

# THE PRINCIPLE OF TERRITORIALITY IN ISLAMIC LAW IS THERE A *LOCUS REGIT ACTUM* IN *SHARI'AH*?

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## A. Introduction

Islamic law, usually referred to as *sharī'ah* (linguistically, a path leading to water, or a straight path, and technically, the entirety of legal rules revealed to the Prophet Muḥammad (pbuh) through the Qur'an and Sunnah) when the entire legal system is addressed, or *fiqh* (derived from Arabic, *faqīh*, *yafqahu*, to understand, in its technical definition the knowledge of the practical *shar'ī* rules as derived from their detailed evidences by demand, option of situation), when the entirety of practical legal questions is in focus, does not easily compare to other legal systems. Islamic law understands itself as a revealed law, derived from sources of revelation, the word of Allah (the Qur'ān), the Sunnah or established practice of the Last Messenger, Muḥammad (p.b.u.h.), and sources accredited in these foundations (mainly, consensus or *ijmā'* and analogy, *qiyās*). The role of the Jurist, the *Faqīh*, is to interpret this law and derive legal rules from these sources. He is in no way understood to be a lawgiver.

An important feature of Islamic law is its encompassing nature. While statutory legal systems generally focus on the relation between human beings only, *Sharī'ah* comprises the human being's relation with his Creator – established by the rules of worship (*'ibādāt*), the human being's relation with himself, with regard to food, clothing, hygiene; and, finally, the relation between human beings – which translates in interpersonal relations (marriage, divorce, inheritance, financial transactions, trade etc.) as well as communal and international issues, in times of war and peace. Questions that are not understood to be legal matter in any other legal system may occupy a central position in Islamic law. It is this encompassing nature of Islamic law that may render any comparative juristic study to appear like a comparison of the incomparable.

The very fact that we use technical terms emanating from categories of legal systems of Western provenance to describe

other, non-Western legal systems, already alludes to an underlying bias - with one concept being treated as standard and anything else evaluated from the point of view of this standard.

With these prolegomena in mind, the author has, rather than attempting to assess Islamic law on the basis of the principles of personality and territoriality, attempted to position these principles on the basis of Islamic law. The paper gives, after an introduction into the legal principles, an overview over the respective evaluations of contemporary authors. It will alert the reader to the incongruity of the basic concepts of statehood and citizenship. Selected case studies will reveal that neither a claim to territoriality not to personality can be consistently upheld.

### ***B. Territoriality and Personality of Law – Meaning and Development***

The principle of the *personality of law* is deemed to be the pre-Westphalian, older mode of law, describing the legal systems of antiquity and Medieval times. Its basic idea is that a person is subject to the legal system of his place of origin, "a foreigner carried his own law wherever he went".<sup>1</sup> Law was therefore seen to be personalized, with sovereignty being rather personal than territorial.<sup>2</sup> The pre-Westphalian order "comprised multiple, layered power centers as well as diverse sources of legitimation, allegiance, and identity."<sup>3</sup> It was not unusual to have a plethora of different legal rules enacted when people of different backgrounds were involved in a legal case.<sup>4</sup>

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1 <http://www.americanforeignrelations.com/E-N/Extraterritoriality-Origins-of-extraterritoriality-html>

2 Ibid.

3 Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, Draft, (December 2003, UCLA Law School), accessible at <http://www.politics.ubc.ca/index.php?id=8675,p.5f>.

4 For the historical development of the principle of territoriality, see Cedric Ryngaert, *Jurisdiction in International Law*, (Oxford University Press, 2008), 44ff.