Law as a kite: Managing legal pluralism in the context of Islamic finance

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The context of Islamic finance: Synergies

• At first sight, studies on legal pluralism and Islamic finance may not go together, but they actually are quite interlinked.
• Both areas are really concerned about theory and practice.
• Developing the right tools remains a challenge for both fields.
• State-centric legal analysis alone fails to offer sufficient tools.
  >> Ethics and economics are connected to law.
  >> The Islamic dimension needs to be accounted for.
  >> We are focused on Europe, but also on Islamic law.
• = We are inevitably in a field marked by pluralism, whether we like this or not, cannot avoid the issue, can play with words, little else >> but that is exactly what academics do!
Auspicious times

• Much rethinking is currently going on all over the world about the relationships of law, culture and values in the form of ethics and religion.

• Post 9/11, religion made a re-appearance in the legal arena. Speech of the Archbishop in 2008 claimed that there is a space for shari’ā law in English law today.

• = Revival of theoretical interest in the study of law, while in practice, law is almost everywhere in a mess.

• If nothing seems to be clear, this is good for business, but perhaps also for legal studies. So we have to think harder!
New journals and studies appear


• *Debating Law.* A new series of books from Hart Publishing, 2010. Series General Editor: Professor Peter Cane, ANU.


• New work on law as kite flying since 2008.
There is simply no global agreement on ‘law’

  Central challenge is: “the absence of any worldwide agreement, in theory as well as in practice, about the central object of globalised legal studies, namely ‘the law’ itself”.

- Compare the entry on ‘Law’ in the OIELH, 2009, volume 4, p. 17, by Brian Z. Tamanaha: *What is law?* Is a question that has beguiled and defied generations of theorists.....Despite a continuous conversation about the character and nature of law ever since [the ancient Greeks], theorists have not been able to agree on how to define or conceptualize law.

- And in Europe we forget all the time:
  Ancient Indians/Chinese/Africans (and others, including Muslims all over the world) evidently thought/think about this as well.
Three types of legal systems in the world

Type 1
Claims to be uniform law, but makes exceptions

Type 2
Special place granted for indigenous people

Type 3
Combination of general law and personal law

- exceptions
- special exceptions for indigenous group(s)
- general law
- personal law system
Where is Islamic law in this picture?

• It is primarily not a state law. God is simply not Napoleon.
• It is manifestly an internally plural system of law.
• It started off as a new natural law in the crowded space of the Middle East in the seventh century.
• The Qur’an is there, but the Prophet of Islam was an immensely skilful kite flyer, a legal pluralist *par excellence*.
• Today Islamic law is found all over the world, as it moves everywhere with Muslims as a personal status law.
• Thus it is manifestly part, in Chiba’s (1986) terminology, of ‘official law’ as well as ‘unofficial law’, and it clearly also constitutes ‘legal postulates’.
• There is much resistance towards calling it ‘law’ where it is not accepted or incorporated by a state, but this is positivist myopia.
• Still the key issue remains, then: What do we mean by law?
Legal pluralism is a fact

  
  Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion. Nevertheless, the ideology of legal centralism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation stone of social and legal theory.

- This is hardly new: Much before C.E., this pluralism was already acknowledged in India:
  - Christian Europe, thirteenth century: St. Thomas Aquinas and his lex humana.
  - Islamic distinction of ibadat and muamalat, and siyasa shari’yya as a bridging concept.
  - Nineteenth century Germany: Rudolf Stammler’s concept of ‘the right law’.
  - 1913/1936: Eugen Ehrlich’s model of ‘living law’ in the Bukowina, far away from Vienna.
  - Today we live in the ‘global Bukowina’ (Teubner, 1997) and Hertogh (2004).
  - New focus on ‘legal consciousness’ = increasing awareness of legal pluralism.
Formal law-making is always piecemeal


  The piecemeal quality of intentional legal intervention, whether legislative, executive or judicial, is due to its construction as a response to particular circumstances at particular moments. The accretion of many such responses over time makes for a composite, unplanned, total result. Even though, at various times and places, there have been attempts to codify everything once and for all, in the long term all legal ‘systems’ are built by accretion, not by total systematic planning.
But: Pluralism is still seen as a ‘dirty word’

  He notes that lawyers continue to have problems with legal pluralism in practice and that ‘legal pluralism is generally marginalised and viewed with scepticism in legal discourse’.

  This major study of jurisprudence admits that when the first edition of that study appeared, in 1959, ‘jurisprudence was still something of a “dirty word”’. Why? English law is based on barristers’ practice, not on theory.

- Today, legal pluralism studies, particularly ethnic minority legal studies, are being dismissed as ‘dirty’. This confirms that ‘law’ continues to struggle with ‘culture’ and ‘religion’ and that we continue to have ideological problems with difference.

- Legrand (1996) highlighted the necessity of a ‘proclivity for difference’.
New fashion: ‘Legal consciousness’

- Is this fairly new talk of ‘legal consciousness’ a way forward?
- Maybe it just hides legal pluralism as a ‘dirty word’!
- It means: ‘Focus on individuals’ experiences with law and legal norms, decisions about legal compliance, and....the subtle ways in which law affects the everyday lives of individuals’ (Nielsen, 2000).
- Two approaches? (Hertogh, 2004):
  - USA: How do people experience official law?
  - Europe: What do people experience as law?
- = a new method to analyse ‘living law’ and legal pluralism?
- Do we need to talk more about Islamic legal consciousness?
Super-diverse realities are all around us

  The worlds of law are marked by super-diversity, reflected in the super-diverse societies many of us are now living in.
- The search for ‘the right law’ and for ‘living law’ is thus not a new challenge nor a matter of travelling around the globe. The ‘other’ is right next to us, as a neighbour.
- All over Europe, Muslims and Islamic law have become an increasingly prominent ‘other’. This development is not reversible.
- Presently a notable shift from theorising about legal pluralism towards more practical application, both as comparative analysis and in specific case studies.
The need to become practice-focused legal pluralists: Troublesome polemics and fears

• The latest writing simply tells us that law is dynamic!

• Such polemics simply oppose pluralist methodology.
• They seem to insist that ‘law’ must remain ‘pure’.
• Continued linkage to ‘the state’ and legal positivism.
• But: Tamanaha’s reductionist perspective also runs into difficulty with the superiority claims in our days of international law and human rights.
• Links in with hostility about ‘religious law’.
Current fashion of international law/human rights

• Human rights discourse does not help us here.
• International law is unable to offer globally uniform solutions.

  The term ‘human rights’ contains a multitude of meanings that cross many academic disciplines. To the philosopher it is about the essential qualities of the human that lead us to an understanding of our duties towards others; to the specialist in international relations, it connotes a force in the management of relations between states; while to the political scientist, human rights are a tool in the construction of a liberal community. Law’s approach to human rights is both simpler and more question-begging than any of these. At one level, law derives the meaning it ascribes to the term from the basic documentation available to it, the international, regional, and national instruments that set out codes of human rights. But the loose ends left by the superficial clarity of this approach leave many questions unanswered, thereby forcing law back into other disciplines in search of a set of truly adequate responses. This is why human rights is an inherently inter-disciplinary subject: law’s grasp of the subject may be coherent but its reliance on authoritative documents renders its coverage inevitably incomplete.
So, all law is plural?

- Law is in reality a plurality of pluralities = a ‘pop’ structure.
- It is like a ‘superstructure’ in a non-Marxist sense.
- Relies on Chiba (1986) and his tripartite structure:
  - official law and unofficial law, and always ‘legal postulates’.
- Chiba emphasised the various forms of law as interlinked = dynamic.

- Chiba (1989) more specifically indicated three dichotomies/tensions:
  - between official law and unofficial law;
  - between these laws and the related postulates;
  - between indigenous and received law.
Global legal realism: The triangle
Menski (2006: 612)
Law as overlapping circles
Broken lines: permeable boundaries
Scholarly politics over ‘religion’

• Complications arise in legal analysis when religion is added.
• Chiba experienced this trouble earlier and devised the term ‘legal postulate’ for values that could be religious or secular.
• When we privilege rationality and secularism today, we fail to notice secularism and also atheism as variant convictions within the category of ‘religion’, always linked to culture.
• If such convictions, secular and religious, now make absolute truth claims, as they do, we are in deep trouble as analysts.
• Most lawyers struggle to understand the complexity of these debates.
• They fail to understand that not all Islamic law is religious.
Legal transplants and ‘ethnic implants’

- Turkey in the 1920s accepted Swiss, German, Italian and French law as transplants, but enforced also socio-cultural changes, became secular, without denying a place for Islam (the Diyanet).
- Middle Eastern countries received all sorts of legal transplants and developed intensely hybrid systems of law.
- Today, ethnic minorities bring everywhere their cultural baggage with them and introduce ‘ethnic implants’ (Menski, 2006: 58-65).
- Ballard (1994) talks of ‘reconstruction on their own terms’.
- Refusal to assimilate, insistence that their own values are better, and of course unwillingness to abandon their religion.
- Result: Muslim law is implanted in Britain and all over Europe.
- But also: Non-Muslim laws are present all over the Arab world.
Why do we not fully understand this?
Troubling perspectives/turbulences

• Firstly, law as a discipline and activity wants to be perceived as something separate. Lawyers see themselves as a special caste and feel it would detract from law’s authority if it was polluted by social or religious matter. They stay in their own ‘black boxes’.

• Secondly, many social scientists are desperately trying to keep lawyers out of their academic fields. They want law to be separate, probably do not trust lawyers, who tend to be perceived as sharks, best left in their own box.

• Post-Enlightenment methodology of division of law and culture, specifically of law and religion, blinds us today, blocking the full view of the inherent connectedness of law and life.

• Islamic fundamentalism does not help the discourse.
Hindu/Muslim/Japanese and other perspectives

- **They** help us understand why Western post-Enlightenment analysis is impoverishered, applying blinkers and much Eurocentric hubris.
- **Europeans** claim to be civilised, perceive non-Western others as undeveloped, even primitive, and then treat them as children.
- **BUT:** Around the world, many ancient and new forms of ‘living law’ brilliantly illustrate the constant connectivity of law and life.
- **Lawyers** tend to measure the law’s success in court statistics and conviction rates. They fail to see that self-controlled ordering, even mental processes in people’s brains, are crucial legal entities.
- **We all** thus overlook that the reality of living law is largely an informal and mental reality, even a matter of psychology.
- **Chiba (1986)** made it clear that all laws are connected to values and that much law is neither made by nor controlled by the state.
Law as self-controlled ordering

• Everywhere, informal legal action happens in our brains when we make split-second decisions.
• Legal indoctrination teaches us to disregard such psychological evidence as non-legal processes.
• Typically, scholars often use the term ‘extra-legal’.
• In socio-cultural and legal reality, however, law is about the constant navigation of competing rules and values.
• = This is a highly sophisticated balancing act.
Law as skilled legal navigation of plurality

- So, can we depict this as kite flying?
- Four types of internally plural law are in competition.
- Admittedly messy, but someone has to make decisions.
- Who or what should that someone be? Not always the state!
- Accepting law as internally plural, we find at the same time:
  - natural law, culture-specific values, Chiba’s ‘postulates’
  - socio-legal and economic norms, customs, conventions
  - state-centric positive law in various forms
  - international and globally valid principles
Menski’s Kite (2010)

1 Nature
(Religion/Ethics/Morality)

3 State Law
(Postivism)

2 Society
(Socio-legal approaches)

Legal Pluralism

4 International law

Note: Each corner is plural - ‘plurality of pluralities’ (POP)
Law as a plurality of pluralities (‘pop’)

• These four elements appear to always need each other to yield ‘the right law’.
• None of these can be totally denied a voice.
• But that four-fold structure alone still does not produce a sufficiently deep pluralist analysis:
• All of these four elements are themselves internally plural = there is not one type of natural law, but many, and so on.
• = law is indeed ‘pop’, a plurality of pluralities.
Plurality-consciousness

• Chiba (1986): We must take more account of law as an internally plural entity and of informal laws and values.

• Menski (2006 et al.): In the modern world, there are not only corners 3 and 4, but also corners 1 and 2 still exist.

• = we find not evolutionism, but pluralist symbiosis.

• Muslim consciousness involves all four corners.

• Potential for huge conflicts, or for harmonisation.
Law as a self-interested shark:
Law and economics/law and power

• Law is a serious business and often concerns economics:
  • Formality/certainty can be good values, but do we really need written contracts and files for everything?
  • Has bureaucratisation of law become dominant and now interferes with commonsense and justice?
  • If we all practised DIY (do-it-yourself) law and used informal legal regulation, lawyers would lose business. Is that good or bad?
  • Have economics intervened in this field and bent our minds?

• Law is also about power:
  • Claims that something is legal grant power to the rule and the rule-maker.
  • In reality, law is often naked self-interest = shark rule.
  • We claim sanctity of contract, but fail to create fair rules and support mechanisms for people who have no/limited power to contract.
  • Law is ambivalent, can always be easily abused.
Positivist objections: Can’t we just have good state law?

- Professor Matthias Rohe (Erlangen) argues against the notion of legal pluralism but belittles the (admitted) presence of other types of law that positivist theorising needs for constructing good law. The argument is as follows:
- The German post-war Constitution is an excellent example of positive law because, having learnt from history, it assiduously takes account of various values and ethics and also accounts for local people’s social norms through the strong federal system.
- Is this simply positivist colonising of the interlinked reality of ‘living law’?
- Is this not a typical lawyerly myopic perspective that is also popular in current post-‘Arab Spring’ thinking?
- In reality, good positivist law everywhere needs all four corners and actually employs legal pluralism to achieve ‘the right law’!
Predictable conclusions:
Islamic finance as a necessarily pluralist construct

• Comparative law in the postmodern age shows that legal monoculture yields a deeply deficient product also when it comes to Islamic finance.
• The kite of Islamic finance needs to make use of a plurality of tool boxes attached to every corner of the kite.
• Because ‘law’ is not this OR that, but this AND that AND that, AND that, too, a financial system that seeks to be shari’ā-compliant is not possible without taking pluralism seriously.
• Everywhere, we need an interdisciplinary methodology to analyse different forms of ‘living law’ and to find ‘the right law’.
• Deliberate omission of ‘religion’ and ‘culture’ prevent safe kite flying when it comes to developing a plural Islamic finance system.
Thank you for your attention so far....... 
And now comes a bit of practical application....... 

How can we fly kites and apply legal pluralism when we practise law in multicultural Britain and are faced with Muslim law issues?
Menski’s Kite of 2010

1. Nature
   (Religion/Ethics/Morality)

2. Society
   (Socio-legal approaches)

3. State Law
   (Postivism)

4. International law

Legal Pluralism

Note: Each corner is plural -
‘plurality of pluralities’ (POP)
A head-on clash does not resolve the issue

- Austistic Bangladeshi boy of 25 years married over the phone to a cousin in Bangladesh.
- Lord Justice Thorpe: “The role of marriage in the life of one so handicapped is inconceivable in our society. Furthermore as a matter of law marriage is precluded. IC lacks the fundamental capacity to marry. However the marriage is not precluded in Bangladesh.”
- = Void under English law, but legally valid in Islamic law and in Bangladeshi (and Indian and Pakistani) civil law.
- Now the family wants to emigrate! Passport is confiscated.
New uses of equity:
Refusal to recognise ethnic minority laws would be unjust

  • Dower of £30.001 agreed in a Bangladeshi marriage in London.
  • Marriage both under *Shari’a* and English law.
  • *Talaq* divorce by husband, followed by his English divorce proceedings.
  • But he refuses to pay the *mahr*, claims this ‘is just ‘cultural’!*
  • Wife cross-petitions and asks for her *mahr*.
  • Judge gives the wife £30.000, but not £30.001.
  • Why? Risk to cut out one or two corners of the kite?
Overall conclusions

• Once there are Muslims in a jurisdiction, we will find elements of Muslim law and legal systems have to manage this new plurality.
• If they get it wrong, people will either emigrate and take their business or the family elsewhere, as in the IC case.
• Or they will develop their own unofficial systems, as manifest in Shariat Councils and the Muslim Arbitration Tribunal.
• Key role of experts, an emerging field of activity – but there are many incompetent ‘experts’.
• Balancing competing types of law remains everywhere a highly sophisticated skill.
• Legal pluralism theory is useful in legal practice. It also helps us analyse much ‘silent law making’ that is actually going on.
Finale

• Thank you for listening.
• Now fly safely!
• Because in reality we are all kites ourselves!