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Sharia: practice of faith, politics of modernity

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Created 2008-02-22 17:55

The furore in Britain over the Archbishop of Canterbury's cautious references to the *sharia* and law in his lecture [1] in London on 7 February 2008 has been extensively discussed by a number of **openDemocracy** writers and from a variety of perspectives: among them Tina Beattie, Fred Halliday, Theo Hobson, Tariq Modood and Roger Scruton and Simon Barrow [2] in OurKingdom. These responses, however, still leave room for some clarifications over the applications of the *sharia* in modern times and their implications for the debate.

The theological logic of the *sharia* is that God had revealed his commandments for a pious life, and that these should constitute the norms for the life of believers, their family, society and, ultimately, government. These commandments are given, in part, in the Qur'an, the word of God, and in other parts in the narratives and utterances of the Prophet Mohammed [6] and his companions (and to the *Shi'*a in the narratives of their "twelve" *imams*). These latter are known as *sunna* (path) and *hadith* (utterance). Theoretically, these canonical sources constitute the bases for elaborate legal traditions, known as *fiqh* (understanding), formulated by divines and jurists over the Islamic centuries, and subject to many mutations. There are close parallels with the Jewish *halakha* and the Talmudic traditions.

Muslim modernists and some western observers have pointed out the distinction between *sharia* (as God's law) and *fiqh* (as man-made elaboration. This distinction allows reformers to challenge the traditional *fiqh* accumulations as contingent on the historical circumstances of their formulation, in favour of new legal deductions in accordance with the spirit of the time. This is against the conservative and fundamentalist Muslims who insist on what they consider literal meaning of the holy texts, or of traditional formulations.

The logic of applying the *sharia* remains that the believer seeks virtue and salvation in living according to God's commandments. Equally, in Muslim thought, it was regarded as the duty of the ruler and government to apply God's law in their domains. In practice, *sharia* only constituted one element in the legal and religious practices that prevailed in various societies and periods. *Qanun* (administrative laws), ‘*urf* (customary law),

Also in **openDemocracy** on religious identity and the *sharia* controversy in Britain:

Callum Brown, "'Best not to take it too far': how the British cut religion down to size [2]" (8 March 2006)

Tina Beattie, "Rowan Williams and sharia law [2]" (12 February 2008)

Fred Halliday, "Islam, law and finance: the elusive divine [3]" (12 February 2008)

Theo Hobson, "Rowan Williams: sharia furore, Anglican future [3]" (13 February 2008)

Roger Scruton, "Islamic law in a secular world [3]" (14 February 2008)

Tariq Modood, "Multicultural citizenship and the anti-sharia storm [3]" (14 February 2008)

OurKingdom [4], the

hisba (market regulation and inspection), and arbitrary police practices were combined with the *sharia* and its courts at most times and places.

The penal law of the *sharia*, the hallmark of Islamic law in western perception, was not always entrusted to *sharia* courts on account of their rigorous requirements of evidence and proof, and often relegated instead to police and military courts and procedures. In practice, *sharia* courts applied primarily to the private and commercial affairs of the subjects, not to the rulers and government affairs. Family relations and disputes - of marriage, divorce, custody, inheritance and financial obligations - constituted the primary realm of *sharia* courts and applications.

A modernist adaptation

Legal reforms in the Ottoman empire and the successor states and in Egypt and Iran, from the nineteenth century, have seen the *etatisation* of law in systematic positive codes. These have included the wholesale incorporation of European codes: Swiss, Belgian and Italian. Elements of the *sharia* were retained primarily for family law, but they became state law, subject to state legislation and amendment. The legal ideology of the historic Muslim states was that the law originated from the dual sources of God and the king (not unlike some Christian formulations).

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Most modern states in the Muslim world derive the law, theoretically, from legislative processes and institutions, including parliaments, which ultimately have authority over holy law. And this is where the divergence from the informal *sharia* practices in Muslim communities in the diaspora, referred to by the archbishop, diverge from modern reforms. Whereas modern legislation has for the most part tried to get away from the rigours of the *sharia* regarding the status of women and children, informal communal practices have no such inhibitions.

Some modernist analysts and commentators emphasise the variability and malleability of the *sharia* (see, for example, Fred Halliday's contribution to **openDemocracy**'s series, "Islam, law and finance: the elusive divine [8]" [12 February 2008]. However, when it comes to family law, the *sharia* corpus has been fairly stable and predictable over the centuries, with minor variations between the four *Sunni* schools and *Shi*'a *fiqh*. Its main features are well known:

* polygamy, the right of the man to take four wives (and for the *Shi*'a the possibility of temporary "pleasure" marriages)

* the right of the husband to unilateral divorce/renunciation, while the wife has very limited rights in initiating divorce

* custody laws that favour the husband and his kin

* the duty of the husband to provide for the household

* mutual sexual obligations; rules over financial settlements at marriage, divorce and custody.

From these elements, other obligations on the wife were derived and were widely observed. These include, most significantly, the husband's right to allow or prohibit the wife's activity (if any) outside the home, including work and travel. The segregation of the sexes in public and the requirements of *hijab* on women are also features in many instances. In addition, there is the

penal provision for adultery, applicable to men and women, of beating for unmarried offenders, and stoning to death for the married.

This corpus is observed in its entirety in Saudi Arabia and under the Taliban regime (still, reportedly, prevalent in many parts of Afghanistan). The Islamic Republic of Iran attempted to institute this corpus in the country's laws after the 1979 revolution [9], though it faced strong opposition and pressures for reform, often from within Islamic circles; in consequence it has, over the three decades of the republic, been led to moderate many of these impositions. Now the faction of the regime led by the president, Mahmoud Ahamdinejad, is pressing to return to the original impulse and undermine the reforms in turn.

The national project

In modern Arab states such as Egypt, Iraq, Syria, and Tunisia, the legislative process, while retaining elements of the *sharia* in their family law, have constantly attempted to liberalise the provisions which disabled women and children. The most advanced was Tunisia where polygamy was prohibited, and many liberal measures instituted. Iraq both under Abd-al Karim Qasim [9] (1958-63) and in the earlier period of the Ba'ath regime (1970s-80s) also instituted reforms and inhibitions on polygamy. In pious Egypt, reforms have been extensive but always controversial. The latest, in 2000, were proposals to give a wife rights of unilateral divorce, *khul'* (under an obscure provision in a supposed, but disputed, *hadith*), while renouncing any financial rights. This was passed against fierce opposition from many sectors of the political class, the media and public opinion. Another proposal made at the same time, to allow a wife to pursue work and travel without the husband's permission, was defeated.

The call for the full application of the *sharia*, however conceived, is a constant element of Islamist advocacy in recent decades. The radical call for the caliphate also has as one of its reasons the enforcement of the shari'a. One part of the rationale of the *sharia*, as already mentioned, is the pious requirement to live and to rule in accordance with God's revelations.

Another powerful motive under modern conditions is a kind of cultural nationalism, a quest for authenticity. Colonial rule, and western invasion, it is argued, have imposed alien cultures, including legal codes, on Muslim peoples. The task for national projects at present is to restore authenticity by instituting the *sharia* [10] as the original, native law. This quest is also characteristic of many modernist nationalists and reformers who espouse diluted and reformed notions of the *sharia*, but hold it as essential for anti-imperialist national revival. This is part of the convergence of nationalism with Islamism, discernable in many parts of the middle east, with anti-imperialism as its motor.

The interest question

An important feature of this quest is the rise of Islamic banking and finance, also featured in Fred Halliday's [10] article. This is an entirely modern and mostly recent phenomenon. The dealing in interest was a common feature of most Muslim societies, and widely accepted as legitimate, sometimes disguised under flimsy formulae. *Sharia* courts in many Ottoman settings enforced contracts stipulating interest payment. Most notably, Ebussu'ud, the court *mufti* of Suleyman the Magnificent in the

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16th century (known in Arabic and Turkish as Suleyman *Qanuni*, law-giver) issued a ruling allowing cash *waqf* (pious endowment). Typically, these endowments are in the form of income from property, but Ebussu'ud ruled the legitimacy of cash endowments, the income from which must be a form of interest. Moreover, many of the Muslim reformers [10] in the 19th century and later - including the leading cleric and *mufti* of Egypt, Muhammad Abduh (1849-1905) - proclaimed the legitimacy of dealing in interest.

The question of the prohibition on interest comes to the fore in the modern period, primarily as a question of identity politics (as well as of opportunity for gain in certain contexts), of asserting difference from the west in a world in which all aspects of financial life are the west. This may be seen as an "alternative modernity" of finance, but one that springs not from some historical and cultural essence (as usually supposed by advocates of the concept) but from current ideological preoccupations.

The need to know

Rowan Williams [11], the archbishop, rightly pointed out that informal *sharia* tribunals were in any case in operation among certain Muslim communities in the United Kingdom, and asked whether these should not be recognised and formalised in some way. Orthodox Jews already enjoyed such recognition, so why not Muslims? And if so, what kind of "recognition"? Surely not extending to enforcing their judgments on unwilling or weak parties and against the law of the land?

The problem in resolving these questions is partly that not enough is known about the forms and procedures of these bodies, nor about the scope of their operation. Do these bodies mix *sharia* provisions with customary law of the ethnic communities? Resort to these tribunals, legally a form of arbitration, can only occur if all parties to a transaction or dispute agree to be bound by its outcome. What happens, however, when the parties are not equal - as in the hypothetical case, say, of a wife from a village in Kashmir against more powerful and informed husband and in-laws? May there not be a case for formalising these tribunals in some way in order to monitor the fairness of procedure and the truth of consent? Or would recognition initiate a process of institutionalisation which may spur further demands for alternative legal provisions? The Archbishop of Canterbury, in my opinion, has raised important questions, swept away in the furore [12] engendered by the symbolic potency that the mention of "*sharia*" seems to engender.

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