – from mere mortals is not a separation between the living on the one hand and the masters of the other world on the other, for then all humans would be equal in their being slaves to the unseen. That is what gives customary laws and rules their tremendous power on the symbolic and religious levels; such a power stems from the idea that this law is not of human origin (Gauchet, 1985; see also Harb, 1985).

The strength of the invisible and its overpowering magic and myth gain respect and allow it to gain influence in every day social life, as witnessed in the crisis of modern law and its inability to fulfill its functions.

These symbolic powers and their meanings still represent the main psychological sources of the call for the application of rules of a religious origin in different societies of the South. Such rules represent an effective social and symbolic substitute for modern, positive law which is being violated in many different ways by the state who formulated it in the interests of the ruling force or, purportedly, in the public interest. The state violates the law daily; the citizen violates it in his daily relations or in his relationship with the state and its institutions. That is a Southern and Arab phenomenon "*par excellence*".

The weakness of modern law in the Arab countries is due to its failure to establish its legitimacy on the basis of symbols as strong as the symbols stemming from the "indebtedness of meaning" and its social laws. Modern law is supposed to have a legitimacy based on other patterns of symbols – myths related to the modern state, but in our case this has, unfortunately, failed. There are myth-symbols related to the modern state, embodied in the belief that the law is there to serve the interest of the masses. But people, with their awareness and experience, soon discovered this myth to be false. For though the law is formulated as

being an expression of the masses and obtains its legitimacy from the fact that legislators are chosen by the public will of the nation, the masses soon discovered that they had not really elected the members of this political institution known as the legislative power, or they discovered that it had gone against their will or even was a result of a falsification of their will. There is also the myth about public order and political stability, where people realize that political and social instability is no longer a temporary situation in their lives, but rather the rule.

Modern law was unable, through state machinery or through the dominating forces, to impose the necessary myths and symbols which would enable it to gain legitimacy from the political-social whole in Egypt, and that is why it is undergoing a serious crisis at the level of everyday life.

The recession of modern law gave way to the law of instincts, to anarchy, to bribery, to customary law, and to symbolic dreams and myths as legal substitutes of a traditional origin. The recession is due to the state's withdrawal from society, of its abandoning of the public sphere to the haphazard and instinctive movement of social groups to impose the laws of chaos and emotions, to the petty interests of minorities, bribery, crime, swindling and contempt of public service and civil service, all of which have led to a recession of the modern law's legitimacy in favour of such deviant patterns of unofficial culture and values which are contrary to the law of the state, where social life is concerned.

There is yet another serious phenomenon which has appeared in recent decades, one that also acts against the modern law: the revival of customary law and its related culture. This phenomenon is closely linked to the phenomenon of the "ruralization of the city". Urbanization has been, and might still be, a priority for many countries, including Egypt after its independence. However, urbanization has produced distorted forms of urbanization, or partial urbanization. Consequently, it has not yielded effective results, but rather distorted forms of hybrid, traditional urban patterns. This is closely related to the defeat of modern law, to its ineffectiveness as compared to the laws of anarchy, instincts and customs.

Such a problem is due to the fact that modern law is basically the law of the city, despite the claim that it is the law for society as a whole, both rural and urban. Legal rules, which are supposed to be known by all and the ignorance of which is inexcusable, are meant to organize and regulate everything pertaining to the city: traffic, construction rents, general tranquillity etc. ..., they are all rules related to western cities, related to reason, to awareness and, basically, to urban values and behaviour. Yet, life and social relations in Egyptian rural areas have been dominated by custom and tradition; local legal mechanisms have played a major role in the social problems of these areas. Undoubtedly, the official law of the state does have a formal presence, and it is resorted to in cases where the local law has failed to solve litigations and problems, especially those which are modern or particularly complex.

The phenomenon of the "ruralization of the city" is a result of the fact that the city attracts rural labour, and as a result of rural exodus towards the city, as well as the incapacity of the city with its facilities and infrastructure, to absorb such high rates of rural migration. The spread of a dense rural population, rural behaviour, culture and traditional values as far as daily conduct and social interaction are concerned, as well as the inability to appreciate the value and role of time, of modern law with its rules for traffic, housing and work, and of other legal rules, make all such rules seem strange to those who have come from rural areas and who live in the pits of the city or in the shanty towns of its peripheral areas. In such areas, an environment of violence prevails, as well as public dissatisfaction, collective anger and marginal patterns of behaviour. Such marginal environments in the pits of the cities, in its peripheries and in the cities of the dead, usually become conducive to delinquency and a breeding ground for outlaws.

The "ruralization of the city" is, undoubtedly, contrary to the idea of social grouping, and it is also contrary to the appropriate urban behaviour related to the reign of law of the state. This is, indeed, a very serious phenomenon and an influential one which has caused a setback to the very idea of the state of law, synonym of the modern state.

André Tincq explained some of the dangers of such a situation in one of his early reports on the phenomenon of modern law in the developing societies of Africa after independence, where traditional law reflects the ideals of rural societies which remained, to a great extent, stable and closed, hence totally incapable of supporting and moving society towards modern industrialization. Consequently, this traditional law is far removed from the law of refinement wished for by Gendarme ('Abd al-Fattah, 1997: 55-65).

Our analysis of the official legal system reveals that its weakness has rapidly led to the formation of the order of disorder.

5. RELIGIOUS SYMBOLS *VIS-À-VIS* MODERN LEGAL SYMBOLS

Contemporary phenomena of political Islam in Egypt have given rise to several problems, foremost among which is the problem of Islamic *shari'a* in the face of modern law. This started in the 1970s, after the promulgation of the 1971 Constitution and the proclamation that Islamic *shari'a* is one of the major sources of legislation. The text was subsequently modified to set out that Islamic *shari'a* is the main source of legislation. Both the constitutional text and its amendment represented a qualitative change in the historical debate about this subject in the history of Egyptian modern and contemporary law. Since then Western laws – French, Italian and Belgian – were used as a reference for the modernization of the Egyptian legal structure, and as a bridge towards political and legal modernity. Laws of religious origin remained confined to the personal status regime for Muslims and to the corresponding regimes for

Copts, Catholics, Protestants and Jews. On the other hand, the well known expert in jurisprudence, Sanhuri, adopted Islamic *shari'a* as a reference for some of the rules of Egyptian civil laws, in particular with regard to the theory of arbitrary use of rights. The new constitutional text accompanied major political transformations in Egypt after President Sadat came to power. With the adoption of relative political pluralism, it became necessary to undertake structural transformations in the political system and in the political balances in Egypt by making use of religion to counteract some radical political forces, such as the Nasserists and the Marxists. Hence the liberation of the Muslim Brothers, the activation of the Islamist forces within the university and the introduction of the notion of the "state of knowledge and faith" into the language of the Sadatian political discourse. Islamic *shari'a* and the necessity of its implementation as one of the tools of political struggle was used by the Muslim Brothers, and by all the radical groupings, such as the Islamic Liberation Party which was responsible for the Military Academy operation, the Jihad, the Jama'a Islamiyya, etc. ('Abd al-Fattah, 1985). Radical changes took place in the Islamist political discourse regarding *shari'a*, some demanding the amendment of certain texts which were not in keeping with its rules, others, more radical, demanding the full and total application of *shari'a* and the "islamization" of all laws. This was not the end of the matter. The rules of *shari'a* and its criteria were used to penetrate areas of faith and belief, as a yardstick for judging the faith of individuals. The question of applying *shari'a* was no longer limited to a calling for legislative amendments, it became a symbolic and theoretical mechanism used in a political project aimed at "islamizing" politics, the law, the economy and even Egyptian human society, i.e. it attempted to penetrate social relations and to control the pattern of everyday life in Egypt ('Abd al-Fattah and Botiveau, 1994: 134-156, 157-183).

From the early 1970s to the 1990s, this transformation in the methods and means of the political presentation of Islamic legitimacy in the Islamist political discourses, became increasingly sharp and strict as a result of the politicization undertaken by the Muslim Brothers, by radical Islamist groupings and by some of the al-Azhar scholars.

Among the most striking effects of this political utilization of the call for the application of *shari'a*, is the way it has reflected on the official law, casting doubt as to its legitimacy from the angle of the necessary submission to its rules and provisions in the realm of legal, economic and social relations, particularly in view of the widening gap between the basis of the law and between the relations it is meant to govern. Political doubt was also cast as to the legitimacy of parliamentary elections and the imbalance in the interests defended by the law, or which the law seeks to achieve or gratify. Other striking effects of the phenomena of political Islam and its groupings on the Egyptian legal realm are embodied in the judiciary sentences pronounced by certain judges directly in keeping with the rules of Islamic *shari'a*. Such sentences resulted from the fact

that the constitutional text was regarded as a discourse addressed to the state's legislative, executive and judiciary authorities, but that a judge is committed to applying the rules of Islamic *shari'a* to the litigations submitted to his judgment. Even though those sentences were abrogated, since a judge is duty bound to apply the rule of law emanating from the legislative authority, yet these scattered sentences indicated the extent to which the Islamist political and social situation affected the Egyptian judiciary institution which represented – and still represents – one of the centres producing liberal juridical culture.

Since the 1980s, and the first half of the 1990s, new generations have joined the Egyptian legal circles, particularly attorney's. Some of them can be described as the descendants of the Islamist situation prevailing in Egyptian universities. This does not mean that they are members of political Islamist groupings, but rather, that they belong within a religious-political context, or, at least, that they have been influenced by Islamic theories and discourse in general. The fact remains that they, undoubtedly, have other criteria and a value system that is relatively different to the value system pertaining to modern law, which is urban in nature, and rules. In this changing context of Egyptian jurists, a group who were always pioneers of liberal culture and thought, the Muslim Brotherhood succeeded in taking over the council of the Lawyers' Syndicate ('Abd al-Fattah, 1994: 35-45). This reflected an important change in Egyptian politics, particularly at the level of the intermediate structures in society.

The Egyptian judiciary witnessed the phenomenon of its mechanisms being used to settle intellectual and political matters, and matters pertaining to creed. Elements belonging to the Islamists intruded upon the judiciary by suing writers, researchers and creators such as film directors and actors, etc. ..., The most notorious example was their attempt to separate a man from his wife on the pretext that he denied a religious certitude. Another example was stopping the projection of Yusif Shahin's film[1] and a number of litigations against Ruz al-Yusif magazine. This phenomenon led to the appearance of a censor who censors ideas, pictures, films and books on the pretext that some contain infractions of the laws of Islam, both the legitimate laws and those of creed, or that they incite actions rejected by religion.

It seems that the phenomenon of some people resorting to the legal mechanism in order to accuse their political or intellectual opponents, reveals the absence of mechanisms capable of regulating general debate on political and cultural matters. It would seem that the attempt to isolate elements belonging to the movement of political Islam has led to the utilization of official systems and mechanisms to submit those elements' views on certain political and cultural matters, whereas such systems and mechanisms are not meant to rule on matters related to politics, to culture or to creed, but were meant to settle dis-

1 See N. Bernard-Maugiron's article in this volume (note of the editors).

putes related to legal matters and positions. That is how those who launched such litigations sought to counteract the attempts to isolate them politically and to reject the opinions and views of secular thinkers among intellectuals, researchers, writers, journalists, film directors, actors, etc. In other words, this phenomenon is an extension of the political struggle synthesized by Islamist political groups in the form of the struggle between secularism and Islam.

All these phenomena have created a duality between the official law based on modern legal references, and between a system of religious values, rules and criteria based on the Islamic religion and submitted by a political movement deprived of legitimacy, i.e. the Muslim Brotherhood, the radical Islamist groupings, elements of the official religious institution, some Sufi elements – as was the case in Chahine's film – and other Islamic public figures, all of whom have resorted to the utilization of religious criteria in judging ideas, creative work, persons and institutions and have attempted to use the judicial mechanism in a struggle which is, in essence, political.[2]

This utilization of the judicial mechanism and of the official legal structure has brought to the fore misconceptions of the rule of law and its role. There has emerged a duality between a modern, positive legal basis and between a religious legislative criterion. One of the striking examples in this context is the accusation of all who hold different opinions of being infidels, to wit the assassination of the writer Farag Fuda, and the violation of a human being's right to life if he happens to hold a different opinion, to wit also the attempt against Egyptian novelist Nagib Mahfuz. Here the Islamic legal opinion (*fatwa*) has played a role against the rule of law that protects the right to life, to freedom of thought and expression. Undoubtedly, the acceptance by some elements of Islamist groupings of such assassinations, reveals the fact that incitement against the rules of modern law, and the passing of judgments to be implemented by regular, organized elements of these radical groupings, have all carried this legal duality from the realm of the official and unofficial to that of the purely political.

The position concerning bank interests has also carried the duality to the realm of economics, particularly the phenomenon of investment companies; it has led the majority of official and unofficial Islamist movements to doubt the religious legitimacy of the rules of modern law that allow interest on debts and bank deposits. That is why vast social sectors turned away from banks and official rules pertaining to credits and interests, and resorted to investment companies.

This religious, political and legal discourse that casts doubt as to the religious legitimacy of modern official law, and which calls for a system of religious criteria and rules, has shaken the foundations and credibility of the rule

2 See for some components of the explanation Suwayfi (n.d.).

of law, particularly among citizens of different religious creeds. It has advocated different legal status according to different religious affiliations and has cast doubt on the credibility of modern constitutional and legal rules based on the equality of all citizens, regardless of their religious affiliation. All these phenomena related to political Islam and its radical groupings, and the violence taking religious or sectarian forms, have led to legal instability, to the weakening of modern, official law's effectiveness and to people resorting to customary or religious rules and criteria. This has helped consecrate the order of disorder, or the law and mechanisms of anarchy. These phenomena are still present on the eve of the third millennium and are still one of the most striking features of the law and the state in Egypt.

CHAPTER 14
Legal Pluralism and the Closure of the Legal Field
The *al-Muhajir* Case

NATHALIE BERNARD-MAUGIRON
CEDEJ, CAIRO

INTRODUCTION

This article will deal with the issue of legal pluralism in the Arab-Muslim world by means of a case study, the case of a conflict brought before the Egyptian courts. Would it not be true to say that studying conflicts may offer "the opportunity (to enter into) a field of research of the normative systems which structure a given society and which are, in themselves, the real objective" (Assier-Andrieu, 1996: 176)? It is, indeed, an opportunity to observe the confrontation, the calling into question or the re-affirmation of different types of legal orders; to grasp the law which individuals experience and comply with.

Even if men and women can experience law outside of conflict, the latter, and thereafter the resulting judgment, enables us to observe law in action, through processes and interactions and not merely as ossified norms and institutions. "Judgments are actions. Triggered by individual initiatives, they activate the situation, in order to draw out proofs while their decrees leave their impact on the situation" (Thévenot, 1992: 1283).

A conflict situation offers the opportunity to study how actors actually conceive the norms, and how they determine their actions in this respect, since actors interact with their human and social environment and act according to the way they conceive reality. They will mobilize certain norms at a given time and in a given place, thus attributing to them consistency, meaning and an effective content.

The case which will provide the guiding force is the case brought against Youssef Chahine's film *al-Muhajir* (The Emigrant). In October 1994, an Egyptian lawyer called up on the emergency section of a Cairo Primary Court (*mahkama li-l-umur al-musta'jila*) to stop the showing of this film, claiming

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 173-189
© 1999 *Kluwer Law International. Printed in the Netherlands.*

that it was recounting the life of the Prophet Joseph, mentioned in the Koran[1] and the Bible, that it committed the sin of personifying the Prophet – because an actor played the role – and violated the Koranic text by adding scenes which shocked the believers' community.[2] The Primary Court viewed the complaint as a *hisba* petition and, deciding that the film did indeed offend the beliefs of Muslims, banned it.[3]

Youssef Chahine, his producers and a number of well-known leading Egyptians[4] decided to appeal. The emergency section of a Cairo Court of First Instance sitting as appeal body (*musta'naf mustab'jil*) rescinded the ban imposed by the first Court on the basis that, on the one hand, the petitioner had no direct interest in the case and, on the other, that the Egyptian Code of Civil Procedure does not recognize *hisba* petitions. Following this decision, the film was allowed to be shown in cinemas again.[5]

But the case did not stop there, because the petitioner was able to ensure that the decision of the Appeal Court was not implemented;[6] this stay of execution (*waqf al-tanfizdh*) meant that the ordinance of the Court of first instance, the Primary Court, recovered its legal strength and the film was banned once again.[7]

In parallel, and as a result of the decision of the Appeal Court which had rejected his complaint because of his lack of direct interest in the case, the petitioner brought in another complaint against the film in April 1995, this time calling upon another capacity (*sifa*), that of a sheikh of a Sufi brotherhood.[8] The supreme sheikh (*shaykh al-mashayikh*) of the Sufi brotherhoods in Egypt,[9] president of the Higher Council of Sufi brotherhoods, also lodged a complaint, "in the name of more than six million Egyptian Muslims".

A Coptic lawyer from Assiut, also lodged a complaint against the film, in his capacity as a Christian Egyptian citizen whose religious convictions, together with those of his children and his family, had been offended morally and spiritually, by watching this film that "distorts the biblical text" and "attacks the Christian religion".[10]

1 In the Koran an entire *sura* is devoted to the life of Joseph (*sura* of Joseph, XII) while mention is made in two other *suras* (XL, 34 and VI, 84).

2 More particularly the scenes where Joseph appears as a seducer.

3 South Cairo Primary Court, emergency section, 29 December 1994.

4 Among them the chairman of the Cinema craft union and that of the Actors' union, the producer Rifa'at al-Mihi and a number of those who acted in the film, including the actress Yousra.

5 South Cairo Court of First Instance, emergency section, 29 March 1995.

6 Through a decree handed down by the Judge responsible for the execution of judgments, dated 31 August 1995.

7 Chahine's lawyers appealed against this decision. They, however, committed a procedural error, by failing to notify their adversaries of their appeal within the legal time limits. As a result, their appeal was rejected on 29 May 1996.

8 The al-Faydiyya al-Shadhliyya brotherhood, one of the four major Sufi brotherhoods in Egypt.

9 Sheikh Ahmad 'Abd al-Hadi al-Qasabi.

10 He subpoenaed Pope Shenouda, who, through his representative, stated that the film contained no attacks against the Christian religion.

The Primary Court of South Cairo, emergency section, decided to bring the three cases together and declared itself incompetent to judge them since, in its view, it was a matter for the administrative courts rather than the civil ones.[11] The applicants appealed against this judgment.[12]

In addition to the legal imbroglio which resulted from this whole procedure, and the dysfunctioning of the Egyptian legal system which it highlighted, this case confirms that state law courts are not immune to the phenomenon of legal pluralism and strategies based on the use of norms. The state is not a homogenous bloc within which one sole state norm can be applied and which is the object of one uniform interpretation. Quite the contrary, it is divided into semi-autonomous social fields (Moore, 1974) which fight to achieve a monopoly in defining the law.

The case also demonstrates the way in which a number of actors reacted to such forms of behaviour which they saw as deviant, how they felt that their personal interests had been offended by such behaviour, and as a result called for sanctions against this violation of the interdict. Becker was right in observing that some actors, whom he calls "entrepreneurs of morality" play the role of the representatives of the law and of morality by complaining that other actors are offenders, by placing them under guard, and either bringing them before the competent authorities or punishing them themselves (Becker, 1962). These "entrepreneurs of morality" thus take the initiative in publicly condemning the practices of those other actors whom they consider as deviants. They give substance to pre-existing norms and call for their application according to their particular perceptions, values, imagination and experiences.

In Egypt, for a number of years now, we have seen a noticeable increase in such strategies. Following Becker, Dupret and Ferrié have noted that "in the Egyptian political context, where the paths open to the opposition are limited, if not non-existent, these entrepreneurs of Islamic morality are on the increase" (Dupret and Ferrié, 1997: 206).[13] While there may exist a number of legal orders and normative repertoires that are called into play, the various social fields are characterized less by the production of different repertoires but rather by the way in which they juggle with existing ones, how they interpret them, and how they create hierarchies within them. This very interpretation of the repertoires embodies a form of pluralism in itself.

11 South Cairo Primary Court, emergency section, 31 August 1995.

12 This appeal brought before the civil courts led to the file being put on hold. Youssef Chahine's lawyers hoped that the State Council would decide that it is competent to act on the issue and would reject the petition on the grounds of failure to respect the legal limits for administrative appeal. The decision of the State Council would therefore overrule that of the judge of the emergency section of the Primary Court, and the ban on the film would be lifted.

13 This article follows the concept of closure of the legal field as it was elaborated by Dupret and Ferrié in their analysis of the Abû Zayd case (Dupret and Ferrié, 1997).

In the *al-Muhajir* case, the actors first of all used the internal dysfunctionings of the positive normative repertoire in order to benefit from the organizational inadequacies of the Egyptian legal system. They also sought to play off the positive normative repertoire and the Islamic one,[14] the one against the other, and did not hesitate to turn, successively or even simultaneously, to the one or other repertoire. Finally, they instrumentalized the Islamic repertoire, the content of which can give rise to different representations and substantializations, even if each actor tends to claim that the *shari'a* is a homogenous bloc, and that its only substance is that which he attributes to it (see the article of Dupret in this present volume).

1. USING THE DYSFUNCTIONINGS OF THE STATE LEGAL SYSTEM

The opposing parties did not hesitate to make the most of the inadequacies of the Egyptian legal system in order to achieve their ends.

We should not forget that the film is still banned from Egyptian cinema screens on the basis of the ordinance of a Primary Court, a decision later annulled upon appeal by a Court of First Instance, which declared the petition inadmissible for lack of direct interest of the petitioner, and despite the fact that another Primary Court, dealing with the same case, was of the opinion that it was a matter for the administrative courts and not the civil ones.

The petitioner may well have turned to the civil courts because he had failed to refer the matter to the administrative judge within the time legally prescribed (a maximum of 60 days after the adoption of the administrative decision). The first Primary Court decided it was competent, laconically stating that the case "is not involving any administrative decision", whereas the petition did attack an administrative decision handed down by the Director of Administrative Censorship: the permit to show the film on cinema screens. The judge of appeal, in affirming competence, based his opinion on another type of argument: the fact that it was an urgent matter and that no emergency procedure existed in the administrative courts. The second Primary Court, for its part, decided it was incompetent *ratione materiae*, and referred the matter to the administrative courts.

[14] Since 1980, the principles of Islamic *shari'a* are, under Article 2 of the Egyptian Constitution, considered the main source of legislation. Nevertheless, the Supreme Constitutional Court has interpreted Article 2 of the Constitution as addressed to the legislator and not to the judicial power. The judge cannot refer directly to *shari'a* and must apply existing laws, even if the latter are contrary to principles arising from Islamic *shari'a*. Some norms arising from Islamic *shari'a*, on the other hand, are part of the Egyptian positive law, in particular with regard to personal status matters. The Islamic normative repertoire cannot, therefore, be considered external to State law, since part of its norms have been incorporated into positive law.

Thus we see that each of the three civil courts offered a different interpretation with regard to the division of competences between the administrative and civil courts, the first two considering themselves competent, the third not.

The various parties involved also used or threatened to use the resources offered them by the *ishkal* procedure. *Ishkal* entitles one of the parties in a lawsuit to suspend, temporarily, the execution of a sentence, should legal obstacles arising after its pronouncement hamper the normal process of its execution; without the judge however being able to give an opinion on the substance of the case, nor to serve as an appeal body. It can be used to establish the flagrant non-existence of a decision, in order to avoid causing a manifest injustice to one of the parties. If the judge decides to suspend the execution of the judgment, such judgment is suspended temporarily, until the matter is put before the judge legally competent to act on the substance of the case.

In the *al-Muhajir* case, the judge responsible for the execution of the ordinance of the Court of Appeal complained that the latter had failed to come to a decision on al-Azhar's capacity to act, whereas al-Azhar had become a co-petitioner in the lawsuit. The judge declared that the Court of Appeal's judgment was devoid of any legal value and non-existent (*ma'dum*), since the fact that the judge had forgotten to give a ruling on al-Azhar's legal interest was a substantial (*jawhari*) defect affecting one of the foundations (*arkan*) of the judgment. This decision of the judge responsible for the execution of the judgments was not, itself, declared enforceable. For that, the petitioner would have to go to another judge responsible for the execution of judgments. But in that case the defence, in its turn, would have introduced a petition of *ishkal* against its execution.

As a result, and since legally this judgment of the judge responsible for the execution of judgments has not been declared enforceable, the Egyptian authorities are under no obligation to ban *al-Muhajir* anymore. However, they prefer to consider the film as being banned, since no one has dared to take the responsibility for authorizing its showing.[15]

In addition to these *technical* aspects, which could, after all, be common to many legal systems, the case has raised questions more specifically related to Egypt and its legal system.

[15] After Youssef Chahine won the special prize at Cannes in May 1997, the film *al-Muhajir* was to be shown on Egyptian television, but at the last minute, and after much procrastination, it was finally dropped.

2. JUGGLING WITH THE NORMATIVE REPERTOIRES

After having declared itself competent, the first Primary Court still had to decide whether the petition was admissible. According to Article 3 of the Code of Civil Procedure a petition is considered admissible if the petitioner has a personal and direct interest (or a capacity to act – *sifa*), and is seeking to protect a subjective right (*haqq dhati*) or a legal status (*markaz qanuni*) rather than the public order (*al-nizam al-'amm*). Did the petitioner have a personal and direct interest in calling for the film to be banned?

In his first petition, the plaintiff called upon his position as a Muslim citizen of Egyptian nationality, the victim of great moral (*adabi*) and spiritual (*ma'nawi*) prejudice, seeking to protect his religion and its prophets, as well as his country and the Egyptian people, as any Muslim Egyptian citizen should do. He added that "with regard to his capacity, the petitioner bases himself on the provisions of the Constitution and of the Islamic *shari'a*".

The first Primary Court did not hand down its decision on the basis of the Code of Civil Procedure, but considered that what they were dealing with in this case was a *hisba* petition, which therefore did not have to meet the conditions laid down by the Code of Civil Procedure. It was on this basis that the Court agreed to examine the petition. As for the Appeal Court, it decided to declare the petition inadmissible because the petitioner did not fulfil the conditions laid down in Article 3 of the Code of Civil Procedure, because he had no direct interest in the case.[16]

Now, if this *hisba* petition belongs to the normative Islamic repertoire,[17] its place in Egyptian positive law was, at the time, a matter of controversy. The only way of bringing cases before civil courts was that laid down in Article 3 of the Code of Civil Procedure. It is true that the Court of Cassation had recognized the legal existence of *hisba* in a case relating to personal status,[18] but this precedent was, on the one hand, limited to personal status matters, and, at the same time, had created dissent among lawyers.[19]

In our case, the first Primary judge was of the opinion that "the petition concerns a prophet of God. Therefore it is a *hisba* petition". He implicitly took for granted the idea that *hisba* petitions exist in Egyptian law, and that it is not

16 In the Abu Zayd case, it was the judge of first degree who rejected the *hisba* petition, which was later judged admissible in appeal.

17 *Hisba* is an obligation on every Muslim to command goodness and condemn misdeeds. It has become in a few countries a way of submitting cases to courts, in order to defend public order in the name of society.

18 Court of Cassation, 30 March 1966. The Court of Cassation based its decision on Articles 89 and 110 of the former rules of procedure of the *shari'a* courts.

19 A few months later (14 June 1995), Giza Court of Appeal, Personal Status Division, in dealing with the Abu Zayd case, referred to the 1966 Court of Cassation's decision to declare admissible a *hisba* petition brought by petitioners who were seeking to bring about the divorce of Nasr Hamid Abu Zayd and his wife, because of his pretended apostasy.

merely a matter of personal status and, even more surprising, that *hisba* can be used in cases involving non-Muslims (given that Youssef Chahine is a Christian), all considerations on which there was no ready consensus to date.

The Court of Appeal, on the other hand, clearly took a stand on the basis of the positive normative repertoire, considering that *hisba* petitions do not exist in Egyptian law, because the legislator foresaw no exceptions to Article 3 of the Code of Civil Procedure.[20] It was of the opinion that "in the absence of any special text, the Code of Civil Procedure does not allow those lacking any capacity to act to bring a petition. Therefore, it does not recognize the *hisba* petition as laid down in Islamic *shari'a*". The Court of Appeal concluded that the petitioner here, had no capacity to act, and therefore declared the petition inadmissible.

Nevertheless, the members of this Court of Appeal went on to express their personal convictions at the end of the ordinance, and launched an appeal to the legislator, urging him to pass new legislation in order to bring contemporary Egyptian law into line with the Islamic *shari'a*, "with regard to the history of the prophets,[21] as well as any other field, in order that the greatness of Islam shall reign over all" (*hatta tu'ala 'ulyat al-islam fawq al-jami'*).[22]

As for the petitioner, he also played the two repertoires off against each other. Even if he made no mention of the term "*hisba*", his explicit references to Islamic *shari'a* and to the Constitution in his petition, clearly indicated his intention to have recourse to this procedure of the Islamic repertoire. He nevertheless subsequently[23] claimed to have always intended basing his petition on Article 3 of the Code of Civil Procedure.

The legal actors play with the normative repertoires depending on their strategies: "The positive and Islamic legal repertoires are paired in such a fashion that sometimes it is the one, sometimes the other which is given precedence, without calling into question the legitimacy and the relevance of the other" (Dupret and Ferrié, 1997: 201). A game which some people refer to as "variance"[24] and others term "instrumentalization".[25] A normative repertoire is

20 The debate was finally settled in January 1996 with the passing by the Egyptian People's Assembly of Law no. 3/1996, which regulates the use of *hisba* in personal status cases.

21 While he did not come to a decision on the substance of the case because he considered the action inadmissible, the judge of the Court of Appeal nevertheless seemed to be of the opinion that the film was about Joseph, since he called on the legislator to put an end to the present legal confusion by passing a law which would clearly ban any personification of the prophets.

22 Bernard Botiveau is of the opinion that this attitude – applying the law while at the same time publicly expressing one's disagreement – is one of the strategies of anti-establishment judges; the other attitude being that of refusing to apply the law at all (Botiveau, 1989: 264).

23 In his request for *ishkal*, dated 15 April 1995, against the judgment of the Court of Appeal.

24 "The active exploitation by the users of the possibility of normative variation, the formulation of individual or group legal strategies, can be termed *variance*" (Henry, 1990: 144).

25 "The concept is that one calls upon an idea, principle, right, or indeed institution, not in order to attain the objectives inherent to it, to achieve its aims, but to serve as an adjunct in order to achieve a different end" (Dupret, 1993: 383).

not activated solely by certain actors for whom it is their exclusive property. On the contrary, a single repertoire, a single object, a single procedure can well be used by different actors from different social fields.

In the *al-Muhajir* case, this interplay between the normative repertoires can also be seen in the arguments put forward by the petitioner to ensure the banning of the film. He first of all took a stand on the basis of the Islamic normative repertoire, and referred to the existence of Islamic fatwas subject to a consensus (*ijma'*), forbidding any representation of the prophets and the messengers of God and actors playing their parts.[26] But he also based his petition on Article 2.1 of Ministerial Decree No. 220, dated 1976, relating to the basic rules on the censoring of artistic productions. The petitioner thus did not hesitate to instrumentalize the positive and Islamic normative repertoires by giving priority some times to one and at other times to another, without calling into question the legitimacy of either. The first Primary Court[27] opted to follow the accusation on religious grounds and established the principle of a ban on the filming of the prophets on the basis of fatwa No. 1292/1983 of Dar al-Ifta'.[28]

The defence itself did not refuse to take a stand on religious grounds, even going so far as to express its respect for the prophets "surrounded as they are by the protection of God and his strength since their birth", and stating that the film calls us "to faith in God, who is Unique, He who has no associate, and in His ability to help all those who make real efforts, despite all the obstacles raised by scientific truths".[29] "Such a miracle can only occur through the power of God, something which the film invites us to contemplate unceasingly".[30] One of Youssef Chahine's lawyers even went so far as to say that in the Egyptian press the film had received support which almost amounted to *ijma'* (consensus).[31]

Such arguments based on elements taken from the religious legal repertoire, are not the monopoly of "Islamists" or "fundamentalists" but the expression of a general consensus on the part of all the actors in the contemporary

---

26 In this respect, Christianity knows no such ban on the representation of the prophets. The complaint lodged by the Christian lawyer does not mention the issue indeed, the petitioner merely accuses the film of distorting the biblical history with regard to Joseph.

27 We should remember that none of the courts dealing with the case was to have any further opportunity to examine the substance of the case. All they could do was to decide on their own competence to act and on the admissibility of the petition.

28 "God chose the prophets and the messengers on the basis of the purity (*naqa'*) and the grace (*fadl*) he sensed within them. They are therefore people of the highest virtue. With regard to their distinction through grace, God said: "We have preferred some prophets above others, and by this fact they are too noble (*a'azz*) to be represented or that a human being, or even Satan should incarnate them. God has preserved them and they have sought refuge in him, and this can never end because they enjoy an immunity (*'isma*) which protects them and keeps them far from capital and venial sins (*al-khatay al-kibar wa al-sighar*), be it before or after their Mission" (Dar al-ifta', 1292/1983).

29 An allusion to the fact that in the film the hero, Ram, succeeds in reclaiming desert land which no one had until then been able to farm.

30 Findings of the lawyers of Youssef Chahine for the session of 15 February 1995.

31 Youssef Chahine's writ of appeal, January 1995. At the end of his application this lawyer even quoted verses from the *sura* of Joseph.

Egyptian legal scene.[32] The Islamic normative repertoire is not the exclusive property of a clearly identified social group calling for further islamization, but is a legal resource in the hands of all the actors of the legal field.

The petition presented by a Christian lawyer can also be seen as an illustration of this instrumentalization of the religious normative repertoire, which is therefore not something pertaining to Muslims alone. Did this lawyer not use, in his petition, typically Muslim expressions, such as the name of God (*Allah* and not *Rabb*), adding after every mention of God the formula "*'azz wa jall*" or "*subhana wa ta'ala*" and, after each mention of the name of Joseph, "*'alayhi al-salam*"?

3. THE CLOSURE OF THE LEGAL FIELD

3.1. Representation of the Prophets

We might well have expected Youssef Chahine's lawyers to rely on the principle of freedom of expression,[33] and claim the right to be able to film the prophets.[34] Or that they would have disputed the legal value of the ban, which, in the long run, is only based on Islamic fatwas – which have no legal value in positive Egyptian law – and a simple administrative decision.[35] Yet they never questioned this ban on filming the prophets but merely tried to give it a restrictive interpretation by claiming that the ban should not prevent people from being inspired by prophetic values, yet without filming the life of a prophet.

Thus the defence sought to prove that *al-Muhajir* did not recount the life of a prophet, and that if the scenes differed from those of the Koran it was because the two stories are completely different and not, as the petitioner claimed, because there was a lack of respect for the Koranic text. They admitted that *al-Muhajir* was certainly inspired by the authentic religious example of Joseph, who was at one and the same time the "axis" (*mihwar*) and the "objective" (*hadaf*). But the story of Ram, the hero of *al-Muhajir*, is not that of Joseph the prophet. The film's hero (who is called Ram and not Joseph), born on the Arabic Island (and not in Palestine) within a Bedouin family, who had nothing to do with prophecy, chose to go to Egypt to learn science and then returned to

---

32 Likewise, in his second petition, the petitioner presented himself as the sheikh of a Sufi brotherhood, and his petition was supported by the supreme sheikh of the Sufi brotherhoods in Egypt. The Sufis also instrumentalize the Islamic repertoire, thus making "(...) a sacrifice which has become almost ritual to the new 'fundamentalist' God – an exercise in which contemporary Sufi sheikhs became experienced" (Luizard, 1993: 93).

33 Guaranteed by Article 47 of the Egyptian Constitution and Article 19 of the International Covenant on Civil and Political Rights, ratified by Egypt.

34 Many of them are closely involved in human rights NGOs in Egypt.

35 This Directive, No. 220 dated 1976, reiterated in condensed form most of the bans included in the Directives laid down by the Division for Propaganda and Guidance, dated February 1947 (Darwich, 1987: 101-102).

his own country – whereas Joseph remained in Egypt. Moreover, three centuries separate the story of Ram from that of Joseph.[36] Youssef Chahine, his lawyers claimed, chose to narrate the story of an ordinary man, and not that of a prophet, so that young people would find it easier to identify with him.

The defence and the accusation both agreed that the Islamic repertoire had to be respected and that it was forbidden to represent the prophets and to alter the Koranic text, but they differed with regard to the precise consequences of these principles. On the one hand, it is absolutely forbidden to change anything from the sacred text including the prophetic narratives to be found in the Koran. On the other hand, there is no ban on drawing inspiration from Koranic narratives and taking the values incarnated by a prophet as models.

Here we find the concept of "solidarity without consensus". The fact that actors share a certain number of normative statements does not mean that they have a common conception of their actual content. There is consensus with regard to the application of the Islamic repertoire, but not with regard to its content. "Agreement on the symbols does not prejudge the consensus on their content. In other words, agreement with regard to the symbols (and on the necessity) of re-Islamization, does not imply that there is identity of viewpoints with regard to the content of the latter" (Ferrié, 1996b, referring to Kertzer, 1988).

Moreover, if the actors' liberty to make use of the different resources is dependent on their individual strategies, there are also certain limits which are imposed by the social field itself. Plurality is limited by power relationships and power strategies. Only certain referents are allowed. Within the institutional system we encounter the phenomenon of "locking" (Burgat, 1993: 36), or "closure" of the normative field and of the legal repertoires in Egyptian society: "By closure, we mean the fact that the actors can only make use of a given number – and of necessity limited – referents and repertoires, not because the latter are limited in number, but because the conditions prevailing in a given field render reference to any unauthorized resource impossible. This circonscription of the legal field endures due to the monopolization of political interplay. As a result, those actors wishing to participate in power have to find their place in a political area which is not their own and seek to profit from it and to exploit a certain number of its potentialities by maximizing the opportunities it offers them" (Dupret and Ferrié, 1997: 198).

In this context of monopolization, the various forces involved will tend to try to bend the political power, while themselves being limited by an area of constraint, a structural logic, a social environment and implicit rules which force themselves upon them. The legal actors will seek to optimize the appeals to the authorized repertoires and referents in order to appropriate a share of

[36] Findings of Youssef Chahine's lawyers, 15 February 1995.

power, while taking care not to break with it or to call it into question, and to respect the limits laid down by the social environment.

Every force represented will seek to affirm the superiority and the exclusivity of its interpretation of the repertoire it supports, at the expense of other interpretations or forms of possible combinations, with the aim of gaining political power. These forces make no attempt to coexist with each other; rather they try to gain the upper hand to the detriment of other actors and political forces. It is not because there is, *de facto*, pluralism of normative repertoires, that there is a desire for coexistence between multiple normative orders, pluralism of law and of power.

By conforming to these limits, the actors recognize, strengthen and legitimize them. They reproduce the limitations of the field by submitting to its logic and by operating within its terms and its limits. By failing to call it into question, Youssef Chahine's lawyers strengthened the ban on filming the prophets.[37] The same is true of their attitude to the phenomenon of Egyptian nationalism and the position of al-Azhar.

3.2. Egyptian Nationalism

In addition to the argument based on the defence of religion, the petitioner also raised what he referred to as "the film's political content" and made personal attacks on Youssef Chahine, raising doubts about his loyalty to the Egyptian nation.[38]

The petitioner remarked that the film had been produced as a co-production with France, and was surprised at the amount of money spent on the production[39] and promotion of the film. He then went on to stress the fact that Youssef Chahine's associates "are not Egyptians", and emphasized that the principal Egyptian characters in the film are all portrayed as ridiculous, impotent or homosexuals. As for the rest of the Egyptian nation, "they are good for nothing" *(siyya')*, as stated in the film.

He also noted time and again that Ram is "a son of Israel" (*min bani Isra'il*). He highlighted the fact that in the film Ram, "son of Israel", is given a piece of uncultivated land in the desert, which no-one had ever been able to farm. Ram manages to turn it into a paradise. "What are Youssef Chahine and his two

37 Youssef Chahine even felt compelled to consult directly Sheikh Tantawi and Sheikh al-Azhar with regard to his first draft scenario entitled "Joseph", although, legally, this was not necessary.

38 Youssef Chahine is a member of the Egyptian Christian minority of Syrian origin, "a minority within the minority, which cannot pride itself on the same historic roots as the Copts and which must constantly justify itself" (Farag, 1995).

39 Youssef Chahine's lawyers pointed out that the petitioner submitted to the Court of Appeal a "translation" of the contract between the three associates which apparently stipulated: "beginning of the filming with 35 million" (*bidayat al-taswir bi 35 milyun*)", thus trying to create the suspicion in the mind of the judges, whereas what the contract really said, in French, was that "filming would be carried out on 35mm" (Findings of Youssef Chahine's lawyers, 29 March 1995).

foreign associates trying to say", asked the petitioner, "when they show that Ram, a son of Israel, is able to farm land which the Egyptians tried in vain to cultivate?"[40]

The petitioner concluded that the image of Egypt had been sullied within and outside the country.

Youssef Chahine's lawyers responded to this accusation by drawing the Court's attention to the fact that Youssef Chahine "has never allowed his country to become involved in any struggle whatsoever without associating himself with it through his artistic creations".[41] The defence then felt obliged to present the whole of Youssef Chahine's cinematographic *oeuvre* in order to prove that he had always acted as a good patriot and had sought to promote the greater glory of Egypt. Moreover, they added, the anecdote of the cultivation in the desert does not imply that the Egyptians failed in their efforts to make the land fruitful but merely demonstrates "the immense difficulty of such a task, difficulties which can always be overcome by science, patience, and hard and fruitful work, and it is these attributes which we must seek to implant in young people today".[42]

Here again we see that the defence is fighting on the same ground as the petitioner – a *nationalist* legal repertoire – and felt it had to respond to this type of accusation, trying to show that Youssef Chahine is just as – if not more – Egyptian than any other Egyptian, and that this can clearly be seen in his films. At no time was there any affirmation of a right to show Egypt in a bad light or to express pro-Israeli opinions. On the contrary, the lawyers affirmed that, through his films, it is obvious that Youssef Chahine has always opposed the normalization process with Israel.[43] Here again we find closure of the field which forces the actors to act within the limits of the same repertoires, and the strengthening of the limits which this brings with it.

3.3. Al-Azhar and Censorship of Artistic Works

A third form of the closure of the Egyptian field is expressed by the role attributed to al-Azhar in the censorship of artistic works.

The 1995 Law No. 430 dealing with censorship of creative and artistic works, and its statutory Decree No. 220 dated 1976, subject all films to a two-fold form of administrative censorship (before and after filming), in order to protect

40 Petition of Mahmud Abu al-Fayd, 15 October 1994.

41 Findings of the defence, 15 February 1995.

42 Youssef Chahine's writ of appeal, January 1995.

43 In their conclusions, dated 15 February 1995, Youssef Chahine's lawyers affirmed that the film-maker had decided to produce his film " '*awdat al-ibn al-dall*' (The Return of the Prodigal Son), at a time when it seemed that Egypt was "moving towards a reconciliation with the Zionist entity", in order to offer a warning against a policy which was in danger of leading to an Arab civil war.

bonnes moeurs, to maintain public order and security and to safeguard the higher interests of the State.

In addition to administrative censorship there is also a religious censorship, which is the responsibility of al-Azhar. Thus, under the provisions of Article 2 of the Ministerial Decree No. 220 of 1976, the government Censorship Department must consult (*ruju' ila*) the relevant religious authorities[44] before agreeing to the projection of films or television productions, or any other work dealing with Islam or the Islamic heritage. The implication of such consultation is interpreted in a different fashion by the various actors.[45] For al-Azhar, and for the petitioner, the opinion handed down is compulsory and therefore binding upon the government Censorship Department. *De facto*, the latter always gives way.

The Chahine case led to a direct confrontation between the Ministry of Culture and al-Azhar. The Censorship Department and the Ministry of Culture – its superior – were attacked by the petitioner because it granted a showing permit,[46] while al-Azhar, first summoned by the petitioner for failing to take any steps to ban the film, decided to become a co-petitioner, and, in its turn, accused the Censorship Department of failing to consult it.

It is true that the Censorship Department, because it was of the opinion that the film had nothing to do with Islam or the Islamic heritage, did not consult al-Azhar before granting the permit to film. Nevertheless it still insisted that the producer should avoid "anything which might tarnish Egyptian history and culture" as well as any issue "with political connotations" or "any link with the story of one of the prophets" and "anything which could lead people to believe that Ram went into Egypt in order to help the Egyptians build the pyramids or to teach them farming, rather than that he went there to benefit from the insights of Egyptian science and Egyptian scholars".[47] Since it considered that Youssef Chahine had taken these comments into account in the making of the film, the Censorship Department had authorized the film for showing on Egyptian screens. In the meantime, however, al-Azhar had learned of the scenario and had opposed the production of the film "in its present form" (*bi-suratihi al-haliyya*).

---

44 The laws and regulations with regard to the organization of al-Azhar place this responsibility in the hands of the Academy of Islamic Research, which, in its turn, passed it on to the General Department for Research, Compilation and Translation.

45 In its opinion handed down on 19 February 1994, the State Council stated that al-Azhar "is the only body competent to give a mandatory opinion to the Ministry of Culture in respect of the Islamic nature (*taqdir al-sha'n al-islami*) of the auditory or audio-visual presentations and the granting or refusal of an authorization".

46 Together with Youssef Chahine they appealed against the decision of the Primary Court dated 29 December 1994.

47 Censorship Department, 28 July 1993.

The defence did not dispute the actual principle of al-Azhar's intervention in cinema censorship. They could have invoked arguments based on the positive normative repertoire and considered that, for example, al-Azhar's opinion was not legally binding, or that it was void because it had not been given according to the legal provisions (it was not the Censorship Department which consulted al-Azhar, but rather the latter who intervened itself), or that the ban was imposed after the Censorship Department had authorized filming and that it was therefore too late. Or, even, that religious censorship is contrary to freedom of expression. However, Youssef Chahine's lawyers never questioned the principle of al-Azhar's intervention as such, and implicitly recognized that his opinions were compulsory. They only affirmed that, in this specific case, there was no need to consult al-Azhar because what was at issue was a fable rather than a Koranic narrative. Besides, al-Azhar's opposition was directed towards the scenario as presented in January 1994 and not on the final version of the film, after the producer had made certain changes in the course of filming and editing, in order to take account of the comments put forward by both the Censorship Department and al-Azhar.[48]

Thus the defence never attempted to dispute the legitimacy of al-Azhar's intervention and the compulsory effect of its opinions. On the contrary, they were of the opinion that they had "taken into account the remarks made by al-Azhar by cutting those specific scenes and altering dialogues so that they would conform to immutable Islamic values and ideas".[49] Does this not amount to saying that al-Azhar had the right to give an opinion on any scenario without actually having been formally consulted, and even in cases which have nothing to do with religion (given that the lawyers were of the opinion that the story was a fable)? Thus, in spite of the fact that their interest in this case was to win over al-Azhar, the defence strengthened the overall position of al-Azhar in the Egyptian society.

48 In its memorandum dated 31 October 1994, the Censorship Department did indeed confirm that Youssef Chahine had taken into account all the comments which both the Department and al-Azhar had made at the time that the permit to film had been granted and, as a result, it had granted a permit for the showing of the film. The Censorship Department however did not clearly state that its comments with regard to the script dated from July 1993, whereas al-Azhar only learned of the existence of the scenario in October 1993 and only made its position known in January/February 1994. The cuts made in the course of filming and editing are therefore, basically, the consequences of the remarks made by the Censorship Department and not those of al-Azhar.

49 Youssef Chahine's writ of appeal, January 1995.

4. PLACES AND ACTORS

4.1. Instrumentalizing the Courts

What we see is a diversion of the legal system by both sides for non-legal ends. Given the difficulty of gaining access to the public scene to make known their political ideas,[50] the actors increasingly instrumentalize the legal system and use accusations of a failure to respect *shari'a* "as a means of promoting re-Islamisation within the institutional framework of the Egyptian State".[51] This also corresponds to what Alain Roussillon has referred to as the "strategy of tensions", which he considers a characteristic of the development of Islamist activity since 1981: "What the militants try to do is to encourage limited confrontations with the authorities in highly 'symbolic' areas, with the aim both to manifest clearly and loudly their existence and their demands and to 'stage' the authorities' refusal to apply the ordinances of Islamic legislation" (Roussillon, 1990: 220).

In addition to the instrumentalization of the normative repertoires practized by all the actors, the closure of the Egyptian legal field also leads to the instrumentalization of the courts themselves. "The legal arena has been the subject of an instrumentalisation which, if its aim was not necessarily to oppose the existing political order, nevertheless forms part of a project to reintroduce a substance, to the substantialisation of a religious referent and of the Islamic normative repertoire which, up until then, may have seemed to be purely theoretical (...). Nowhere in the Abu Zayd case is power and the possessors of that power mentioned. On the other hand, wide use is made of the judicial institutions and of positive and Islamic legal references of Egyptian law, with the aim, arising probably largely from a desire to share in power, by adopting its methods and by seeking to clarify its postulates" (Dupret and Ferrié, 1997: 197*f.*).

In the *al-Muhajir* case, the parties involved all recognized the legitimacy of the Egyptian State courts,[52] and some of them tried to use them as an arena in which to express their political opinions. On the one hand such strategies strengthen the strategic importance of the courts, but on the other, they lead to divisions within the judiciary,[53] since magistrates may give priority to their own conceptions of law and society rather than to the norms of positive law, and use the ambiguities, inadequacies and dysfunctionings of the legal system in Egypt.

50 It is very difficult for a political party to gain official recognition as such (Burgat, 1993).

51 See Ferrié (1996a: 5) on the Abu Zayd case.

52 Al-Azhar's lawyer concluded his report dated 1 February 1995 to the Court of Appeal by stating that the case had been entrusted to "those most well-placed to provide protection, the judiciary", thus recognizing the legitimacy of the State courts and their authority to rule on religious issues.

53 All conflicts of competences that happened in this case took place within the same territorial court, the Primary and First Instance Courts of 'Abdin district in Cairo.

4.2. The Actors

In this case, three different main actors were at play: the judges, al-Azhar and the lawyers.

The judge on his part is often seen as a blind agent and a technician of the state institution, and has a certain number of civic responsibilities *vis-à-vis* the state, including the duty of discretion. However, in addition to his status as a state civil servant, the judge also belongs to other social fields which generate other norms or at least other hierarchies of normative repertoires. Thus some magistrates may be of the opinion that they are facing a dilemma: they have sworn to apply the law, but prior to that they have sworn to apply God's law. Others increasingly tend to intervene on the political scene, putting to one side their duty to be neutral, and thus contributing to the calling into question of the legitimacy of the state institutions. Yet others will show sensitivity to social demands calling for the immediate and total application of Islamic *shari'a*. They belong to the group of those who "no longer feel at home in a legal order which they consider unsuited to their way of life, or indeed completely foreign to their conceptions of the world" (Botiveau, 1993: 251).

The judge is not insensitive to the tool represented by legal pluralism, and he too does not hesitate to make use of the various repertoires, in terms of the aims he wishes to achieve. Legal pluralism exists within the state itself, and within the state the judiciary itself is not sheltered from this phenomenon of instrumentalization of the law. Of course, the judge has wide room to manoeuvre even if, in theory, he is only expected to apply the law. In the absence of any law, or where it is vague, he may look to the original spirit of the legislator or, on the contrary, decide to adapt the law to meet what he sees as the contemporary social needs (Assier-Andrieu, 1996: 204). "Legal judgments cannot be reduced to a reference to existing rules or to a given precedent: a good number of them are individual judgments, and often equity judgments" (Thévenot, 1992: 1293).

The judge will often be called upon to employ a plurality of referents, principally with regard to the two main repertoires in the legal field. He, like any other actor, will be influenced by his own moral concepts and will tend to give priority to the legitimacy of the norm over its legality. Thus he will tend to apply those norms which he considers legitimate rather than those which are legal; those which correspond to his own sense of justice.

Al-Azhar, subject since 1961 to the political authority which has used it to promote "good Islam" and to back its policies, increasingly began to rebel and to try to escape from its tutelage. It is not the first time that, in the courts, al-Azhar called upon its position as protector of the Islamic religion. Thus it was co-petitioner with the Ministry for *Waqfs* in the case dealing with interest rates which formed the basis for the famous decision of the Supreme Constitutional

Court, dated 4 May 1985. In the present case, however, this religious body took a clear stand against the state authorities since, among the defendants sued by the petitioners, was the Minister of Culture. Rather than Youssef Chahine, it was in fact the government, via its system of censorship, which was under fire, because it failed to follow al-Azhar's opinion (or rather for having failed to ask its opinion) and thus having failed to give religious principles their due place. The whole issue goes beyond the simple framework of the cinema to call into question the institutional operation of Egypt.

The conspicuous and intentional discretion on the part of the state – which claimed to take its stand on "the independence of justice" – while being directly implicated, clearly demonstrates its embarrassment and the difficulties it encounters in its desire to re-appropriate religious symbols while reaching an accommodation with the religious opposition.

Finally, we see that very often it is lawyers who behave as "entrepreneurs of morality", who instrumentalize the courts and call for the application of the Islamic repertoire, be it in this case where the Muslim and Christian petitioners were both lawyers, or in the Abu Zayd case, where it was a lawyers' collective which brought the case.

Thus, some lawyers use their skills and their privileged position with regard to the judicial organization to fight a state of law which they perceive as unislamic and therefore do not recognize. Botiveau has pointed out that since classical Islamic law has envisioned other modes of defending individuals in the courts than the use of lawyers, there is a contradiction between being a lawyer and calling for the reislamization of the society (Botiveau, 1993: 274). In spite of this contradiction, the Islamic tendency won the 1992 elections in the Lawyers' Union.

This may well be another example of the closure of this Egyptian legal field which operates in a closed space, among legal professionals.

CHAPTER 15
Legal Plurality
Reflection on the Status of Women in Egypt

NAGLA NASSAR
HASHEM, IBRAHIM & TAWFIK LAW OFFICE, CAIRO

INTRODUCTION

The theme of this book is to shed light on "legal pluralism in the Arab world". The term "legal pluralism" has varied meanings and applications. The geographic area of the "Arab world" comprises many different nations, cultures and legal systems. The complexity of the many varied definitions of legal pluralism is, therefore, not assuaged by the compound context in which it is applied. Limiting one's research to a geographical unit, such as a country, only partly solves the complexity of the matter. One still has to further define legal pluralism and decide on the meaning which will be used. For the purposes of this work, legal pluralism is understood to mean the existence of rules other than those enacted by the state which govern and shape social conduct. This reality exists in all societies whatever their structure or state of development.

The rule of law is never the only conduit for formulating social behaviour. However, some societies or areas have a tendency to overlook the rule of law, if not abandon it, for the benefit of social norms and economic realities. This phenomenon is more true of societies where the rule of law is not necessarily reflective of social needs. This is usually the case where the rule is either imposed by a non-representative process or is used as a tool of change deriving its force from an elite circle. Whatever the reasons underlying the existence of legal pluralism, it is always useful to know why a rule of law remains in the books but its application is greatly modified by prevailing non-legislated norms (whether social, economic or any other).

It is the purpose of this contribution to examine the interplay between state enacted laws and other norms prevailing in the geographic area occupied by the Egyptian State where several social groups and realities coexist. In a country like Egypt, because of historic reasons, enacted laws which are either ignored or modified by practice, are a reality which is reflected in almost every

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 191-204
© 1999 *Kluwer Law International. Printed in the Netherlands.*

branch of law and legal practice. Attempting to cover such a wide spectrum in a limited contribution of this sort is an ambition bound to failure and superficiality. It, therefore, was thought best to concentrate on a specific area of concern. The area of the personal status of women comes to the forefront as being a fertile field for pluralism. Laws relating to the formation and dissolution of marriage are best suited to this kind of study and lend themselves to issues of legal pluralism. The historical evolution of, the religious influence on, and the diversified social structures underlying this branch of law, endows it with a rare complexity ensuing from the plurality of its sources. Here, enacted laws are based on a heritage of Islamic notions which they neither wholly embrace nor totally ignore because of economic and social realities. These latter considerations mark the bottom line and determine the content and actual sphere of enacted laws.

First, we will reflect on the influence of these non-legal considerations on the formation of marriage and then its dissolution emphasizing women's particular status in the spousal relationship and to what extent it is affected by existing plurality in adopted solutions.

Secondly, a woman's share under the inheritance laws will be examined with emphasis on their social implications and connotations.

Finally, the value of a woman's evidential testimony will be introduced, but not in great detail, due to the lack of authority in this area.

1. HISTORIC EVOLUTION

Before detailing the development of family laws in Egypt, two matters should be clarified. First, marriage in Egypt is affected not only by enacted laws and regulations, but is mainly determined by prevailing social and economic realities and norms. In this respect, *shari'a* is not discussed as an independent source of law. However, it will be pointed out how marriage is either, directly or indirectly, affected by the formulation of the rule of law or the prevailing social norms.

Secondly, to avoid confusion, the terms "rules, laws or regulations" will be used to refer to any legislative enactment of the state. Any other forms of regulations which are not officially enacted or recognized by the state will be referred to as a "norm" or "concept". This, however, is not an evaluation of their role as an effective conduit of defining social behaviour. The discussion will attempt to show when and how such norms affect the implementation of the rule of law. It is interesting to note at the outset that these rules, in many instances, do not only narrow the application of the enacted legislation, but may influence its expansion as well.

Family laws provide the rules and orders regulating the personal lives of individuals in society. Primarily, these rules are concerned with the formation and dissolution of marriage and the consequences resulting therefrom. The

first law promulgated to regulate family relationships was Law No. 25 of 1925, which was amended by Law No. 29 of 1929. This law was based principally on the Hanafi school which was the school officially adopted by the Ottoman Empire, of which Egypt was a part. This law was applicable for fifty years, during which many of its shortcomings surfaced. These shortcomings were due to legislative inadequacies as well as the evolution of social and economic conditions that rendered the provisions of Law No. 25 greatly outdated.

In the mid-1970s, when the said Law was reviewed, the structure of society was totally different. Participation of women in economic activities and in the labour force became significant. Women became a recognizable social force with voices to be heard and views to be imposed. Legal provisions based on the assumption of women's passive contributions had to be reviewed in the light of new social realities.

Added to this, the economic realities of life no longer allowed for the man to shoulder all the financial responsibilities associated with marriage. Men had to pay the dowry or *mahr*, which forms part of the validation conditions of the marriage contract under *shari'a*. However, the great increase in population resulted in a housing crisis and radical increases in housing prices (which have currently reached unprecedented levels). Men could no longer afford to prepare the matrimonial home alone. A woman's participation was essential and it is the bride-to-be who customarily furnished the matrimonial home. All these changes led to women having a more prominent role and a more significant share of the social and economic life, and called for a review of the applied family law.

Fifty years later, Law No. 25 of 1925, as amended by Law No. 25 of 1929, was replaced by Law No. 44 of 1979. This was a progressive piece of legislation that was meant to face the new social and economic realities without disregarding Egypt's Islamic heritage. Unfortunately, this law had a brief life cycle extending to only a few years which renders its detailed examination unnecessary. In 1985, it was abrogated by the Supreme Constitutional Court on procedural grounds. In June of that same year, Law No. 100 was enacted retaining the major innovative solutions introduced by Law No. 44, while, however, exhibiting a less radical tone. It is the latter legislation that regulates family relationships today and is the subject matter of the subsequent discussion.

In this connection, it must be mentioned that two aspects of family relationships are not regulated by the aforementioned Law No. 100 of 1985. These are inheritance and spousal financial support laws. The first of these issues is subject to Law No. 77 of 1943, which is directly derived and based on specific Koranic verses that regulate inheritance in great detail.

As for financial support and alimony, these are still governed by Law No. 62 of 1976 that was neither amended nor abrogated by subsequent enacted legislation. However, some of its provisions were certainly affected, whether direct-

ly or indirectly, by Law No. 100 of 1985 with respect to issues involving financial implications to either spouse, such as the retention of the marital home.

2. MARRIAGE

2.1. Formation of Marriage

The marriage contract, according to the majority of opinions of *shari'a* scholars, is just another civil contract, which, like all other contracts, is constituted by the meeting of two wills. However, under *shari'a* rules, some precedent conditions precedent should be satisfied before a marriage contract can validly be concluded.

1. Marriage must be made public by means of witnesses to the contract signing.
2. The bride is entitled to a *mahr* or a dowry, to be paid at the time of concluding the contract or deferred to either the time of divorce or the death of the husband.
3. Both parties must fully consent to the conclusion of the marriage. This condition is not only essential to the conclusion of the marriage, but it is also required for the valid continuation of the marriage. This being so, it is interesting to see that under prevailing practice, courts never award divorce because of lack of continuation of consent of the wife or her mere desire to terminate the marital relationship.
4. The potential spouses must have reached puberty. The law, through an introduction of a minimum age requirement, has modified this condition. The minimum age for men is 18 and for women it is 16. The medical or physical definition of puberty is ignored in the law. Neither the legislature nor the courts, or for that matter the marriage registrar, were prepared to handle the question of puberty on a case by case basis. From an administrative perspective, imposing an unrebuttable legal presumption of puberty was a perfectly acceptable solution. The fixing of puberty at a certain age before which the conclusion of marriage would not be permitted was regarded as an administrative convenience that was not meant to depart from *shari'a* rules.

The current marriage age is not in line with actual puberty and puberty as a pre-condition of marriage is emptied of most of its content. Jurisprudence and practice justified the imposition of a marriage age which does not coincide with puberty, on the grounds that consent (which is a condition for the conclusion and continuation of marriage) otherwise cannot be ascertained.

Another social reason precluding any lowering of the marriage age is the population explosion currently experienced in Egypt. It is thought that any lowering of the marriage age may directly result in an undesired population increase. Regardless of the merits of this argument, the tendency among policy makers and the educated elite is to call for a further increase of the marrying age.

These suggestions so far have been coolly received by the rest of the community for being unrealistic to implement. Already, the required marriage age of sixteen for women and eighteen for men is detached from social realities and practices which ignore it in a great many instances. Tradition and custom, not the rule of law, are the factors that influence the actual marriage age of either sex.

In urban areas the actual marriage age is much higher because of prevailing economic and financial conditions of Egyptian cities. It is hard for young men to endure the financial responsibilities of marriage at a young age. It is also hard for them to attain the wealth necessary to start a new, independent life which usually involves acquiring (whether renting or buying) suitable housing.

This being so in the urban areas, the contrary is absolutely true of rural areas. There, the actual marriage age is far less than that legally mandated, especially for women. There are many social and economic norms leading to this reality. First, the entrenched belief that puberty is the age required by God to qualify for marriage. After puberty, a girl or a boy is no longer a child but an adult, required to carry out all religious responsibilities. Adulthood starts with puberty and child marriage is defined rather differently.

Secondly, the fact that premarital relationships are not allowed exerts pressure in favour of early marriages where teenagers' energy cannot be otherwise absorbed.

Thirdly, the financial burdens of marriage, because of the extended family, are much more modest in rural areas than in urban areas.

In addition, a girl is an economic burden since she does not directly and feasibly contribute to the household income (indirect contribution of women's labour within the family is usually not recognized). This statement is qualified by the fact that many of the poorer rural families send their girls out to work, whether in the fields or in urban areas. Besides being a social stigma, this solution possesses other social concerns and brings to the forefront the social burden of having single female members of the family. It is always a worry for a family having to keep, and, to a great extent, guard younger women, to avoid any unwanted male interaction which may cause the concerned family great social shame and damage.

Also, the restricted lives of girls (this to a lesser extent equally applies to urban girls), generate a genuine desire in girls to leave the family home. Departure from the family home is usually connected with freedom and independence and having one's own way of life (this may very well turn out to be illusionary, but nonetheless it is very true). These and other social concepts (girls are raised to regard their main role as marrying and having children and that their greatest success will be landing "an appropriate" husband), play a vital role in the early marriages of girls below the legally required age.

The question can be asked how an underage marriage can occur if a birth certificate is required to be presented at the conclusion of the marriage. This is

usually attained through what is called an "age certificate". This certificate is obtained by claiming that the concerned person was not registered at birth, and, hence, has no birth certificate. This would require a doctor's examination and witnesses' testimony as to the recollected birth date. Afterwards, the Health Authority having jurisdiction, issues an "age certificate". Many of these certificates are obtained by fraud and falsification of the data of the certificate itself.

Though clearly a criminal act, the practice of "age certificate" is neither rejected nor frowned upon by social standards, nor is it expressly regarded as a social threat. Seldom is a marriage annulled because the spouse(s) is/are underage, as long as the parents and both families have consented and approved its conclusion. Data is neither accurate nor available in this area, but very few – if any – underage spouse(s) would have the means (whether financial or otherwise) to access courts to annul their own marriage and prove the contrary of that stated in the marriage certificate.

To conclude, it may be stated that the marriage age is one of those issues where legal rules are greatly undermined because of prevailing religious, social and economic norms. A marriage age which reflects internationally recognized standards of protecting minors and prohibiting child marriage is practically set aside to the benefit of more influential social norms and needs.

2.2. Dissolution of Marriage

The Prophet Muhammad has stated that divorce is the most loathsome of legitimate acts to God. This may explain social attitudes towards divorce, despite its legality all the way through. Divorce never was illegal and neither was it prohibited by clergy or the law. However, because of the social structure and dominant position of the family, divorce has always been frowned upon. Another reason may be the social attitude towards divorcees, especially women. Before attempting to explain the current divorce law or practices, it is first essential to set out the rules regulating divorce.

Definition

Dissolution by divorce is termination of the marriage through the will of either party or the judge. In other words, dissolution of marriage by means other than death is termed divorce. The right to divorce is vested in the husband by law and religion. That is to say that when a marriage is concluded, the husband is vested with the right to divorce his wife whenever he pleases, without the need to show any grounds and incurring no responsibility other than financial support and alimony. There is no need for a man to request divorce from a court. It is merely sufficient for a husband to declare his wife divorced. Such divorce is valid even if it occurs in private and without witnesses. The registration of divorce is merely a requirement for official recognition, not validity.

To the contrary, for a woman to be able to divorce her husband, without resort to the courts for a judicial divorce, she must, at the time of marriage, have made express provisions for such right in her marriage contract. This is more commonly known as the *'isma* or the right to divorce vested in the woman. A woman having *'isma* is excused from seeking a judicial dissolution of the marriage and proof of any pre-legally acquired grounds for divorce.

Although commonly used in Islamic jurisdictions other than Egypt, the practice of giving the *'isma* to the woman is very rare in Egypt. It is socially unacceptable and families of repute would not engage in such a demeaning act.

One of the impediments of widely establishing an *'isma* to women is the unwarranted and mistaken belief that this will undermine the husband's right to an automatic divorce. It is thought that if a marriage contract contains a condition under which a wife herself has the right to divorce, this will necessarily mean that the husband will lose such a right. Although totally unfounded, whether from a legal or a *shari'a* perspective, it reflects the social attitude that allowing the wife such a right would infringe upon the husband's manhood. Yet another instance where social norms prevail to the detriment of both law and *shari'a*.

Types of divorce

a) Revocable divorces are those where a husband may reinstate the marital bond by his own will, without the need to obtain a new consent from the divorced wife. This right to reinstate the marriage without the need for consent from the divorced female spouse, is allowed during the *'idda* period (three months following the divorce, during which a woman may not remarry). Under both *shari'a* rules and legal provisions, a husband is allowed to divorce the same wife three times, after which the divorce is considered a final separation.
b) Irrevocable divorces are those that are final in the sense that a husband may not reinstate his wife without her consent and the conclusion of a new contract. A divorce is considered irrevocable either after the expiration of the *'idda* period or when it is expressly stated so and when the third in a series of divorces occurs between the same husband and wife.

   In the latter case after the third divorce a husband may not remarry his ex-wife unless, and until, she has consummated a marriage with another man and has been legally divorced from him. Under *shari'a* rules, a marriage that has had problems serious enough to lead to divorce three times, is probably a limping marriage. There is no point in continuing in such a relationship. Also, this rule is meant to force men to reason before acting in a divorce situation and to allow for more rational behaviour. For these very same reasons, the law has retained this rule. However, practice has deprived it of all real content.

Traditionally, couples who have gone through three divorces and yet want to reinstate their marriage, will simply use a phony legitimizer. This means that the woman concludes a marriage contract that is not consummated with a man (usually paid for the job), then divorces him and is able to re-marry her ex-husband. Another example of how social practice can disregard both law and religion.

Grounds of divorce

As mentioned above, a husband need not show any ground for divorce. He may simply divorce for no reason other than his desire to do so. However, the same rule does not apply if the wife seeks divorce. Not only does she need to apply for a judicial divorce, but, in addition, she has to prove, and to bring her case within, one of the legally recognized grounds for divorce. It is not sufficient that a wife no longer desires to live with her husband. Unlike a man, a wife has to have a legally recognized reason to terminate the marriage. In other words, the grounds for divorce stated in the law are grounds for awarding divorce to women, not to men. A wife is granted a divorce if she can bring her case under one of the following causes:

a) Prejudice. This is in fact the most widely defined ground of divorce. Courts have elaborated on factual instances constituting prejudice which is regarded as comprising any incompatibility between the spouses whether socially, culturally or even sexually. The Court of Cassation held that "prejudice is to be interpreted to include all forms of mistreatment whether physical or psychological". Courts' decisions are plentiful in this respect and extend to include any act or omission (whether by words or action) that physically or psychologically injures the wife. Included under this heading is the instance of remarrying or taking a second wife which, because of its special nature and evolution, will be discussed seperately.

   It is essential in this connection to reflect on the conditions to be satisfied before a judge may award divorce because of prejudice. First, the mistreatment or abuse, whether physical or psychological, should be coming from the husband and not contributed to by the woman. A wife, under this condition to be granted divorce, should prove that her mistreatment or abuse was initiated by her husband and not provoked by her own conduct. The burden of proof lies heavily on women in these cases.

   It is hard in a disintegrating spousal relationship to allocate the blame to only one party. A woman, in one way or another, is bound to have participated to the existing form and stage of her relationship with her husband. If her husband proves that the provocation of his wife or her misconduct is the cause of the abusing mistreatment, the woman will either lose her case or her financial rights, as the case may be. Courts look unsympathetically at disobedient wives. It is irrelevant that this may be provoked by a lack of desire to continue in the matrimonial relationship.

By itself, lack of desire to continue in a marriage is not a recognized ground of divorce allowing the prejudiced woman relief. Under the law and judicial practice a woman may be obliged to continue in a spousal relationship which she no longer desires. This solution, though reflecting social conceptions of women and their roles, overtly conflict with religion and *shari'a* under which consent is not only conditioned to the conclusion of a marriage, but also its continuation. This provides another example where social beliefs and realities dominate both law and practice and ignore Islamic requirements and tradition.

The second condition to be fulfilled before divorce may be granted because of prejudice is that the continuation of marriage becomes impossible between both spouses. An irreparable harm must have befallen the marriage. The test applied by courts to determine whether an irreparable damage to the marriage has occurred is a subjective, not an objective one. What matters is that the marriage of the litigating spouses is damaged beyond repair and a normal spousal relationship is impossible to continue between them. Whether the same instance may be regarded as an irreparable damage by an objective test based on the average spousal attitude, is irrelevant. Here courts give special attention to the litigating couples' social, cultural and educational standing in the community. What is acceptable for a specific couple under certain circumstances in a certain social environment may not be regarded as such in respect of another couple with different circumstances and social environment. Blue collars are not judged by the same standards as white collars or elite. Each is held to the standard of an average couple in his community with the general limitation that there is a minimum behavioural standard which no couple is allowed to fall below. The courts never accept physical abuse even if it is widely practiced within a certain community. This subjective test determining prejudice and its effect on the matrimonial relationship is a leeway for social realities to define the exact standard of required spousal behaviour. Though appealing from a social perspective, it is nonetheless an undeniable reflection of the class structure of the Egyptian society. A reality which under the proposed subjective test, may lead to multi-legal pluralism and a serious diversion in the standards of applied justice.

The third condition required to grant divorce because of prejudice is the failure of all conciliation attempts between the litigating spouses. Before deciding on the case, a judge has to refer the dispute to a panel of three referees or conciliators. These are not judges and have no official or judicial authority. Rather, they are chosen from among the litigating spouses' families (or social circle) and are assigned a quasi-judicial task. They are supposed to investigate the reasons for the disintegrating spousal relationship.

Because these referees are not law officers and they belong to the same social circle of the litigating parties, they are expected to have a better

insight into existing matrimonial problems than would a judge. They go to the spouses at home and watch closely what is happening. They interact with the spouses and their problems, a task which a court is not capable of doing. This semi-judicial body is entrusted with the responsibility of recommending divorce to the court as a solution, either in the form of granting or denying divorce. It is indisputable that non-legally trained referees are bound to judge the matter not in reference to strict legal rules, but to prevailing social norms.

It is interesting to note that sitting judges consider themselves bound by the conclusions reached by these referees who ultimately shape legal reasoning. The contribution of social norms to this process is evident. It is not the legal or religious solution that dominates but the acceptable social behaviour. This referee process complements and mirrors the subjective test previously analyzed. Under the subjective test the individual social behaviour of the litigating spouses has to be identified and examined by those nearest to the social realities in which it is operating. A sitting judge certainly is not the most qualified for this task, but rather a person coming from the very same social background against which the litigating spouses' behaviour will be tested.

A close analysis of the conditions which need to be satisfied before a court may grant a divorce because of prejudice, reveals the complexity of such cases.

With the exception of battery and other forms of physical abuse, it is very difficult to prove prejudice, be it social or otherwise. Rarely is a divorce granted on these grounds, with the result that many women remain in unhappy marriages simply because they cannot meet the required standard of proof.

b) A husband, without the consent of his wife, has married another woman. This is a novel ground which was introduced for the first time by Law No. 44 of 1979 and retained by Law No. 100 of 1985. Under such circumstances, a wife, within 12 months notification of the second marriage, may seek divorce on the basis of material or emotional prejudice ensuing from the second marriage.

   The wife still has to prove prejudice. The question that has yet to be answered by the courts is whether the standard of proof required under such instance is similar to all other cases of divorce for prejudice, or whether the burden of proof is shifted to the husband or if an easier test is applied in favour of the wife.

   All these questions remain unanswered. However, it is interesting to note that to conform to the spirit of the newly introduced amendments would require regarding the instance of polygamy itself as evidencing prejudice. However, how far a male dominated bench, where other social norms gov-

ern, may accept such interpretation remains to be decided.

c) A husband has been absent for more than one calendar year, whether such absence is attributed to voluntary desertion or because of imprisonment for a term exceeding three years. Experience has proven that this is the more commonly used ground for divorce.

   Judicial precedents show that courts show more willingness to grant divorce in cases of absent husbands than in any other cases. Another factor for this is that the burden of proof is relatively lighter in these cases. It is always easier to prove that a husband no longer lives at the matrimonial address than it is to prove prejudice or any of the other divorce grounds.

d) A husband, though living in the matrimonial home, no longer supports the family or is suffering from a chronic incurable disease. These grounds are hard to prove and are unsympathetically looked upon by courts, though strictly speaking, in law and *shari'a*, marriage seems to be for the good, not the bad. This is to say that a wife, under *shari'a* rules and the enacted law is not required to continue in a marriage where the husband can no longer financially sustain his family or where he is not capable of cohabitation.

   These rules do not reflect the social norms of society and hence, are restrictively applied by the courts. It is unacceptable that a wife can desert her husband and ask for a divorce simply because of the husband's inability to earn or to cohabit. A male bench would not feel sympathetic to such claim. Also, very few wives would have the social courage to terminate a marriage because of such reasons. A social rule of conduct would deter the wife in most cases from seeking a divorce solely based on these considerations.

e) A husband's impotence (or any sexual defect) or sterility. Although related to the above ground, it is however treated totally differently. If proven (it is very hard to succeed in proving impotence), divorce is usually granted because socially, cohabitation and reproduction are regarded as the main goals of marriage. An impotent man should not have married to start with. However, a sick man, incapable of cohabitation, deserves more sympathy – after all, a marriage is for better or worse. Once again, prevailing social norms interfere to distinguish between legally and religiously indistinguishable instances.

   In addition to the above stated difficulties, the lengthy divorce procedures and financial costs deter many women from seeking judicial divorce which they would otherwise have attained. This reality does not reflect equally on all sectors of society. Women coming from wealthy backgrounds or those employed, having their own source of income, usually refuse to be locked into a limping marriage. In many instances, women with means buy divorces. They either pay their husbands, or waive their financial rights, to obtain a divorce.

It is interesting to note that none of the above grounds of divorce make allowance for the consensual basis of marriage or what was earlier mentioned, that consent is a requirement for the valid continuation of the marriage. Under *shari'a*, a woman cannot be locked into a marriage against her own will. If she so wishes, a wife may walk out of a marriage at any time, as long as she no longer desires to cohabit with her husband. However, as revealed from the above *exposé*, neither enacted law nor prevailing social norms allow women such expanded rights. This is one of the instances where religion has yielded to social norms which have dictated the adopted laws.

Divorce consequences

a) A divorce, whether unilateral or judicial, dissolves the marital relationship.
b) Unilateral divorce has to be notified to the divorced wife within 30 days of its occurrence (Law No. 100 of 1985). This duty to inform is imposed not on the divorcing husband, but on the *ma'dhun* who registers the divorce. An unregistered divorce, though obviously valid, does not produce its legal effects insofar as the uninformed wife's pecuniary rights (including inheritance) are concerned.
c) The wife, after the divorce, is obliged not to remarry for a certain period which is referred to as *'idda*. This period is three months. If during the *'idda* period, the wife is found to be pregnant, the period is extended to delivery.
d) The wife is entitled to several pecuniary rights:
   - the collection of her deferred dowry pursuant to the marriage contract;
   - *'idda* financial support for one year. Payment out of a social bank upon a summary judgment is guaranteed not to jeopardize the wife's rights and to avoid long litigation. This rule extends the *shari'a* rule which allows for financial support only during the *'idda* period.
     There is a priority to such debt. It takes precedence over all other debts, whatever their registered priority and it is the first to be collected. Under Law No. 62 of 1976, the order of priority of collecting different items under the financial support and alimony heading, gives preference to the wife's share and then the children's shares. Evading these obligations also constitutes a criminal offence penalized under Article 293 of the Penal Code;
   - *mut'a* alimony which may be awarded for two years following the divorce. This alimony is calculated on the basis of the husband's financial standing and its legitimacy is very much doubted under *shari'a.*
e) Custody of children – until a certain age – remains with the mother as long as she does not remarry. Upon remarrying, custody goes to the maternal or paternal grandmother, as the circumstances may be. Custody of boys remains with the mother until the age of 10 and for girls to the age of 12, after which the father has custody. This age limit may be extended in cases of boys to the age of 15 and for girls until marriage. Visitation rights are also awarded to the non-custodial spouse.

In practice, things are not always that easy and many disputes arise in respect of custody. *Shari'a* rule does not fix an age after which custody reverts to the father. It rather applies the flexible standard of "the need for the mother's services" or the age of puberty. This is one area of law where neither *shari'a* nor enacted legislation decides the norm, but rather the prevailing social conduct.

f) A major worry of both spouses when dissolving the marriage is the matrimonial home. In light of the very tight housing crisis, it is a major concern and the party moving out usually finds great difficulties in finding placement. This reality up until 1979 did not reflect itself in any legal instrument.

Under *shari'a* rules and enacted laws, it is the husband who provides the matrimonial home. Thus, it is only natural and just that a wife moves out of the provided home once the marriage partnership is dissolved. This may have been the reality of older days and the rationale of an outdated law. However, although under Islamic *shari'a* a wife is not required to contribute to the establishment of the matrimonial home or to the household thereafter, the reality of life does not accord this. To remedy the situation and to provide legal protection for a factually existing situation was resisted tremendously. The legal protection finally adopted was far from satisfactory.

The matrimonial home goes to the parent who has custody of the children, a rule which, although providing for the welfare of the children, ignores both religion and social realities.

2.3. Polygamy

The law does not restrict polygamy in any way. It merely requires a husband to notify his wife on taking a second wife. The wife is entitled to ask for a divorce within one year of such notification. This rule has been severely criticized for being restrictive of the *shari'a* right to polygamy. However, if considered in the light of the consent basis of marriage under *shari'a*, it is easily validated. In practice, polygamy only amounts to 2.8 percent in Egypt. The question is whether such a low percentage justifies radical legal actions which may lead to serious consequences.

3. INHERITANCE

This is one area where the only applied rules are those endorsed by the Qur'an and enacted by Law No. 77 of 1943. Unlike family law, they apply to all Egyptians, whether Muslim or not. These laws are closely tied to the Islamic organization of the family which obliges the males to shoulder all the financial burdens of the social unit. It does not require any contribution on the part of the woman. Accordingly, women only inherit half the man's share. However, the realities of modern life are different. Women have become major partici-

pants in the commercial and economic life. To overcome such discrepancy between life and law, many parents transfer, during their lifetimes, part of their estate to the female members to place them on an equal footing with male members. Alternatively, a will is drawn up in favour of the female relatives to raise her share to equal that of the male counterparts.

4. WOMEN'S EVIDENCE

The Egyptian Constitution provides, under Article 40, that all "citizens are equal before the law. They have equal rights and duties without distinction because of sex, origin, language, religion or belief". Under this rule, a woman's testimony has to be treated not differently than a man's. This rule applies to all branches of law with the exception of those involving personal status. Because the latter directly involves the application of *shari'a*, a man's testimony has more evidentiary weight, with the testimony of two women equal to that of one man.

The constitutionality of this rule has not yet been challenged and the outcome of such a battle is unpredictable. It would very much depend upon whether, according to Article 2 of the Constitution, *shari'a*, as a source of law, would be ranked on an equal footing with the Constitution.

5. CONCLUSION

The above analysis reveals how, only with respect to the few issues discussed, much of their existing organizational form is a by-product of more than the written rule of law. It is a combination of both religion and other social norms.

CHAPTER 16
Formal and Informal Finance in Egypt
The Significance for Legal Pluralism

ZIAD BAHAA-ELDIN
ATTORNEY-AT-LAW
LEGAL ADVISOR TO THE MINISTER OF ECONOMY
OF THE ARAB REPUBLIC OF EGYPT[1]

INTRODUCTION

The co-habitation of formal and informal financial institutions and practices in various societies, with differing levels of economic development, reflects the existence of a dual legal structure whereby a different set of rules, regulations and remedies corresponds to each of the two spheres of financial activity.

This chapter will attempt to contribute to the debate about legal pluralism by analyzing the process by which both the formal and informal financial systems coexist and the various relationships which tie them together in the context of the Egyptian financial system. It will also attempt to contribute to the theoretical research on legal aspects of informal finance, and to show that, far from suggesting tension and conflict, the coexistence of formal and informal finance allows lenders and borrowers alike a wider menu from which to choose, thus arguing that pluralism may be a desirable and harmonious process.

Part One of this chapter will start by introducing certain conceptual ideas about formal and informal finance. Part Two will discuss in some detail the Egyptian case. Part Three will summarize the conclusions and findings of this chapter.

1. FORMAL AND INFORMAL FINANCE

Financial transactions occur in order to satisfy an important need in the society. This is the need to transfer funds from surplus sectors in the economy to

---

[1] The views expressed in this chapter are those of the author alone and constitute part of his academic research on the subject. They are not to be attributed in any manner to the Egyptian Ministry of Economy.

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 205-218
© 1999 *Kluwer Law International. Printed in the Netherlands.*

deficit sectors in a manner that is beneficiary to both groups and conducive to an efficient use of resources. The development of financial intermediation throughout the history of human society has been concerned with increasing the available options, reducing the transaction costs and improving the means of transfer of funds among borrowers and lenders.

Regulators of financial markets, on the other hand, have been concerned with keeping up with such developments in order to safeguard the rights of lenders and borrowers alike and reduce instances of fraud, negligence, excessive risk taking and other forms of abuse of the financial market. The dramatic development in market mechanisms and processes as a result of advances in the fields of communications and electronics as well as the growing trend of market liberalization have taken formal financial markets into new realms unknown and unimaginable only a few years ago. These have, in their turn, increased the importance of the regulatory role and added to an ongoing debate over the suitability of advanced financial services to the needs of most users around the world.

Formal regulated markets are not the only place where borrowers and lenders interact. A wide variety of informal and quasi-formal transactions allows the act of lending to occur far from the eyes of regulators.[2] From simple informal loans amongst members of a family, to rotating credit schemes involving groups of individuals, to the traditional role played by pawnbrokers and professional money lenders, informal finance has been known to exist in virtually every society either on its own, or parallel to the formal financial system.

Egypt is no exception to that. The modern banking system that was introduced in the middle of the nineteenth century, and capital markets which became operative in the early twentieth century were not the first, nor were they to become the only, arena for financial exchange. Alternative financial arrangements have either persisted or come into existence, and they continue to operate until today in parallel with the formal financial system.

A number of major assumptions have had a significant impact on shaping the wider debate about informal finance. These concern the role of finance in economic development, the relationship between formal and informal finance, the existence of barriers to formal finance and the methods by which such barriers may be reduced.

---

2 The distinction between formal and informal finance is in itself a subject of controversy. In this chapter the term informal finance refers to all financial transactions occurring outside the regulation of a central monetary or financial market authority. The term 'quasi-formal' shall be used to describe a range of activities and transactions which equally fall outside the realm of central monetary authorities, but which are partly regulated or supervised by other institutions and authorities. This assumes that financial markets should be seen as a continuum of tools, institutions and mechanisms which ranges from the formal to the informal, rather than a simple dichotomy of one versus the other.

1.1. Finance and Development

Financial systems are assumed to have a positive role in a country's economic development. By allowing the mobilization of unused savings and their allocation in productive investments, financial systems are considered the engine for economic growth. This view is not universally held by economists, some of whom consider the financial system a consequence rather than a cause of economic growth. But the general trend in economic thinking accepts at least a certain degree of positive contribution from the financial system towards a society's general economic performance.[3]

In particular, the capacity of financial systems to reduce transaction costs for both lenders and borrowers is often seen as their greatest advantage. On the savings side, the movement of funds from hoarding or investment in tangible assets towards investment in financial assets is prompted by an expectation of a higher return and a lower cost of saving. On the investment side, the reduction in transaction costs is achieved through specialization, portfolio management, the gathering of information, as well as different aspects of economies of scale and scope.

However, it is important to note that if financial markets are a necessary condition for economic growth, they are by no means the only one. What investments are made of ultimately depends on the levels of income as well as expectations about future incomes.[4] The same argument applies to the investment side of economic growth. A financial system could make savings available for investment, but the decision to borrow such funds and invest them will ultimately depend on other factors such as available investment opportunities and the expected return on investment as compared to the cost of borrowing.

1.2. Formal versus Informal Finance

It is widely believed that large sectors of developing countries' societies have limited access to modern, formal, and regulated financial services. This, it is assumed, is in spite of the need of those particular segments of the society for financial services as a way of encouraging savings and investment, and alleviating poverty.[5]

However, to start by asking what prevents or discourages certain people from using formal financial services, assumes that ordinary behaviour warrants the use of such formal systems. For people who have never used banking services, nor have any reason to do so, the necessity of these services may not be so

3 For example, Kazarian, 1993: 11-36. See also Germidis, Kessler and Meghir, 1991, and Ghani, 1990.
4 Kazarian, 1993: 20-21.
5 Holt and Ribe, 1991: 6-7. The authors were careful to add that the so-called ultra-poor rarely benefit from their inclusion in financial markets anyway because whatever credit they receive is likely to be directed to urgent consumption.

obvious. Moreover, the same question implicitly assumes that any person is normally the user of either the formal financial system, the informal one, or an alternative quasi-formal mechanism. What such a question does not account for is the case of people who do not use financial services at all, as well as those who use both the formal and the informal systems simultaneously. In fact, the question should be whether formal finance is necessarily superior to informal and other alternative forms, and whether barriers which exist between certain people and formal finance are so well defined that an individual is either in or out of the realm of formal activities.

Both questions have been widely discussed lately. With regard to the first, the mere existence and persistence of alternative financial arrangements and their capacity to accommodate a demand that is otherwise unsatisfied, confirms that in certain situations informal finance may be a superior engine of intermediation. As to the second question, empirical research has shown that behind the choice of formal or alternative finance is a rational pragmatic decision which weighs the benefits and costs of each option, and which may find the combination of both formal and alternative arrangements the most beneficial one.[6]

Theoretically speaking, formal financial systems provide their users with three advantages: safety as a result of the existence of a regulatory system with adequate prudential safeguards, wider resources which allow the lending of larger sums for longer periods of time, and a higher degree of expectations and clarity in terms of the rights and obligations of the parties involved. Informal finance, on the other hand, is often more flexible in providing credit that is tailored to the needs of the borrower, easier to deliver, administer and monitor, and capable of reaching much wider circles of individuals and adapting to their needs. However, higher interest rates have often been associated with informal lending, as well as the latter's capacity to provide only limited resources and for a short term.[7]

Formal finance, it is argued here, is accordingly not superior in itself to informal finance. It is only more desirable by individuals and of a higher value to the society at large in so far as it achieves the role for which it was instituted in the first place, namely safety, availability and certainty, and to the extent that its benefits outweigh the advantages of informal finance, namely flexibility and familiarity. Where formal benefits do not outweigh informal advantages, alternative financial practices will persist and will fulfill a function that is essential for the development of society.

6 For example, Abdelkarim, 1992, Howell, 1980, Jagannathan, 1987.
7 See for example Kitchen, 1986, and Ghate, 1992.

1.3. Barriers to Formal Finance

Formal financial markets remain inaccessible to several groups of individuals in developing countries, particularly the poor and women among them. Recent economic and anthropological research has attempted to explain this phenomenon, first by refuting certain widely held beliefs concerning this matter and then by providing an alternative explanation.

Two such widely held beliefs are worth mentioning: the first is that poor borrowers, particularly women, are credit risks because of their inability to invest prudently and because they tend to use whatever credit is available exclusively for consumption purposes. The second is that poor and uneducated borrowers find difficulty in grasping the intricacies of formal finance. To these two assumptions, recent research has responded by showing that poor people's saving and consumption decisions are no less rational than those of other groups in the society and that they are no more credit risk than any other group, provided the credit offered to them is made in the right context.[8]

Other factors should, therefore, be considered in explaining the exclusion of poor borrowers from the formal financial system. Among these are the high transaction costs of borrowing, collateral requirements, and the general cultural and social barriers which inhibit poor people from dealing with a bank, such as the hostile attitude of the bank's staff towards some customers.[9]

Some of these factors are particularly relevant to the accessibility of women. For instance, travelling to the bank's premises may entail exceptionally high transaction costs due to the woman's multiple work obligations, and may be socially unacceptable. On the supply side of credit, lending to poor clients may involve higher transaction costs for the formal financial institution due to the small amounts of credit provided to a large number of clients which requires large costs in processing applications and monitoring funds.

1.4. How to Reduce Barriers to Formal Finance

A traditional approach generally assumed that the main barrier was the high lending interest rate charged by financial institutions, and that the best way to attract poor borrowers was through government programmes which initiate and subsidize such lending. However, experience has asserted the failure of this approach due to several factors. On the one hand, subsidized credit may distort the macroeconomic and regulatory environments, which in turn hinders the financial sector development. On the other hand, subsidized loans often do not

---

8 Holt and Ribe, 1991: 2-6.

9 Such hostile attitudes to clients who seem poorer than average or those who walk into a bank in traditional costumes mainly worn in villages were experienced by the author during his work in an Egyptian bank.

improve access to credit because they get diverted to less needy borrowers who are capable of using their influence and contacts to qualify for credit that was originally intended for the poor. Finally, subsidized credit has been criticized for failing to achieve, on its own, the required conditions for poverty alleviation when investment options are limited. Without the existence of adequate training, advice, markets, and other elements of infrastructure, credit is likely to remain debt.

It is precisely for the latter reason that more recent, and successful, programmes which aim at reducing poor people's barriers to financial services have tended to emphasize institutional development rather than credit subsidy. In particular, such programmes have emphasized the development of the borrowers' skills, targeted poor clients rather than poor sectors, encouraged their clients to save any surplus funds, and have been primarily concerned with the reduction of transaction costs as a way of reducing lending barriers.[10]

2. THE EGYPTIAN CASE

Informal and alternative forms of finance are conducted in Egypt parallel to formal ones. However, the lack of data is so acute that it is difficult to make any accurate assessment of the size of informal financial transactions.

2.1. Barriers and Accessibility

In Egypt, like elsewhere in the developing world, it is possible to think of many barriers which could hinder some people's accessibility to formal banking services. These include economic, social/cultural and legal barriers. Economic considerations affect the price of credit and the rate of return on investment, both of which will determine whether a certain individual will choose formal banking or alternative arrangements.

From the social and legal perspectives, other considerations have a significant impact. A study based on a household survey, undertaken in 1992-1993 in four villages in the Qalyubiy Governorate, north-west of Cairo, reveals the following results:[11] of the sampled households, 14 percent had no relation whatsoever with either formal or informal financial services, and of the remaining 86 percent, almost one half (46.7 percent) borrowed simultaneously from the formal and informal markets. This confirms that barriers to formal finance are

---

[10] On successful experiences, see Yaron, 1992. See also generally Padmanabham, 1986.

[11] Mohieldin, 1994. This survey shall be referred to in this chapter as the Qalyubiya Survey. Its results should not be considered accurate indicators for Egypt due to the fact that they are based on a relatively small sample size of two hundred households, and that the survey was undertaken in a rural community that is close to Cairo. But the results of the survey may, nevertheless, be useful as a general indicator of the main barriers to financial services that exist in Egypt.

not always as strict and well-defined as is often suggested by the existing literature and that a significant proportion of people either do not use financial services at all, or combine the available formal and informal services. Among those who dealt exclusively with either formal or informal markets, use of the latter was more frequent than of the former, although formal lending tended to be for longer periods of time and in larger sums of money.

The Qalyubiya Survey further addresses the issue of why borrowers dealt with each of the two markets. It reveals that borrowers from the formal market tend to be wealthier and more educated than those who borrowed from the informal market, thus suggesting education and collateral as the main determinants. But it also reveals that borrowers from the informal market have a different perception as to why they may not have access to formal borrowing. High interest rates in the formal market, lack of collateral, perceived conflict of conventional banks with Islamic legal principles, and the fear of attracting the attention of the tax authorities are the four main barriers mentioned by the surveyed sample.

2.2. Islamic Law

The Islamic prohibition on usury under principles of Islamic law is emphasized by the Qalyubiya Survey as a barrier to formal finance on the basis of the absence of professional moneylenders and the fact that informal credit seems to be, generally speaking, free of an explicit interest rate (Mohieldin, 1994: 16). This does not mean that inflation and profit are ignored, on the contrary, the Islamic prohibition on usury has led to the use of ingenious methods and mechanisms which account for both inflation and profit. Among these, for example, are the use of profit and loss sharing methods, repayment in kind in order to conceal an interest payment, and joint purchase of commodities in rotating credit schemes.

2.3. Collateral Requirements

As regards legal barriers, those interviewed in the Qalyubiya Survey mention the lack of collateral as the most significant one. It also reveals that more than half of those actually refused lending by formal institutions managed to obtain the required credit from informal sources. And when asked why their requests for formal credit had been refused, 60 percent stated the lack of collateral, 25 percent the fact that the loan was required for consumption purposes, and 15 percent due to previous bad history with the formal institutions (Mohieldin, 1994: 12-13).

To understand why lack of collateral is a significant obstacle, it is necessary to understand the treatment of security in Egyptian banking law and practice.

But it is important to note that the issue of adequate collateral does not arise until the bank which has been approached for making the loan has made a preliminary decision to lend. Prior to such decision, the bank investigates the borrower's status and reputation in order to ascertain whether he/she will be able to promptly repay the debt.[12] The investigation stage should be seen as the first potential barrier to formal lending. It is particularly important in view of the wide discretion normally given to the bank's staff in this matter because it is the stage at which any prejudices against poor, rural or female borrowers is likely to be exercised.

Under current banking practices in Egypt, lending is made against one or more securities which are, generally speaking, either real or personal. Real securities are taken over some or all of a borrower's assets and they include mortgages on real estates and pledges on movable assets. Personal securities arise where the creditor takes the security from a third party who becomes liable to repay the debt if, and when, the original borrower defaults.[13]

The problem with these forms of collateral is that they rely almost exclusively on the borrower's wealth, or on his/her ability to produce wealthy guarantors. Although this may be considered prudent banking, it results in the elimination from the world of banking of all those who have no collateral. And although Egyptian law and banking practice recognize lending against receivables or against other forms of rights in forthcoming proceeds, such security is normally accepted only in conjunction with other wealth-based collateral.

The restrictions created by the collateral requirement are a universal phenomenon, and recent writing has shown the growing interest in this problem. However, what often escapes writers unfamiliar with the developing world is the fact that this is a problem which does not only affect those who own no, or very little, property. It is equally a problem with regard to those who, in spite of significant ownership, have no way of proving it and therefore of presenting to the bank what the latter deems to be adequate collateral. This situation occurs when the law and practice concerning transfer and registration of titles is neither sufficiently developed nor observed, so that a large proportion of assets that are effectively owned by certain individuals are not formally registered.

In Egypt, this problem exists in spite of the fact that the law and institutional framework of dealing with real estate transfer and registration is relatively sophisticated. There are two main reasons why such problem persists: first the registration fees and taxes are too high to encourage people to come forward. And second, in view of the strict rules governing the distribution of a deceased person's estate in Egyptian law – with its origin in *shari'a* – the distribution is

12 'Alam al-Din, 1987, Vol. II:1056.

13 For details of lending securities in Egyptian banking law and practice, see 'Alam al-Din, 1987: 1057-1112. For a comparison with English law, see for example Goode, 1995: 635-674.

often conducted informally and remains unregistered in order to avoid those strict rules. This is particularly true with regard to women's inheritance which is protected in law – albeit in a smaller proportion than that of the male counterpart – but which is often resented and avoided by declaring neither the death of the original title holder, nor the redistribution of the estate.[14] The result is a situation where not only those with no significant wealth are barred from obtaining formal credit, but even those with sufficient but unregistered wealth find it difficult to convince the banks that such wealth may be used as collateral and that their finances are sound.

2.4. Adverse Effect of Regulation

Aside from collateral requirements, other legal barriers persist. One such barrier that is rarely considered or mentioned is the set of laws and regulations introduced by the authorities with the aim of expanding the benefits of formal finance which end up re-enforcing the use of informal practices and driving it further into the realm of secrecy.[15] This is often the consequence of official bias against informal finance which ends up "regulating away" alternative financial arrangements as a way of encouraging formal markets. Although such acts of regulation are not in themselves barriers to formal finance in the direct sense, they should nevertheless be seen as an indirect contributor to the persistence, or expansion of an informal system.[16]

In Egypt, attempts by the authorities to regulate informal finance are considered a way of protecting the interests of different parties involved and of preserving the integrity of the financial system by driving out of its institutions which do not qualify. But some of the measures introduced have produced the adverse, and probably unintended, effect of encouraging the persistence of informal practices in a more secretive and concealed manner. One such case may be found in the limitations imposed on interest rates by the Egyptian Civil Code.

The interest rate has been subject to limitation in Egyptian law since the nineteenth century. The current interest provisions, in force since 1949, limit agreed interest between the parties to 7 percent per annum.[17] Moreover, should the parties decide to agree on a higher interest rate, then the borrower can later decline to pay interest except up to the stated maximum. Formal banking and capital market transactions are exempt from the interest rate restrictions of the Civil Code in accordance.

But the practical result of such distinction is that during times of high inflation and market lending rates, banks may charge interest rates above the 7 percent

---

14 This problem was encountered many times by the author of this article during his work at the legal department of one of the Egyptian banks.
15 On this issue, see for example Cranston, 1995.
16 On the issue of "regulating away", see for example Montiel, Agenor and Ul Haque, 1993: 7-9.
17 Law Number 131 of 1948, Article 227.

limit. Informal lending, however, would have to be limited to that rate even if it implied a real loss for the lender. In practice, one of the consequences of such restriction has been to drive informal lending – which would have persisted anyway – into concealed agreements. It continues, accordingly, to be made at rates higher than the 7 percent limit, but under several disguises which escape formal regulation. One of the most popular forms of disguise is for the lender to deliver the required amount in cash in exchange for a promissory note which obliges the borrower to return a higher amount of money at a future date. Formally, such loan is interest free, but in reality the difference between the advanced cash funds and the stated amount in the promissory note represents the interest rate as agreed between the parties and irrespective of the 7 percent limitation.[18] Perhaps the most striking example of the unintended adverse effect of regulating alternative financial practices in Egypt has been the case of Islamic Investment Companies.

2.5. Islamic Investment Companies

Quasi-formal finance is the term which refers to a wide range of schemes, programmes, and activities which fall outside the regulation of central monetary authorities, but which are not conducted in complete isolation from the legal system. Quasi-formal practices often represent attempts made by governments, individuals and development organizations to tap into the informal financial world by extending some form of legal umbrella over them, but which fall short of total incorporation into the banking sector. The largest, and unfortunately most disruptive, experience in Egypt of this nature was, however, undertaken by individuals who established the so-called Islamic Investment Companies[19] whose failure led to a crisis that has not, to this day, been resolved.[20]

Because of the complexity of this phenomenon, various writers on the subject have chosen to emphasize different aspects of it as the basis for analysis. Some, for example, have emphasized the religious dimension concerning the prohibition of usury in Islam.[21] Others chose to address the issue from the political perspective; its significance in terms of social change, government corruption, and the effect of workers' repatriation from oil-rich Gulf countries. A

18 Examples of such informal practices have not been documented, and the one referred to above has been known to the writer of this thesis through personal experience.

19 The more accurate translation of their name in Arabic – *sharikat tawzif al-amwal* – would be Islamic Placement Companies, but this chapter will use the more familiar term of Islamic Investment Companies.

20 It is perhaps worth noting here that this type of investment companies is not unique to the Egyptian experience. A very similar story occurred in Pakistan during the late 1970s and led to a serious crisis. For details see Ghate, 1992: 75-78.

21 This has generally been the attitude of newspaper reporting through the crisis, as well as few academic studies, for example, Rycx, 1987.

third group of writers based their analysis on the economic significance and implications of the rise and fall of Islamic Investment Companies.[22]

Here the inclusion of the story of these companies in the context of informal and other forms of alternative finance has been deliberate. It reflects the author's belief that their most significant aspect was the extent to which they managed to attract substantial funds, both from formal as well as informal pools of saving, into their unique quasi-formal structure.[23]

The origin of Islamic Investment Companies may be traced to the oil boom of the early 1970s which prompted a large movement of workers from Egypt into the newly enriched Gulf countries. The savings made by migrant workers, having failed to be channelled back to Egypt through the formal banking system, found their way back through informal moneychangers operating across the borders. Soon those moneychangers were handling sufficient funds to enable them to start investing them on behalf of clients on an informal basis. Hence began the activities of Islamic Investment Companies. The reasons behind their subsequent growth and remarkable capacity to attract funds from depositors across the social divide are the subject of an ongoing controversy. For the purposes of this chapter, they may be summarized in three main factors: the higher than average rate of return on investment they were able to offer to their clients, the Islamic outlook and slogan they very skilfully adopted, and their ability to reach sections of the society which had limited contact with the modern banking sector.

By the mid-1980s, Islamic Investment Companies had reached the height of their strength. Estimates of the number of such companies and their size are arbitrary due to their informal and quasi-formal nature, as well as the secrecy with which they conducted their affairs. However, according to the most comprehensive study on the subject, by 1988 there were about 200 such companies, with a combined number of depositors of no less than half a million individuals, representing aggregate deposits of around 8 billion Egyptian pounds.[24]

But undoubtedly the most intriguing aspect of Islamic Investment Companies was their ability to operate on the fringe of formal regulation and of the legal system. They operated in a regulatory vacuum, did not have a uniform mode of operation, or one form of incorporation. In fact, some of them were not incorporated at all and operated entirely in an informal environment.

---

22 For example, see 'Abd al-Fadil, 1989. This particular book covers social and political aspects as well. Moreover, it was the first major and comprehensive treatment of the whole issue, and has provided important data for other subsequent research.

23 The treatment of Islamic Investment Companies within this context has been previously adopted by other writers, in particular Kazarian, 1993, and Mohieldin, 1994.

24 'Abd al-Fadil, 1989: 14-18. According to the author, the significance of the estimated size of deposits is illustrated by comparison with the 1987 figure for household banking deposits, which were equal to 10.8 billion Egyptian pounds.

But other, generally larger, companies, did have a legal status which varied according to the circumstances of each of them, thus some were partnerships, others were closed joint stock companies. However, what they had in common was the fact that none was regulated by monetary authorities and none was registered with the Central Bank of Egypt nor supervised as a financial institution in any manner.[25] This, it should be noted, was in spite of their violation of banking laws which prohibited any entity or individual from undertaking any banking operations unless registered with the Central Bank of Egypt.[26]

The first sign of trouble occurred late in 1986 when news circulated in Egypt that a substantial loss had been incurred by the largest of the Islamic Investment Companies, al-Rayan, as a result of gold trading on the international market. This company was immediately subject to a run by depositors. The crisis was overcome due to an aggressive public relations campaign, which revolved around the existence of a conspiracy by the enemies of Islam, and a rumoured act of solidarity by other such companies.[27] The damage, however, had been done; for the first time depositors were questioning the soundness of these companies as well as the truth about their adherence to Islamic principles. The reported loss had been incurred in international financial markets, specifically in gold derivatives, a practice which is suspected of violating the Islamic prohibition on gambling.[28]

The 1986 crisis prompted the first official response, whereby the government finally intervened and issued a law for The Regulation of Certain Cases of Inviting Public Subscription.[29] In fact, the law had very little effect on the existing Islamic Investment Companies. But the following year, 1987, saw a further deterioration in the status of Islamic Investment Companies. Reports of substantial losses incurred by them on international financial markets, of their imminent crisis, of the corrupt practices in which they were involved, all contributed to a continuous erosion in public confidence and in government patience. Thus in 1988 the government intervened again with the enactment of a new law.[30] The 1988 law represented a complete turn in the government's

---

25 On the legal basis for their operations, see for example Rousillon, 1988.

26 Law Number 163 of 1957, Article 19.

27 Part of the public relations campaign took the shape of inviting interested people to visit some of the companies which had been established by al-Rayan. As a university undergraduate, the writer of this thesis participated in one of the trips during which the group met one of the three Rayan brothers.

28 The debate about the legality of derivative trading in view of the prohibition on gambling is as interesting and complicated as the debate on interest rates and usury. However, it has not yet been sufficiently dealt with by scholars and Islamic jurists.

29 Law Number 89 of 1986 for The Regulation of Certain Cases of Public Subscription. The awkward name as well as content of the law may indicate the extent to which the government was still undecided about what to do with these companies.

30 Law Number 146 of 1988, for Companies Operating in Receiving Funds for The Purpose of Investment.

attitude towards these companies whereby they would be brought under tight supervision and regulation of state authorities.

The thrust of the 1988 law may be summarized in three major aspects. The first was to state that no company, entity, or individual may accept, or invite, funds from the public with the intent of investing them in any manner, with the exception of authorized joint-stock companies in which case the authorization would be accorded by the Capital Market Authority. The second was to list conditions which had to be met by companies seeking such authorization, as well as a wide range of regulatory measures which applied to companies after authorization. The third, and perhaps most crucial aspect, was to state that companies operating prior to the enactment of the law had to meet all of the previous conditions within 15 months.[31]

What may have seemed at the time as a decisive and strict interference by the government ended up escalating the crisis and deepening the financial crisis. The enactment of the 1988 law was followed by a long and heated debate between those supporting Islamic Investment Companies and those sceptical about their true nature and intentions. At the end, however, the biggest of these companies had no choice but to apply for registration in accordance with the provisions of the 1988 law. But when some of them started to use the new law as an excuse for halting payment of monthly returns as well as original deposits, public confidence vanished.

The scale of the tragedy did not unfold until the expiry of the fifteen month period, after which all remaining companies were placed under the trusteeship of the Office of The Public Prosecutor. With the owners and directors of the major companies either in custody or abroad, it now became clear that what had seemed like successful investments capable of generating unprecedented returns was what economists describe as pyramid schemes. This refers to the fraudulent practice of paying a fictitious return on old deposits from the capital of new deposits, hoping that there will be a continuous stream of fresh deposits to keep the scheme going for as long as possible.[32] The result was that upon liquidation, the Islamic Investment Companies' assets fell far short of repaying the depositors their funds, and until the present time, the depositors have only obtained a fraction of their dues, often in the form of tangible commodities.

Several years after the collapse of these companies and the resulting financial disaster, it has become accepted wisdom that the fictitious success of these

[31] The time allowed is specifically one year after the company had notified the Capital Markets Authority of its intention to meet those conditions. The notification had to be made within three months from the date the Implementing Decree became operative, i.e. a total of fifteen months beginning on 9 August 1988.

[32] On the economic significance of pyramid schemes and their application to the case of Islamic Investment Companies, see Mohieldin, 1994.

companies was based on two major lies: the first is that they were Islamic, i.e. careful to avoid the use of interest rates, and the second is that they were profitable. The first was disproved by the sheer size of their own deposits held in interest bearing accounts around the world, and the second by the realization that they had throughout the years been operating pyramid schemes.

Although both conclusions are undoubtedly true, it is important not to overlook the significance of the whole affair in terms of financial regulation and informal markets. Behind the success of the Islamic Investment Companies was undoubtedly their ability to provide a financial service on a scale and in a manner which was much more familiar, and therefore inviting, than ordinary banking facilities. They were accessible to large sections of the society which have traditionally been excluded from formal financial services.

3. CONCLUSION

This chapter has attempted to contribute to the debate about legal pluralism by making the following arguments.

The existence of the formal and informal financial systems in parallel and their cohabitation is one form of a legal plurality as each of the two spheres of financial transactions is based on its own set of rules and practices. The various mechanisms and considerations which define the relationship between formal finance and other alternative forms of financial intermediation were discussed and analyzed. Empirical and field research has shown that formal and informal financial domains do not necessarily exclude each other, nor are the boundaries between them well defined. The conceptualization of the relationship between the two domains in terms of tension, exclusivity and conflict was criticized in favour of one based on their harmonious cohabitation and complementarity. The case of Islamic Investment Companies was discussed in order to emphasize the mechanisms by which the same financial act cuts accross formal and informal arrangements. To describe the relationship between formal and informal finance as a duality based on competition and exclusivity would be to entirely miss the very nature of both domains, and the essence of their complementarity. It is this aspect which users of financial systems have come to realize and to exploit by shifting their resources and their options continuously between various domains and by learning to ultimately treat them as one.

CHAPTER 17
Legal Plurality and Legitimation of Human Rights Abuses
A Case Study of State Council Rulings Concerning the Rights of Apostates

AHMED SEIF AL-ISLAM HAMAD
LAWYER AT CAIRO BAR

INTRODUCTION

Plurality of legal systems within the same society has elicited divergent attitudes. It is viewed quite positively by some commentators, since it grants some groups of society the right to choose their legal codes. On the other hand, others believe it negatively affects social cohesion. It is far beyond the scope of this article to deal with this subject in its entirety. Our aim is simply to give concrete evidence of how plurality of legal systems may lead to legalizing human rights abuses. However, that is not to say that plurality in legal systems always implies human rights abuses, nor that the existence of a unified system automatically leads to the respect of these same rights.

In fact, the conjecture implicit here is that the probability of the occurrence of such abuses increases in pluralistic systems, as long as one of the components of this pluralism is a relatively archaic system that was developed before the present awareness of human rights. On the other hand, the danger inherent in such a system is increased by the fact that it usually commands strong social acceptance due to its social and historical weight, and to the fact that in most cases it is deeply rooted in religious beliefs.

The structure of the Egyptian law is based on parallel legal systems among which we mention the ones that have their roots in traditional Islamic *fiqh*, the ones that date back to Latin tradition from which, for historical reasons, our positive laws were extracted, and the ones inspired by popular convention.

This pluralism allows the judiciary in some cases to adopt rulings that are irrational, illogical, lacking in humanity, and completely incompatible with the progress that has been achieved by humanity as a whole in the field of human rights. This is due to the fact that such rulings attempt a literal application of positions adopted by traditional Islamic *fiqh* scholars dating back some thousand years. Such positions, well-suited to the time in which they were original-

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 219-228
© 1999 *Kluwer Law International. Printed in the Netherlands.*

ly developed, are hardly compatible with the realities of modern life. During the period in question, it was quite natural for citizenship to be based on a confessional basis. The notion of human rights as a prerogative of the human condition was not entertained.

In this work we present some verdicts passed by the State Council in reference to apostasy, highlighting the fact that legal pluralism may some times lead to some extremely bizarre results.

1. IRRECONCILABLE POSITIONS OF *FIQH* AND EGYPTIAN POSITIVE LAW

Before presenting our case study, we give a brief survey of the irreconcilable positions of classical Islamic *fiqh* on the one hand, and Egyptian positive law on the other, in relation to citizenship for Egyptian non-Muslims and apostasy.

1.1. The Rights of Egyptian Non-Muslims in Relation to Citizenship

Classical Islamic fiqh

The traditional position of Islamic *fiqh* is to differentiate between the rights of Muslims and those of non-Muslims. Non-Muslims are granted security and the protection of the Islamic state in return for paying *jizya*.[1] Their status is subject to the following conditions:

1. It is forbidden to build non-Islamic temples or restore existing ones.
2. Church bells are not to be heard outside the church, and crosses should not be raised on churches.
3. Non-Muslims are forbidden from trying to recruit converts to their religion.

These conditions are known as "'Umar's conditions".[2] Ibn Qudama[3] states in his book *al-Mughni* what is known in traditional Islamic *fiqh* and in history as the 'Umar Conditions, from which scholars of *fiqh* extracted the following conditions:

1. Buildings owned by non-Muslims may not be higher than those owned by Muslims.
2. It should be possible to distinguish non-Muslims from Muslims by their dress, their haircut, the animals they are allowed to ride, and their names (Ibn Qudama, 1995: 290).

---

1 A poll tax levied on non-Muslims living in the Islamic state.

2 'Umar b. al-Khattab. 'Umar was the second caliph after the death of the prophet Muhammad. His "Conditions" relate to the treatment of non-Muslims in Muslim society (editors' note).

3 Prominent Muslim legal scholar (1147-1223 AD) the Hanbali School (editors' note).

Egyptian Positive Law

The position of Egyptian positive law is to base the right to citizenship on social belonging rather than religious calling. The Egyptian Constitution (Art. 40) clearly stipulates that all citizens are equal regardless of religion.

1.2. Apostasy

Classical Islamic fiqh

Apostasy is understood to mean denying Islam after having been a Muslim. Whether an apostate embraces another religion or becomes an atheist is irrelevant in this context. Being an apostate is seen as synonymous to dying. The individual is no longer considered a human being, and thus is denied rights that human beings are entitled to. An apostate does not have the right to form a family, inherit – whether from a Muslim or from a non-Muslim – or change his Muslim name to another and therewith reflecting his adherence to a new religion.

Egyptian Positive Law

Positive law is directly opposed to the above. Civil law (Law No.132 of 1948) protects the civil rights of individuals. Article 38 of this law grants every individual the right to a name and surname. The surname is passed on to the person's children. Article 44 confers full legal capacity on any major (over 21 years old) who enjoys full mental capacities and who has not been placed under a restraining legal order. Article 48 prohibits a person from giving up his legal capacity. Article 49 prohibits a person from giving up his liberty. Article 50 stipulates that an individual whose personal rights have been illegally infringed upon has the right to demand the lifting of all such infringement and to be adequately compensated.

The Position of the Egyptian State Council Concerning Apostasy

When it comes to apostasy, the position of the majority of the Egyptian judiciary is far more in keeping with traditional Islamic *fiqh* than with Egyptian positive law. This was made possible by Article 1 Paragraph 2 of the Egyptian Civil Code which stipulates that "In the absence of applicable text of law, the judge may rule according to customary law (*'urf*). In the absence of customary law, according to Islamic *shari'a*. And finally, in the absence of all the above, according to natural law (*qanun tabi'i*) and the rules of justice (*qawa'id al-'adala*)".

The text of this Article is addressed directly to the judge presiding in court. Thus, if a judge does not apply this Article, he could be accused of denying jutice.

In order to justify certain of its rulings, the Egyptian judiciary has developed a theory that differentiates between the right of an individual to practice a certain liberty and the consequences of this practice. This will be discussed in detail in the following case studies of verdicts concerned with freedom of belief, and the right to change one's religion.

2. CASE STUDIES

2.1. Preliminary Case Study

In choosing the cases to be studied we were guided by the following:

1. The case to be studied should be what might be called an ordinary case, the parties to the case being ordinary citizens, not public figures, because we aim to study the attitude of the judiciary in normal circumstances. Thus, we wished to avoid cases which had captured public interest causing public opinion (of which the judiciary is part) to be polarized.
2. We have confined ourselves to the State Council on the one hand because this is the court whose sole competence is to arbiter litigation in which one of the parties is the state, represented by one of its institutions. On the other hand, we wished to avoid the area of family law which is directly subject to religious adherence in the absence of a unified Civil Code.
3. There are also some practical considerations, such as the size of this paper.

2.2. First Case: An Apostate Does Not Have the Right to Change the Data on His Documents of Identification in Accordance with His New Status

Facts of Case 20/29,[3] *State Council, 8 April 1980*

An Egyptian Copt converted to Islam in 1953, and accordingly changed his name and his religion in his identification documents. In 1974 he reverted to Christianity and requested the competent state authority (in this case the Civil Records Office) to issue him new documents with his original Christian name, stating his religion as a Christian. The Office replied that it was legal to change his name but not his religion since Islam does not allow its adherents to apostatize. He filed a lawsuit before the State Council demanding that the court oblige the Civil Records Office to comply with his request. The demand of the plaintiff was based on the following points:

---

[3] Each court verdict is indicated by two numbers. The first number is the serial number of this verdict among the verdicts passed by the same court during a certain year. The second number refers to the year in which the verdict was passed. In the case of higher courts (the Court of Cassation, the Higher State Council, and the Appeal Courts) the year referred to is the judicial year, which dates from the year the court in question was established.

1. There is no text in the Civil Code prohibiting individuals from changing their religion. Moreover, every citizen has the right to change the relevant data on his documents should the need arise, so long as he can prove the correctness of the new data without needing to obtain a court order according to Article 36/2 of Law No. 260 of 1960 regulating Civil Status.
2 Freedom of belief is guaranteed by Article 46 of the Egyptian Constitution.
3. Islamic *shari'a* is only applicable to family law. It is not applicable to civil status except in the absence of regulatory text. But since the Civil Status Law has stipulated that a citizen has the right to change his religion, this is the law that should be followed in this case.

The defence of the state was based on the following points:

1. The State Council is not competent to decide in the present litigation since Article 36 of the Civil Status Law has designated the Committee mentioned in Article 41 of the same law to decide which data appearing on identification documents can be changed. The court does not have the right to replace the aforementioned committee. It may only revoke the committee's decisions should they not be in accordance with the law.

   Although the law stipulates that the religion stated on a person's documents may be changed, this is subject to the original rule that apostasy is not sanctioned by Islam. This is a rule of public order which this court is not competent to review.
2. Article 2 of the Constitution has clearly stated that the principles of Islamic *shari'a* are the main source of positive legislation in the Egyptian State. And since the Koran, the prime source of *shari'a*, clearly forbids apostasy, every law opposed to this rule can now be considered defunct. Thus, changing one's religion as appears in Article 36 of the Civil Status Law is implicitly revoked particularly when the change is from Islam to other religions, since it contravenes the basic principle of *shari'a* that an apostate has no religion.

The Ruling of the Court

1. The court ruled that it was competent to decide in this case since the Committee that had taken the decision to refuse the plaintiff's request was an administrative body. Hence, the plaintiff's lawsuit could be viewed as demanding the revocation of the administration's decision to refuse his request.
2. The court ruled that the principles of *shari'a* should be applied to the litigation in question. The court based this ruling on Article 2 of the Constitution, and on Article 1 Paragraph 2 of the Civil Code which stipulates that in the absence of an applicable text of law, one may refer to customary law, then Islamic *shari'a*, and finally, natural law and the rule of justice. Thus, the court ruled that since there is no law to regulate the status of persons embracing or repealing Islam, and since customary law in this case

is mainly concerned with moral issues rather than legal status, it becomes imperative to apply the rules of *shari'a*.

3. The court ruled that an apostate has no civil rights according to *shari'a*, and that freedom to change one's religion only applies to those who wish to become Muslims, not those who wish to cease to be Muslims. In fact, in its ruling the court explicitly stated that "it is completely acceptable for a non-Muslim to embrace Islam. On the other hand, by consensus Muslims are not allowed to embrace another religion or to become of no religion at all. Islamic *shari'a* is clear in stipulating that apostasy is not to be condoned, but should be prevented".
4. Since the plaintiff had previously embraced Islam, he is now subject to its rules. In denying Islam he becomes an apostate, and his action is not to be accepted or condoned. But since his request to change the religion on his documents from Islam to Christianity stems from his apostasy, acceding to his request would imply condoning his position. Therefore, both *shari'a* and the Civil Code forbid the acceptance of his request.
5. The plaintiff's request is not sanctioned by law, for though the law has stipulated that the data appearing on a person's identification documents, which include a person's religion, may be changed, the purpose of the law is to make it possible to properly identify people. It follows that such changes must have a legal reason that is not opposed to public order. However, if the change in question implies sanctioning an action that is in itself illegal, the administration has the right to refuse the plaintiff's request, and this, in fact, is the plaintiff's position since his request is caused by apostasy which is not to be accepted.
6. Finally, the court stated its position on the subject of freedom of belief on the one hand, and apostasy on the other hand as follows:

   "Article 46 of the Constitution, which protects freedom of belief, is not opposed to Article 2 thereof which states that Islam is the official religion of the state. Since Islam protects freedom of belief – for Islam may not be forced on anyone – freedom of belief as granted by the Constitution means that each individual may freely embrace whichever religion he believes without constraint. However, this freedom does not restrict the application of Islamic *shari'a* to those who embrace Islam. The state's religion is Islam. Its Constitution has stipulated that the principles of Islam are the main source of legislation. The Civil Code stipulates that in the absence of text, Islamic *shari'a* should be applied. Thus, both justice and legality require that freedom of belief should not restrict the application of Islamic *shari'a* to those who embrace Islam. Since the plaintiff has embraced Islam, he must then submit to its law which does not condone apostasy".

2.2. Second Case: An Apostate May Neither Marry Nor Inherit

Facts of Case 240/22, State Council, 13 May 1973

An Egyptian Christian woman married a Christian professor at the Faculty of Medicine, Cairo University. The husband died on 1 May 1963. As a widow, she received a pension from the university until 31 December 1966 when the sister of the deceased presented the university with the ruling number 36/83 of the Cairo Court of Appeal, which had upheld the ruling of the Cairo Primary Court on family affairs (lawsuit 111/1964). The latter had ruled that the marriage was invalid since the wife was an apostate having previously converted to Islam, then reverted to Christianity. Therefore, she had no right to the inheritance. The university then requested advice from the State Council's Advisory Section. The department was of the opinion that the widow in question had no right to the pension, and should in fact return sums she had already received illegally; since she had not legally been the wife of the deceased, the marriage of an apostate being void, and thus was not his widow and had no right to his pension (Legal advice No. 1/2/281, 8 January 1967).

On 13 November 1967 Cairo University filed a case against the aforementioned woman demanding that she return the pension she had already received from the university, in accordance with the previous court ruling and with the Legal Council of the State Council.

The defendant argued that the demands of the plaintiff should not be met since the principle on which the plaintiff's case was based was unconstitutional, the rules governing apostasy being incompatible with religious freedom. And that in fact the Article denying an apostate's inheritance had been erased from Law No. 77 of 1943, which is a clear indication that the legislator does not consider apostasy as a reason for disinheriting a person.

On 8 May 1972 the State Council ruled that the defendant should return the sums she had illegally received as a pension, since the law regulating pensions stipulates that the beneficiary should be the legal widow of the deceased and since the aforementioned court ruling proves that the defendant was never legally married to the deceased, her marriage to him being completely invalid because she was an apostate.

On 13 May 1973 the defendant appealed the above ruling before the High Administrative Court of the State Council. Here follows an analysis of this appeal.

The Grounds for the Defendant's Appeal

Of the grounds for the appeal, the following ones are important to the subject of this study:

1. That Article 46 of the Constitution protects freedom of belief.
2. When the defendant converted to Islam, she did this as a means to obtain legal divorce from her husband who had incited her to sin. Having obtained the divorce, she reverted to Christianity. This could not really be what *shari'a* scholars had meant by apostasy in bygone times.

The Ruling of the Court

The defendant's appeal was rejected on the following grounds:

a) An apostate does not have the right to marry:

Since the Court of Personal Status Affairs has already ruled that the marriage in question is not legal, when considering who were the legal heirs of the deceased, and since the ruling of the Court of Personal Status Affairs is a final ruling, it may not be reconsidered and must be upheld by all other courts dealing with any case related to the same marriage.

Moreover, the ruling of the Court of Personal Status Affairs is a correct ruling, for it is proved by the attestation of the petitioner dated 12 January 1957, that she was a Christian before God enlightened her mind so that she embraced Islam, and attested that she had become a Muslim and that she denied all other religions. However, her marriage certificate shows that she married the deceased (an orthodox Copt) as an orthodox Copt.

Thus it can be seen that the petitioner willingly denied Islam in order to marry the deceased, therefore she is an apostate; for Islamic *shari'a* defines an apostate as any Muslim who denies Islam regardless of whether he was born a Muslim, had originally belonged to another religious sect, or had been of no religion.

In fact this is the answer to the petitioner's question, as to whether she can really be described as an apostate.

According to Article 1 of Law No. 462 of 1955, the position of the petitioner is to be decided according to Islamic *shari'a*, and not according to Orthodox Coptic *shari'a*; since by embracing Islam, she committed herself to its rules, including those of its rules which deal with apostasy.

According to the doctrine of Abu Hanifa,[4] an apostate's marriage is invalid and no man may marry an apostate, be he a Muslim, a Christian, a

[4] Founder of one of the four legal schools in Islamic legal doctrine. Islamic law in Egypt follows the Honafi School (editors' note).

Jew, an apostate or an infidel. Furthermore an apostate is not recognized as an adherent to his new religion. This is a rule of public order that may not be contravened.

b) An apostate does not have the right to inherit:

Article 7 of Law No. 77 of 1943 restricts a person's legal heirs to blood relatives and spouse, thus invalidation of a marriage automatically disqualifies the spouse in question as an heir. On the other hand it is the unanimous opinion among scholars of Islamic *shari'a* that inheritance among non- Muslims does not include apostates; an apostate does not therefore inherit from a Muslim nor from a non-Muslim. In the first instance because only a Muslim may inherit from another Muslim. In the second instance because an apostate is not recognized as an adherent of a religion or a member of a sect.

As for the claim of the attorney of the petitioner that the law regulating inheritance does not stipulate apostasy as disqualifying an heir, and that such a disqualification is unconstitutional, since it violates freedom of belief as well as equality of individuals before the law; the answer of the court is that all that concerns the inheritance of an apostate is governed by Article 280 of Law No. 178 of 1931 which clearly states that in the absence of legislation, the court is to apply the salient position within the doctrine of Abu Hanifa.

c) Depriving an apostate of his rights does not violate freedom of belief:

None of the above is unconstitutional, nor does it violate freedom of belief, or equality of individuals before the law, for freedom of belief is different from the legal consequences of this belief:

Every individual is free to embrace the religion of his choice within the limitations imposed by public order. On the other hand the legal consequences of this choice are regulated by law. Thus Islamic *shari'a* is applied to a Muslim, while a different code is applied to *dhimmis* (non-Muslims living under the protection of a Muslim state), and this code differs from one religious school to another. This differentiation is not discrimination, on the contrary it is a manifestation of respect for freedom of belief as it allows family and personal affairs to be regulated according to the individual's religion.

It is a matter of consensus that Islamic *shari'a* contains certain rules dealing with personal status affairs that may not be ignored, since they are part of the public order, among these the rules concerning apostasy.

The above mentioned verdicts are consistent with the rulings of the Court of Cassation. In its rulings (No. 37/22, Personal status affairs, 21 April 1965; No. 28/33, Personal status affairs, 19 January 1966; No. 20/34, Personal status affairs, 30 March 1966) we find "Islamic *shari'a* is the gener-

al code to be followed in personal status affairs". Article 280 of Law No. 78 of 1931 stipulates that family affairs are to be judged according to the text of this code and to the most prevalent position in the doctrine of Abu Hanifa, except in cases regulated by special laws such as inheritance. This means that in such cases in the absence of text the most prevalent position in the doctrine of Abu Hanifa is applicable. Thus the absence of text can never be understood to mean that rulings should contradict the rules laid out by the Koran, Sunna,[5] or the consensus of scholars of *fiqh*. Among these is the rule that an apostate's marriage is invalid, that an apostate may not inherit, nor may anyone be heir to an apostate. For apostasy – which means denying Islam after having adhered to it – has certain consequences, among which "an apostate may not marry a Muslim nor may he or she marry a non-Muslim. Apostasy annuls a marriage that preceded it, and invalidates it should it take place after it, and such an effect is instantaneous, it does not await the verdict of a judge. An apostate has neither religion nor sect, his apostasy is not sanctioned, nor is his adherence to a new religion recognized. In ruling that an apostates marriage is invalid, Divine rights are preserved and protected. This is not connected to freedom of belief, but to its consequences as perceived by scholars of *fiqh*".

3. CONCLUSION

In order to justify denying an apostate all rights, the verdicts that we have studied based their ruling on legal plurality. In fact legal plurality was used to justify denying an apostate the right to change his status in his official documents, to marry, to inherit, and to have heirs.

This conclusion leads us to suggest that we need to explore new ways for limiting the negative effects of legal pluralism, while trying at the same time to enhance its positive aspects.

5 Sayings and actions of the Prophet Muhammad. The Sunna is second to the Koran as a source of *shari'a* law (editors' note).

CHAPTER 18

The Secular Reconstruction of Islamic Law

The Egyptian Supreme Constitutional Court and the "Battle over the Veil" in State-Run Schools

KILIAN BÄLZ
JOHANN WOLFGANG GOETHE-UNIVERSITÄT, FRANKFURT/M

INTRODUCTION

In 1994, the Egyptian Minister of Education enacted a decree that regulated school-dress in state-run schools. According to the new regulation, female students in secondary schools were obliged to wear a school uniform consisting of a white shirt and a skirt of "appropriate length". Moreover, the decree contained the following provision for the veil: "Upon a written application of the guardian (*wali al-amr*) a student can be permitted to cover her hair *as long as she does not cover her face*" (Art. 2, §2, Decree No. 113 of 1994, emphasis added). The *niqab*, the facial veil covering the entire face, was banned from state-run schools through this decree. To wear a *hijab*, a head scarf, was all that remained permissible. Moreover, the decree provided that students who did not abide by the new dress code were not allowed to enter school premises (Art. 2, §3). Subsequently, a number of students were excluded from school for wearing the *niqab*.

The decree, therefore, instantly ignited a public polemic debate which became known as the "battle over the veil" (*ma'rakat al-hijab*) and which, even years later, has still not gone off the boil.[1] "Baha al-Din[2] – Atatürk!" wrote the newspaper al-Sha'b (22 July 1994) which led the campaign against the new regulation of school-dress by claiming that the measure taken by the Egyptian Minister of Education was as "un-Islamic" as the secularization-policies of the founder of the Turkish republic. It was argued that the new regulation was equivalent to "A French decree following a secularist model" (al-Sha'b, 5 July 1994), thus equating the Egyptian controversy with the French debate on the *foulard islamique*.

1 "To veil or not ... the question now is how", Middle East Times, 4 January 1997.
2 The Egyptian Minister of Education.

B. Dupret, M. Berger and L. al-Zwaini, Legal Pluralism in the Arab World, 229-243
© 1999 *Kluwer Law International. Printed in the Netherlands.*

Taking the larger political framework into consideration, such fierce opposition to the new regulation is not surprising. Since the early 1970s, so called "new veiling" has appeared in Egyptian public life: affiliation to the Islamist opposition is expressed through the display of "Islamic dress" (*al-ziyy al-islami*), which includes the *niqab* for women. Dress serves as a means to express both opposition to the state and to construct a new, "Islamic" identity (*cf.* El Guindi, 1983, Macleod, 1991: 97-141, Moghadam, 1993: 135-170, Radi, 1996). The rationale of the prohibition of the *niqab* was therefore political and was aimed at counterbalancing these developments. In a subsequent decree that was enacted by the Minister of Education some time later, in order to settle public excitement, it was held that the regulation shall guarantee, "that veiling ... is based on the (free) will (of the student) and that it is not due to coercion from any other person or organization" (Art. 1, Sec. 1, Decree No. 208 of 1994). By unifying school-dress, the government wanted to alleviate the pressure exercised by Islamist groups on students to wear "Islamic dress". At the same time, banning the display of Islamist symbols in the realm of public education was intended visibly to restore government authority.

However, the "battle over the veil", soon took a distinct legal turn: with the help of Islamist lawyers, parents, whose daughters were excluded from school for wearing the *niqab*, turned to the administrative courts (*al-mahakim al-idariyya*). In the end, the Egyptian Supreme Constitutional Court (*al-mahkama al-dusturiyya al-'ulya*, S.C.C.) was concerned with the issue.

The case before the S.C.C. was based on the following facts: the plaintiff's two daughters had both been excluded from school for wearing the *niqab*. Subsequently, the plaintiff attacked the school's decision in the Administrative Court of Alexandria on the grounds that the ministerial decree was unconstitutional. First, the plaintiff claimed that the decree violates Article 2 of the Egyptian Constitution[3] which provides: "Islam is the religion of the state ... and the principles of the Islamic Shari'a are the main source of legislation".[4] Secondly, he maintained that the decree infringed Article 46 of the Egyptian Constitution which guarantees freedom of religion. The Administrative Court suspended proceedings and transferred the dispute to the S.C.C. However, the S.C.C. dismissed the action and held in a ruling on 18 May 1996, that the decree of the Minister of Education was constitutional.

1. ISLAMIC LAW AND STATE-ENACTED LEGISLATION

The *facts* of the case discussed in the Egyptian S.C.C. are reminiscent of the French debate on the *foulard islamique* that originated in 1989 and that has still

3 *Dustur Jumhuriyyat Misr al-'arabiyya*, enacted on 11 September 1971, amended on 22 May 1980.
4 *"Al-islam din al-dawla ... wa mabadi' al-shari'a al-islamiyya al-masdar al-ra'isi lil-tashri'"*.

not been entirely settled (*cf.* Kepel, 1994: chap. 3, Rädler, 1996: 357-376). Moreover, the permissibility of the Islamic veil in state-run schools has been subject to judicial scrutiny in other countries as well. Similar cases have also been discussed in German and Turkish courts (*cf.* Rumpf, 1990: 144-155, Füssel, 1994, Rädler, 1996: 377-381). Nevertheless, the *arguments* presented to the Egyptian S.C.C. reveal the major difference between the Egyptian controversy and the debates in France, Germany, and Turkey: in Egypt, the question is not whether a "secular state" can "tolerate" a "religious symbol" like the Islamic veil in state-run schools. Instead, the crucial question is the extent to which the "worldly legislature" of a "Muslim state"[5] is bound to the "principles of Islamic law". Here, the emphasis is not on the individual's freedom to express religious beliefs in state-run schools, but on the legislature's autonomy in the law making process. The significance of the decision of the S.C.C. is therefore not limited to comparative aspects. The decision also touches on a fundamental question of Egyptian constitutional law, namely the interpretation of Article 2 of the Egyptian Constitution, which elevates the "principles of Islamic law" to "the main source of legislation" and thus defines the relationship between Islamic law (*shari'a*) and state-enacted legislation (*qanun*).

The provision contained in Article 2 of the Egyptian Constitution is not peculiar to Egyptian constitutional law. Similar provisions are found in numerous Arab constitutions.[6] In Egypt, such a provision was included for the first time in the Constitution of 1971.[7] Article 2 of the Constitution originally read "Islamic law is *a* main source of legislation (emphasis added)". Today's wording, elevating Islamic law to *the* main source of legislation, was introduced through a constitutional amendment in 1980.

At first sight, Article 2 of the Egyptian Constitution represents a paradox: on the one hand, legislation is traditionally associated with a body of legal rules enacted by a competent body, the legislature, through a specific procedure, the legislative process. On the other hand, Islamic law is not "legislated" but is a jurists' law. The *corpus iuris* of Islamic law (*fiqh*) consists of the legal writings of the Islamic jurists (*fuqaha'*), who, in turn, refer to the religious texts of Islam in order to legitimize the body of substantive law. How does this fit together?

5 *Dawla muslima.* The term "Muslim" state is used in official discourse instead of the term "Islamic" state (*dawla islamiyya*). The latter term is the catchphrase employed by the Islamist opposition to denote the "Islamic order" (*al-nizam al-islami*) they want to implement.

6 Article 2, Constitution of Bahrain, enacted on 16 December 1973; Article 3, Constitution of Yemen, enacted on 16 May 1991, amended on 28 September 1994; Article 2, Constitution of Kuwait, enacted on 11 November 1962, amended on 28 August 1980; Article 1, Constitution of Qatar, enacted on 2 April 1970, amended in 1975; Article 1, Constitutional Decree No. 3 of 1993 of Sudan; Article 7, Constitution of the United Arab Emirates, enacted on 2 December 1971.

7 On the background of the new constitutional provision, *cf.* O'Kane, 1972.

In the search for a theoretical paradigm offering an escape route, three principle models have been developed. These models are not necessarily exclusive. To some extent, they are even complimentary:

1. Article 2 of the Egyptian Constitution can be interpreted as establishing Islamic law as a body of "supra-legislative norms": in other words, this provision enshrines a kind of "Islamic *Grundnorm*". Kelsen, who developed the concept of *Grundnorm* in his *Reine Rechtslehre* (Pure Theory of Law) defined the *Grundnorm* as the "shared source for the validity of all legal rules belonging to the same (legal) order" (Kelsen, 1960: 197). In this context, he distinguishes between the procedural *Grundnorm* of positive law as the procedure through which legal rules are generated on the one hand, and the substantive *Grundnorm* of natural law on the other (Kelsen, 1960: 198-200). In the latter case, legal rules are derived from a body of presupposed substantive rules: legal rules are only valid if they meet certain requirements in substance (Kelsen, 1960: 226-227). Under Article 2 of the Egyptian Constitution, therefore, the "principles of Islamic law" constitute a substantive source (*masdar mawdu'i*) of state-enacted legislation (Mutawalli, 1975: 21), or, in the words of Botiveau, "il existe ... *une hiérarchie déclarée* entre l'esprit de l'article 2 posant la *chari'a* comme source première et les autres articles (de la constitution égyptienne) régis par le droit positif et donc susceptible d'être pour partie d'entre eux, contestés comme non conformes à l'article 2" (1993: 286, emphasis added).
2. To refute such a "monist" perception built on a hierarchical arrangement of different legal layers, one could turn to a pluralist vision of the coexistence of different legal orders. A possible interpretation would be to argue that *shari'a* and *qanun* are two separate legal orders. Through Article 2 of the Egyptian Constitution, however, the order of Islamic law is *incorporated* in the order of state-enacted legislation, hereby curtailing the legislature's discretion: in substance, state-enacted legislation must conform to the "principles of Islamic *shari'a*". Nevertheless, rules of Islamic law are not valid unless they are incorporated in the order of *qanun* by being formally promulgated as laws. This is what Rigaux termed "*hétéronomie par corporation*" (1985: 205). Here, Islamic law imposes an extraneous limitation upon the order of secular law. The relationship of Islamic law and state-enacted legislation is thus characterized by the interpenetration of two legal orders (Rigaux as quoted by Dupret, 1996a: 127, 129-136).
3. The last model would agree with the aforementioned model regarding the "pluralist setting" of the problem. However, it would take a different approach to the *intersystemic* relation of coexisting legal orders, arguing that *shari'a* and *qanun* are two legal orders which are *radically autonomous*. Such a reading can draw on the foundations of systems-theory which defines the law as one among several "operationally closed" systems. Here, the law is an autonomous epistemic subject, which constructs a social reality of its own

(Teubner, 1989a, Luhmann, 1993). This constructivist approach, moreover, also has implications for the understanding of legal pluralism: if several legal orders coexist in the same social field, they depend on "introducing" legal rules belonging to other, "alien" normative orders. However, these "incorporated legal rules" are always generated through an internal reconstruction process (*cf.* Teubner, 1992: 1452-1456). In this light, emphasis shifts from the wording of Article 2 of the Egyptian Constitution to the process through which this constitutional provision is put into practice. From this perspective, one can argue that Islamic law neither exercises "direct influence" over the order of secular law through establishing a set of "supra-legislative norms", nor imposes any extraneous limitations on state-enacted legislation. On the contrary, the order of secular law maintains its autonomy by constructing a "secular" reading of Islamic law (*cf.* Bälz, 1996a: 45-53).

In this article, the investigation of legal reasoning in the *niqab*-case is employed as a basis for a discussion of these theoretical issues. As legal argumentation is not simply an exercise in abstract thought and speculation, but is employed to support a distinct legal decision, I have chosen the discussion of a *concrete legal question* (and not the legal actor's perceptions of law)[8] to clarify these questions. For this purpose, the case under examination is particularly suited: it concerns a comparatively accessible, highly politicized question of Egyptian administrative law (and not, for example, the technicalities of Egyptian family law). This article argues that the interpretation of Article 2 of the Egyptian Constitution by the S.C.C. illustrates the struggle to defend the autonomy of the secular legal order. The underlying strategy of the Court's decision it to *gain control over the authoritative interpretation of Islamic law*: the S.C.C. pays rhetorical tribute to being "bound" by the rules of Islamic law in principle, while it reserves the right to determine the substance of these rules. It is exactly this "substantialization" of Islamic legal rules within the secular legal order (*cf.* Dupret, 1995: 48) that allows the latter to maintain its autonomy.

---

8 The study of legal actors' "perceptions of law" has an important contribution to make to the anthropology of law (for the Egyptian context, *cf.*, in particular, Dupret, 1997). Nevertheless, one should not forget that – in spite of the importance of ideological "sedimentation" – law is not exclusively an academic subject. Legal discourse does not primarily revolve around the question of "perceptions of law", it rather tries to find concrete solutions to specific legal problems. In this process, however, the legal actors are limited to what they contribute to legal discourse. For this reason, the investigation of legal reasoning is employed as the departure point for the theoretical discussions in this article. The emphasis lies, therefore, on investigating "How the law thinks" (*cf.* Teubner, 1989b) and not on "how people think about law".

2. CONSTITUTIONAL REVIEW BASED ON THE "PRINCIPLES OF ISLAMIC LAW"

In the years following the constitutional amendment, interpretation of Article 2 of the Egyptian Constitution was anything but clear.[9] Since the mid-1980s, however, the Egyptian S.C.C. has developed several principles for constitutional review[10] based on Article 2 of the Egyptian Constitution. The critical question for the S.C.C. has been: under which circumstances are legislative enactments unconstitutional, and, therefore, to be declared null and void, on the grounds that they violate the "principles of Islamic law"? The principles established by the S.C.C. are reiterated in the case under discussion. These principles concern two questions in particular: (1) application of Article 2 of the Egyptian Constitution with respect to time and (2) the scope that Article 2 of the Egyptian Constitution offers for constitutional review.

In a first step, the S.C.C. defined application of Article 2 of the Egyptian Constitution with respect to time. In a leading case in 1985 concerning the constitutionality of interest claims ("Azhar-case"),[11] it was held that only

> with the day the amendment ... of Article 2 of the constitution came into force on 22 May 1980, the legislative power (*sultat al-tashri'*) became *bound*

[9] Initially, the debate revolved particularly around the question of whether Article 2 E.C. allowed for an "immediate" application of the "principles of Islamic *shari'a*" through the judge, i.e., may a *judge* deviate from legislative enactments in case he considers them contrary to the "principles of Islamic law"? Moreover, is a *judge* entitled to apply the "principles of Islamic *shari'a*" *in lieu* of state-enacted legislation in this case? (al-Shuqayri, 1986: 151-153 on the one hand, Mutawalli, 1975: 21-23, al-'Ashmawi, 1988: 11-22, Abu Talib, 1990: 210, on the other). As such a "judicial implementation of Islamic law" posed a sincere threat to the functioning of the Egyptian legal system, the preferred opinion soon agreed that Article 2 E.C. does not allow for a judicial application of Islamic law, but was merely directed to the legislature. In the following, therefore, attention shifted to constitutional review based on the "principles of Islamic *shari'a*". For details, Peters, 1988: 240-248, Hill, 1990: 246-250, Najjar, 1992: 64-66, Botiveau, 1993: 281-283, Dupret, 1996a: 123-129.

[10] By virtue of Article 29, Law of the Supreme Constitutional Court (*qanun al-mahkama al-dusturiyya al-'ulya*), enacted as Law No. 48 of 1979, the S.C.C. is competent for the constitutional review of laws and decrees. On the development of constitutional review in Egypt in general, al-Sharif, 1990: 6-39, Elwan, 1990: 312-314, el-Morr, 1993, Mallat, 1992: 22-30; Jacquemond, 1994.

[11] The case was based on the following facts: Al-Azhar University had been directed by a lower court to pay a debt and, in addition, interest on the amount of the debt at 4 percent as provided for by Article 226 Civil Code (*al-qanun al-madani*), promulgated as Law No. 131 of 1948. The University refused payment of the interest, arguing that fixed interest rates are *riba*, forbidden under Islamic law and that, therefore, Article 226 of the *Civil Code* is null and void, as this provision violates the "principles of Islamic *shari'a*" mentioned in Article 2 E.C. Subsequently, the case was transferred to the S.C.C. in order to decide about the constitutionality of Article 226 Civil Code (S.C.C., 4 May 1985a).
The "Azhar-case" was only one among a large number of cases where the constitutionality of Article 226 Civil Code was challenged on the grounds that this provision contravenes Article 2 E.C. However, other than the "Azhar-case", all cases were dismissed on procedural grounds (S.C.C., 3 December 1983a, 3 December 1983b, 3 December 1983c, 16 February 1985, 6 April 1985, 1 June 1985). Moreover, similar cases have been discussed in the courts of other Arab states, as well (Amereller, 1995: 133-174, Elwan, 1992: 78-84, Krüger, 1987: 116-125, Obeid, 1995).

> when enacting new laws or amending laws, which predated this day, to observe, that these laws must conform to the principles of Islamic law (*mabadi' al-shari'a al-islamiyya*) (S.C.C. 4 May 1985a: 315, emphasis added).

The provisions of the Egyptian Civil Code (*al-Qanun al-Madani*), enacted as Law No. 131 of 1948 cannot therefore be attacked on the grounds that they violate the "principles of Islamic law". The S.C.C. argued that this can be derived from the *travaux preparatoires* of the constitutional amendment. As the majority of Egyptian legislation at the time consisted of laws enacted prior to the constitutional amendment, there was initially little room for constitutional review based on the "principles of Islamic *shari'a*" mentioned in Article 2 of the Egyptian Constitution. Regarding laws enacted prior to the constitutional amendment, the S.C.C. held that the legislature is merely under

> the *political obligation* to make efforts in order to clear the provisions of these laws from violations of the aforementioned principles (of Islamic law)(S.C.C. 4.5. 1985a: 317, emphasis added).

Applying the principle of non-retroactivity of legislation to the constitutional amendment, represented a first important measure through which the application of Article 2 of the Egyptian Constitution was limited. In spite of its character of a "temporary solution" (in the double sense of the word), this first decision of the S.C.C. also set the pace for later discussions.

However, since the "Azhar-case" more than a decade has passed. This decade has witnessed lively legislative activity, including two legislative enactments in the field of personal status laws.[12] Therefore, the principles established in the "Azhar-case" required reformulation, particularly in the numerous cases in recent years where state-enacted legislation was attacked on the grounds that it violated the "principles of Islamic law". The majority of these cases concerned the new law of personal status enacted as Law No. 100 of 1985 (*cf.*, eg., S.C.C., 15 May 1993, 14 August 1994, 5 August 1995, 4 May 1996, 6 June 1996). In this instance, the S.C.C. engaged in constitutional review based on the "principles of Islamic *shari'a*" for the first time.

---

[12] In 1979, a new personal status law was enacted (Law No. 44 of 1979). This legislative enactment, which became known as "Jihan's Law" (Egypt's former "first lady" Jihan al-Sadat claimed to have made a material contribution to the new law), was strongly criticized. Here again, opponents argued that the new personal status law, in particular the provisions relating to polygamy and divorce, did not conform to the relevant provisions of Islamic law. In 1985, the S.C.C. declared Law No. 44 of 1979 null and void for being unconstitutional. However, the S.C.C. based its decision exclusively on procedural grounds: the Court held, that such a piece of legislation may not be enacted through a presidential decree (S.C.C., 4 May 1985b). In 1985, therefore, another personal status law was enacted as Law No. 100/1985 (for details, Fahmi, 1986, Hatem, 1986, Najjar, 1988, Botiveau, 1993: 200-204).

In a second step, therefore, the S.C.C. had to define the scope that Article 2 of the Egyptian Constitution establishes for constitutional review. In the case under discussion, the S.C.C. summarized these principles as follows:

> No legislative enactment may contravene the provisions of Islamic law, which are definite in terms of their immutability and their meaning (*al-ahkam al-shar'iyya al-qat'iyya fi thubutiha wa dalalatiha*). Because they are the only rules regarding which *ijtihad* is prohibited (S.C.C., 18 May 1996).

Ijtihad, literally "exerting oneself", is the technical term in Islamic law for the use of "independent reasoning" (*cf.* Schacht, 1960). *Ijtihad* is the "worldly" interpretation of the "divine sources" of Islamic law. The relationship of immutable, "divine" sources of Islamic law on the one hand and "worldly" interpretation on the other, is defined by the S.C.C. in the following manner: only rules which belong to the immutable core of Islamic law are beyond the scope of *ijtihad*. Because

> they represent the general principles (*al-mabadi' al-kulliyya*) of the Islamic *shari'a* and its immutable sources, which cannot be interpreted or altered. Therefore it is beyond imagination, that their interpretation is subject to change depending on time and clime. They, therefore, cannot be amended. To deviate from them or to alter their meaning is not permissible (S.C.C., 18 May 1996: 1031-1032).

However, this does not imply that the legislature is bound to a specific *interpretation* of Islamic law developed by the Islamic jurists:

> In contrast (to the immutable principles of Islamic law), there are the rules based on interpretation (*ahkam zanniyya*) that are, regarding their immutability or their meaning or in both respects, not absolutely firm. Here, *ijtihad* is permitted. (...) Due to their flexible nature (*tabi'iyya mutatawwara*), they are subject to change according to the change of time and clime (*al-zaman wal-makan*) ... The only prerequisite is, that *ijtihad* is (exercised) within the framework of the general sources of Islamic law (*al-usul al-kulliyya lil-shari'a*) and that this (limit) is not transgressed (S.C.C., 18 May 1996: 1032).

The approach taken by the S.C.C. in distinguishing between "definite" and "flexible" rules of Islamic law is not entirely new. On the contrary, it is reminiscent of what 'Abd al-Razzaq al-Sanhuri (Sanhoury, d. 1971), the foremost Egyptian jurist of the 20th century (*cf.* Hill, 1987), once suggested in his *Le califat* (1926: 580). Sanhoury argued in favour of Islamic law as the foundation of a new, *national* Egyptian legal tradition. He claimed, this would also require a

substantial development of the body of traditional Islamic law in order to adapt it to modern conditions. Following this "*phase scientifique*", Islamic law should be codified in state-enacted legislation in a subsequent "*phase legislative*" (Sanhoury, 1926: 578-584). The discussion of the S.C.C. can therefore be taken as an indicator of the direction the argument will take: not to subordinate state-enacted, "secular" legislation under the "principles of Islamic law", but rather to "nationalize" Islamic law by submitting it under the control of the nation-state.

This becomes obvious when one looks at the way the S.C.C. exploits the differentiation between "definite" and "flexible" rules of Islamic law in order to enlarge the scope of legislative discretion. In distinguishing between "definite" and "flexible" rules of Islamic law the S.C.C. held:

> Opinions based on *ijtihad* regarding a controversial question do not exercise *per se* a binding power exceeding the (jurists) other than those who express them. These (opinions), therefore, cannot be considered establishing immutable legal rules which cannot be abrogated. Otherwise, this would equate to banning reason and reflection from God's religion (S.C.C., 18 May 1996: 1033).

This means that as soon as opinion is divided among Islamic jurists, there is room for *ijtihad*, as the matter is no longer governed by a "definite" rule of Islamic law. In this instance, it is at the legislature's discretion to find its own interpretation which conforms to the requirements of contemporary social conditions. The only prerequisite is that this interpretation does not transgress the framework of the general principles of Islamic law.

However, the question of *whether* there is a "definite" rule of Islamic law governing a particular matter, in other words, whether there is room for *ijtihad*, is to be decided by the S.C.C. The Court held:

> The Supreme Constitutional Court has the power to control that they (the "definite" rules of Islamic law) are observed and to declare whatever legislative enactments which contravene them, null and void (S.C.C., 18 May 1996: 1032).

It is therefore not the "definite" rules of Islamic law *per se*, but the interpretation of these provisions through the (secular) constitutional court, that constitutes the limits which curtail legislative discretion. In other words: "The Article 2 is a norm within – and not above – the Constitution" (Johansen, 1996: 199). Ultimately, the constitutionality of legislative enactments is exclusively decided by the S.C.C. according to its own standards, or, in the terminology of Teubner and Luhmann: its "normative code". Because the "definite" rules of Islamic law that provide the scope for constitutional review under Article 2 of the Egyptian

Constitution, are not a body of stable, presupposed rules (like Kelsen's *Grundnorm* of natural law), but are generated within the order of secular law through interpretation, the S.C.C. "selects" rules from the body of Islamic law and provides them with validity within the order of secular law. The S.C.C., and no other authority, decides whether or not to elevate certain rules of Islamic law to "definite" provisions. These provisions are therefore an internal construction of the order of secular law; they do not represent a set of "supra-legislative norms" derived from a body of "natural law".

3. VEILING AND "LEGISLATIVE *IJTIHAD*"

After defining the scope that Article 2 of the Egyptian Constitution establishes for constitutional review, the S.C.C. turned to the legal question under scrutiny: may the legislature prohibit the wearing of the *niqab* in state-run schools? The argument of the S.C.C. illustrates the aforementioned process of "selection" through which rules of Islamic law are introduced to the order of secular law.

The Court's argument starts with a general statement regarding women's standing in Islam:

> Islam elevates the standing of the woman, requires her to preserve her modesty, and obliges her to cover her body from being despicable or sacrificing her dignity in order to protect woman from whatever may damage, or be detrimental to, her shame. (...)Therefore, she does not have the right to choose her dress according to her entirely free will (*ibid.*: 1035).

However, regarding the firm picture of "modest" dress that women have to wear, the S.C.C. maintained that Islamic law lacks a "definite" provision. The Court held that opinion on this question is divided among Islamic jurists. In this case *ijtihad* is therefore permissible. Here, independent reasoning is limited only by the relevant Koranic provisions. To support this opinion, the S.C.C. quoted from *sura* 24 verse 31 and *sura* 33 verse 59:

> (Say to the believing women) that they should draw their veils over their bosoms; that they should cast their outer garments over; that they should not display their beauty and ornaments except what (ordinarily) appear thereof; that they should not strike their feet in order to draw attention to their hidden ornaments (S.C.C., 18 May 1966:1035).

These Koranic verses, so the S.C.C. argued, belong to the rules that govern the relationship between God and man and that therefore may not be altered in any respect. However, the way these provisions are *put into practice* – i.e., their worldly interpretation – belongs to the realm of *ijtihad*, thereby allowing for legislative discretion. Islamic jurists, it was held, do not interpret the aforemen-

tioned Koranic verses in a uniform manner. Moreover, the Court stressed that only a minority among Islamic jurists were of the opinion that women must cover their entire face through wearing the *niqab*.

This is not the place to discuss either the issue of the *niqab* in Islamic law in general or the Egyptian debate in particular. Suffice it to say that the "division in opinion" regarding the question of "how to veil" has been at the centre of the public polemic which was provoked by the enactment of the ministerial decree in 1994. While Islamists dismissed the new regulation as "violating not only Islamic legal principles and true Egyptian customs, but also (civil) liberties and human rights" (al-Sha'b, 1 July 1994), Sayyid al-Tantawi, at the time Grand-*mufti* at the official Dar al-Ifta', argued that the ministerial decree conformed to Islamic law: "the *niqab* is not a religious duty (*'ibada*) but merely a custom (*'ada*)".[13] Al-Azhar took a position somewhere inbetween by criticizing several provisions of the decree but not refuting it altogether.[14] Others, like Muhammad Sa'id al-'Ashmawi, a "secularist" intellectual with "Islamic orientation" (Shepard, 1996: 53, *cf.* also Ferrié and Radi, 1995), took advantage of the occasion to maintain that dress in general and veiling in particular had little to do with religion (*cf.* Ruz al-Yusif, 13 July 1994, 1 August 1994).

So regarding the question of "how to veil", no "definite" rule of Islamic law therefore exists. The S.C.C. concluded, that it is both the duty and the privilege of the legislature to regulate women's dress "in the light of what is socially acceptable and what is generally considered appropriate regarding customs and usages" (S.C.C., 18 May 1996: 1035). The only prerequisite is that the legislature's interpretation does not contradict any definite rule of Islamic law and that it conforms to the general principles of the *shari'a*. The Court held that the regulation of dress "is subject to change according to time and clime" (S.C.C., 18 May 1996: 1035). As the new regulation met the aforementioned requirements, it was held that the decree enacted by the Minister of Education, fell within the scope of legislative discretion which is the privilege of the legislature. Therefore, the ministerial decree does not violate Article 2 of the Egyptian Constitution.

Interpretative pluralism and casuistic differentiation have always been a method employed by Islamic jurists to enlarge the scope of *ijtihad* in order to adapt the body of Islamic law to changing social and economic conditions (*cf.* Johansen, 1995: 154). However, in the case under discussion the S.C.C. draws on this tradition in order to enlarge the *legislature*'s discretion. *Even though it is*

---

13 Sabah al-Khayr, 13 September 1994. This opinion also was upheld by his successor, Nasr Farid Wasil (*cf.* Middle East Times Egypt, 4 January 1997).

14 The *fatwa*-Committee of al-Azhar was particularly critical of the fact that students' "right to veil" depends on the permission of both the guardian and the school administration. It was argued that this constitutes an unlawful restriction curtailing a right granted by virtue of Islamic law (*cf.* al-Sha'b, 19 August 1994).

nominally bound to the "definite principles" and "immutable sources" of Islamic law, the legislature has the privilege to put these rules into practice. This approach allows the order of secular law to construct a reading of the rules of Islamic law which meets the requirements of "time and clime", in other words: to "invent" an Islamic legal tradition (Dupret, 1998). In this instance, reference to Islamic law is more than just a means to *legitimize* rules of state-enacted legislation, in a sense that "l'utilisation sociale des signes religieux implique leur intégration dans d'autres systèmes (... Ainsi,) la restitution du religieux (...) est détachée de sa capacité à ordonner le réel" (Ferrié, 1996: 12). This internal reconstruction of Islamic legal rules enables the order of secular law to remain autonomous. On the one hand, under the "dictate" of Article 2 of the Egyptian Constitution, the order of secular law cannot operate without reference to Islamic law. On the other hand, it always reserves the right to decide which Islamic legal rules it acknowledges. Under Article 2 of the Egyptian Constitution, Islamic law therefore, does not "determine" the *substance* of state-enacted legislation as, for instance, Rigaux's concept of "hétéronomie par corporation" suggests. Instead, for the territory of the Egyptian *nation-state*, the S.C.C. defines the authoritative, "legally acknowledged" interpretation of Islamic law.

4. FREEDOM OF RELIGION IN STATE-RUN SCHOOLS

In addition, the plaintiff had maintained that the ministerial decree infringes on freedom of religion. Article 46 of the Egyptian Constitution provides:

> The state guarantees freedom of belief (*hurriyat al-'aqida*) and freedom of religious practice (*hurriyat mumarasat al-sha'a'ir al-diniyya*).

In Egypt, freedom of religion has always been a controversial issue, and particularly in recent years. Even though freedom of religion has been guaranteed since the first Egyptian Constitution enacted in 1923,[15] debate on the scope of this freedom has still not abated. In general, Egyptian Courts interpret freedom of religion referring explicitly to the Islamic legal tradition. Therefore, only the "religions of the book" (i.e., Islam, Judaism and Christianity) are recognized as religions protected under the constitution (*cf.* Aldeeb Abu Sahlieh, 1979, Edge, 1990, Bälz, 1997). In addition, it is an established principle of Egyptian law that

[15] Article 13, Constitution of Egypt, enacted on 19 April 1923.

conversion from Islam, for example, is not protected by freedom of religion (an issue, which, once again caught public attention in the "Abu Zayd-case").[16]

In the context at hand, however, another aspect of freedom of religion is at stake: how does the state's privilege to determine an official interpretation of Islamic law relate to the individual's freedom of religion that is guaranteed under the Constitution?

Again, the S.C.C. opened with some general remarks concerning freedom of religion under Egyptian law. *Freedom of belief*, the S.C.C. stated, protects the individual chiefly from "being forced to adopt a particular belief he does not believe in, to abandon a belief once adopted or to disclose it" (S.C.C., 18 May 1996: 1038-1039). However, *freedom of religious practice* is also protected under the Constitution, because:

> Freedom of belief cannot be separated from freedom of religious practice. Therefore, Article 46 of the constitution mentions them together in one sentence ... The latter (freedom) represents the expression of the former (freedom), as it permits transforming belief from a mere (inner) belief (*iman*) ... into a concrete expression of its content which materializes in the conduct of life (S.C.C., 18 May 1996: 1039).

Nevertheless, the Court made an important distinction between freedom of belief and freedom of religious practice regarding the possible *limitations* of these freedoms: freedom of religion, it was argued, does not generally include the privilege to inflict harm upon third parties. This means that:

> (Freedom of belief) is .. not subject to any limitations. The latter freedom (of religious practice), however, may be restricted through measures which regulate it in order to protect certain supervening interests ... and, in particular, on the grounds of the *ordre public* (*al-nizam al-'amm*) and the *bonnes moeurs* (*al-qiyam al-adabiyya*), and to protect rights and freedoms of third parties (S.C.C., 18 May 1996*: 1039*).

16 Nasr Hamid Abu Zayd, professor of Islamic studies and literature at Cairo University, prompted the fierce criticism of both the religious establishment and Islamists with his modernist reading of the Koran. In 1993, a Cairo-based group of lawyers brought an action in the Giza Court of First Instance (*Mahkamat al-Jiza al-ibtida'iyya*) demanding the dissolution of his marriage, arguing that his writings were "heretical" and that he, therefore, was an "apostate". Under Islamic law, the marriage of an apostate to a *muslima* is void. Invoking the Islamic principle of *hisba*, the plaintiffs argued that it was the duty of "every Muslim" to enforce the dissolution of a marital union of that kind. After the action had been dismissed in the Court of First Instance, the Cairo Court of Appeals (*Mahkamat isti'naf al-Qahira*) ruled on 14 June 1995 in favour of the plaintiffs. This decision was upheld in a ruling of the Egyptian Court of Cassation (*Mahkamat al-naqd al-misriyya*) on 5 August 1996 (for a detailed discussion of the case, Dupret, 1996b, Dupret and Ferrié, 1997, Bälz, 1996b, 1997).

The Court maintained that the decree regulating school-dress represents a limitation of freedom of religious practice which is consistent with the aforementioned prerequisites. Therefore, the decree does not violate freedom of religion. Here, the Court relied on two arguments in particular:

- First, the S.C.C. invoked Article 18 of the Egyptian Constitution. This Article provides: "Education is a right which is guaranteed by the state ... (In turn, the state) supervises ... education". It was held that this stresses the duty of the state to regulate education in the light of contemporary social conditions. It was argued that this included the privilege to impose a unified school-dress for educational purposes. The governmental function of supervising education therefore ensures freedom of religious practice on the side of the students.
- Secondly, the Court reiterated that the decree represents a permissible kind of *ijtihad*. As mentioned before, it is the legislature's privilege to regulate women's dress in state-run schools. It was emphasized that this is a matter subject to change according to time and clime. This argumentation gives preference to the *official* reading of Islamic law as defined in the ministerial decree, over the *individual* reading suggested by the plaintiff. In this instance, again, the order of secular law determines the reading of Islamic law that is acknowledged in the order of secular law and not *vice versa*.

5. THE "STRUGGLE FOR LAW": TOWARD A SECULAR RECONSTRUCTION OF ISLAMIC LAW

The case I have examined is paradigmatic for recent developments in Egyptian law in two respects: on the one hand, Islamist groups increasingly use legal procedure for political ends. The most popular examples of such tendencies represent the legal battle over Youssef Chahine's film "al-Muhajir"[17] and the "Abu Zayd-case".[18] On the other hand, this development is countered through a strategy that permits "secular" courts and legislation to define an official reading of the sacred texts of Islam.

However, these developments do not simply bear the character of political justice, that has been traditionally defined as "the enlarging of the radius of

[17] In 1994, an Egyptian lawyer brought an action in the Cairo Court of Summary Justice (*Mahkamat al-Qahira lil-umur al-mustaʿjila*) demanding that Youssef Chahine's film "al-Muhajir" should be banned from Egyptian cinemas. The plaintiff argued that the protagonist of Chahine's pharaonic epic represented the prophet Joseph and that the film, therefore, violated the Islamic prohibition of forming an image of the Prophets. This, the plaintiff maintained, violated the Egyptian Muslims' religious feelings. In the course of the extended legal battle that followed (including a total of more than half a dozen judicial decisions and an even larger number of court hearings) the film was temporarily banned (for a detailed discussion of the case, Bernard-Maugiron, 1997, and her article in this volume).

[18] *Cf.* note 16.

political action by resort to the courts" (Kirchheimer, 1961: 430). Here, law is not merely instrumentalized in the political struggle. Instead, the law itself is at the centre of controversy (*cf.* Dupret, 1997). The question is: who has the power to determine the substance of legal rules? This finding is reminiscent of what the German jurist von Jhering (died 1892) once polemically termed *Kampf um's Recht* (struggle for law): law does not grow "organically" in society, as, for example, the Historist School of Law assumes, but is the product of a Darwinist-like struggle (v. Jhering, 1872: 20, *passim*).[19] Or, in the words of Bourdieu: "Le champ juridique est le lieu d'une concurrence pour le monopole du droit de dire le droit" (1986: 4).

The struggle over authoritative interpretation of Islamic law has a long standing tradition (*cf.*, e.g., Jackson, 1996). However, what distinguishes the setting of the *niqab*-case from the traditional debate is that the power over the authoritative interpretation of Islamic law has been transferred from the Islamic jurists to secular institutions. It is the legislature's privilege "to put the rules of Islamic law into practice". Moreover, this process is controlled by the Constitutional Court, which ensures that "legislative enactments do not contravene the definite provisions of Islamic law".

To conclude from these findings, that under Article 2 of the Egyptian Constitution Islamic law exercises "direct influence" over the order of state-enacted legislation in the sense that Islamic law determines the substance of legislative enactments, is, therefore, a rather superficial reading. On the contrary, Islamic law and state-enacted legislation are two legal orders that remain *autonomous.* Wherever rules of Islamic law are "incorporated" into the order of secular law, they are an *internal construction* of the order of secular law. Under Article 2 of the Egyptian Constitution, reference to Islamic law through secular courts is nothing but a strategy used by the order of secular law to maintain its autonomy. Reference to Islamic law serves as a means to legitimize state-enacted legislation. However, Islamic law does not constitute a body of presupposed "supra-legislative norms", that are inaccessible to worldly interpretation, because it is the legislature's privilege to codify Islamic law in a manner which corresponds to the requirements of "time and clime". Nor does Islamic law impose extraneous limitations on the order of secular law, as the secular S.C.C.'s interpretation of Islamic law constitutes the sole limitation that curtail legislative discretion. In the end, the question of legal validity in general and the constitutionality of laws in particular is decided exclusively by the order of secular law according to its own standards. This self-referentiality, and not the phenomenon of "legislation", constitutes the positivity of law, namely that "legal validity cannot be brought in from outside; it can only be produced within the law" (Teubner, 1989a: 2).

[19] For a general introduction to v. Jhering's work (and a critical discussion of his ideas), Larenz, 1983: 43-48, Wieacker, 1967: 450-453.

Bibliography

'Abd al-Fadîl M., 1989, *The Great Financial Deceit* , Cairo, Dar al-mustaqbal al-'arabi (in Arabic)
'Abd al-Fattah N., 1985, *The Qoran and the Sword. The Conflict Between Religion and the State in Egypt*, Cairo, Madbuli (in Arabic)
'Abd al-Fattah N., 1994, *Veiled Violence: Islamic Fundamentalism in Egyptian Politics in the 1990s*, Cairo, Dar Sechat
'Abd al-Fattah N., 1997, *The Text and the Bullets: Political Islam, the Copts and the Crises of the Modern State in Egypt*, Beirut, Dar al-nahar (in Arabic)
'Abd al-Fattah N. and Botiveau B. (eds.), 1994, *Politiques législatives: Egypte, Tunisie, Algérie, Maroc*, Le Caire, Dossiers du CEDEJ
Abdelkarim A., 1992, *Primitive Capital Accumulation in the Sudan*, London, Frank Cass and Co. Ltd.
Abel R.L., 1973, «A Comparative Theory of Dispute Institutions in Society», *Law & Society Review*, 8, 217-342
Abu Sahlieh S.A., 1979, *Non-musulmans en pays d'Islam: Cas de l'Egypte*, Zürich, Editions Universitaires Fribourg
Abu Talib S., 1990, «Islamic *Shari'a* and Positive Law in Arab Countries», *Majallat al-Qanun wa-l-iqtisad (Majmu'at al-Ustadh 'Abd al-Razzaq al-Sanhuri)*, 193-253 (in Arabic)
'Alam al-Din M.D.I., 1987, *Banking Operations in Law and Practice* (in Arabic), Cairo, no publisher, 2 vols. (in Arabic)
Al-Ahnaf M., Botiveau B. and Cesari J., 1993, «Sur les usages politiques du droit», *Monde arab Maghreb Machrek*, No. 142, 3-10
Al-Zwaini L. and Peters R., 1994, *A Bibliography of Islamic Law, 1980-1993*, Leiden, New York, Köln, E.J. Brill
Alliot M., 1984, «L'anthropologie juridique et le droit des manuels», *Bulletin de liaison de l'équipe de recherche en anthropologie juridique*, No. 6
Allott A. N. and Woodman G.R. (eds.), 1986, *People's Law and State Law: The Bellagio Papers*, Dordrecht, Foris, ALRC (Australian Law Reform Commission)
Allott A.N., 1960, *Essays in African Law*, London, Butterworths
Allott A.N., 1970, *New Essays in African Law*, London, Butterworths
Amereller F., 1995, *Hintergründe des "Islamic Banking": Rechtliche Problematik des riba-Verbotes in der Shari'a und seine Auswirkungen auf einzelne Rechtsordnungen arabischer Staaten*, Berlin, Dunker & Humblot
Amin S.H., 1985, *Middle East Legal Systems*, Glasgow, Royston Limited
An-Na'im A.A., 1992, *Towards an Islamic Reformation*, Cairo, AUC Press

Antoun R.T., 1989, *Muslim Preacher in the Modern World. A Jordanian Case Study in Comparative Perspective*, Princeton, Princeton University Press

Arnaud A.J. (ed.), 1993, *Dictionnaire encyclopédique de théorie et de sociologie juridique*, Paris, L.G.D.J. (2e ed.)

'Ashmawi, M.S. (al-), 1988/1996, *Islamic Shari'a and Egyptian Law*. A comparative Study, Cairo, Madbuli (in Arabic).

Assier-Andrieu L., 1987, «Le juridique des anthropologues», *Droit et Société*, 5, 89-108

Assier-Andrieu L., 1996, *Le droit dans les sociétés humaines*, Paris, Nathan

Ayubi N., 1991, *Political Islam. Religion and Politics in the Arab World*, London, Routledge

Azziman O. (ed.), 1995, «Le droit international privé dans les pays maghrébins. Les conflits de lois: le statut personnel», *Les cahiers de droits maghrébins*, No. 1

Badie B., 1992, *L'Etat importé. L'occidentalisation de l'ordre politique*, Paris, Fayard

Baer G., 1969, «Tanzimat in Egypt: the Penal Code», in G. Baer, *Studies in the Social History of Modern Egypt*, Chicago, University of Chicago Press

Bailey F. G., 1973, *Debate and Compromise: The politics of Innovation*, Totowa, Rowman & Littlefield

Bajazet, 1996, «La tradition...quelle tradition?», *Monde arabe Maghreb-Machrek*, No. 151, 23-31

Balandier G, 1985, «Le politique des anthropologues», in M. Grawitz and J. Leca, (eds.), *Traité de science politique*, Vol. 1, Paris, P.V.F.

Ballion F., 1989, «La pratique judiciaire et administrative et le droit maghrébin des personnes dans l'arrondissement judiciaire de Bruxelles», *Journal des juges de paix et de police*, 69-94

Bälz K. 1997, «Submitting Faith to Judicial Scrutiny Through the Family Trial: The Abû Zayd Case», *Die Welt des Islams*, 37, 135-155

Bälz K., 1996a, «Shari'a and Qanun in Egyptian Law: A Systems Theory Approach to Legal Pluralism», *Yearbook of Islamic and Middle Eastern Law* Vol. 2, 37-53

Bälz K., 1996b, «Eheauflösung aufgrund von Apostasie durch Popularklage: Der Fall Abû Zayd (zu Appellationsgericht Kairo, 14.6.1995 – E. 287/111)», *Praxis des Internationalen Privat- und Verfahrensrechts*, 353-356

Bastenier A. and Dassetto F., 1990, *Immigrations et nouveaux pluralismes. Une confrontation de sociétés*, Bruxelles, De Boeck Université

Becker H., 1962/1985, *Outsiders. Studies in the Sociology of Deviance*, New York, Free Press (Fr. translation, *Outsiders*, Paris, Métaillé)

Ben Achour Y., 1993, *Religion, politique et droit dans le monde arabe*, Tunis, Cerp

Ben Nasser A. and Jouan M.P., 1993, «Développement des formes de médiation dans la régulation des conflits de la vie quotidienne», *Report on Action-Research in European and North African Towns for the European Urban Security Forum As Part of the MAD-Urbs Programme*

Benda-Beckmann K. and F. von, 1993, «Islamic Law as Folk Law», in H. Slaats (ed.), *Liber Amicorum Mohammad Koesnoe*, Surabaya, Airlangga University Press

Bentzon A.W., 1992, «A Note on the Polycentricity of Law. A Danish Version of Legal Pluralism», *Commission on Folk Law and Legal Pluralism Newsletter*, No. XXI

Berger M.S., 1997, «The Legal System of Family Law in Syria», *Bulletin d'Etudes Orientales (Institut Français de Damas)*

Bernard-Maugiron N., 1997, «Anatomie d'une affaire égyptienne. Le procès de «L'Emigré» de Youssef Chahine», in G. Boëtsch, B. Dupret and J.N. Ferrié (eds.), *Droits et sociétés dans le monde arabe*, Aix-en-Provence, Presses de l'Université d'Aix-Marseille

Berque J., 1944, *Essai sur la méthode juridique maghrébine*, Rabat, M. Leforestier

Berque J., 1953, «Problèmes initiaux de la sociologie juridique en Afrique du Nord», *Studia Islamica*, Vol. 1, 137-162

Berque J., 1978, *Structures sociales du Haut-Atlas*, 2e éd. revue et augmentée, Paris, P.U.F.

Bishri T. (al-), 1996, *al-Wad'al-qanuni al-mu'asir bayn al-shari'a al-islamiyya wa al-qanun al-wad'i*, Cairo, Dar al-shuruq

Blaise P. and De Coorebyter V., 1990, «L'Islam et l'école. Anatomie d'une polémique», *Courrier Hebdomadaire du CRISP*, No. 1270-1271

Bleuchot H., 1994, *Les cultures contre l'homme? Essai d'anthropologie historique du droit pénal soudanais*, Aix-en-Provence, Presses universitaires d'Aix-en-Provence

Bohannan P., 1965, «The Differing Realms of the Law», in L. Nader (ed.), The Ethnography of Law, *American Anthropologist*, 67, Special Supplement No. 6, 33-42

Boltanski L. and Thévenot L., 1991, *De la justification. Les economies de la grandeur*, Paris, Gallimard

Bonderman D., 1968, «Modernization and Changing Perceptions of Islamic Law», *Harvard Law Review*, 81, 1169-1193

Botiveau B., 1986, «L'exception et la règle. La justice vue par les magistrats (Annexe: l'organization judiciaire de l'Egypte)», *Bulletin du CEDEJ*, No. 20, 81-113

Botiveau B., 1988, «Faits de vengeance et concurrence de systèmes de droit», *Peuples méditerranéens*, Nos. 41-42, 153-166

Botiveau B., 1989, «Les juges égyptiens saisis par le doute», *Annuaire de l'Afrique du Nord*, XXVIII, 261-268

Botiveau B., 1990, «Droit islamique: Du politique à l'anthropologique», *Droit et Société*, No. 15, 161-174

Botiveau B., 1993, *Loi islamique et droit dans les sociétés arabes. Mutations des systèmes juridiques du Moyen-Orient*, Paris, Karthala

Botiveau B., 1995, «Le métier de juger. Constructions sociales et politiques de la figure du juge dans le monde arabe», *Droits et Cultures*, No. 30, 9-15

Botiveau B., 1996, «Remarques sur les conditions d'une anthropologie du droit dans les sociétés du monde arabe et musulman», *Égypte-Monde arabe*, No. 25, 25-40

Botiveau B., 1997a, «Palestine, Instituer un droit de la nation», *in* Palestine, Palestiniens. Territoire national, espaces communautaires, *Les Cahiers du Cermoc*, 59-71

Botiveau B., 1997b, «Les usages politiques du droit dans le monde arabe: L'analyse des pratiques judiciaires et la notion d'aire culturelle», in G. Boëtsch, B. Dupret and J. N. Ferrié (eds.), *Droits et sociétés dans le monde arabe. Perspectives socio-anthropologiques*, Aix en Provence, Presses Universitaires d'Aix-Marseille

Bouchon-Meunier B., 1993, *La logique floue*, Paris, P.U.F.

Boulahbel-Villac Y., 1994, «La famille intermédiaire: Comportements familiaux dans et pour l'immigration», in Bensalah N. (ed.), *Familles turques et maghrébines aujourd'hui. Evolutions dans les espaces d'origine et d'immigration*, Paris/Louvain-la-Neuve, Maisonneuve et Larose/Academia

Bourdieu P., 1979, *Algeria 1960 – The Disenchantement of the World, The Sense of Honour, The Kabyle House or the World Reversed*, Cambridge, Cambridge University Press (Paris, Éd. de la Maison des Sciences de l'Homme)

Bourdieu P., 1986a, «Habitus, code et codification», *Actes de la Recherche en Sciences sociales*, No. 64, 40-44

Bourdieu P., 1986b, «La force du droit: Éléments pour une sociologie du champ juridique», *Actes de la Recherche en Sciences sociales*, No. 64, 3-19

Bourdieu P., 1987, «La codification», in *Choses dites*, Paris, Minuit

Bourdieu P., 1994, «Esprits d'Etat. Genèse et structures du champ bureaucratique», in *Raisons Pratiques*, Paris, Seuil

Bourlond A., 1997, *Teaching Law in Palestine. Strategies and Challenges*, Birzeit, Birzeit University, Law Center

Bousquet G.-H., 1944, *L'Islam maghrébin. Introduction à l'étude générale de l'Islam*, 2nd ed., Alger, Maison des livres

Bousquet G.-H., 1947, *Précis de droit musulman principalement malékite et algérien*, Alger, Maison des livres

Brunschvig R., 1955, «Considérations sociologiques sur le droit musulman ancien», *Studia Islamica*, No. 3, 61-73

Brunschvig R., 1976, «Averroès juriste», in *Études d'islamologie*, tome 2, Paris, Maisonneuve et Larose

Burgat F., 1993, «Cacher le politique: Les représentations de la violence en Egypte», *Maghreb Machrek*, No. 142, 32-60

Carlier J.-Y., 1993a, «De Schengen à Dublin en passant par Maastricht: Nouveaux itinéraires dans la circulation des personnes, leur incidence sur le droit international privé de la famille», in *Nouveaux itinéraires en droit. Hommages à François Rigaux*, Bruxelles, Bruylant

Carlier J.-Y., 1993b, «Les contrats de mariages internationaux: L'aspect particulier des clauses relatives aux relations personnelles», in M. Verwilghen and R. De Valkeneer (eds.), *Relations familiales internationales*, Bruxelles, Bruylant

Carlier J.-Y., 1994, «Les conventions entre la Belgique et le Maroc en matière de droit familial», *Revue trimestrielle de droit familial*, 447-462

Carlier J.-Y., 1995, «Les conventions internationales en matière matrimoniale et successorale au regard des droits marocain, algérien, tunisien et turc», in *Internationale contractuele relaties. De rol van de notaris. Les relations contractuelles internationales. Le rôle du notaire* (Notarieel congres 1995/Congres des notaires 1995), Antwerpen/Apeldoorn, Maklu

Carlier J.-Y., 1996, «Le droit confronté à la présence de familles musulmanes en Europe: Quelles perspectives?», in M.-C. Foblets (ed.), *Familles – Islam – Europe. Le droit confronté au changement*, Paris, Karthala

Carlier J.-Y. and Verwilghen M., 1992, *Le statut personnel des musulmans. Droit comparé et droit international privé*, Bruxelles, Bruylant

Cerruti S., 1996, «Normes et pratiques, ou de la légitimité de leur opposition», in B. Lepetit (ed.), *Les Formes de l'expérience. Une autre histoire sociale*, Paris, Albin Michel

Certeau M. (de), 1990, *L'invention du quotidien. 1. Arts de faire*, Paris, Gallimard

Chanock M., 1985, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge, Cambridge University Press

Charnay J.-P., 1965, *La vie musulmane en Algérie d'après la jurisprudence de la première moitié du XXe siècle*, Paris, P.U.F.

Chehata Ch., 1965, «Etudes de philosophie musulmane du droit», *Studia Islamica*, No. 23

Chehata Ch., 1971, *Etudes de droit musulman*, Paris, P.U.F.

Cohen A.P. and Comaroff J.L., 1976, «The Management of Meaning: On the Phenomenology of Political Transactions», in B. Kapferer (ed.), *Transaction and Meaning*, Philadelphia, Institute for the Study of Human Issues

Collectif, 1989, *Droit et environnement social au Maghreb*. Paris/Casablanca, CNRS/Fondation du Roi Abdel-Aziz Al Saoud

Coulson N.J., 1964, *A History of Islamic Law*, Edinburgh, Edinburgh University Press

Cranston R., 1995, «Credit, Security and Debt Recovery: Law's Role in Reform in Asia and the Pacific», *Saint Louis University Law Journal*, 39, No. 3

Crone P., 1987a, *Roman, Provincial and Islamic Law. The Origins of the Islamic Patronate*, Cambridge, Cambridge University Press

Crone P., 1987b, «Max Weber, das islamische Recht und die Entstehung des Kapitalismus», in W. Schluchter (ed.), *Max Webers Sicht des Islams. Interpretation und Kritik*, Frankfurt/M., Suhrkamp

Dakhlia J., 1996, «La question des lieux communs. Des modèles de souveraineté dans l'Islam méditerranéen», in B. Lepetit (ed.), *Les formes de l'expérience. Une autre histoire sociale*, Paris, Albin Michel

Darwich M., 1987, «La censure, le cinéma et d'autres choses», *Bulletin du CEDEJ*, No. 21, 97-107

Dassetto F., 1996, *La construction de l'Islam européen. Approche socio-anthropologique*, Paris, L'Harmattan

Davidson D., 1980, *Essays on Action and Events*, Oxford, Clarendon Press

De Jardin M. and Quin A., 1996, «L'application de la Convention des Nations Unies relative aux droits de l'enfant», *Revue de la Recherche juridique – Droit prospectif*, No. 1, 193-208

De Sousa Santos B., 1987, «Law: A Map of Misreading. Toward a Postmodern Conception of Law», *Journal of Law and Society*, Vol. 14, No. 3, 279-302 (Fr. transl. «Droit: Une carte de la lecture déformée. Pour une conception post-moderne du droit», *Droit et société*, No. 10, 363-390)

Decroux P., 1985, «La Convention franco-marocaine du 10 août 1981 relative au statut des personnes et de la famille et à la coopération judiciaire», Journal du Droit International Clunet

Dekeuwer-Defossez Fr. (ed.), 1993, *Le droit de la famille à l'épreuve des migrations transnationales*, Paris, L.G.D.J.

Deprez J., 1981, «La pérennite dé l'Islam dans l'ordre juridique du Maghreb», in *Islam et politique au Maghreb*, Paris, CNRS

Deprez J., 1988, «Droit international privé et conflits de civilisations. Les relations entre systèmes d'Europe occidentale et systèmes islamiques en matière de statut personnel», *Recueil des Cours de l'Académie de droit international de La Haye*, tome 211

Deprez J., 1989, «Au carrefour du droit comparé et du droit international privé, quelle place pour le droit musulman?», in J.-R. Henry (ed.), L'enseignement du droit musulman en France, Paris, CNRS

Deprez J., 1996, «Statut personnel et pratiques familiales des étrangers musulmans en France. Aspects de droit international privé», in M.-C. Foblets (ed.), *Familles – Islam – Europe. Le droit confronté au changement*, Paris, Karthala

Dodier N., 1991, «Agir dans plusieurs monde», *Critique*, Nos. 529-530

Doucet M. and Vanderlinden J. (eds.), 1994, *La réception des systèmes juridiques: Implantation et destin*, Bruxelles, Bruylant

Dumont L., 1983, *Essais sur l'individualisme. Une perspective anthropologique sur l'idéologie moderne*, Paris, Seuil

Dumper M., 1994, *Islam and Israël. Muslim Religious Endowments and the Jewish State*, Washington, Institute for Palestinian Studies

Dupret B. and Ferrié J.-N., 1997a, «For intérieur et ordre public, ou comment la problématique de l'Aufklärung peut permettre de décrire un débat égyptien», in G. Boëtsch, B. Dupret, and J.-N. Ferrié (eds.), *Droits et Sociétés dans le monde arabe*, Aix-en-Provence, Presses de l'Université d'Aix-Marseille

Dupret B. and Ferrié J.-N., 1997b, «Participer au pouvoir, c'est édicter la norme: À propos de l'affaire Abu Zayd (Egypte 1992-1996)», *Revue française de science politique*, Vol. 47, No. 6, 762-775

Dupret B., 1993, «La problématique du nationalisme dans la pensée islamique contemporaine, Introduction», *Egypte-Monde arabe*, Nos. 15-16, 377-388

Dupret B., 1995a/1996, «La *sharî'a* comme référent législatif. Du droit positif à l'anthropologie du droit», *Revue Interdisciplinaire d'Etudes Juridiques*, No. 34, 99-153 (repris dans *Egypte-Monde arabe*, No. 25, 121-173)

Dupret B., 1995b, «Entre le droit et la Loi. Le juge et le jeu de la normalisation islamique du droit positif», *Droit et Cultures*, No. 30, 47-64

Dupret B., 1996a, *Le jeu des répertoires juridiques positif et islamique en Égypte. Le droit, entre théorie critique, sociologie et anthropologie*, Thèse de doctorat, sous la direction du prof. J. Leca, I.E.P. Paris, novembre 1996 (to be published in 1998 under the title *Au nom de quel droit. Répertoires juridiques et référence religieuse dans la société égyptienne contemporaine*, Paris, L.G.D.J.)

Dupret B., 1996b, «Répertoires juridiques et affirmation identitaire», *Droit et Société*, No. 34, 89-111

Dupret B., 1996c, «L'affaire Abû Zayd, universitaire poursuivi pour apostasie. Le procès: L'argumentation des tribunaux, *Monde arabe Maghreb-Machrek*, No. 151, 18-22

Dupret B., 1996d, «Représentations des répertoires juridiques en Égypte: Limites d'un consensus», *Monde arabe Maghreb-Machrek*, No. 151, 32-40

Dupret B., 1998, «Inventing Sharia: Egyptian Judges and the Islamic Legal Repertoire», in Chr. Barrigar and D. Sinacore-Dunn (eds.), *Religion, Pluralism and Law: Studies in Global Perspective*, Mc Gill Studies in Religion Vol. 5

Dwyer D.H. (ed.), 1990, *Law and Islam in the Middle East*, New York, Wesport, London, Bergin & Garvey Publishers

Ebert H.-G., 1996, *Das Personalstatut arabischer Länder: Problemfelder, Methoden, Perspektiven. Ein Beitrag zum Diskurs über Theorie und Praxis des islamischen Rechts*, Frankfurt/M., Peter Lang

Edge I., 1990, «A Comparative Approach to the Treatment of Non-Muslim Minorities in the Middle East, with Special Reference to Egypt», in C. Mallat and J. Connors (eds.), *Islamic Family Law*, London-Dordrecht-Boston, Graham & Trotman

Egyptian Society for Medecine and Law, The Egyptian Association for International Law, The National Council for Maternity and Childhood, UNICEF, 1988, *The National Conference on the Future United National Convention on the Rights of the Child*, 21-23 November 1988, Alexandria

Ehrlich E., 1936, *Fundamental Principles of the Sociology of Law* (trans. Moll W.L.), Cambridge, Harvard University Press

El Alami D., 1994, «Law No. 100 of 1985 Amending Certain Provisions of Egypt's Personal Status Laws», *Islamic Law and Society*, Vol. 1, No. 1, 116-136

El Guindi F., 1983, «Veiled Activism: Egyptian Women in the Contemporary Islamic Movement», Femme de la Méditerranée, *Peuples Méditerranéens*, Nos. 22-23, 79-89

El-Morr A.M.A., 1993, «The Supreme Constitutional Court of Egypt and the Protection of Human and Political Rights», in C. Mallat (ed.), *Islam and Public Law: Classical and Contemporary Studies*, London-Dordrecht-Boston, Graham & Trotman

Elgeddawy A.K., 1971, *Relations entre systèmes confessionnel et laïque en droit international privé*, Paris, Dalloz

Ellul J., 1982, *Histoire des Institutions*, Vol. 2, 3, 4, 5, Paris, P.U.F.

Elster J., 1986, *Le Laboureur et ses enfants. Deux essais sur les limites de la rationalité*, Paris, Minuit

Elster J., 1992, *Local Justice. How Institutions Allocate Scarce Goods and Necessary Burdens*, Cambridge, Cambridge University Press

Elwan O., 1990, «Überblick über die Entwicklung des ägyptischen Staatsrechts seit den 70er Jahren», *Verfassung und Recht in Übersee*, Vol. 23, 297-327

Elwan O., 1992, «Der Scheck im ägyptischen Recht mit vergleichenden Hinweisen auf das Recht anderer arabischer Staaten», in U. Huber and E. Jayme (eds.), *Festschrift für Rolf Serick*, Heidelberg

Fahmi H., 1986, *Divorcer en Egypte: Etude de l'application des lois du statut personnel*, Le Caire, CEDEJ

Fallers L.A., 1969, *Law Without Precedent: Legal Ideas in Action in the Courts of Colonial Busoga*, Chicago, Chicago University press

Farag I., 1995, «L'Egypte des contradictions», *Le Monde diplomatique*, Février

Farah R, 1997, «Crossing Boundaries: Reconstruction of Palestinian Identities in al-Baq'a Camp, Jordan», Palestine, Palestiniens. Territoire national, espaces communautaires, Beyrouth, *Les Cahiers du Cermoc*, 259-298

Ferrié J.-N., 1991, «Vers une anthropologie déconstructiviste des sociétés musulmanes du Maghreb», *Peuples méditerranéens*, Nos. 54-55, 229-246

Ferrié J.-N. and Radi S., 1995, «L'aporie d'Al-'Ashmawy et les limites de l'anthropologie relativiste: Est-il possible de décrire comme un fait culturel la position de deux cadis sur l'application de la Sharî'a?», *Droit et Cultures*, Vol. 30, 65-76

Ferrié J.-N., 1995, «Lieux intérieurs et culture publique au Maroc», *Politix*, No. 31, 187-202

Ferrié J.-N., 1996a, «Les paradoxes de la réislamisation en Egypte», *Monde arabe Maghreb-Machrek*, No. 151, 3-5

Ferrié J.-N., 1996b, «Remarques sur l'islamisation des espaces modernes au Caire», *Monde arabe Maghreb-Machrek*, No. 151, 6-12

Fischbach M.R., 1997, «Une autonomie morcelée», *Le Monde diplomatique*, Septembre

Foblets M.-C., 1991, «La femme marocaine et sa loi en Belgique», *Revue du droit des étrangers*, 336 *ff.*

Foblets M.-C., 1994a, *Les familles maghrébines et la justice en Belgique. Anthropologie juridique et immigration*, Paris, Karthala

Foblets M.-C., 1994b, «Remaniements de quelques dispositions-clés du Code de statut personnel et des successions marocains relatives à la position matrimoniale de l'épouse. Des modifications génératrices d'une pacification des relations internationales privées?», *Revue du droit des étrangers*, No. 78, 125-135

Foblets M.-C., 1996, «La répudiation répudiée par la Cour de cassation. Un examen sans mansuétude des conditions de régularité internationale d'un acte de répudiation» (note sous Cass. belge, 11 décembre 1995), *Revue du droit des étrangers*, No. 88, 140-165

Foblets M.-C., 1997a, «Hoofddoekjes op de identiteitskaart: Een onvermijdelijke implicatie van de positieve bescherming van de vrijheid van geloofsovertuiging en levensbeschouwelijke meningsuiting in het openbaar leven?» (note sous Civ. Hasselt, 24 juin 1996), *Vlaams Jurist Vandaag*, No. 3, 1-3

Foblets M.-C., 1997b, «L'approche fonctionnelle du conflit de nationalités ou la survivance d'un statut étranger en la personne de naturalisés binationaux» (note sous Civ. Bruxelles, 9 avril 1997), *Revue du Droit des Etrangers*, No. 93, 257-262

Füssel H.-P., 1994, «Kulturkonflikte im Schulrecht», in Brun-Otto Bryde (ed.), *Das Recht und die Fremden*, Baden-Baden, Nomos, pp. 67-81.

Gaffney P.D., 1994, *The Prophet's Pulpit. Islamic Preaching in Contemporary Egypt*, Berkeley and Los Angeles, University of California Press

Galanter M., 1981, «Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law», *Journal of Legal Pluralism*, 1-47

Galanter M., 1986, «Indigenous Law and Official Law in the Contemporary United States», in A. Allott and G.R. Woodman (eds.), *People's Law and State Law: The Bellagio Papers*, Dordrecht, Foris, ALRC (Australian Law Reform Commission)

Gallagher C., 1963, *The United States and North Africa*, Cambridge, Harvard University Press

Gami'i H., forthcoming, «Consent Protection in Consumption Contracts», *al-Shari'a wa-l qanun*, No. 47 (in Arabic)

Ganage P., 1979, «La coexistence des droits confessionnels et des droits laïcisés dans les relations internationales privées», *Recueil des Cours de l'Académie de droit international de La Haye*, tome 164

Gaspard Fr. and Khosrokhavar F., 1995, *Le foulard et la République*, Paris, La Découverte

Gauchet M., 1985, *Le désenchantement du monde. Une histoire politique de la religion*, Paris, Gallimard

Geertz C., 1968, *Islam Observed. Religious Development in Morocco and Indonesia*, Chicago, London, The University of Chicago Press

Geertz C., 1973, *The Interpretation of Cultures*, New York, Basic Books

Geertz C., 1983/1986, *Local Knowledge*, New York, Basic Books (Fr. transl. *Savoir local, savoir global. Les lieux du savoir*, Paris, P.U.F.)

Gellner E., 1985, *Leben im Islam. Religion als Gesellschaftsordnung*, Stuttgart, Klett-Cotta

Gellner E., 1992, *Postmodernism, Reason and Religion*, New York and London, Routledge

George R.P.H., 1993, *Making Men Moral. Civil Liberties and Public Morality*, Oxford, Clarendon Press

Gerber H., 1994, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*, Albany, State University of New York Press

Germidis D., Kessler D. and Meghir R., 1991, *Financial Systems and Development: What Role for the Formal and Informal Financial Sectors*, Paris, OECD

Ghani E., 1990, *How Financial Markets Affect Long-Run Growth*, Washington D.C., The World Bank

Ghate P., 1992, *Informal Finance: Some Findings from Asia*, Hong Kong, Oxford University Press

Ghurab M.A.H., 1986, *Islamic Judgments Contradicting Positive Laws*, Cairo, Dar al-i'tisam

Gilissen J. (ed.), 1972, *Le Pluralisme juridique*, Bruxelles, Université Libre de Bruxelles

Gluckman M., 1965, *The Ideas in Barotse Jurisprudence*, Manchester, Manchester University Press

Goldziher I., 1890, *Muhammedanische Studien II*, Halle (reprint Hildesheim, Olms, 1961)

Goldziher I., 1925, *Vorlesungen über den Islam*, 2., umgearb. Aufl., Heidelberg, Carl Winter

Goldziher I., 1941, «Fikh», in A.J. Wensinck and J.H. Kramers (eds.), *Handwörterbuch des Islam*, Leiden, E.J. Brill

Goode R., 1995, *Commercial Law*, London, Penguin Books

Greenhouse C.J., 1982, «Looking at Culture, Looking for Rules», *Man*, Nos. 17, 58-73

Gribaudi M., 1996, «Echelle, pertinence, configuration», in J. Revel (ed.), *Jeux d'échelles. La micro-analyse à l'expérience*, Paris, Gallimard-Le Seuil

Griffiths J., 1984, «The Division of Labor in Social control» in D. Black (ed.), *Toward a General Theory of Social Control*, Vol. 1, Orlando, Florida, Academic Press, pp. 37-80.

Griffiths J., 1986, «What Is Legal Pluralism?», *Journal of Legal Pluralism*, No. 24, 1-55

Griffiths J., 1995, «Legal Pluralism and the Social Working of Law», in H. Petersen and H. Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law*, Dartmouth, Aldershot

Grignon C. and Passeron J.-C., 1989, *Le savant et le populaire. Misérabilisme et populisme en sociologie et en littérature*, Paris, Gallimard-Le Seuil

Gurvitch G., 1935, *L'expérience juridique et la philosophie pluraliste du droit*, Paris, Ed. A. Pedone

Habermas J., 1990, *Ecrits politiques. Culture, droit et histoire*, Paris, Cerf

Hallaq W.B., 1984, «Was the Gate of Ijtihâd Closed?», *International Journal of Middle East Studies*, No. 16, 3-41

Hallaq W.B., 1994, «From *Fatwâs* to *Furû'*: Growth and Change in Islamic Substantive Law», *Islamic Law and Society*, Vol. 1, 29-65

Hallaq W.B., 1995, «Model *Shurût* Works and the Dialectic of Doctrine and Practice», *Islamic Law and Society*, Vol. 2, 109-134

Hanf T. and Sabella B., 1996, *A Date with Democracy. Palestinians on Society and Politics. An Empirical Survey*, Freiburg i. Br., Arnold Bergstraesser Institut

Harb 'A., 1980, *The Origin of Violence and the State. Marcel Gauchet and Pierre Clastres*, Beirut, Dar al-hadatha (in Arabic)

Hart H.L.A., 1961, *The Concept of Law*, Oxford, Clarendon Press

Hatem M., 1986, «The Enduring Alliance of Nationalism and Patriarchy in Muslim Personal Status Laws: The Case of Modern Egypt», *Feminist Issues*, Vol. 6, 19-43

Henry J.-R., 1990, «Le changement juridique dans le monde arabe ou le droit comme enjeu culturel», *Droit et Société*, No. 15, 139-151

Hermet G., 1986, *Sociologie de la construction démocratique*, Paris, Economica

Heyvaert A., 1990, «De gezinsrechtelijke situatie van Marokkanen met vast verblijf in België», in K. De Feyter, et al. (ed.), *Migratie- en migrantenrecht* (Vol. I), Brugge, La Charte

Hill E., 1978, «Comparative and Historical Study of Modern Middle Eastern Law», *The American Journal of Comparative Law*, No. 26, 279-304

Hill E., 1979, *Mahkama! Studies in the Egyptian Legal System*, London, Ithaca Press

Hill E., 1987, «Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar», *Arab Law Quarterly*, Vol. 3, 3-61, 182-218

Hill E., 1990, «Law and Courts in Egypt: Recent Issues and Events Concerning Islamic Law», in I. M. Oweiss (ed.), *The Political Economy of Contemporary Egypt*, Washington, Center for Contemporary Arab Studies, Georgetown University

Hill R., 1959, *Egypt in the Sudan, 1820-1881*, Oxford

Hilw K.A. (al-) and Darwish S.M., 1989, *Customary Law in Northern Sinai*, Cairo

Hoebel E.A., 1954, *The Law of Primitive Man*, Cambridge, Mass., Harvard University Press

Holt S. and Ribe H., 1991, *Developing Financial Institutions for the Poor and Reducing Barriers to Access for Women*, Washington D.C., The World Bank

Hooker M.B., 1975, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws*, Oxford, Clarendon Press

Hopkins N., 1995, «La culture politique et l'Egypte», *Egypte-Monde Arabe*, No. 24, 13-27

Howell J. (ed.), 1980, *Borrowers and Lenders: Rural Financial Markets and Institutions in Developing Countries*, London, Overseas Development Institute

Ibn Qudama, 1995, *Al-Mughni wa-l-sharh al-kabir*, Cairo, Dar al-jad al-'arabi

Ireton F., (to be published), «Les quatre relations d'incertitude d'un construit identitaire collectif à référence territoriale: L'exemple des Sa'îdis», in Ch. Décobert (ed.), *Dynamiques identitaires en Egypte*, Aix-en-Provence, MMSH Ed.

Jaber H.M., 1997, «Le camp de Wihdat à la croisée des territoires», in Palestine, Palestiniens. Territoire national, espaces communautaires, Beyrouth, *Les Cahiers du Cermoc*, 237-258

Jabri M. 'A. (al-), 1996, *al-Din wa al-dawla wa tatbiq al-shari'a*, Beirut, Markaz dirasat al-wahda al-'arabiya

Jackson S.A., 1996, *Islamic Law and the State: The Constitutional Jurisprudence of Shihâb al-Dîn al-Qarâfî*, Leiden-New York-Köln, E.J. Brill

Jacquemond R., 1988, «Egypte: La Haute Cour Constitutionnelle et le contrôle de constitutionnalité des lois (1979-1987)», *Annuaire international de justice constitutionnelle*, No. 4, 271-295

Jacquemond R., 1994, «Dix ans de justice constitutionnelle en Egypte (1979-1990)», in *Politiques législatives: Egypte, Tunisie, Algérie, Maroc*, Le Caire, Dossiers du CEDEJ

Jagannathan V., 1987, *Informal Markets in Developing Countries*, New York, Oxford University Press

Jahel S., 1994, «La lente acculturation du droit maghrébin de la famille dans l'espace juridique francais», *Revue internationale de droit comparé*, 31-58

Jallad F., 1890-1895, *Qamus al-idara wa-l-qada'*, 5 vols., Alexandria, al-Matba'a al-bukhariyya

Jhering R. v., 1872, *Der Kampf um's Recht*, 2nd ed., Vienna, Verlag der G.J. Manz'schen Buchhandlung

Johansen B., 1988a, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights under the Hanafite Doctrine*, London, New York, Sydney, Croom Helm

Johansen B., 1988b, «Die sündige, gesunde Amme: Moral und gesetzliche Bestimmung (*hukm*) im islamischen Recht», *Die Welt des Islams*, No. 28, 264-282

Johansen B., 1995, «Casuistry: Between Legal Concept and Social Praxis», *Islamic Law and Society*, Vol. 2, 135-156

Johansen B., 1996, «Supra-Legislative Norms and Constitutional Courts: The Case of France and Egypt», *Proceedings of the International Conference on the Role of the Judiciary in the Protection of Human Rights*, 1-3 December, Cairo

Kantorowicks E., 1984, *Mourir pour la Patrie*, Paris, P.U.F.
Kapferer B. (ed.), 1976, *Transaction and Meaning*, Philadelphia, Institute for the Study of Human Issues
Karamé C., 1997, «O.N.G., Autorité palestinienne et bailleurs de fonds: Quelques pistes de recherche», in Palestine, Palestiniens. Territoire national, espaces communautaires, *Les Cahiers du Cermoc*, 237-258, 73-83
Kazarian E., 1993, *Islamic Versus Traditional Banking*, Boulder, Westview Press
Kelsen H., 1960, *Reine Rechtslehre*, 2nd ed., Vienna, Verlag Franz Deuticke
Kepel G., 1994, *A l'Ouest d'Allah*, Paris, Seuil
Kertzer D., 1988, *Rituals, Politics and Power*, New Haven, Yale University Press
Kirchheimer O., 1961, *Political Justice: The Use of Legal Procedure for Political Ends*, Princeton, Princeton University Press
Kitchen R., 1986, *Finance for the Developing Countries*, New York, John Wiley
Kosheri, Rashed and Riad, 1994, «Egypt», *Yearbook of Islamic and Middle Eastern Law*, No. 1, 125-141
Krüger H., 1978, *Fetwa und Siyar. Zur internationalrechtlichen Gutachtenpraxis der osmanischen Seyh ül-Islam vom 17.-18. Jahrhundert unter besonderer Berücksichtigung des "Behcet ül-Fetava"*, Wiesbaden, Harrassowitz
Krüger H., 1987, «Überblick über das Privatrecht der Staaten des ägyptischen Rechtskreises», *Recht van de Islam*, Vol. 5, 98-168
Lagarde P., 1993, «La théorie de l'ordre public international face à la polygamie et à la repudiation», in *Nouveaux itinéraires en droit. Hommages à François Rigaux*, Bruxelles, Bruylant
Lambert E., 1903, *Etudes de droit commun législatif. Introduction. La fonction du droit civil comparé*, Paris
Laoust H., 1939, *Sur les doctrines sociales et politiques de Taki-d-Din Ahmad B. Taimiya*, Le Caire, Institut français d'archéologie orientale
Larenz K., 1983, *Methodenlehre der Rechtswissenschaf*, 5th ed., Berlin-Heidelberg-New York-Tokyo, Springer-Verlag
Latour B., 1988, «Le Grand Partage», *La Revue du MAUSS*, No. 1, 27-64
Legendre P., 1974, *L'amour du Censeur*, Paris, Seuil
Legendre P., 1993, «Ce que nous appelons le droit», *Le Débat*, No. 74, 107-122
Lepetit B., 1995, «Le présent de l'histoire», in B. Lepetit (ed.), *Les formes de l'expérience. Une autre histoire sociale*, Paris, Albin Michel
Levi G., 1989, *Le Pouvoir au village. Histoire d'un exorciste dans le Piémont du XVIIe siècle*, Paris, Gallimard
Lévi-Strauss C., 1958, *Tristes tropiques*, Paris, Plon
Linant de Bellefonds Y., 1955, «Immutabilité du droit musulman et réformes législatives en Egypte», *Revue internationale de droit comparé*, Vol. 7, No. 1, 5-34
Lochak D., 1993, «Normalité», in A.J. Arnaud et al. (ed.), *Dictionnaire encyclopédique de théorie et de sociologie du droit*, 2e éd., Paris, L.G.D.J.

Lohlker R., 1996, *Schari'a und Moderne. Diskussionen über Schwangerschafts-abbruch, Versicherung und Zinsen*, Stuttgart, Steiner

Louevi A. 1995, «Les déclarations non-occidentales des droits de l'homme», *Revue de la Recherche juridique – Droit prospectif*, No. 2, pp. 629-638.

Luhmann N., 1993, «Le droit, l'histoire du droit et le recours au paradoxe», *Le Débat*, No. 74, 94-106

Luhmann N., 1993, *Das Recht der Gesellschaft*, Frankfurt/M., Suhrkamp

Luizard P.-J., 1993, «Un mawlid particulier», *Egypte-monde arabe*, No. 14, 79-102

Luizard P.-J., 1995, «Al-Azhar, institution sunnite réformée», in A. Roussillon (ed.), *Entre réforme sociale et mouvement national. Identité et modernisation en Egypte (1882-1962)*, Le Caire, CEDEJ

Macleod A.E., 1991, *Accomodating Protest: Working Women, the New Veiling and Change in Cairo*, New York, Columbia University Press

Malinowski B., 1926, *Crime and Custom in Savage Society*, London, Routledge & Kegan Paul

Mallat C., 1992, «Constitutional Law in the Middle East: The Emergence of Judicial Power», *SOAS Law Department Working Paper*, No. 2.

Martin E., 1991, «The Egg and the Sperm: How Science Has Constructed a Romance Based on Stereotypical Male-Female Roles», *Signs*, 485-501

Masud M.K., Messick B. and Powers D.S. (eds.), 1996, *Islamic Legal Interpretation: Muftis and Their Fatwas*, Cambridge, Mass., London, Harvard University Press

Maunier R., 1932, *Loi française et coutume indigène en Algérie*, Paris, Domat-Montchrestien

Mauss M., 1978, *Soziologie und Anthropologie*, Bd. 2, Frankfurt/M., Berlin, Wien, Ullstein

Merry S., 1988, «Legal Pluralism», *Law and Society Review*, 869-896

Messick B., 1993, *The Calligraphic State. Textual Domination and History in a Muslim Society*, Berkeley, University of California Press

Milliot L., 1953, *Introduction à l'étude du droit musulman*, Paris, Sirey

Mir-Hosseini Z., 1993, *Marriage on Trial. A Study of Islamic Family Law*, London Tauris

Moghadam V.M., 1991, *Modernizing Women: Gender & Social Change in the Middle East*, Boulder-London, Lynne Rienner Publishers

Mohieldin M., 1994, «Informal Finance in Egypt», Paper presented to the 1994 *British Society for Middle Eastern Studies Conference*, The University of Manchester

Moneger F., 1984, «La Convention franco-marocaine du 10 août 1981 relative au statut des personnes et de la famille et à la coopération judiciaire», *Revue critique de droit international privé*

Moneger M., 1994, «Les musulmans devant le juge français», *Journal de Droit international*, No. 2, 345-374

Montiel P.J., Agénor P.R. and Ul Haque N., 1993, *Informal Financial Markets in Developing Countries: A Macroeconomic Analysis*, Oxford, UK-Cambridge, USA, Blackwell

Moore S.F., 1973/1978, *Law As Process. An Anthropological Approach*, London, Routledge & Kegan Paul (Ch. 2, «Law and Social Change: The Semi-Autonomous Social Field As an Appropriate Subject of Study», reprint of *Law & Society Review*, No. 7, 719-746)

Moore S.F., 1989, «History and the Redefinition of Custom on Kilimanjaro», in J. Starr and J.F. Collier (eds.), *History and Power in the Study of Law. New Directions in Legal Anthropology*, Ithaka, N.Y., London, Cornell University Press

Morand M., 1916, *Avant-projet de Code du droit musulman algérien*, Alger

Morand M., 1921, *Introduction à l'étude du droit musulman algérien*, Alger

Morse B.W. and Woodman G.R., 1988, «Introductory Essay: The State's Options», in B.W. Morse and G.R. Woodman (eds.), *Indigenous Law and the State*, Dordrecht, Foris

Motzki H., 1991, *Die Anfänge der islamischen Jurisprudenz. Ihre Entwicklung in Mekka bis zur Mitte des 2./8. Jahrhunderts*, Stuttgart, Steiner

Mutawalli 'A.H., 1975, *Islamic Shari'a As a Main Source of Legislation*, Alexandria, al-Ma'arif (in Arabic)

n.a., n.d., *Customary Law in Northern Sinai*, Cairo

Najjar F.M. (1988), «Egypt's Laws of Personal Status», *Arab Studies Quarterly*, Vol. 10, 319-344

Najjar F.M., 1992, «The Application of Sharia Laws in Egypt», *Middle East Policy*, Vol. 1, 62-73

O'Kane J., 1972, «Islam in the New Egyptian Constitution: Some Discussions in *al-Ahrâm*», *The Middle East Journal*, Vol. 26, 137-148

Obeid N.C., 1995, «Charging Interest in the Arabian Peninsula», *Middle East Commercial Law Review*, Vol. 1, 87-96

Ost F. and Van de Kerchove M., 1991, «De la scène au balcon. D'où vient la science du droit», in F. Chazel and J. Commaille (eds.), *Normes juridiques et régulation sociale*, Paris, LGDJ

Padmanabham K.P., 1986, *Rural Financial Intermediation*, Pune, Shubhada-Saraswat Publications

Paine R., 1976, «Two Modes of Exchange and Mediation», in B. Kapferer (ed.), *Transaction and Meaning*, Philadelphia, Institute for the Study of Human Issues

Paradelle M., 1995, «Entre juge et muftî: La place du religieux dans l'organization judiciaire égyptienne (A partir d'une lecture de l'Article 381 du code de procédure pénale)», *Droit et Cultures*, No. 30, 77-89

Pearl D., 1981, *Interpersonal Conflict of Laws in India, Pakistan and Bangladesh*, London, Stevens

Peteet J., 1987, «La justice au quotidien dans les camps palestiniens au Liban», *Revue d'études palestiniennes*, No. 24, 25-39

Peters R., 1980, «*Idjtihâd* and *Taqlîd* in 18th and 19th Century Islam», *Die Welt des Islams*, No. 20, 131-145

Peters R., 1988, «Divine Law or Man-Made Law? Egypt and the Application of the Sharia», *Arab Law Quarterly*, Vol. 3, 231-253

Peters R., 1990, «The Codification of Criminal Law in 19th Century Egypt: Tradition or Modernization?», in J.M. Abun-Nasr (ed.), *Law, Society, and National Identity in Africa*, Hamburg, Buske

Peters R., 1995, «Sharia and the State: Criminal Law in Nineteenth Century Egypt», in C. van Dijk and A.H. de Groot (eds.), *State and Islam*, Leiden, CNWS

Peters R., 1997, «Islamic and Secular Criminal Law in 19th Century Egypt: The Role and Function of the Qâdî», *Islamic Law and Society*, 70-90

Peters R., forthcoming, «The Origins of Nineteenth Century Egyptian Criminal Legislation Enacted Before 1883», in *Festschrift Jamil Abun-Nasr*

Pospisil L., 1971, *Anthropology of Law: A Comparative Theory*, New York, Harper & Row

Powers D.S., 1994, «*Kadijustiz* or *Qadi*-Justice? A Paternity Dispute from Fourteenth-Century Morocco», *Islamic Law and Society*, No. 1, 332-366

Quoc Dinh N., Dailler P. and Pellet A., 1992, *Droit international public*, 4e éd., Paris, L.G.D.J.

Radi S., 1996, «De la toile au voile: Les actrices égyptiennes voilées et l'islamisme», *Monde arabe Maghreb-Machrek*, No. 151, 13-17

Rädler P., 1996, «Religionsfreiheit und staatliche Neutralität an französischen Schulen. Zur neueren Rechtsprechung des Conseil d'Etat», *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 56, 353-388

Rahman F., 1979, *Islam*, 2nd ed., Chicago, Chicago University Press

Rawls J., 1972, *A Theory of Justice*, Oxford, Oxford University Press

Rigaux F. and Fallon M., 1993, *Droit international privé, tome 2, Droit positif belge*, Bruxelles, Larcier

Rigaux M.-F., 1985, *La théorie des limites matérielles à l'exercice de la fonction constituante*, Bruxelles, Larcier

Roberts S. and Comaroff J.L., 1981, *Rules and Processes. The Cultural Logic of Dispute in the African Context*, Chicago, University of Chicago Press

Roberts S., 1979, *Order and Dispute: An Introduction to Legal Anthropology*, Harmondsworth, Penguin Books

Rosen L., 1984, *Bargaining for Reality: The Construction of Social Relations in a Muslim Community*, Chicago, University of Chicago Press

Rosen L., 1989a, *The Anthropology of Justice*, Cambridge, Cambridge University Press

Rosen L., 1989b, «Responsibility and Compensatory Justice in Arab Culture and Law», in B. Lee and G. Urban (eds.), *Semiotics, Self, and Society*, Berlin, Mouton de Gruyter

Rosen L., 1989c, «Islamic 'Case Law' and the Logic of Consequence», in J. Starr and J.F. Collier (eds.), *History and Power in the Study of Law. New Directions in Legal Anthropology*, Ithaca, N.Y., London, Cornell University Press

Rosen L., 1995a, «Have the Arabs Changed Their Minds? Intentionality and the Discernment of Cultural Change», in L. Rosen (ed.), *Other Intentions: Cultural Contexts and the Attribution of Inner States*, Santa Fe, NM, School of American Research Press

Rosen L., 1995b, «Law and Custom in the Popular Legal Culture of North Africa», *Islamic Law and Society*, 194-208

Rouland N, 1988, *Anthropologie juridique*, Paris, P.U.F.

Rouland N., 1993, «Le pluralisme juridique en anthropologie», *Revue de la Recherche juridique – Droit prospectif*, No. 2, 567-571

Roussillon A., 1988, *Sociétés islamiques de placement de fonds et ouverture économique*, Cairo, CEDEJ

Roussillon A., 1990, «Entre al-Jihad et al-Rayyan: Phénoménologie de l'islamisme égyptien», *Monde arabe Maghreb-Machrek*, No. 127, 17-50

Rude-Antoine E., 1997, *Des vies et des familles. Les immigrés, la loi et la coutume*, Paris, O. Jacob

Rumpf C., 1990, «Das türkische Verfassungsgericht und die Grundzüge seiner Rechtsprechung», *Europäische Grundrechtszeitschrift*, 129-155

Rutten S., 1988, *Moslims in de Nederlandse rechtspraak*, Kampen, Kok

Rycx J.-F., 1987, *Islam et dérégulation financière*, Cairo, CEDEJ

Rycx J.-F. and Blanchi G., 1980, «Références à l'Islam dans le droit public positif en pays arabes», *Pouvoirs*, No. 12, 57-70

Sami A., 1928-36, *Taqwim al-Nil*, 3 Vols, Cairo, Matba'at al-kutub al-misriyya

Sanhoury A. (El-), 1938, «Le droit musulman comme élément de refonte du Code civil égyptien», in *Introduction à l'étude du droit comparé. Recueil d'études en l'honneur d'Edouard Lambert*, Paris, L.G.D.J.

Sanhoury A., 1926, *Le califat: Son évolution vers une société des nations orientales*, Paris, Libraire orientaliste Paul Geuthner

Schacht J., 1933, «Shari'a und Qanun im modernen Ägypten», *Der Islam*, No. 20, 209-236

Schacht J., 1935, «Zur soziologischen Betrachtung des islamischen Rechts», *Der Islam*, No. 22, 202-238

Schacht J., 1950, *The Origins of Muhammadan Jurisprudence*, Oxford, Claredon Press

Schacht J., 1959, «Islamic Law in Contemporary States», *American Journal of Comparative Law*, No. 8, 133-147

Schacht J., 1960, «Idjtihâd», *The Encyclopaedia of Islam*, New Edition, Vol. 3, Leiden, Brill, London, Luzac & Co

Schacht J., 1960, «Problems of Modern Islamic Legislation», *Studia Islamica*, No. 12, 99-129

Schacht J., 1964, *An Introduction to Islamic Law*, Oxford, Clarendon Press

Schacht J., 1980, «Recht und Staat», in J. Schacht and C.E. Bosworth (eds.), *Das Vermächtnis des Islams*, Bd. 2, Zürich, München, Artemis

Schneider I., 1993, «Die Merkmale der idealtypischen *qadi*-Justiz. Kritische Anmerkungen zu Max Webers Kategorisierung der islamischen Rechtssprechung», *Der Islam*, No. 70, 145-159

Serjeant R.B., 1991, *Customary and Sharî'ah Law in Arabian Society*, Great Yarmouth, Variorum

Sharif 'A. (al-), 1990, *Egyptian Constitutional Justice*, Cairo, Dar al-nahda al-'arabiyya (in Arabic)

Shehadeh R., s.d., *The Law of the Land. Settlement and Land Issues under Israeli Military Occupation*, Jerusalem, Passia

Shepard W.E., 1996, «Muhammad Sa'id al-'Ashmawi and the Application of the Shari'a in Egypt», *International Journal of Middle East Studies*, Vol. 28, 39-58

Shuqayrî M.F., 1986, *Facing the Conspiracy Against Application of Islamic Shari'a*, Mansura, Dar al-Wafa' (in Arabic)

Smith M.G., 1969, «Some Developments in the Analytic Framework of Pluralism», in L. Kuper and M. G. Smith (eds.), *Pluralism in Africa*, Berkeley, University of California Press

Smith M.G., 1974, *Corporations and Society*, London, Duckworth

Snouck Hurgronje C., 1898, «Le droit musulman», *Annales du Musée Guimet. Revue de l'Histoire des Religions*, No. 37, 1-22, 174-203

Snouck Hurgronje C., 1957, *Selected Works*, G.-H. Bousquet and J. Schacht (eds.), Leiden, E.J. Brill

Sontag S., 1990, *Illness As Metaphor and AIDS and Its Metaphors*, New York, Doubleday

Starr J., 1992, *Law As Metaphor. From Islamic Courts to the Palace of Justice*, Albany, State University of New York Press

Supreme Constitutional Court (S.C.C.), 3.12.1983a, Muhammad Mahmud al-Misri/ 'Abd al-Hamid al-Shawaribi, *The Constitutionality of Laws in the Light of the Supreme Constitutional Court's Rulings, 1979-1985*, Alexandria, Al-Ma'arif, 1986, pp. 303-304; 3.12.1983b, *ibid.* pp. 304-305; 3.12.1983c, *ibid.* pp. 306-308; 16.2.1985, *ibid.* pp. 308-310; 6.4.1985, *ibid.* pp. 310-311; 4.5.1985a, *ibid.* pp. 311-318; 4.5.1985b, *ibid.* pp. 52-57; 1.6.1985, *ibid.* pp. 318-319

Supreme Constitutional Court (S.C.C.), 15.5.1993, *al-Mahkama al-Dusturiyya al-'Ulya*, Vol. 5/2, pp. 260-290; 14.8.1994, *al-Jarida al-Rasmiyya*, No. 35, 1.9.1994, pp. 2260-2271; 5.8.1995, *ibid.*, No. 35, 31.8.1995, pp. 2127-2129; 4.5.1996, *ibid.*, No. 19, 16.5.1996, pp. 891-895; 30.5.1996, *ibid.*, No. 21, 30.5.1996, pp. 1026-1041; 6.6.1996, *ibid.*, No. 3, 18.6.1996, pp. 58-79.

Suwayfi A. (al-), n.d., *The Trial of Apostates, the Complete File of the Testimonies of al-Ghazali and Mazru'a in the Faraj Fuda Case* n.l. (in Arabic)

Tamanaha B.Z., 1993, «The Folly of the 'Social Scientific' Concept of Legal Pluralism», *Journal of Law and Society*, Vol. 20, No. 2, 192-236

Tamanaha B.Z., 1997, *Realistic Socio-Legal Theory*, Oxford, Clarendon Press

Taylor C., 1992/1995, «To Follow a Rule», in M. Hjort (ed.), *Rules and Conventions*, Baltimore, The John Hopkins University Press (Fr. tr. «Suivre une règle», *Critique*, No. 289)

Teubner G., 1989a, *Recht als autopoietisches System*, Frankfurt/M., Suhrkamp

Teubner G., 1989b, «How the Law Thinks: Toward a Constructivist Epistemology of Law», *Law and Society Review*, Vol. 23, 727-757

Teubner G., 1992a, «Pour une épistémologie constructiviste du droit», *Annales ESC*, No. 6, 1149-1169

Teubner G., 1992b, «The Two Faces of Janus: Rethinking Legal Pluralism», *Cardozo Law Review*, No. 13, 1443-1462

Thévenot L., 1992, «Jugements ordinaires et jugements de droit», *Annales ESC*, No. 6, 1279-1299

Thévenot L., 1992, «Un pluralisme sans relativisme? Théories et pratiques du sens de la justice», in J. Affichard and J.B. de Foucauld (eds.), *Justice sociale et inégalités*, Paris, Ed. Esprit

Tibi B., 1994, «Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations», *Human Rights Quarterly*, Vol. 16, No. 1, 277-299

Tirado Chase A.B., 1997, *The Palestinian Authority Draft Constitution: Possibilities and Realities in the Search for Alternative Models of State Formation*, Jerusalem, IPCRI

Treves R., 1995, *Sociologie du droit*, Paris, P.U.F.

Twining W.L., 1973a, «Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration», *Law & Society Review*, No. 7, 56-583

Twining W.L., 1973b, *Karl Llewellyn and the Realist Movement*, London, Weidenfeld & Nicholson (rev. 1985)

Udovitch A.L., 1970, *Partnership and Profit in Medieval Islam*, Princeton, Princeton University Press

'Umrân S., 1986, *Consumer's Protection During Contract Settlement*, Alexandria, Munsha'at al-ma'arif (in Arabic)

United Nations, 1992, «The Rights of the Child», *Bulletin of Human Rights*, Vol. 94, No. 2

Van Loock L., 1994, «De Hoofddoek: Integratie of integrisme?», *Journal des Procès*, No. 260, 16-17

Vanderlinden J., 1971, «Le pluralisme juridique: Essai de synthèse», in G. Gilissen (ed.), *Le Pluralisme juridique*, Bruxelles, Université Libre de Bruxelles

Vanderlinden J., 1989, «Return to Legal Pluralism: Twenty Years Later», *Journal of Legal Pluralism*, No. 28, 149-157

Vanderlinden J., 1993, «Vers une nouvelle conception du pluralisme juridique», *Revue de la recherche juridique – Droit prospectif*, No. 53, 573-583
Verhoeven J., 1980, «Etat des personnes et compétences consulaires. A propos d'un accord belgo-marocain», *Journal des Tribunaux*
Verstegen R., 1994-1995, «Over het dragen van de hoofddoek in het onderwijs», *Jura Falconis*, No. 2, 137-140
Verwilghen M. and De Valkeneer M. (eds.), 1993, *Relations internationales familiales. Sélection de questions actuelles*, Bruxelles, Bruylant
Veyne P., 1983, *Les Grecs ont-ils cru à leurs mythes? Essai sur l'imagination constituante*, Paris, Seuil
Walzer M., 1983, *Spheres of Justice. A Defense of Pluralism and Equality*, New-York, Basic Books
Weber M., 1954, *On Law in Economy and Society*, New York, Simon and Schuster
Whitbeck, 1996, «The Palestinian State Exists», *Palestine -Israël*, Vol. 3, No. 2, 8-12
Wichard J.C., 1995, *Zwischen Markt und Moschee: Wirtschaftliche Bedürfnisse und religiöse Anforderungen im frühen islamischen Vertragsrecht*, Paderborn, Schöningh
Wieacker F., 1967, *Privatrechtsgeschichte der Neuzeit – Unter besonderer Berücksichtigung der deutschen Entwicklung*, Göttingen, Vandenhoek & Ruprecht
Woodman G., 1998, «Ideological Combat and Social Observation: Recent Debate about Legal Pluralism», *Journal of Legal Pluralism*, No. 40
Woodman G.R., 1969, «Some Realism about Customary Law – The West African Experience», *Wisconsin Law Review*, 128-152
Woodman G.R., 1985, «Customary Law, State Courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria», in A. Allott and G.R. Woodman (eds.), *People's Law and State Law: The Bellagio Papers*, Dordrecht, Foris, ALRC (Australian Law Reform Commission)
Woodman G.R., 1989, «The Peculiar Policy of Recognition of Indigenous Laws in British Colonial Africa. A Preliminary Discussion», *Verfassung und Recht in Übersee*, No. 22, 273-284
Woodman G.R., 1996, «Legal Pluralism and the Search for Justice», *Journal of African Law*, 152-167
Yaron J., 1992, *Successful Rural Finance Institutions*, Washington D.C., The World Bank
Zaghlul A.F., 1900, *The Bar*, Cairo, Matba'at al-ma'arif (in Arabic)
Zeghal M., 1997, *Gardiens de l'islam*, Paris, Presses de science po

Index

Abbasids, 44
Abu Zayd case, 175n13, 178n16, 178n19, 187, 189, 241-242
actor(s), ix, xiii-xiv, xvii, 21-23, 29, 30, 34-40, 49, 50, 53, 54, 71, 77, 86, 101, 108, 112, 155, 175, 176, 180-185, 187, 188;
legal, xv, xvii, 30, 48, 51, 53, 100, 123, 179, 182, 233;
social, xi, 33, 165
'adat (custom), see *'urf*
adoption, 99, 105, 106, 112
Afghanistan, 92
Africa, African territories (societies), 5, 19, 152, 168
African customary law, 5
ahl al-hadith (Islamic traditionalists), 42
ahl al-ra'y (Islamic rationalists), 42
Algerian code (*Droit musulman algérien*), 46
'alim, pl. *'ulama'* (Islamic scholar), 50, 116, 116n4, 140, 142, 143; *see also* Islamic scholars
alimony, spousal financial support, 62, 193, 196, 202
Alliot, M., 11
Allott, A., 9
alms tax (*zakat*), 115, 116
Amin, S.H., 47
Anglo-Muhammadan Law, 41
apostasy, apostates, xviii, 178, 220, 221, 223-228, 241n16; *see also* right(s) of apostates
Aquinas, Thomas, 121n11
Arab world (countries, societies, states), vii, ix, xii-xiv, 3, 8, 15, 29, 37, 39, 41, 45, 47, 49-51, 54, 73, 77, 81, 82, 87, 101, 114, 125, 131, 155, 159, 164-166, 173, 191; *see also* Muslim world
Arafat, Yasser, 78, 83, 84
arbitration, arbitrators, 31, 144, 145, 153, 155; *see also* customary arbitration
Aristotle, 22
al-'Ashmawi, Muhammad, 120, 239
Asia, 5
Australasia, 5
Australia, 9
Averroes (Ibn Rushd), 44
al-Azhar, 62, 153, 169, 177, 183-186, 188, 189, 239

Badie, B., 102
Bälz, K., 51, 52, 53, 67
Baha'i sect, 64
Balandier, G., 76, 77
banking (law, practices), xvii, 211, 216
Ba'th party (Syria), 117
batil (void), 52
Becker, C.H., 42
Belgium, xiv, 57-61, 67, 69-71, 99n2;
Constitution, 60;
courts, xiv, 57-60, 69;
judges/judiciary, 58-60, 70, 71;
law/legislation, 58, 61, 69, 168;
legal system, 57
Ben Achour, Y., 98

Berber law, customary practices, 93, 94
Berber tribes, 45
Berque, J., 45
Bible, 174
Birzeit University, 78, 84
al-Bishri, Tariq, 120
blood feud(s) (*tha'r*), xii, 80, 85, 143, 147
blood money (*diya*), 80, 141
Bohannan, P., 7
Boltanski, L., 25, 26, 34
Botiveau, B., 50, 51, 63, 65, 153, 154, 179n22, 189, 232
Bourdieu, P., 33, 156, 243
Britain, 5, 99n2
British (the), 19;
  Mandate, 78, 82;
  policy of indirect rule, viii, 19n8
Brunei, 98
Brunschvig, R., 44, 45

Cairo, xi, xvii-xxiii,21, 46, 125, 142, 159, 173-175, 191, 210, 219, 225, *see also* Egyptian court(s), Cairo
Canada, 9
Certeau, M. de, 38
Cerutti, S., 21, 23, 24, 26, 34
Chehata, Ch., 43n4, 121n11, 124
child(ren) 91, 98109n6, 202, 203, 221
children's rights, rights of the child, xv, 58, 59, 98, 99, 103;
  Committee, 98;
  Convention, xv, 58, 97, 102, 105, 106, 109-111
Christian(s), 114, 116n1, 146, 169, 179, 183n38, 189, 222, 225, 226
Christian courts, 49
Christianity, viii, 174, 180n26, 222, 224, 226
civil courts, 141, 155, 174, 175n12, 176, 177, 221
civil law(s), 5, 6, 46, 52, 62, 159, 169
civil rights, 60, 181n33, 221, 224, 239; *see also* right(s) of citizens
civil society, 81, 83, 84
code(s), 45, 51, 93, 94; *see also under country name*
codification, 26, 31, 33, 41, 47, 53, 78, 94, 102, 106, 109
colonial rule, colonialism, viii, xiv, 5, 19, 41, 45, 47, 93, 95
Comaroff, J.L., 34
commercial courts, 94
commercial disputes (matters), 23, 93
commercial law(s), 46, 92
common law, 5, 8, 15, 78, 82
Constitution, 15, 87, 162; *see also under country name*
constitutional law(s), 62, 70
contract(s), 25, 52, 53, 81, 126-128, 130, 131, 183n39, 194;
  freedom of, 126, 129;
  unfair terms, xvi, 125-127, 129-132
contractual law(s), 103, 104
Convention on Human Rights, 58
Convention on the Rights of the Child, xv, 58, 97, 102, 105, 106, 109-111
conventional law, 100, 102, 103, 107-112
Copt(s), 62n1, 168, 174, 181, 183n38, 222, 226
Coptic *shari'a*, 226
Coulson, N.J., 43n4
court(s), viii, xiv, xvi, 6, 12, 12n4, 19, 57, 64, 147, 175;
  administrative, 63, 175-177, 225, 230;
  Christian, 49;
  civil, 141, 155, 174, 175n12, 176, 177, 221;
  commercial, 94;
  criminal, 62, 93;

customary/rural, 94, 144, 153;
International Court of Justice, 104;
Islamic/*shari'a*, 52, 122, 142;
Jewish, 49;
military, 160;
national, 52, 94;
party, 160;
religious, 63, 92;
secular, 92, 94, 242, 243;
state, viii, 147, 175; *see also under country name*
court system(s), xiv, 147, 154, 155, 160
coutume, 45
criminal court(s), 62, 93
criminal law(s), viii, 62, 92, 140, 141, 143, 160, 165
criminal offences (matters), 62, 93, 137-142, 148, 149, 165
cultural pluralism, 61
cultural relativism, 38
cultural unity, xv, 95
custody (age), guardianship, xvii, 62, 69, 202, 203; see also *kafala*
custom(s), viii, xiv, xvii, 12, 43, 45, 62, 68, 76, 82, 94, 162, 195;
Berber, 93;
coutume, 45;
Egyptian, 239;
international, 104n5;
law and, 6, 19, 48; see also *'urf*
customary arbitration (*tahkim 'urfi*), xvi, 144, 146, 148, 149, 150, 151, 152, 156
customary (traditional) authorities, 19, 161, 162
customary (rural) courts, 94, 144, 153
customary law(s), viii, xi, xv, xvi, 4, 5, 7-10, 14-16, 18, 19, 36, 45-47, 78, 80, 94, 143, 160-163, 165-167, 172, 223
damages, 128-130
Damascus (University), 115
Dar al-Ifta' (office of the Grand Mufti of Egypt), 153n15, 180, 239
De Sousa Santos, B, 35, 90, 92
death sentence, 80, 141, 142
dhimmis (non-Muslims living under the protection of a Muslim state), 227
discrimination, 98;
non-, 60;
of minorities, 9
dispute(s), ix, xvii, 6, 25, 64, 81, 94;
commercial, 23;
family, 79;
land, 83, 86
dispute-settlement institutions, 8
divorce, xvii, 62, 80, 115, 192, 194, 196, 197, 199, 200-203, 226, 235n12;
by repudiation, 59, 69
diya (blood money), 80, 141
dowry (*mahr*), 69, 193, 194, 202
Droit musulman algérien, 41, 46
Druze (community), 80, 85, 114
Dupret, B., 50, 53, 175
Durkheim, E., 45, 90

Egypt, xii, xiii, xiv, xvi, xvii, 62, 63, 68, 70, 71, 77, 79, 82, 101, 105, 113n1, 129, 130, 131, 144, 145, 150, 152, 153, 155, 160, 162-165, 167-169, 172, 175, 177, 181, 182, 184-188, 191-194, 197, 203, 206, 210, 212-216, 231, 234n10, 235n12, 240, 242;
19th century, xvi, 52, 135, 140;
administrative law, 233;
Civil Code, 46, 47, 53, 62, 127-129, 169, 213, 221-223, 234n11, 235;
civil law, 62, 159, 169;

Code of Civil Procedure, 174, 178, 179;
Code of Criminal Procedure, 160;
codes, 46, 52, 148;
Constitution, xviii, 39, 63, 67, 68, 176n14, 178, 179, 181n33, 204, 221, 223, 224, 226, 230-237, 240-243;
constitutional law, 62, 70;
Consultative Council, 153;
courts, *see* Egyptian court(s);
Criminal Code, 160, 165, 202;
criminal law, 62, 140, 160, 165;
family law, xvii, 192, 193, 204, 222, 223, 233;
Jihan's law, 235n12;
judge(s)/ judiciary, 39, 57, 62, 63, 68, 70, 71, 120, 128, 129, 148n5, 163, 165, 169, 170, 174n6, 175n12, 176, 177, 179n21, 183n39, 187, 188, 196, 198-200, 219, 221, 222, 228;
jurisprudence, xvii, 163;
law, xvi, xviii, 62, 125, 176, 178, 179, 181, 187, 212, 219, 220, 221, 240, 241;
lawyers, xvii, 174, 178, 180, 181, 182n36, 183n39, 184, 187n52, 188, 230, 241n16, 242n17;
legal system, xvii, 39, 176, 187;
legislation, xvii, 61-63, 67;
legislator/legislature, xviii, 39, 68, 69, 130, 231, 234n9, 236, 239, 240, 242, 243;
Mufti of the Republic, 62, 153n15, 239;
Parliament, 153;
State Council, 220-223, 225
Egyptian court(s), xiv, xvii, 57, 70, 135, 139, 148, 160, 173, 175, 187-189, 194, 196, 198-201, 222n3, 223, 224, 227, 240, 241n16;
administrative, 63, 175-177, 225, 230;
Cairo, xvii, xviii, 173-180, 183n39, 184, 187n53, 225;
civil, 174, 175n12, 176, 177, 221;
Court of Cassation, 178, 198, 222n3, 227, 241n16;
Court of Personal Status Affairs, 226;
Court of Summary Justice, 242n17;
courts of values, 160;
criminal, 62;
military, 160;
Mixed Courts, 52;
national, 52;
party, 160;
shari'a, 52, 142;
Supreme Constitutional Court, xviii, 63, 64, 67, 68, 69, 176n14, 188, 193, 230, 231, 233, 234, 235, 236, 237, 238, 239, 241, 242, 243
Ehrlich, E., xi, xii, 6, 76
England, 8;
law, 19
equity, 131
estate, 52
Ethiopia, 5
Europe, European countries (society), 58, 61, 65, 69, 70, 75, 125, 131, 154, 156;
law, 127
evidence, 23, 140, 141, 142

family, viii, 97, 98, 103, 107, 109n6;
disputes, 79;
property, 99
family law(s), xvii, 82, 87, 94, 192, 193, 204, 222, 223, 233

faqih, pl. *fuqaha* (Islamic jurist), 44n6, 131, 228, 231; *see also* Islamic scholars
fasid (legally invalid), 126
fatwa, pl. *fatawa* (legal opinion), 44, 92, 117, 171, 180, 181, 239n14
Ferrié, J-N., 175
financial law, xvii
financial practice(s), transactions, xvii, 207
fiqh (Islamic jurisprudence, doctrine), xiv, 42, 43, 44, 45, 46, 52, 53, 114, 115, 126, 140, 219, 220, 221, 228, 231
forum shopping, 35, 50n23, 71
France, 5, 66, 67, 75, 77, 79, 81, 99n2, 125, 131, 154-156, 183, 231;
courts, 66;
law/legal tradition, 52, 63, 114, 140, 168
Fuda, Farag, 171

Galanter, M., 95
Gauchet, M., 166
Gaza, xv, 78, 79, 82
Geertz, C., xiv, 21, 47, 48, 50, 112
Gellner, E., 47
George, R.P.H., 122
Germany, 81, 99n2, 231;
courts, 231
Gilissen, J., 4
Golan Heights, 85
Goldziher, I., 42, 46
Greenhouse, C., 32
Gribaudi, M., 32-34
Griffiths, J., xi, xii, 9, 11, 13, 29, 36, 37, 75, 79, 81, 91, 101, 109
guardianship, *see* custody
Gulf countries, 215
Gurvitch, G., 6, 74

hadd, pl. *hudud* (fixed penalties for crimes named in the *Qur'an*), 140, 141
hadith(s) (Traditions of the Prophet), 42, 43
Hallaq, W., 44
Hamas, 84
Hanafi school (law, tradition), Abu Hanifa, 44, 62, 115, 131, 193, 226, 228
Hanbali school (scholar), 44, 131
haqq al-arab (customary arbitration in Upper Egypt), xvi, 145, 147, 148, 150-152
haram (forbidden), 52
Hart, H.L.A., 122
headscarf (-ves), *see* veil
Henry, J-R., 49, 50
hijab (headscarf), *see* veil
hisba (legal action to preserve Islam), 62, 174, 178, 179, 241n16
hiyal (legal devices), 44
homicide, manslaughter, 139, 140-142
Hooker, B., 5, 9, 13, 74
Hopkins, N., 154
human rights, 97, 159, 220, 221, 239;
abuses, xviii, 219;
Convention, 58;
Commission, 103;
NGO, 181n34; *see also* right(s)

'ibada (religious duty), 239
Ibn Qudama, 220
Ibn Taymiyya, 44
'idda (waiting period for a woman after divorce), 197, 202
ijma' (consensus), 42n3, 44, 180, 228
ijtihad (independent reasoning), 44, 52n33, 125, 236-238, 242

'ilm (knowledge), 42
imam (founder of Islamic school of law), 125
Imperial Code (*al-qanunname al-sultani*), 140, 142, 142n12
indigenous law(s), ix, 5, 18, 19, 41; *see also* customary law(s)
indigenous population(s), viii, 9
Indonesia, 5, 15; law, 5
inheritance, 62, 114, 115, 193, 202, 204, 213, 225, 227, 228
inheritance law(s), 46, 52, 53, 62, 116, 192, 227
interest (rate), 171, 188, 208, 209, 213, 216n28, 218, 234; see also *riba*
International Court of Justice, 104
International Covenant of Civil and Political Rights, 60, 181n33
interpretation:
of Arab legislations, xvi;
of conventional law, 102;
of Islamic law, xviii, 63, 64, 241, 243;
of law, 63, 69;
of (religious) norms, xiv, 22, 57, 66, 70
investment companies (*sharikat tawzif al-amwal*, Egypt), 171, 214-216, 218
Iran, 94, 105;
legislation, 105
Iraq, 106
ishkal procedure (Egypt), 177
Islam, viii, xvii, 37, 43, 49, 51, 58-65, 68-70, 94, 99, 114, 119, 171, 185, 214, 222-224, 226, 228, 230, 238, 241
Islamic courts, 52, 122, 142
Islamic fundamentalism (islamism, political islam), 92, 94, 117, 168-172, 180, 187, 230, 239, 242
Islamic jurisdiction, 63, 93
Islamic jurisprudence, see *fiqh*
Islamic law, see *shari'a*
Islamic legal history, 92
Islamic legislation, 57, 187
Islamic repertoire, 176, 180, 181, 182, 189
Islamic scholars (jurists), 43, 44, 194, 216n28, 226, 227, 236, 237, 238, 239; see also *faqih* and *'alim*
Islamic schools of law, 43
Islamic society (*umma*), 42
Islamic studies, 41, 42, 45, 46
Islamic texts, manuals, see *fiqh*
Islamic tradition, 37, 39, 47
islamism, *see* Islamic fundamentalism
'isma (contractual right of a woman to divorce), 197
Isma'il Pasha, 161, 165
isnad (chain of transmitters of a Prophetic tradition), 43
Israel, 78, 82, 183;
authorities/administration, xv, 82, 84, 85;
jurisdiction, 79;
law, 78;
Supreme Court, 78
Italy (law), 168

al-Jabri, Muhammad, 120
Jerusalem, 85;
East, 84, 85;
University, 84
Jew(s), 114, 169, 227
Jewish courts, 49
Jhering, R. von, 243
jihad (holy war), 115
jizya (poll tax), 220
Johansen, B., 44, 52n32
Jordan, 80, 113n1;
land registration project, 85;

law/legislation, xv, 78, 82, 86
judge(s), judiciary, 6, 50, 52, 63, 64, 114, 115, 131, 132, 234n9; *see also under country name*
judicial sentences, *see* legal decision(s)
judicial system, 49, 161
judiciary, *see* judge(s)
jurisprudence, xvi, 130, 131;
religious, 5; see also *fiqh*
justice, 24, 25, 49;
summary, 23, 24, 27, 242n17

Kadijustiz, 48, 122
kafala (guarantee, guardianship), 99, 109-112; *see also* custody
Kantorowicks, E., 74, 156
Kerchove, M. van de, 30
Koran, *see* Qur'an

Lambert, E., 46
Laoust, H., 44
Latour, B., 38
land disputes (issues), 83, 85, 86, 91
land law(s), 87
land property (ownership), 44, 78, 86
land tax, 44
law(s), rules, norms:
administrative, 63, 233;
banking, xvii, 216;
canon/-ical, 121n11, 156;
case, 78;
civil, 5, 6, 46, 62;
colonial, 93;
commercial, 46, 92;
common, 5, 8, 15, 78, 82;
comparative, ix, 41, 45, 46, 53, 89, 163;
confessional, 92, 93;
constitutional, 62, 70;
contractual, 103, 104;
criminal/penal, viii, 62, 92, 140, 141, 143, 160, 165;
customary, viii, xi, xv, xvi, 4, 5, 7-10, 14-16, 18, 19, 36, 45-47, 78, 80, 94, 143, 160-163, 165-167, 172, 223;
family, xvii, 82, 87, 94, 192, 193, 204, 222, 223, 233;
financial, xvii;
folk, ix, 31;
formal, xv, 113, 118, 160, 163;
indigenous, ix, 5, 18, 19, 41;
informal, xv, 118, 113, 31;
inheritance, 46, 52, 53, 62, 116, 192, 227;
international, xv, 31, 83, 98, 100, 102, 104, 103, 104n5, 106, 107;
international private, 60, 71;
international public, 100, 104n5;
Jihan's, 235n12;
jurists', 52;
labour, 7, 8;
land, 87;
living, 6, 7, 76;
local, ix, 36;
marriage, 14, 17, 18;
modern/contemporary, xv, 162, 163, 165-168, 171, 172;
morals, 122;
national, 60, 81, 98;
native, viii, 19;
natural, 121n11, 221, 223;
people's, 36;
personal status, xvii, 50, 52, 235;
positive, xvi, xvii, xviii, 6, 39, 44, 47, 51, 53, 57, 105, 118n7, 124, 166, 176n14, 178, 181, 187, 219-221, 232;
private, 60, 71, 75;
public, viii, 60, 75;
received, 18, 19;

religious, xi, xvi, 3, 5, 8, 10, 14, 15, 16, 19, 52, 59, 71, 90, 94, 121, 122, 123, 124, 161, 165, 168, 172;
Roman, 121n11, 131, 156;
secular, 161, 232, 233, 240, 242;
state, *see* state law(s);
traditional, 31, 36, 39;
Western, 5;
written, 4; *see also under country name*
law maker(s), *see* legislature
lawyer(s), vii, viii, xi, xiii, xiv, 9, 23, 50, 74, 121, 189; *see also under country name*
Lebanon, 80
legal actor(s), *see* actor(s)
legal anthropology/-ist, xvi, 7, 41, 74
legal authorities, xv, 57, 59, 101, 102
legal centralism, xiii, 11, 12n5, 16, 29, 37, 81
legal centralization, 79, 80, 81
legal decision(s), judicial sentences, 43, 49, 60, 64, 65, 69, 148, 233
legal doctrine, 9, 10
legal documents, 23, 44, 45, 51
legal history, xvi, 47, 92
legal language, 50
legal monism, vii, 27, 50, 74, 81
legal pluralism, vii, xi-xvii, 3, 5, 7-10, 13-18, 26, 27, 29, 30, 36, 51, 57, 74, 81, 86, 89, 91, 93, 95, 98, 100-103, 107, 109, 112, 118, 145, 152, 153, 155, 159, 173, 175, 188, 192, 199, 205, 218, 220, 228, 233;
colonial, viii, ix;
deep/strong, 5, 7, 10, 11, 13, 14, 18, 19, 109;
definition of, vii, viii, ix, xi, 3, 4, 5, 9, 11, 13, 14, 21, 92, 191;
effects of, xvi;
internal/weak, 11, 13, 14, 18, 19, 109;
theory of, xi, xii, xiv, 11, 25, 108, 113, 135, 143
legal positivism, viii, 12n5; 37-39, 111
legal practice(s), 6, 43, 45, 46, 54
legal precedent(s), 15, 23
legal procedures, 49, 62, 103, 141, 146, 147
legal profession(als), practitioners, 11, 15, 24, 79, 155; *see also* lawyer(s)
legal reception, 5, 18, 19
legal reform (changes), xvii, 18, 49, 50, 51, 64
legal source(s), xi, xii, xvii, xviii, 6, 47, 49, 52, 57, 82, 109, 142, 205, 224, 232
legal system(s), *see under country name*
legal theory, theoretician(s), xi, xiii, 11
Legendre, P., 156
legislation(s), xi, xii, xvi, 7, 11, 15, 16, 51, 57, 78, 84, 101, 107, 114, 125, 142, 243;
procedures, xviii, 15; *see also under country name*
legislature, legislator, law maker(s), xi, xii, xvi, 14, 19, 24, 29, 59, 108, 113, 124, 125, 131;
international, 101, 102, 110-112; *see also under country name*
Le Roy, E., 155
Levi, G., 33
Lévi-Strauss, C., 38
liability, 129
Linant de Bellefonds, Y., 47
Luhmann, N., 51, 53, 237

ma'dhun (notary public, Egypt), 202
Maghreb, 45, 49
Mahfuz, Nagib, 171
mahr (dowry), *see* dowry
majlis (official judicial council in
  19th century Egypt), 138-142
majlis al-'arab (customary judicial
  council, Egypt) 145-147, 153,
  154, 157
Majlis al-ahkam (highest court in
  19th century Egypt), xvi, 139
Majlis al-sha'b (Egyptian
  Parliament), 153
Majlis al-shura (Egyptian
  Consultative Council), 153
Malaysia, 98
Maldives (Constitution), 106
Maliki law (school), 93, 131
Malinowski, B., 6, 7, 31, 34
Mamluk period, 44
marital status, 17
marriage, 17, 62, 69, 115, 192, 193,
  196, 198, 200, 201;
  age, 194-196;
  contract, 194, 197, 202, 226;
  inter-religious/apostate, 62, 225,
    226, 228, 241n16;
  second, xvii, 200
marriage law(s), 14, 17, 18
Marxists, 169
Maunier, R., 45
Mauritania, 105
Mauss, M., 45
Mecca, 116
mediation, *see* arbitration
Melanesia, 6
Middle East, 95
minorities, 4, 9;
  cultural, 60;
  religious, 114, 159; *see also*
    Muslim immigrants
minors, 4
Mixed Courts (Egypt), 52
Molière, 22
Moore, S.F., xi, xii, 7, 11, 14, 34, 36,
  48, 91
Morand, M., 46
Morocco, xv, 49, 89-95, 106;
  commercial law, 92;
  Constitution, 106;
  courts, 48, 91, 92, 92n3, 93, 94;
  criminal law, 92;
  family law, 94;
  judge/*qadi*, 49, 94;
  law, 49, 93, 94
mosque(s), xv, 113-118
Motzki, H., 42n3, 43
mudiriyya (provincial administra-
  tion, Egypt), 137-139, 141
mufti (legal adviser), 44, 52n32,
  117, 140;
  Mufti of the Republic (Egypt),
    62, 153n15, 239;
  Grand Mufti (Syria), 113
al-Muhajir case, *see* Youssef Chahine
Muhammad Ali, 156, 161, 165
mujahid (warrior), 116n1
murder, 137, 138
Muslim(s), 114-120, 123, 124, 146,
  181, 189, 204, 220, 221, 224,
  226, 227, 241n16, 242n17;
  legal status, 58, 168;
  non-, 220, 221, 224, 227;
  orthodox, xv, 116
Muslim Brothers (Brotherhood),
  169-171
Muslim (Arab) immigrants (immi-
  gration, communities), xiii, 57-
  61, 69, 117
Muslim world (countries, societies,
  states), xv, xvi, 37, 38, 41, 47, 49,
  66, 67, 98, 99, 100n3, 101, 103,
  105, 106, 110, 112, 114, 118,
  156; *see also* Arab world
mut'a (payment to a woman after
  divorce), 202

al-Na'im, 'Abdallah, 120
al-Nasser, Gamal 'Abd, 161
Nasserists, 169
nationality, 58, 59, 98
Near East, xv, 89
Netherlands, 5, 70;
law, 5
New York, 7, 8
New Zealand, 9
NGOs (non-governmental organizations), 83, 84, 181n34
Nigeria, 7
niqab (full veil), 67, 69, 229, 230, 238, 239, 243; *see also* veil
normative order(ing)s, xiii, xiv, 5, 7, 10-12, 19, 26, 35, 36, 110n7, 111
normative pluralism (plurality) viii, ix, xiv, 21, 26, 29, 37, 39, 50, 152
normative repertoire(s), xv, 34, 99, 100, 101, 107, 112, 176, 181
North Africa, 45, 47, 49

oath(s), 23, 91
occupied territories, xv
Oman, 98
Oslo agreements, 78, 79n2, 82
Ost, F., 30
Ottoman Empire, 77, 78, 193;
heritage, 87;
law, xv, 78, 82, 86;
period, 44

Pakistan, 105, 214n20
Palestine, 73, 74, 77-87;
courts, 80;
law/legislation, xv, 73, 77, 82, 86;
lawyers, 79, 82;
legal authorities, xv;
Legislative Council, xv
Palestinians, xv, 79
personal status, 4, 58-60, 62, 79, 80, 83, 98, 107, 114, 116, 159, 176n14, 178, 179, 192, 204, 227
personal status law(s), xvii, 50, 52, 235
Peters, R., 44
Petit, B., 34
pilgrimage (*hajj*), 115, 116
police inspector (*mulahiz*), 136, 137, 146
polygamy, 18, 59, 69, 200, 203, 235n12
Pospisil, L., 76
proof, (means of) 23
property, 17, 141;
family, 99;
land, 44, 78, 86
prophet(s), xvii, 179n21, 180, 181, 182, 183, 185
Prophet Joseph, 174, 178, 179n21, 180n26, 181, 182, 242n17
Prophet Muhammad, 42, 43, 196, 228n5
public law(s), viii, 60, 75;
international, 100, 104n5
public order, 59, 64, 66, 68, 71, 83, 139n4, 142, 154, 167, 178, 185, 223, 224, 227, 241
public prosecutor(s), 23, 217

qadi (Islamic judge), 44n7, 48, 49, 137, 138, 140, 141, 142, 143; *see also* judge(s)
qanun (positive law), 51, 231, 232; *see also* law(s), positive
Qatar, 105
qiyas (analogy), 42n3
Qur'an(ic), 42, 51n26, 52, 68, 114, 116, 117, 120, 125, 150, 157, 174, 181, 182, 193, 204, 223, 228, 238, 239, 241n16

Rawls, J., 122
ra'y (ratio), 42
real estate, 85, 86, 212
religion, xiv, 16, 38, 42, 60, 62, 64, 65, 89, 91, 95, 98, 101, 105, 114, 121, 122, 159, 169, 170, 174, 196, 198, 199, 202, 204, 220, 221, 222, 224, 226-228, 230, 237, 239
religious authorities, 115, 116
religious communities (minorities), 114, 159; *see also* Muslim immigrants
religious dogmatism, 37
religious education, 91
religious law(s), xi, xvi, 3, 5, 8, 10, 14-16, 19, 52, 59, 71, 90, 94, 121-124, 161, 165, 168, 172
religious norms (prescriptions), 37-39, 52
repudiation (*see also* divorce), 59, 69
retaliation, 85
riba (unlawful interest, usury), xvii, 126, 132, 211, 214, 216n28, 234n11; *see also* interest
Rigaux, M-F., 110
right(s):
  administrative, 59;
  of apostates, xviii, 221, 222, 226, 227, 228;
  basic, 57;
  of the child, *see* children's rights;
  of citizens, 161, 172;
  civil, 221, 224, 239;
  to education, 242;
  to equality (of the sexes/citizens/individuals), 59, 60, 94, 172, 221, 227;
  to the family house, xvii;
  to freedom of conscience, 60, 64, 99;
  to freedom of expression, 57, 65, 71, 171, 181, 186, 231;
  to freedom of the press, 84, 85;
  to freedom of religion/belief, 57, 64, 68, 69, 71, 99, 106, 222, 223, 224, 225, 226, 227, 231, 240, 241, 242;
  to freedom of thought, 99, 171;
  hereditary, 99;
  human, *see* human rights;
  to individual liberty, 68;
  to legal counsel, 142;
  to life, 171;
  to movement, 59;
  to non-discrimination, 60, 98;
  political, 87;
  property, 17;
  to self-determination, 9;
  social and economic, 59;
  succession, 62, 69;
  universal, 124;
  of women, 59, 80, 95;
  of workers, 7
Roberts, S., 34
Roman law, 121n11, 131, 156
Rosen, L., 47, 48, 49, 50
Roussillon, Alain, 187

al-Sadat, Anwar, 161, 169
Sade, 22
sahih (valid), 52
sale, 10
al-Sanhoury (Sanhuri), 'Abd al-Razzaq, 46, 53, 169, 236
Santillana, D., 46
Saudi Arabia, 98, 146
Schacht, J., 43, 44, 45, 52n32
semi-autonomous social field(s), *see* social field(s)
al-Shafi'i (law, school), 43, 44, 131
shari'a (Islamic law), xiv, xv, xvi, xvii, xviii, 39, 41-47, 49, 50-53, 57, 61-63, 65, 67, 68, 71, 79, 80, 85, 86, 91, 94, 99, 99n2, 103, 105, 109-117, 119-121, 123-127,

130-132, 140, 142, 143, 153, 156, 161, 168-170, 176, 178, 179, 187-189, 192-194, 197, 199, 201-204, 211, 212, 221, 223, 224, 226, 227, 230, 232, 233, 234n9, 235-240, 243;
application of, xv, xvi, 113, 118, 141, 224, 234n9;
authority of, 15, 118;
courts, 52, 122, 142;
codification of, 47;
criminal, 141;
Faculty of, xv, 115;
formal, xv, 113, 118;
informal, xv, 113, 118;
interpretation of, xviii, 63, 64, 241, 243
sharikat al-mudaraba (partnership in profit and loss), 53
shaykh or sheikh, pl. *shuyukh*, *mashayikh* (title of a traditional Islamic scholar), 113, 115, 116, 118, 174, 181n32
shaykh or sheikh, pl. *mashayikh* (village or tribal head), 136, 137, 143
Shaykh al-Azhar (Head of Al-Azhar University), 62, 153, 183n37
shurut-works (legal documents), 44
slave, 136, 139
Smith, M.G., 91
Snouck Hurgronje, Ch., 42, 43, 46
social actor(s), *see* actor(s)
social control, vii, viii, ix, 12, 31
social field(s), ix, xi, xii, xv, 6, 9, 10, 12, 29, 92, 100, 107-109, 112, 182, 188;
semi-autonomous, xii, 7, 14, 36, 39, 91, 175
Somalia, 98
state, vii, viii, ix, xi, xiii, xiv, 4, 6, 7, 11-13, 15, 16, 29, 30, 31, 36, 37, 39, 61, 65, 69, 74-77, 79, 81, 84, 86, 89, 98-102, 104-106, 108, 109, 113, 114, 140, 142, 143, 148n5, 152, 154, 156, 160, 162, 164, 166, 167, 175, 185, 188, 191, 222-224, 230, 231, 240-242;
authority/-ies, 14, 16, 60, 80, 114, 115, 140, 143, 170, 189, 217, 222, 230
state law (statute, formal, official, enacted law), viii, ix, xiii, xv-xvii, 4, 5, 10-12, 12n4, 14-16, 18, 19, 29-31, 36, 37, 73-75, 77, 79, 81-83, 91, 108, 113, 119, 140, 142, 143, 148n5, 153, 157, 161, 162, 168, 172, 191, 192, 201, 203, 231, 235, 236, 243;
non-, 7, 9, 11, 12, 15, 31, 108, 191;
see also *qanun*; law(s)
state law pluralism, xii, 5, 8, 9, 10, 11, 12, 16, 79, 82
succession (right of), 62, 69
Sudan, 139
Sufi brotherhood(s), 174, 181n32
summary justice, 23, 24, 27
Sunna (al-sunna al-nabawiya) (sayings and acts of the Prophet), 42, 52, 114-117, 120, 125, 228
Sunni schools (of law), 47
Supreme Constitutional Court, *see* Egyptian court(s)
sura (chapter of the Qur'an), 150n9, 157, 174n1, 180n31, 238
Syria, xv, 113, 114, 117, 118, 120;
Ba'th party, 112;
Constitution, 114;
Grand Mufti, 113;
judges, 114, 115;
law/legislation, 113, 114, 118

tahkim (arbitration), *see* arbitration; customary arbitration
Tamanaha, B., 11, 12, 30, 31, 37

al-Tantawi, Sheikh, 183n37, 239
Tanzania, 7, 98
Tanzimat codification, 78
taqlid (following earlier legal opinions), 44
Taylor, C., 25, 33
ta'zir (discretionary judicial power), 140, 141
testimony, 23, 137, 192, 204
Teubner, G., 51, 53, 237
Thailand, 5
tha'r (blood feud), *see* blood feud(s)
theft, 139, 141, 165
Thévenot, L., 22, 25, 26, 34
tribal (traditional) life, 6, 143, 161, 165
trust, 91
Tunesia (code of civil and commercial law), 46
Turin, 23, 25
Turkey, Turkish Republic, 5, 229, 231;
  courts, 231

'ulama' (Islamic scholars), see *'alim*
'Umar b. al-Khattab, 220n2
'umda (village head, Egypt), 136, 146, 148, 149, 153, 155
United Arab Emirates (UAE), xvi, 98, 125-127, 129-131;
  Civil Code, 126, 127, 129;
  legislator, 129, 130
United Nations, 97, 104
Upper Volta, 98
'urf, 'adat (custom, customary law), 82, 223, 239; *see also* custom(s); customary law(s)
USA, North America, 5, 9;
  lawyers, 8, 47
USSR, 5
usul (sources and principles of Islamic jurisprudence), 42
usury, *see riba*

Vanderlinden, J., viii, 4, 5, 10, 13, 35, 74, 93
veil, headscarf, xviii, 57, 59, 60, 61, 64, 65, 66, 67, 69, 70, 71, 229, 231, 238, 239; see also *hijab*; *niqab*

wajib (obligatory), 52
wali (saint), 116n1
waqf (religious endowment), 62, 86, 114, 146, 150n8, 153, 188
Weber, M., 48, 90, 122
West Bank, xv, 78, 79, 82
Western academic context, 38
Western world, 101
Wichard, J.C., 52n32
witnesses, 91, 137, 194
women, 59, 62, 66-68, 80, 91, 95, 120, 173, 192, 193, 195, 197, 198, 200, 204, 209, 213, 230, 238, 239, 242
Woodman, G., 31, 37, 81

Youssef Chahine (Yusif Shahin), *al-Muhajir* case, xvii, 170, 173, 175n12, 176, 177, 179, 180, 180n30, 180n31, 181-186, 188, 242

Series General Editor
Dr. Mark S.W. Hoyle

Titles in the Series

Legal Pluralism in the Arab World, Baudouin Dupret, Maurits Berger, and Laila al-Zwaini (eds.)
(ISBN 90-411-1105-0)

United Arab Emirates Court of Cassation Judgments 1989 - 1997, Richard Price and Essam Al Tamimi
(ISBN 90-411-1005-4)

Islamic Law and Finance: Religion, Risk and Return, Frank E. Vogel and Samuel L. Hayes III
(ISBN 90-411-0547-6)

Islamic Institutions in Jerusalem, Yitzhak Reiter
(ISBN 90-411-0382-1)

The Law of Business Contracts in the Arab Middle East, Nayla Comair-Obeid
(ISBN 90-411-0216-7)

Arab Islamic Banking and Renewal of Islamic Law, Nicholas D. Ray
(ISBN 1-85966-104-1)

Business Laws of Yemen, Abdulla M.A. Maktari and John McHugo
(ISBN 1-85966-112-2)

Finance of International Trade in the Gulf, Dr. Ahmed A.M.S. Al-Suwaidi
(ISBN 1-85333-947-4)

Islamic and Public Law, Chibli Mallat (ed.)
(ISBN 1-85333-768-4)

Islamic Family Law, Chibli Mallat and Jane Connors (eds.)
(ISBN 1-85333-301-8)

Islamic Law and Finance, Chibli Mallat (ed.)
(ISBN 1-85333-121-X)

The Islamic Law of Personal Status (2nd ed.), Jamal J. Nasir
(ISBN 1-85333-280-1)

The Law of Commercial Procedure of the United Arab Emirates,
Dawoud S., El Alami
(ISBN 1-85966-080-0)

The Status of Women under Islamic Law (2nd ed.), Jamal J. Nasir
(ISBN 1-85966-084-3)

The Marriage Contract in Islamic Law, Dawoud S. El Alami
(ISBN 1-85333-719-6)

Mixed Courts of Egypt, Mark S.W. Hoyle
(ISBN 1-85333-321-2)

The Theory of Contracts in Islamic Law, S.E. Rayner
(ISBN 1-85333-617-3)

Unlawful Gain and Legitimate Profit in Islamic Law, Nabil A. Saleh
(ISBN 1-85333-721-8)

(please order by ISBN or by title)