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Léon Buskens, Baudouin Dupret

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4. Léon Buskens & Baudouin Dupret - The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient¹

In memory of Albert Dekker (1952-2011)

Normativity in Muslim societies existed before, and independent of the introduction of the concept of Islamic law at the end of the eighteenth century. However, nowadays the concept of Islamic law has become so self-evident and politicised, for Muslims as well as for outsiders, that some Muslims consider the analysis of its coming into being as a provocation. Despite this, in this talk I sketch the development and spread of this way of understanding of normativity in Muslim societies, a process in which orientalists and politicians transformed it into Islamic law.

In the West scholars only started to study Islamic law seriously from the end of the eighteenth onwards. European colonialism stimulated the quest for knowledge of local law overseas. The European governments needed to become better informed about the rules and norms of the societies which they colonised, in order to impose their rule and maintain order. This process of knowledge formation meant imposing Western concepts such as “law” on alternative understandings of normativity and social order.

In this short essay we investigate the history of this scholarly and political concept by analysing some examples taken from the Dutch and French traditions of the study of Islamic law, and from the post-colonial teaching and legal practices in some Muslim societies.

Beginnings and Debates: Lessons from Delft and Leiden

At the end of the eighteenth century British linguists and jurists were among the first to converse with local scholars about the norms governing the lives of Hindus and Muslims in India.² A few decades later some French Arabists and soldiers started research on the native laws of Algeria.³ At about the same time, a number of Dutch scholars tried to understand what norms were governing the daily lives of indigenous and “oriental” inhabitants of Indonesia.⁴ These practice-oriented studies of what was considered to belong to the legal domain were

¹ Unlike Bontems (Claude Bontems, “L’invention du droit musulman algérien à l’époque coloniale (XIXe siècle). Une approche anthropologique”, in Yadh Benachour, Jean-Robert Henry & Rostane Mehdi (eds.), *Le débat juridique au Maghreb. De l’étatisme à l’Etat de droit. Etudes en l’honneur de Ahmed Mahiou* (Paris: Editions Publisud – IREMAM, 2009) we use the term “invention” not only in the epistemological innocent sense of “discovery”, but we intend to stress the constructive character of the category “Islamic law”.

² On the British studies, see e.g. Bernard Cohn, *Colonialism and Its Forms of Knowledge. The British in India* (Princeton: Princeton University Press, 1996).

³ Jean-Robert Henry & François Balique, *La doctrine coloniale du droit musulman algérien. Bibliographie systématique et introduction critique* (Paris: Editions du Centre National de la Recherche Scientifique, 1979); Bontems, “L’invention du droit musulman algérien à l’époque coloniale (XIXe siècle). Une approche anthropologique”, 39-51.

⁴ See B.J. Boland & I. Farjon, *Islam in Indonesia. A Bibliographical Survey 1600-1942 with post-1945 Addenda*, (Dordrecht: Foris Publications Holland, 1983); Albert A. Trouwborst, “Anthropology, the Study of Islam, and Adat Law in The Netherlands and the Netherlands East Indies, 1920-1950”, in Han Vermeulen & Jean Kommers (eds), *Tales from Academia. History of Anthropology in the Netherlands* (Saarbrücken: Verlag für Entwicklungspolitik Saarbrücken GmbH, 2002), vol. 2, 673-694; Léon Buskens & Jean Kommers, “The Delayed Reception of Colonial Studies about Adat Law and Islamic Law in Dutch Anthropology”, in Han Vermeulen & Jean Kommers (eds), *Tales from Academia. History of Anthropology in the Netherlands* (Saarbrücken: Verlag für Entwicklungspolitik Saarbrücken GmbH, 2002), vol. 2, 733-755.

closely linked to the emerging tradition of learned orientalism, which aimed at collecting, describing and analysing distant civilisations.⁵

In order to answer the new questions on local or "indigenous" law, scholars followed philological, historical, ethnographic, and legal approaches. From the beginning, researchers, administrators and politicians were engaged in debates about what the law was, and what it should be. Knowledge was not only a matter of description and analysis, but also a question of normativity as defined by Western legal positivism. The issue of the relation between theory and practice, which has become central in the Western study of Islamic law, originated in these scholarly and political debates of the nineteenth century.

The beginnings of the study of Islamic law in the Netherlands, which were closely linked to the colonisation of Indonesia, especially of the islands of Java and Sumatra, offer a telling example of the early entanglement of scholarly and practical questions. Until the departure of the English in 1814, Dutch civil servants were hardly involved in the administration of local communities. From then on, Dutch policy developed the idea that a proper colonial government implied maintenance of law and order.⁶ To this end, the government established several institutes for the education of colonial civil servants in Delft and Leiden. In 1844 the Arabist Albert Meursing (1812-1850) was the first in the Netherlands to publish an introduction to Islamic law. The manual was an adaptation of a manuscript text written in Malay by a scholar from Aceh, who had resided in Mecca for many years, at the request of a seventeenth-century female ruler of Aceh. The abridged edition was used as a textbook for students at the colonial institute in Delft.⁷

Salomo Keyzer (1823-1868), the successor of Meursing in Delft, published the first introduction to Islamic law in Dutch.⁸ In this handbook he stressed the importance of knowledge of the "pure Islam", which he contrasted with the "aberrations" of daily life in Indonesia. According to him the law of Indonesian Muslims was to be found in the normative texts of the Muslim scholars, the books of *fiqh*. Keyzer taught these texts following the classical order in which Islamic scholars treated legal issues. "Practical men" working in Indonesia, such as civil servants and entrepreneurs, engaged in fierce polemics with Keyzer concerning his teachings and understanding of indigenous law. For people like W.R. van Hoëvell the actual law was to be found in the practices of the natives, in their local customs, which were completely different from the norms which the Muslim scholars stipulated in their texts, and which varied from one place to another.⁹ According to Keyzer's critics the

⁵ On the French tradition: Maurice Flory & Jean-Robert Henry (dir.), *L'enseignement du droit musulman* (Paris: Editions du Centre National de la Recherche Scientifique, 1989). Zomeño gives an overview of Spanish studies on Islamic law in Morocco: See Amalia Zomeño, "El derecho islámico a través de su imagen colonial durante el Protectorado español en Marruecos", in Fernando Rodríguez Mediano & Helena De Felipe (eds), *El protectorado español en Marruecos. Gestión colonial e identidades* (Madrid: Consejo Superior de Investigaciones Científicas, 2002), 307-337. Kemper, offers a history of Russian orientalism, especially concerning the relation between Islam and local customs: Michael Kemper, "'Adat against Shari`a: Russian Approaches Toward Daghestani 'Customary Law' in the 19th Century", in *Ab Imperio* 3 (2005): 147-174.

⁶ On colonial law and jurisprudence in the Dutch East Indies, see: Albert Dekker & Hanneke Van Katwijk, *Recht en rechtspraak in Nederlands-Indië* (Leiden: KITLV Uitgeverij, 1993); and Jan Michiel Otto & Sebastiaan Pompe, "The Legal Oriental Connection", in Willem Otterspeer (ed.), *Leiden Oriental Connections 1850-1940* (Leiden: E.J. Brill, 1989), 230-249.

⁷ Albert Meursing, *Handboek van het Mohammedaansche regt, in de Maleische taal; naar oorspronkelijke, Maleische en Arabische, werken van Mohammedaansche regtsgeleerden bewerkt door ...* (Amsterdam: Johannes Müller, 1844).

⁸ Salomo Keyzer, *Handboek voor het Mohammedaansche regt* ('s Gravenhage: Gebroeders Belinfante, 1853).

⁹ W.R. van Hoëvell, "Varia; brief aan den heer S. Keijzer", *Tijdschrift voor Nederlandsch Indië* 15, no. 1 (1853): 452-454; W.R. van Hoëvell, "Varia; antwoord aan S. Keijzer", *Tijdschrift voor Nederlandsch Indië* 24, no. 1

education of future colonial civil servants should be focused on local customs and native languages, rather than on "pure" and "universal" Islamic law and classical Arabic.

The polemics on the relative weight of classical Islamic norms as laid down in *fiqh* texts and their relation to local practices lasted for several decades, and were finally brought to an end by the Arabist and Islamicist Christiaan Snouck Hurgronje (1857-1936). In cooperation with the jurist Cornelis van Vollenhoven (1874-1933) he managed to impose the doctrine of *adatrecht* (Indonesian customary law) as the authoritative view both in academia and in the colonial administration.¹⁰ Together they encouraged their students and colonial administrators to collect local customs and court practices in the field, which were published in compilations of customary law (*adatrechtbundels*). Afterwards Van Vollenhoven further analysed these raw materials in a monumental synthesis and in separate studies. Through these collections and analytical restatements these scholars transformed local customs (*adat*) into customary law (*adatrecht*), for which they claimed a normative authority comparable to Dutch codified law. The Arabist and jurist Theodoor Willem Juynboll canonised the teachings of the two masters on the relation between Islamic law and local customs in his manual on Islamic law, first published in 1903.¹¹ In this book he systematically juxtaposed the classical norms of the Shafi'i school, one of the four surviving Sunni schools of law, with local customs of the various Muslim regions of the Indonesian archipelago.¹² During half a century all colonial civil servants had to learn this handbook by heart during their studies to imbibe themselves with the sole authoritative view of Islamic law in Indonesia. And until about two decades ago Juynboll's book remained considered a proper textbook to teach Islam and Islamic law in Dutch.

The Positivism of the New Categories

The understanding of indigenous norms followed to a large extent the evolution of legal thinking in continental Europe, which was dominated by national legislation and Napoleonic codification. Scholars studying Islam and Muslim societies had to decide whether a norm was worthy to be elevated to the level of a legal ruling or not. One of the stages of the research usually consisted of transforming norms into law. When these scholarly opinions were accepted at the political level, they became the new law of the colonial administrators, and sometimes even of the natives administered. There were many reasons for this legal positivism, which led to a stark form of conceptual ethnocentrism. Many colonial civil servants had initially been trained in law. A considerable number of scholars combined the study of oriental languages with law. And several early ethnologists had started out as legal scholars.

In the nineteenth century legal scholarship was dominant in the self-understanding of the colonising societies. This normative view of social processes was intimately linked to the

(1862): 260-261 (cf. *ibidem*, 195-197); Salomo Keyzer, "Varia; brief aan de redacteur W.R. van Hoëvell", *Tijdschrift voor Nederlandsch Indië* 24, no. 1 (1862): 258-260 (cf. *ibidem*, 54-57; 195-197).

¹⁰ Cf. Christiaan Snouck Hurgronje, *Verspreide geschriften* (Bonn & Leipzig: Kurt Schroeder, Leiden: E.J.Brill, 1923-1927), especially volume IV; Christiaan Snouck Hurgronje, *Œuvres choisies de C. Snouck Hurgronje présentées en français et en anglais par G.-H. Bousquet et J. Schacht* (Leiden: E.J. Brill, 1957); Christiaan Snouck Hurgronje et al., "Adat Guide", in J.F. Holleman, (ed.), *Van Vollenhoven on Indonesian Adat Law. Selections from Het Adatrecht van Nederlandsch-Indië (Volume I, 1918; Volume II, 1931)* (The Hague: Martinus Nijhoff, 1981), 262-265. On the doctrine of *adatrecht* Peter Burns, *The Leiden Legacy. Concepts of Law in Indonesia* (Leiden: KITLV Press, 2004).

¹¹ Th. W. Juynboll, *Handleiding tot de kennis van de Mohammedaansche wet, volgens de leer der Sjafi'itische school* (Leiden: E.J. Brill, 1930, fourth edition (orig. 1903)).

¹² Apparently the manual was considered to be so important for the maintenance of law and order and for the understanding of Muslims in Indonesia that a Dutch publishing house in exile had it reprinted in the United States during the Second World War (New York: Querido, 1943).

process of the formation of nation states, which dominated the history of Europe at that time. Romantic legal philosophy, expressed by for example Von Savigny, held that nations were considered to find their expression in their law. In turn, legal positivism was used to understand normativity in Muslim societies, which led to obfuscating the differences between the European and Muslim systems and benefitted the imposition of the European conception of norms as law.

This "epistemic violence" expressed itself in the introduction of new analytical categories, such as "personal status", "criminal law", and "public law" versus "private law", which were unknown to Islamic scholars till then. The European researchers tried to determine as soon as possible the most authoritative summaries of each law school (*madhhab*) and to publish editions and translations of these. The Dutch concentrated on the classical Shafi'i texts taught in Indonesia, whereas British scholars became specialists on the Hanafi school dominant in South Asia. French and Italian scholars were involved in the colonisation of the Maghrib and hence focused on editing and translating the Maliki classics.

Several scholars however, raised objections to this legal approach to Islamic normativity. Christiaan Snouck Hurgronje severely criticised the ethnocentric conception of *Shari'a* as law, which might partly have been due to the fact that he did not have a background in law, unlike many of his fellow scholars on Islamic law.¹³ He contributed greatly to abolishing the division of labour between fieldwork and library research, and between the study of texts and of practices. Due to his background in theology and philology he had a sound knowledge of the normative texts, but he was also well versed in spoken variants of Arabic and Malay, and the vernaculars particular to the different regions of Indonesia, such as Sundanese and Acehnese. His prolonged sojourns in the field, in the Hijaz and in Indonesia, enabled him to collect rich ethnographic data. He was gifted in developing personal networks of friendships and family alliances, which contributed considerably to his insights into local societies. While in Jeddah in 1884 he converted to Islam, and bought an Abyssinian slave girl (*jama'a*) after his move to Mecca in 1885. Through the good services of this concubine he managed to obtain intimate data about the daily life of women, as he shows in the second, ethnographic volume of his study on Mecca. Later in Java he successively married two female members of the Sundanese Muslim elite and thus reinforced his ties with the ruling class, which he had already established in Mecca. While the Dutch colonial government paid him to collect useful data and to give advice on Islamic affairs, Snouck Hurgronje managed to combine political action with scholarly research. Due to his analysis of Acehnese society and his practical advice the Dutch colonial army managed to finally "pacify" this "rebellious" region.

When Snouck Hurgronje returned to Leiden in 1906 he started a new life as a professor of Arabic and Islam, and as a family man, marrying a young Dutch woman and fathering a daughter named Christien. But he remained involved in colonial affairs, together with his neighbour and friend the Leiden law professor Cornelis van Vollenhoven. As already mentioned, together they developed the doctrine of *adatrecht*. But they also strongly advocated the idea of an "ethical policy" towards Indonesia. For them this implied an active concern for the education of the Indonesian elite. They supervised a considerable number of Indonesian doctoral students in Leiden, in the fields of Arabic, Islam, Indonesian languages and cultures, and law. From a scholarly point of view Snouck Hurgronje should be considered the founder of an anthropology of Islamic law, which links the study of texts with ethnographic fieldwork.

¹³ On the life of Snouck Hurgronje and on his studies on Islamic law, see: Jan Brugman, "Snouck Hurgronje's Study of Islamic Law", in Willem Otterspeer (dir.), *Leiden Oriental Connections 1850-1940* (Leiden: E.J. Brill, 1989), 82-93; Léon Buskens & Jan Just Witkam (eds), *Scholarship in Action. Studies on the Life and Work of Christiaan Snouck Hurgronje (1857-1936)* (Leiden: Brill, forthcoming).

Christiaan Snouck Hurgronje stressed the original character of Islamic normativity in his writings. For him Islamic normativity found its main expression in *fiqh*, a term which he rendered into Dutch as *plichtenleer* ("a doctrine of obligations"), which was more a deontology, than a legal system, and as such rather similar to the Jewish Law.¹⁴ Snouck Hurgronje recommended the use of Arabic terms rather than renderings in European languages for the analysis of local norms, in order to demonstrate the singularity of Islamic normative categories. Snouck's approach was similar to Van Vollenhoven's conception of Indonesian customary law, for which sound linguistic knowledge and the use of vernacular concepts and texts were also fundamental. He was strongly opposed to attempts at the codification of Islamic norms, as he considered the idea of a law code as completely contrary to the "spirit" of Islamic law.¹⁵ Snouck Hurgronje's "deontological" conception of Islamic normativity was spread by his two main pupils, the German (and later British) Arabist Joseph Schacht (1902-1969) and the French sociologist Georges-Henri Bousquet (1900-1978), neither of whom were jurists by training either. However, they both used the term "Islamic law" in the titles of their manuals and essays.¹⁶

In order to stress the fact that the use of the expression "Islamic law" implied an altogether new conception of Islamic normativity we deliberately use the rather fashionable term "invention". The positivist conception of Shari`a as law was foreign to the understanding that Islamic scholars themselves had of the tradition that they transmitted. However, at present this view has become dominant to the extent that students at institutions for Islamic higher learning take courses in "Islamic law" and "Islamic legislation", and that islamists and other activists strife for the introduction of "Islamic law" in Islamic states.

Contributions of Oriental Collaborators

The work of European scholars in the nineteenth century was only possible because of the help of local collaborators. The contributions of these assistants, who gathered materials and information which enabled their European masters to write their studies, have generally received scant attention. Often the role of informant went together with the tasks of interpreting, translating, assisting in the research and counselling. Some worked as dragomans for foreign consulates and combined their knowledge of oriental languages with an expertise of local norms. Later on, colonial governments created specific institutions for the transmission of knowledge and the education of local staff. Bodies for the maintenance of law and order, such as services for native affairs and law courts, also depended heavily on the cooperation of native servants with knowledge of local languages, customs and norms.

The cooperation between researchers and colonial civil servants on the one side and their oriental "assistants" on the other often took the form of a mutual exchange. Christiaan Snouck

¹⁴ Snouck Hurgronje might have been influenced in these views on the similarity between Islamic and Jewish normativity by his contacts with his friend Ignaz Goldziher (1850-1921). The two of them are generally considered to belong to the founders of the Western academic study of Islam. Their extensive lifelong correspondence, edited by Van Koningsveld in 1985, sheds important light on the development of their understanding of Islamic normativity (Pieter Sjoerd van Koningsveld (ed.), *Scholarship and Friendship in Early Islamwissenschaft. The Letters of C. Snouck Hurgronje to I. Goldziher. From the Oriental Collection of the Library of the Hungarian Academy of Sciences, Budapest* (Leiden: Documentatiebureau Islam-Christendom, Faculteit der Godgeleerdheid, Rijksuniversiteit, 1985)).

¹⁵ These views can be found scattered throughout his collected studies (Snouck Hurgronje, *Verspreide geschriften*), especially in the second volume, which brings together his studies on Islamic law, see for example pp. 139-140. On the question of codification of Islamic law, and on the *Projet de Codification du Droit Musulman* in Algeria, see: Snouck Hurgronje, *Verspreide geschriften*, vol. IV, II: 259-266.

¹⁶ On Schacht, see: Janet Wakin, *Remembering Joseph Schacht (1902-1969)* (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2003); on Bousquet: Laure Bousquet-Lefèvre & Michel Robine, "L'œuvre islamologique de Georges-Henri Bousquet (1900-1978).

Hurgronje gained access to Meccan society because of the good services of Si Aziz, an Algerian scholar banned by the French from his native country, to which he hoped to return with the help of his Dutch acquaintance. Snouck Hurgronje also gathered a considerable amount of his ethnographic data with the help of some Indonesian students residing in Mecca, such as Raden Aboe Bakar Djajadiningrat and Hasan Moestapa.¹⁷ These young gentlemen also took good care of the Abyssinian slave girl, who turned out to be pregnant after her master had been forced to leave the holy city prematurely. Their reliability and assistance helped them to obtain important positions in the colonial administration in Indonesia later on, and secured the lifelong support of their family interests by Snouck Hurgronje. In Southern Morocco the famous sociologist and colonial administrator Robert Montagne could do his research on Berber customary law thanks to the materials and information furnished by Ben Daoud, a military interpreter.¹⁸

The orientalist perspective which transformed Islamic normativity into Islamic law became natural and self-evident to the local collaborators, also through their daily involvement with the colonial administration. By actively participating in and contributing to the colonial project they assimilated a new understanding of their own society and culture. This process is already visible in the first doctoral thesis on Islamic law that was defended at Leiden University. Emile Testa (1821-1896) was born in Istanbul into a family which originally came from Venice and which had for several generations provided foreign legations in the Ottoman Empire with dragomans and diplomats. In 1843 Testa presented a sketch of Hanafi family law, based on al-Halabi's well-known overview *Multaqa al-abhur* and Shaykh-zade's commentary, under the title *Specimen juris inaugurale de conjugii jure moslemico*. The work of Carel F. Winter (1799/1859) on judicial practice in the sultan's court at Surakarta (Java) offers a similar case. Carel Winter acted as an informant through correspondence for Taco Roorda, who was a professor of Javanese in Amsterdam and later in Delft.¹⁹ Both in their turn official *translateurs* at the court of Surakarta in 1825, father and son Winter were members of a family which lived in the East and played an important role in collecting, disseminating, and practicing the new knowledge on local norms.

In general the oriental collaborators received much less attention for their scholarly work than their masters. They did not get the privilege to write the manuals and overviews which were intended to become authoritative in the mother countries. They were rather relegated to the humble tasks of editing texts, letters and documents, with translations, annotations and glossaries,²⁰ of composing guidebooks to judicial practice,²¹ or of translating classics of Islamic law.²² Traces of their activities as brokers between two cultures are certainly to be found in the court records, and in the archives of the colonial administrations and of the Chambers of Commerce. This kind of *microstoria* largely remains to be written.²³

¹⁷ Witkam, "Inleiding", 7-182; Laffan, *Islamic Nationhood and Colonial Indonesia. The Umma Below the Winds*.

¹⁸ See: Ben Daoud, "Recueil du droit coutumier de Massat. Exemplaire des Ida ou Mout", in *Hespéris* 4, no. 4 (1924): 405-439.

¹⁹ E.M. Uhlenbeck, *Critical Survey of Studies on the Languages of Java and Madura* ('s-Gravenhage: Martinus Nijhoff, 1964), 45-51; 142-143, and *passim*.

²⁰ E.g. E. Zeys, & Mohammed Ould Sidi Saïd, *Recueil d'actes judiciaires arabes avec la traduction française et des notes juridiques* (Alger: Adolphe Jourdan, 1886, deuxième édition revue par Henri Pérès 1946).

²¹ E.g. Ahmed Hacène, *Manuel-formulaire à l'usage des interprètes judiciaires de l'Afrique du Nord et des candidats à ces fonctions précédé d'une étude sur...* (Alger: Adolphe Jourdan, 1917).

²² E.g. Ahmed Laïmeche, *Averroès. Bidayat al moudjetahid. Manuel de l'interprète des lois et traité complet du juriste. Livre des échanges. Théorie générale des contrats et obligations. Des différents contrats. Traduit par ...* (Alger: Minerva, 1940).

²³ An example of this kind of research is offered by Colette Establet, *Etre caïd dans l'Algérie coloniale* (Paris: Editions du Centre National de la Recherche Scientifique, 1991).

Among later generations a growing number of jurists with an oriental background defended doctoral theses on "Islamic law", either in the mother countries or at local institutions of higher learning. Some of them became rather famous, such as the Egyptian jurist `Abd al-Razzaq al-Sanhuri (1895-1971), who would become the master architect of the codification of civil law in the Middle East, which he tried to build on the legacies of Islamic, Roman, and French law.²⁴ His Egyptian colleague Chafik Chéhata offers another example of the internalisation of the legal positivist perspective on Islamic law. The title of his doctoral thesis which he defended in 1936 in Cairo is revealing: *Essai d'une théorie générale de l'obligation en droit musulman* ("Essay of a General Theory of the Obligation in Islamic Law").

For an Indonesian example we might turn to the life and work of Pangeran Ario Hoesein Djajadiningrat (1886-1960), a nephew of Raden Aboe Bakar, Snouck Hurgronje's friend in Mecca and in Indonesia. He was the first Indonesian to obtain a doctorate from Leiden University in 1913, again under the guidance of the faithful friend of his family. Hoesein Djajadiningrat would transmit his master's views on Islamic law and local customs in his own teachings at the colonial law school in Batavia and in his advice to the Dutch colonial government.²⁵

The oriental collaborators had studied law in European fashion, which meant that their understanding of Islamic normativity stemmed directly from this legal positivism. For them the notion of "Islamic law" had become entirely self-evident. For example, contemporary Indonesian people use the expression *hukum islam* to refer to Islamic law, whether in the titles of introductory handbooks or in the name of the official restatement of Islamic family law, *Kompilasi Hukum Islam*. It would be useful to trace the history of the terminology related to Islamic law in the various languages used in Muslim societies. The history of Islamic normative thought which the reformist intellectual Muhammad bn al-Hasan al-Hajwi (1874-1956), who also acted as a Minister of Justice in Morocco under the French protectorate, composed under the title *al-Fikr al-sami fi ta'rikh al-fiqh al-islami* and which was published in instalments between 1917 and 1932, might offer a starting point for such a genealogy.²⁶ We might also understand the usage by other authors of expressions such as *al-tashri` al-islami*, "Islamic legislation", for example employed by Mahmassani,²⁷ as an indication of a new view of Islamic normativity. But at the same time we should also pay attention to possible differences between orientalist understandings of Islamic law and the interpretations of local researchers, who often had an excellent training in classical Islamic scholarship and superior linguistic skills.

Finally, we should consider the social position of these oriental scholars and collaborators. Sometimes they were members of local elites or of classes which aspired to social mobility, such as Aboe Bakar and Hoesein Djajadiningrat. Often they belonged to minorities, such as

²⁴ Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* (Leiden & Boston: Brill, 2007); Enid Hill, *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 1895-1971* (Cairo: The American University in Cairo Press, 1987).

²⁵ Cf Hoesein Djajadiningrat, *De Mohammedaansche Wet en het geestesleven der Indonesische Mohammedanen* (Weltevreden: G. Kolff & Co., 1925); and Hoesein Djajadiningrat, *Verslag van de Commissie van advies nopens de voorgenomen herziening van de priesterraad-rechtspraak* (Weltevreden: Landsdrukkerij, 1926).

²⁶ Second edition in two volumes, presented as the first edition, published in al-Madina by al-Maktaba al-`ilmiyya in 1397 AH/1976-1977 (Muhammad bn al-Hasan Al-Hajwi Al-Tha` Alibi Al-Fasi, *al-Fikr al-sami fi ta'rikh al-fiqh al-islami*, al-Madina, al-Maktaba al-`ilmiyya, 1397 AH/ 1976-1977). On the author, see: Abdallah Laroui, "Muhammad al-Hajwi et l'ordre urbain", in Abdallah Laroui, *Esquisses historiques* (Casablanca: Centre culturel arabe, 1992), 115-121.

²⁷ S. Mahmassani, *Falsafat al-tashri fi al-islam. The Philosophy of Jurisprudence in Islam. Translated by Farhat J. Ziadeh* (Leiden: E.J. Brill, 1961).

Jews in the Maghrib or Christians in the Levant, who were employed as dragomans.²⁸ Their marginal position made contacts and exchanges with foreigners both easier and more necessary for their survival. The ways in which these people used their ambiguous social status brings to mind Benjamin Disraeli's saying, which Edward Said chose as a motto for his famous book: "The East is a career".²⁹ Their engagement not only concerned a social career which offered them a living and upward social mobility, but also a cultural transformation of their way of understanding their own societies through their explanation of these to foreign diplomats, scholars, and rulers. Their culture became hybrid and mixed, impregnated with a conceptual orientalism. By occidentalising themselves these collaborators orientalised themselves, through the internalisation of new concepts and technologies of knowledge, a process which Edward Said called "orientalism from within".

Texts and Scholarly Techniques

European scholars introduced scholarly techniques and textual forms which were dominant in legal scholarship in Europe.³⁰ Their local collaborators adopted these techniques and forms, together with the new conception of Islamic law. The use of printed texts, instead of the manuscripts in which *fiqh* was transmitted until the nineteenth century, was a major innovation. For centuries Islamic scholars had opposed the use of print technology for the transmission and reproduction of religious texts. But book culture changed dramatically after Napoléon's expedition to Egypt, when printed texts started to be considered indispensable for new methods of education and administration. With the introduction of printing, the lay-out and organisation of texts also changed profoundly.³¹ The commentaries of the *fiqh* were replaced by the law codes and annotated court rulings of French law.

Together with this new technology new ways of understanding and formulating Islamic normativity spread. Whereas in classical Islamic scholarship the proper language to compose *fiqh* texts was Arabic, with occasionally some use of local languages to explain things to beginners, orientalist scholarship on Islamic law assigned a dominant role to European languages. Local collaborators who aspired a career in the colonial administration or in academia had to express themselves in the language and concepts of orientalist scholarship. Those who wanted to gain a reputation in the world of scholarship or administration had to publish their writings with local publishing houses, especially in colonial capitals such as Rabat, Algiers, Tunis, Delhi, or Batavia, or with metropolitan publishers in Paris, London, Oxford, or Leiden.

The orientalist understanding of Islamic law was structured by regionally specific colonial experiences. In every region of the colonial world researchers took it upon themselves to "discover" the specific configurations of customs, Islamic norms, and decrees of local rulers, and then remodelled these according to the conceptions of legal positivism. This applies to the studies of *'amal* in Morocco, Kabyle customary law in Algeria, Anglo-Muhammadan law in

²⁸ Christians have for a long time played a role as cultural and political intermediaries in the Levant. Bernard Heyberger (dir.), *Orientalisme, science et controverse. Abraham Ecchellensis (1605-1664)* (Turnhout: Brepols, 2010) presents a compelling case study, as does Lucette Valensi, *Mardochée Naggiar. Enquête sur un inconnu* (Paris: Stock, 2008) for Jews in the Maghrib.

²⁹ Edward W. Said, *Orientalism* (London: Routledge & Kegan Paul, 1978): xiii; 5.

³⁰ Léon Buskens, "Islamic Commentaries and French Codes: The Confrontation and Accommodation of Two Forms of Textualization of Family Law in Morocco", in Henk Driessen (ed.), *The Politics of Ethnographic Reading and Writing. Confrontations of Western and Indigenous Views* (Saarbrücken & Fort Lauderdale: Verlag Breitenbach Publishers, 1992), 65-100.

³¹ On lithography as an intermediary form of publishing, see: Brinkley Messick, "On the Question of Lithography", *Culture & History*, no. 16 (1997): 158-176. Messick's works are fundamental for an understanding of the relation between textual forms and legal norms, see especially Brinkley Messick, *The Calligraphic State. Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993).

British India, or *adatrecht* in Indonesia. These regional understandings of Islamic law and their relation with local customs were marked by national traditions of statecraft and law, of legal scholarship and practice. Hence it does not come as a surprise that the image of Islamic law in the Maghrib among French scholars reflects the French civil law tradition, while the Anglo-Muhammadan law is deeply rooted in British common law.

Positivism and Codification: The New “Economy” of Islamic Law

The orientalist conception has lasted until the twenty-first century; it was reproduced from generation to generation, in the East and in the West. The concept of “Islamic law” was somehow naturalized, for researchers as well as Muslims, so that many consider speaking of the “invention of Islamic law” as something sacrilegious. Since the colonial period, there have been attempts at codifying Islamic law (*Code Morand* in Algeria or *Code Santillana* in Tunisia) and customary law (Van Vollenhoven’s *Het adatrecht van Nederlandsch Indië*³² and *Een adatrechtboekje voor heel Indië*), which were inspired by this positivist perspective. Qadri Pasha’s codification of Hanafi jurisprudence, in 1875, in Egypt, and the promulgation of the Ottoman *Mecelle*, in 1877, constitute primitive forms of a reception of legal positivism. Such trend extended beyond independence with the Sanhuri codifications in Iraq, Egypt and other Middle-Eastern countries.³³ This positivist conception of Islamic law is nowadays livelier than ever, and the codification experiments multiply, as in Iran and in Indonesia. The same positivist conception of Islamic law can be found in university curricula and teaching, in Muslim countries as well as in Europe.³⁴

The understanding of Islamic normativity was thoroughly transformed within two centuries. Judiciaries and judicial systems were totally reshaped.³⁵ Without strictly correlating it to colonialism – not all countries were colonized – it is obvious that religion-inspired law was progressively confined to the sole domain of personal status (marriage, divorce, affiliation, inheritance) and jurisdictions adjudicating in this domain were stripped of their competences in favour of more or less secularized courts. Iran since the 1978 revolution, Saudi Arabia and several Gulf countries are exceptions to this general trend. Even in the restricted area of personal status, one can observe the adoption of codified statutes—a technique alien to the Islamic normative tradition—the application of which belongs to specialized circuits of civil courts with judges trained within law faculties. The tendency, from the 1970s onward, to “Islamize” the law because it is considered too secular did not translate into a return to classical Islamic normativity but in the adoption of legislative texts which explicitly referred to the Shari`a, which is often upgraded to the rank of the principle source of legislation.

The Egyptian case allows us to assess the influence of these transformations at the legislative and judicial levels.³⁶ At the former level, the reference to Islam is embedded within the frame of the parliamentary institution, which is in charge of passing laws in a state characterized as Islamic. As soon as Islamic law, designed under the name of Shari`a, is constitutionally

³² Cornelis van Vollenhoven, *Het adatrecht van Nederlandsch-Indië* (1906-1931). See: J.F. Holleman, (ed.), *Van Vollenhoven on Indonesian Adat Law. Selections from Het Adatrecht van Nederlandsch-Indië (Volume I, 1918; Volume II, 1931)* (The Hague: Martinus Nijhoff, 1981).

³³ Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)*; Hill, *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 1895-1971*.

³⁴ Flory & Henry, *L'enseignement du droit musulman*; Vatin, “Exotisme et rationalité: A l'origine de l'enseignement du droit en Algérie (1879-1909)”, 161-183.

³⁵ For an overview of these changes, see: Jan Michiel Otto (ed.), *Sharia Incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010).

³⁶ Nathalie Bernard-Maugiron & Baudouin Dupret (eds.), “Le Prince et son juge. Droit et politique dans l’Egypte contemporaine”, *Egypte-Monde arabe*, no. 2 (1999); Nathan Brown, *The Rule of Law in the Arab World* (Cambridge: Cambridge University Press, 1997).

elevated to the rank of the main source of legislation, the legislature is in charge of checking the conformity of the laws in two ways: in a political way (not hurting public opinion) and in a legal way (not exposing itself to the Supreme Constitutional Court's negative review). Since the language of the Egyptian public sphere became from the 1970s onward increasingly religious and oriented to the promotion of society's re-Islamization, Islam—not to speak of Islamicism—became the language that fits every situation, although it can correspond to extremely different normative attitudes. For instance, members of parliament can refer to the Qur'an in order to promote as well as to oppose this or that provision. However, the Islamic repertoire does not determine the acceptability of the text: it is an umbrella; not its substance. Islamic normativity gets its authority from within the constraining framework of the parliamentary procedure, which has its own rules of speech, vote and majority. What we call Islamic relevance can determine the rhetorical colour of the debates, but it proves insufficient to constrain their outcome.

At the judicial level, in Egypt again, we see that, at the very place where the reference to Islamic law is supposedly dominant, i.e. personal status law, it is actually far from systematic. This dominance of the reference does not stem from the importance the scientific tradition ascribes to the Islamic reference, nor from the supposedly exceptional nature of its expression. On the contrary, it looks very ordinary, non-exceptional, routine-based. The reference to the authority of Islam is only occasional; moreover, it is mediated through the use of what constitutes nowadays the major sources of Egyptian positive law: statutes and case law. It is embedded in the banal accomplishment of the judge's everyday work, which mainly consists of legally characterizing the facts which are submitted to him. By doing so, the judge is keen to exhibit his capacity to judge adequately, according to the standards of his profession, the formal constraints attached to its accomplishment, the legal sources to which he resorts, and the rules of his interpretive work it supposes. If ever referring to Islam, the judge does so through the intermediary of Egyptian positive law and institutions.³⁷

One can conclude to the dilution of *fiqh*-referred Islamic law into the modern constitutional order and to the positivisation of Islamic normativity. It is without doubt that the contemporary experiences of integrating the Shari`a within the nation states' legal body lead to the disruption of the economy and epistemology of normativity, that is, the transformation of the general balance, fundamental principles, sources and references on which this normativity leans. This is true at an institutional level, with the building of constitutional architectures devoted to the division of powers, the hierarchy of jurisdictions, the legislative principle, the popular representation, and the fundamental rights and freedoms. It is equally true at a substantial level, since the applicable norms are largely formulated by the means of codification, not in a doctrinal continuity with Islamic classical normativity (*fiqh*) but rather in an attempt at not blatantly contradicting it.

Although the Shari`a and the *fiqh* in their classical form have almost disappeared from the legal universe, the law referring to Islam –that is, a positive law inscribed, through the game of sources and references, under the umbrella of the Shari`a– has by large imposed itself. The vast majority of the constitutions of countries where the population is dominantly Muslim give a place to Islamic law, under one denomination or another, and this requires some work of conforming not to substantial provisions but to a kind of ethical standard. This is why we observe the ever-growing place occupied by notions like “Islamic public order”, in which legal technique gives way to moral assessments of the socio-political spirit of the time. In

³⁷ For an ethnomethodological critique of the concept of Islamic law, see: Baudouin Dupret, “What is Islamic Law? A Praxiological Answer and an Egyptian Case Study”, *Theory, Culture and Society* 24, no. 2 (2007): 79-100.

sum, even in situations where Islamic normativity is put in the middle of the legal system, it is achieved according to institutional, procedural and referential modalities which are partly or wholly different from what they used to be before the orientalist invention of Islamic law.

Even in situations where Islamic normativity is “again” put in the middle of the legal system, it is done in ways hugely different from what they were, for instance, at the end of the eighteenth century. The “return” to the Shari`a never consists of the utopian journey dreamed of by the supporters of authenticity and tradition, but of the imposition of a law exclusively referring to Islam and at the same time, thoroughly permeated by the legal dynamics of a globalised world.

Conclusions

Islamic law, as a scientific and normative category, is an orientalist legal invention largely fashioned after the Western notion of positive law. One could say, following Jacques Derrida, that it is a form of conceptual and epistemological “violence”. However, one should add that oriental scholars and jurists greatly participated in this process—and not only in situations of colonial domination. It was an academic, political and practical invention. Having its roots in a nineteenth century colonial context, this notion got a sequel that was never contradicted up until now.

Some Western scholars contested this positivist understanding of Islamic normativity. From a philological rather than a legal background, these scholars compared *fiqh* to Jewish normativity and often contrasted the French *droit* and *loi* in order to speak of Islamic normativity in terms of divine law. The notion of “Islamic law” nevertheless spread to the point that it eventually imposed itself on the majority of scholars, administrators, politicians and practitioners. Its success is largely explained by the emergence of the modern nation state.

The idea of a “discovery” rather than an “invention” of Islamic law is flawed; it was part of Western scholars’ rhetoric who wanted to make believe that their categories corresponded to an already-existing reality. From a historical point of view it was indeed a new conception of normativity within Muslim societies and therefore the creation of a scientific and political category that did not exist before. The creation of this new category must be understood in parallel to the invention of overseas customary law.

Studies in Islamic law constitute knowledge of a practical nature, which used to serve and still serves to govern. It is also normative knowledge in which the “ought-to-be” dominates. It is only in the last instance academic knowledge. Islamic law is a form of knowledge intimately linked to the exercise of power. It is therefore imperative to deconstruct the notion, in particular through a reconstruction of its genealogy.