Jan Hjärpe:
The Problem of Jurisdiction in the Contemporary Nation-State

The problematic that I want to discuss in this paper has not to do with the contents of laws in the legislation of one country or other, or with the actual rules to be found in any specific jurisprudence, neither Islamic *fiqh*, or Canon Law. The problematic has to do with the question of jurisdiction. *Who* is the one, or which entity, is regarded as having the right to decide? Who has (or takes) the right to decide what rule to apply, what interpretation to prefer, and to apply it in reality? The state? Some religious authority? The family or clan leaders? Some *vigilante* group? Or the conscience of the individual himself? Who is regarded as the legitimate judge or arbiter?[1]

In order to explain what I mean I will begin with a very special matter discussed very much in my youth, when I was still in school, i.e. in the 1950s. At that time there was a hot debate in Sweden as to corporal punishments in the schools. The teachers still had the jurisdiction. They could, if they regarded it as adequate, box the pupil's ears, pull the pupil's hair, or even beat him. Spanking was regarded as an appropriate part of education. The teacher could decide to do it and immediately carry out his verdict himself. No legal proceedings and no trial were necessary. The teacher had jurisdiction by himself, as teacher.

In the 1950s the discussion led to legislation. The parliament instituted a law that prohibited corporal punishments and chastisements in the schools entirely, regardless if it was in state schools or private ones. The teachers lost in that way their jurisdiction in this respect, even if they could apply other kinds of punishments.

The interesting thing, as I now see it, was that the debate almost entirely had to do with the role of corporal punishments, if they had a positive function or a negative effect only, if they were necessary for the discipline in the schools, if they were beneficial or harmful as a tool in the education. What was mainly not seen during the debate was the interesting fact that this legislation was a part of a long process of change in the fields of jurisdiction. It was, during the debate, taken for granted that the state and its chosen parliament had the right to decide in this matter. This meant too that the teachers' right to spank the pupils could be seen as a delegation from the state. In their capacity of being employed by the official sector of society they had a certain jurisdiction – not in any other capacity.

A long process. The historian of law, Kjell Åke Modéer has studied the long and gradual development in which the courts of the state in Sweden were able to be accepted as having jurisdiction in more and more matters, in fields where traditionally for instance people in the villages had applied their own customs, their own methods of arbitration, of punishing those who broke the customary rules and habits of the local community. The customary rules as to sexual behaviour, betrothal and marriage was – with a certain success – superseded first by the rules of the church and then by the legislation of the state. The difference as to the content of these rules was perhaps not so great (at least not in the beginning), the content was the same, but the important change was that the idea of jurisdiction changed radically. The state's legislation was applied by the authorities of the state (and the church and the municipalities), and the function of the courts of the state was accepted in the general opinion. The Nation-State was the entity of jurisdiction. This meant that the local communities, the family, and other social entities had their jurisdictions diminished, very often without being very much aware of this fact. The process coincided in time with the development of the Nation-state (and later on the welfare state) as the main political and legal entity.[2]

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[1] I have treated this question in the introductory part of a book on Islamic legal tradition, Jan Hjärpe (2005), *Shari'a: gudomlig lag i en värld i förändring*. Stockholm (Norstedts), esp. 16-36.
[2] Cf. Kjell-Åke Modéer (1994), *Den svenska domarkulturen: Europeiska och nationella förebilder*. Lund: Corpus iuris.

So the state's legislation declared corporal punishments in school illegal. A few years later the legislation was widened. A law declared illegal for parents to spank their children. No corporal chastisement was permitted henceforward. This means that the parents lost a part of their traditional right of jurisdiction. The state, and not the parents, had the right to decide. Again the debate was centred on the question of the actual function of punishments – were they good or bad? But more interesting as I see it is the change in jurisdiction, a wider role for the state and its authorities, a diminished jurisdiction for the parents.

The changes in jurisdiction have to do with another phenomenon usually regarded as connected with modernity.[3] Modernity is commonly characterized by a differentiation of both individual and societal functions. In the pre-modern society the roles and "identities" of the individual were intertwined. We can take as examples local communities anywhere in the world in ancient times, in Northern Europe, Central Asia, Indian subcontinent, Africa – wherever. We could take for granted that most people would die within the same local community as where one was born. This was true also for a community of nomads – the circle of people which the individual was in contact with during his life was limited, and all his functions and roles had to do with little more than that specific group of people. This means that his life had a certain cognitive coherence. So much could be taken for granted. There was no doubt as to who should decide what. The individual, born within that village or group of people, had his "primary socialization" (i.e. learning to talk and understand, getting the norms of everyday life), creating his basic concepts and understanding of life in this limited circle, the extended family and the immediate neighbourhood. He would almost certainly marry a girl from the same village/circle, and have the same kind of sustenance or profession as his father and grandfather. Family and neighbourhood constituted simultaneously both the ritual-religious community and the circle of jurisdiction. The village council or family council had the customary right to decide and to judge in conflicts. The rites and rituals of the family, the village, the agricultural year, and the *rites de passage* of the different stages in life (puberty rites, marriage, burial), were all intertwined. It had not to do with if you were a believer or not – the rituals had their societal meaning for the nonreligious individual too. The religious narratives were integrated with the different functions of life, including the norm systems, and the distributions of "punishments" by the social pressure and the customs of the community. The village constituted basically a self reliant and endogamous community, whose "cognitive universe" for all practical purposes was within the frame and horizon of village life. "Custom" and "law" was more or less identical.

This characterisation of a pre-modern local society is true for a village in old-time Sweden or for a village in the Subcontinent or Africa in ancient times. The long process of modernization (in its various stages) meant a radical change in respect to both the individual's function and to his (or hers) roles and cognitive universe. Modernity includes very much a differentiation of these functions. Regardless of your background, regardless from where you come, it is very probable that you will die in another place than where you were born. Education includes today migration from the place of birth: schools, university, peregrination, studies in other countries. Knowledge, information and disinformation are transmitted by media too, Cassettes, Video, DVD, TV, Internet. Your profession will probably by another

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[3] Cf. Hjärpe, Jan (2002). "Religious Affiliation as a Problem for Universal Ethics" in Bexell, Göran, and Andersson, Dan Erik (eds.) (2002). *Universal Ethics. Perspctives and Proposals from Scandinavian Scholars.* Dordrecht: Kluwer Law International, 119-128, and Hjärpe, Jan (1999). "Revolution in Religion: From Medievalism to Modernity and Globalization" in Therborn, Göran (ed.) (1999). *Globalization and Modernities – Experiences and Perspecitives of Europe and Latin America.* Stockholm: Forskningsrådsnämnden, 111-120. Cf also . Kjell-Åke Modéer (1999), "Optimal Legal Cultures? Modernity and Continuity in National and Global Legal Cultures" in Göran Therborn (ed.)(1999), 121-128.

than your father's and grandfather's. Your marriage mate will probably not be a neighbour's daughter from your childhood, and she will probably have a profession of her own. You will move in order to get jobs. The professional community will be distinct from other belongings, as family, neighbours, religious community, ethnicity, nationality, interest groups. But in all these different circles there will be a kind of jurisdiction functioning in different ways and in different fields of competence. The economic structure of family life is different from what it once was. Your wife will probably have her income and in reality contribute to the sustenance of the nuclear family, which will not be any more dependent of the extended family or clan – if the modern society and its conventional frame, i.e. the Nation-State, is functioning adequately. The welfare state means that the traditional role of the extended family and clan has diminished. The traditional gender roles tend to lose their social relevance, and the same happens in a considerable degree to other inherited norm hierarchies. They lose their character of being self evident. They are no more taken for granted. This means that the traditional authorities are questioned. Who has the right to decide what is right and what is wrong? Who has – in reality – the authority to decide and the power to implement the decisions?

The differentiation comes to the individual's "cognitive universe" too. There will be a compartmentalization of how to understand and react to what happens in one's own life and in the world. The frame of the mental "system" is no longer life in a local community. You know, even in detail, events in other parts of the Globe, and what ideas there are in the debate in other societies. Norms in this way becomes in a higher degree dependent on individual choices. The individual's belongings, the belonging to a professional community, a religious community, an ideological community, networks of common interest of different kinds, are not geographically limited.

Now, the Nation-State, an idea that we can say developed in Europe from the West-phalian peace negotiations in the first half of the 17th century and onwards also became the societal form of organisation of modernity. It constitutes the administrational frame of a size with a high degree of compatibility with modernity as to the technical development of new ways of communication and of industry superseding the small village communities. And thus began the process of change in jurisdiction from the local to the larger entity, the state in the word's modern sense, the administrational entity encompassing smaller regions and their communities but still smaller than a global political and administrational entity. The Nation-State is something "in between" the local and the global. And here we can see one of the problems of jurisdiction. Who has the jurisdiction in the smaller local society, who in the Nation-State, who on the global level? We have past from modernity to a global post-modernity.[4]

This our conference is due to this development, the reason why we find it meaningful to discuss – in an international conference – Non-Muslims in Muslim societies. This is no more a local question but is seen as a part of a global problematic. By new communication techniques we can be in contact with colleagues, relatives, friends, people with the same hobbies (or ideas), or the same religious faith, or the same lack of religious faith, all over the world. (Do not forget the atheists, those who deny any religious affiliation whatsoever! They do exist – I have met many from the Muslim world too. Likewise we should remember those believers who see their religiosity as a private matter and not as a legal affiliation.) Even those who are small in numbers locally can constitute a distinct and even powerful community on a global level. One characteristic of this post-modern status is the availability. We can choose among many competing ideas. The individual is aware of alternatives. The tradition, including

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[4] Cf. Kjell-Åke Modéer (2000), "Global and National Legal Cultures: Consciousness and Interaction of the National Legal Identity" in Cecilia Lindquist (ed.)(2000), *Globalization and Its Impact – On Chinese and Swedish Society.* Stockholm: Forskningsrådsnämnden, 275-291.

the legal tradition and the hierarchies of norms has lost their self evidence. The religious affiliation can not be taken for granted. It is no more, in the same degree as it was previously, linked to profession, neighbourhood, family or clan belonging. This means that the religious community as a jurisdictional entity is more in question today than previously, as it is less linked than before to where you live, your profession, your interest groups, your nationality (in the sense of citizenship in a state).

The globalization means that the question of any legal system's relation to international declarations and conventions is inevitable. They have a high reputation. To use their vocabulary and categorizations is almost a necessity, even when criticizing and refuting them. If a law system, a legal practice, and a legislation (of a state) should be founded on religious sources, as is the case in the Islamic legal tradition, there must be developed some kind of at least a verbal accommodation to these international documents. This is a fact. An early example of this is the Iranian Constitution of 1979.[5] The Constitution declares itself as entirely an expression of Islamic law and Ja'fari jurisprudence, but its terminology and its structuring is very much in the model of other Nation-State constitutions and of international conventions (not without influence from the earlier constitutional debates in Iran – especially the constitution of 1906)[6] This terminological and structural accommodation is a part of the strategy to get the Constitution accepted, not only for an international public but most of all for the reading public in Iran itself.

There is a necessity for leaders, in any community, be it described as ethnic, religious, local, social-economic, professional or tribal etc., in order to retain influence and mobilize support, to stress *one* identity/belonging as the essential one, and to minimize the role of all the other identities, belongings and eventual loyalties that the individual actually possesses. An alternative strategy is to declare the different identities as interconnected. The religious affiliation is for instance used as a tribal, ethnic, national or social marker ("a Muslim country, an Islamic state, a Muslim neighbourhood, a Christian ethnic group etc.).

If we take the ongoing crisis in Iraq [7]as an example, we must ask the question in what respect Iraq can be said to exist as a state or as an entity of national identity. We can see that a kind of Iraqi nationalism and identity feeling showed itself en late July (2007), when the Iraqi football team secured its victory (by beating Saudi Arabia) in the Asian championship. We could witness a national euphoria for a short time, a euphoria which certain groups tried to disturb in violent ways as much as possible. What we saw in that situation was a battle about what identity that should be regarded as the important one, a national one or a specific communal one.

The problem is that the citizenship in Iraq gives no benefits to the individual. The institutions of the state can not be said to function in any sufficient way. Criminality is extremely common. No social welfare can be guaranteed by the state, no security, no participation in power, and so on. The Nation-State is practically non-existent. This means that the individual is by necessity dependent on other belongings, other identities than an Iraqi nationality. And this other network or "security institution" is almost always the extended family, the clan and the clan alliances, very often related to religious belongings (or ethnic, or professional ones, or combinations of all three). Such a network has its militia, its economy, and its representatives in the intricate political play in the country. And it carries out its own

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[5] Cf. Hjärpe, Jan (1997). "Some problems in the meeting between European and Islamic legal traditions. Examples from the Human Rights discussion" in Forsgren, Tuuli and Peterson, Martin (eds.) (1997). *Cultural Crossroads in Europe*. Stockholm: Forskningsrådsnämnden, 52-69.

[6] For the earlier constitutional development in Iran, see Hairi, Abdul-Hadi (1977). *Shî'îsm and Constitutionalism in Iran*. Leiden: E. J. Brill.

[7] For the recent political development in the Muslim world, see Jan Hjärpe (2007), *Profetens mantel: Den muslimska världen 2001-2006*. Stockholm: Leopard Förlag. As for the situation in Iraq, esp. pages,106-141, Afghanistan, pages 65-84, Somalia, pages 207-211.

verdicts, i.e. has its own jurisdiction in reality totally independent of the state and the official administration which is too week to impose any national legislation. The individual's loyalty to this network is then a pragmatic necessity. The different belongings in its turn give the possibilities of changing alliances. For instance, a Turkmen Shii group (most Turkmen are Sunnites) can get support from Turkey as they are "Turks" and from Basra as they are Shiites.

May I quote one example only of this kind of web of "belongings"? In northern Iraq we find two Kurdish political parties, the KDP and the PUK. I doubt that we can find any difference in political (or religious) ideology between the two. But we know that the leader of KDP always belongs to the Barzani family and that the leader of PUK always is a Talabani. The parties can be described as clan alliances around these two families. We also notice that in the regions were KDP is predominant the Kurdish Kurmanji dialect is spoken, and in the PUK region the Kurdish Sorani dialect. Then we can see that there is a connection between the Barzani family and the Naqshibandi Sufi Order. In the same way there are ties between the Talabani family and the Qadiri Sufi order. Both are networks existing in many regions of the world, even in Sweden... These different belongings can be actualized in various situations, so in the conflicts with (or relations to) other ethnic groups in northern Iraq, the Turkmen and the Arabs. This regardless of the formal religious affiliation (mostly Kurds are in that respect Shafi'i Sunni).

Likewise the groupings around various Shii religious leaders in Iraq, can be seen as a pragmatic necessity when the secular political, social and economic system is not functioning. This also is questioning the traditional role of the *marâji'*, the "sources of emulation", the old Shi'i religious authorities. But the main feature and characteristic, and the condition which creates this situation of competing jurisdictions, is the lack of functioning institutions in the state, its weakness, the lack of security. The *marja'iyya* is the tradition of family and clan wise relations to a *marja' at-taqlid*, one or the other of the high Ayatullahs – now four of them residing in Najaf in Iraq. Around them we can see institutionalized (and functioning) networks for mutual help and loyalties. We can see the connection between the Sadr family, the *Jaysh al-Mahdî* militia, and the Da'wa party, the Hakim family and the Sciri party and its militia called the Badr Brigades, and so on. Clan alliances, family relations are connected with whose jurisdiction one is actually following.

But this factor is very much of relevance for the conditions in the Muslim world today in general, and so obviously for the immediate future too: the fact that the state and its institutions, in so many of the countries and regions today are dysfunctional or even non-existent, as is the case for instance of Somalia, Uzbekistan, Afghanistan, Palestine and to a considerable degree Pakistan as well.

Somalia is a strikingly evident example. A country whose borders are not defined, a government unable to create law and order, without real executive power, an interim parliament that can legislate but not enforce or implement any of its laws, non-existing state institutions, a very insecure life for the people, no functioning police or judiciary. This means that the individual is totally dependent, in order even to survive, on other networks, com-munities, group belongings. What networks? Again we can see that it is the extended family, the clan, the ethnic subgroup (the tribe), the religious community, the professional community (the mafia, the tribal or group militia), or varying combinations of these. We call that kind of society a tribal one. Who have in reality some kind of executive power in Somalia? The tribal war lords, the clan leaders, because they have weapons and a clan militia. Their will and whim have been so to speak the "law of the land"; a very detrimental situation for the people. Was there any alternative to the whims of the war lords? Yes, in the case of Somalia, we could see that people becoming more and more interested in the so called Islamic courts and the idea of a divine Law, not dependent on the (non-functioning) legislation of the state. We can see that the idea of a divine Law, the Islamic Sharia, actually had relevance in the

situation in Somalia (as elsewhere where the state and its institutions are crumbling or lacking resources and legitimacy – as in Palestine now). Now the war lords has come back, with the help of Ethiopian troops and support from the USA, and the Islamist groups changed thus into a guerrilla. And the situation for the common people became as before: insecurity. Again we can see that the question of *who* having jurisdiction is in the centre of the problematic.

The tribalism is a consequence of the dysfunction of the state. A point here: for analyses and prognoses for the future, we must consider that governments and state institutions are not the most important actors or agents in what happens. More important are networks not connected with states and citizenships or governments. On one hand global networks of very different kinds, but so to speak available on the Web, on the other hand weak governments, often without a popular mandate, and institutions not able to give people stability, safety and welfare.

Let us consider the elections in Iraq of the 15th of 2005. Between 100 and 200 parties (the number 191 was mentioned) were registered or tried to register. Almost all of them were *clientage* parties, not ideological ones.[8] There were a small number of ideological parties, a communist party (mostly Shii), a liberal party, a social democrat party, a handful of Islamist parties of various brands. But those got very few seats in the Parliament. The voters voted for their "security system", that is parties connected with ethnic groups, religious communities, clan alliances. Of the 275 seats in the parliament, only about 10 went to parties that can be called ideological. I want to stress this point: the parties were connected with family alliances. In some cases the religious affiliation is a marker of clan belonging, but the main definition of belonging was in reality the family affiliation. This will probably continue in the future. Who dares to trust the state under present conditions? Tribalism will prevail for a considerable time.

Let us for a moment consider the recent events in Pakistan, centred in and around the Lal Mosque in Islamabad during the month of July (2007) under the aspect of the problem of jurisdiction. As we know, the groups in and around the Lal Mosque aspired just to that, to have jurisdiction. A special "Islamic court" was installed and in a way functioning in the Mosque, challenging the official judiciary of the state. Vigilante groups were taking the application of their interpretation of Shariʿa rules into praxis, attacking shops and night clubs and amusement centres of different kind, imposing by force (but without sanction from the state) their idea of an Islamic order in society. This being a challenge not only to the state but also a challenge for the traditional religious authority. Simultaneously the legal legitimacy of the Musharraf regime is challenged by the state judiciary and the (secular) legal authority – the conflict between Musharraf and Iftikhar Mohammad Chaudhry. Who represents the legal authority, who has the right of jurisdiction, and jurisdiction over whom? What is the relation between citizenship and legal belonging? What is – in reality – the relation between the conditions due to citizenship and the conditions due to *other* belongings, kinship, social, religious, ethnic, or professional identity? Who is the judge in the various field of legality (criminal law, economic rules, personal law [*akhwâl shakhsiyya*])?

As for vigilante groups, we can compare this with the mutawiʿun in Saudi Arabia (*hayʾat al-amr bi l-maʿrûf wa n-nahy ʿan al-munkar*), the semi-official "religious police", just now being in a conflict of jurisdiction with the legal authorities.[9] Similar – but less officially recognized – groups can be found in other regions too.

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[8] As for the concept of clientage parties, see the PhD thesis by Ann-Kristin Jonasson (2004), *At the Command of God? On the Political Linkage of Islamist Parties*. Göteborg: Department of Political Science, Göteborg University. She analyses in her thesis the actual function of three parties, the Fazilet Partisi in Turkey, the Jabhat al-ʿAmal al-Islâmî in Jordan and the Jamaat-i Islami in Pakistan.

[9] Cf. Scott MacLeod (2007), "Vice Squad. The power of Saudi Arabia's morality police is being challenged, amid allegations of abuse and violence", in *Time*, August 6, 2007, 33-35.

May I mention that I have had some interest in the function of Personal Law in Syria? As we know the legislation demands that marriages are registered at the state/municipal administration. But I would say that only a minority of marriages are registered in those official archives. As a rule people in general regard the Nikah contract written by the families are enough. The families thus regard themselves as having the jurisdiction in family matters, not the state.

My last point has to do with the change in religious authority. Religious leaders, in the meaning of those in leading positions in traditional religious institutions, popes and patriarchs, grand muftis, community leaders and so on, have lost both in power and in influence. This is due to a lot of factors, among them the media development, the rapid changes in social structures, the globalization, and the actual secularization (which I have seen increase during recent years.) This means that traditional religious leaders are in reality not very represent-ative for their communities, and their pronouncements are not reflecting what people in general think and how they act. There are a multitude of others who claim jurisdiction, with or without religious vocabulary. That is a fact. Young people meet this on the Web, and they very much take part in the debate there. Take a look at the Internet Cafés in Iran or Egypt. They are jammed with young people, engaged in the immense global flow of information, disinformation, propaganda, discussions, even Web wars. You can find everything there, from extreme jihadism, recruitment pages for being a volunteer in Chechnya, to the most liberal, modernist, democratic Islamism, from Deobandi Taliban traditionalism to the mildest introvert Sufism. The young individual can choose, no, he has to choose. He can one day accept one standpoint and the other day the opposite. We can see very fast processes of change. The individual oscillates between all his different belongings or "identities".

We must consider that the specific religious affiliation is *not* a determinant factor. There are more belongings to take into account. The *roles* of religious belonging changes as the political conditions changes, the strength or weakness of the state being one of the most important factors. A very strong state in the sense of a Nation-State having the actual power to impose its legislation in reality is something quite different from a weak one, where the State jurisdiction is very much challenged and in reality supplanted by others having or claiming jurisdiction – among them leaders of religious communities or groups, or cults (i.e. *ad hoc* movements). And the authority of religious leaders – is it seen as a delegation of the State, or due to something else? In our conference the focus is on Pakistan and on the Middle East. In both regions the states are weak in this sense. So who are those claiming jurisdiction, and what are people's responses to their different claims? The conditions are not something constant, unchangeable. And the actual function of religious affiliation is changing due to new conditions. We can not regard traditional religious leaders as very representatives of their communities. Their utterances have a low prognostic value as people, as we can see, do not act according to them.

What is the role, actually, of the different belongings of the individual? What is the function of citizenship in relation to the other collective identities of the individual locally or on the global level? What is the jurisdiction of the professional community, the kinship, and the religious community? As for religious rules: *who* decides (in reality) their application for the individual? The state and its judiciary? The religious community leaders? Vigilante groups? Or the individual's own conscience? Are religious rules laws or are they admonitions, moral advices? And what to do with the increasing number of explicit non-believers, or those who do not regard the affiliation to a specific religious community as an essential part of one's i identity, preferring to identify oneself with nationality, ethnicity, profession, or perhaps political ideology?