

Legal Pluralism and Sharia: Implementing Islamic Law in States and Societies

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ADEL ELSAYED SPARR, DEC 18 2014

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Between multiculturalism and islamophobia, allowing Sharia to govern certain aspects of Muslim lives has emerged as a frequently debated issue in several Western countries, such as the UK, the USA (Macfarlane, 2012), Australia, France, Germany, Canada, and so on. This debate is no less vivid in predominantly Muslim countries. For instance, Article 2 of the Egyptian constitution makes the principles of Sharia *the* primary source of legislation. This specific article has remained since 1980, before which the principles of Sharia were a primary source of legislation. Furthermore, note that the principles of Sharia are being referenced – not Sharia as such – but what this ambiguous formulation means in practice is unclear (Brown, 2002:181). Moreover, in Lebanon, each large denomination has its own jurisdiction in matters of family law, which is reflected in the existence of Shia, Sunni, Christian, Jewish, and secular civil courts – and yet, the highest court of appeal is the national and secular Court of Cassation (Mallat, 1997:31). The questions range from what Sharia is, which Islamic jurisprudential tradition should be permitted, to what extent Sharia may govern the lives of Muslims, and what legal areas should be influenced by Sharia. In times when violent and radical fundamentalist groups such as Boko Haram, ISIL, or al-Shabaab, for instance, use their (mis)interpretation of Sharia to legitimise their abominable actions – often as means to an end, i.e. the establishment of an Islamic state or caliphate – it becomes imperative to discuss and clarify what Sharia actually is.

So what role does Sharia play in today's societies? What role can it play? What role should it have? And what potential does it have? All these questions have become ever so pertinent in a globalised world, where the increasing mobility of people has led to increased cultural diversity that challenges national identities and thus erodes the nation-state. From a socio-legal perspective, multiculturalism creates legislative challenges. In abstract, a law corresponds to a social norm and contains a moral distinction between right and wrong. However, having a single body of national law contradicts the features of a multicultural society, in which different norms compete. The solution has been legal pluralism, which Woodman defines as the “condition in which a population observes more than one body of law” (1999:3). Consequently, the most important overarching question is what the implications of legal pluralism are.

This article will address this question in order to shed light on the present status of Sharia in an international system of nation-states and increasingly diverse societies, ethnically, culturally, and religiously. I will argue that although Sharia has the potential to overcome certain challenges to govern a multicultural society, insofar as it is considered by some to be the only legitimate source of legislation for Muslims, gradual introduction of legal pluralism in a nation-state will incrementally delegitimise the state. Instead, I propose a reinterpretation of Sharia, which will constitute the basis for political organisation. If Muslims want Sharia norms to govern, they must get representation in the legislature by ways of an equal citizenship – which has to be the common denominator in any nation-state – and democratic deliberation. Subsequently, this endeavour requires an understanding and definition of what Sharia is, which the article initially provides. It then moves on to ask why people obey the law, as the answer to that constitutes the basis for realising why legal pluralism is not compatible with the notion of a legitimate nation-state. The article ends with a suggestion about how to deal with the call for legal pluralism – in this case, an urge to permit Sharia as a legal code alongside national law – which grows stronger when societies become more multicultural.

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The Path to the Waterhole

There is an important distinction to be made between Sharia and Islamic law (Brown, 1997:363). While Sharia literally means the path to the waterhole and constitutes the totality of the normative system for Muslims, Islamic law is the legal system inspired by those principles. According to an-Na'im, Sharia is a "human endeavour to understand the divine", and as such, it can never *per se* be divine. Thus, there is no such thing as Sharia *law*; only law inspired by Sharia, i.e. Islamic law, which per definition is man-made. Consequently, Islamic law is suppositional and not divine, since it is fundamentally the product of what Muslim scholars and jurists suppose is God's idea of right and wrong. When both Muslims and critics of Sharia conflate Islamic norms of right and wrong with Islamic law, jurisprudence, and punishments, the question of introducing Sharia is asked in the wrong way. Muslims in general consider legitimate legal sovereignty to belong to the divine Sharia, as opposed to the people. Thus, any institution that can attach itself to Sharia and claim its authority will command this for Muslims' legitimate legal sovereignty as well. If such institutions, for instance al-Azhar in Cairo or the Guardian Council in Iran, are co-opted in a political regime, they enable political actors to obtain legitimacy for their decisions (Abou El Fadl, 2012:55). Islam can be used for such purposes as well. This essentially builds on the inaccurate notion that Sharia is divine, and that Islamic law is not suppositional. Moreover, because of this, Islamic law is manipulated to conform to certain political interests of subduction. The modernisation of Islamic jurisprudence and law is therefore a matter of political will more than anything else, and so is its implementation in a state. As soon as Islamic law is enacted by the state, it ceases to be the will of God – if it ever were – and becomes the political will of the state (An-Na'im, 2013).

Is it hypothetically possible for Sharia to adjust to a modern society? Consider the examples of Christianity and Judaism. The Old Testament is full of provisions that are seriously abhorrent to the most moderate human rights advocate. Still, very few Christians or Jews would propose that rebellious children should be stoned to death (Book of Deuteronomy, 21:18-21), or that if a man commits adultery with another man's wife, both shall be put to death (Book of Leviticus, 20:10). Disobeying a parent – unless the parent is abusive – or having an affair are examples of immoral actions, and the moral principle is still that both acts are wrong, but the social norm regarding their punishment has radically changed. Similarly, the normative system of Sharia stipulates that having extramarital sexual intercourse, which would be considered *zina*, is morally wrong. However, the punishment for adultery is one hundred lashes, according to the Quran (24:2), and stoning to death, according to the *hadith* of Sahih Muslim (17:4194). Such punishments are hardly compatible with modern societies, but if Christianity and Judaism could modernise from this status, so can Islam.

The question of why Islamic jurisprudence has not modernised is debatable – even the very premise that it has not, cannot be taken for granted. Arguably, however, it has yet to modernise. In the 9th century, the legal schools formed and *taqlid* was subsequently introduced. This closed the door to *ijtihad*, and no new interpretations of the legal sources were made. Indeed, an-Na'im do acknowledge that although there were some developments and adaptation through *fiqh* since *taqlid* was introduced, they took place within the methodology and structure of Sharia that were already established before *taqlid*, which thus remained ever since (2005:42). This historical account is to be understood through another historical development, i.e. the conflict between *ahl al-ra'y* and *ahl al-hadith*, which preceded *taqlid*. The former were those who argued that law should be understood through logic and reasoning – proponents of *ijtihad* – as opposed to the latter, who advocated an exclusive adherence to the Quran and *hadith* regarding legal thought (Shalakany, 2013:12). This conflict was resolved by the institutionalisation of *fiqh*, but fundamentally meant that *ahl al-hadith* became the reigning paradigm in Islamic legal thought.

What, then, would be necessary to modernise Islamic law and punishments, while retaining the moral principles of Sharia that, for instance, adultery is wrong? In an open letter to the leader of ISIL, Abu Bakr al-Baghdadi, 126 very prominent Sunni scholars – for instance the Grand Mufti of Egypt, professors from al-Azhar, and several Sheikhs from the Fatwa Council of Egypt – conclude that virtually every act committed by ISIL is forbidden in Islam. Furthermore, they establish that it is necessary for legal scholars to consider the "reality of contemporary times when deriving legal rulings", a practice which is called *fiqh al-wāqi'*, literally meaning the jurisprudence of reality. This opens up for a consideration of the modern global context in Islamic legal reasoning. Above all, it provides an authoritative hint that *ijtihad* should be practiced. Moreover, reintroducing the legal principles of *istihsan* and *istislah* would also make a good start to modernise Sharia, because they rely on the social context and reality as opposed to

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literal interpretation of the legal sources. As is clear, there are jurisprudential tools available within Islam that can update and modernise *fiqh*, and it is against this background that the question of permitting Sharia must be understood.

Forced to Be Free

Essentially, laws always reflect activities that a given community at a given time disapproves of and perceives as illegitimate. Moreover, political legitimacy is derived from legitimate laws, and the latter emerges through a conscientious behaviour of obedience (cf. Higgins, 2004:1-47). This is important, because it tells us why the political legitimacy of a nation-state is threatened if its laws are illegitimate. A nation-state needs to be founded and maintained by a conscientious behaviour of obedience. But what does such a behaviour emerge from? Why do people obey the law? And what is it that makes laws legitimate? These are no simple or small questions, and probably require a more thorough and exhaustive analysis to answer than what can be offered here. Thus, the outline below will have to suffice as a primer to the political and legal theory of legitimate laws.

Some argue that in a procedural democracy, the legitimacy of laws depends on whether the legislative process is accepted by the subjects of those laws or not (Allard-Tremblay, 2013:381). However, there is no *prima facie* obligation to obey the law; as Raz points out, “the fact that a legal system is just is not a reason to obey it” (1979:245). The problem can be understood through the relationship between legality and legitimacy, where the former does not imply the latter. The laws of the European Union, for instance, have legality but lack legitimacy (Kratochwil, 2006:303). Law is legitimate only if its claims to obedience get assent amongst its subjects independent of content (Higgins, 2004:6). The lack of such assent is exactly why Muslims – or other denominations in today’s nation-states – demand Sharia and pledge obedience to it, as opposed to national state law. Religious belief is obviously the explicated reason to why Muslims demand Sharia, but if Islamic jurisprudence can modernise as described above, then Sharia could arguably conform to national laws on a political level.

Subsequently, the political theory that underscores the nation-state is social contract theory of some sorts. The political theory of Rousseau is relevant in this regard, because the constituent principle in Rousseau’s legitimate state is the law, which justifies the state’s existence spiritually by making the social contract’s associates politically free (Putterman, 2010). The assumption is that two contradicting interests politically drive people: freedom and security. The state is the solution meant to accommodate these interests, but the cardinal problem for any associational state is this accommodation. Rousseau argued that “the people, being subjected to the laws, should be the authors of them; it concerns only the associates to determine the conditions of association” (1762:179, II:VI:10). The social contract generates to general will, which forces people to obey the law. This means they obey themselves, but they do not obey a ruler; they obey the law, and only the law that they themselves have decreed (Cohen, 2010:136). In this context, Rousseau’s maxim “forced to be free” means nothing less than that obeying the law which oneself has prescribed is freedom and security at the same time (Rousseau, 1762:167, I:VIII:§3). If an individual thinks s/he has good, conscientious reasons *not* to obey the law, this corresponds to the will of each, as opposed to the general will. Therefore, s/he shall be forced to be free. Arguably, conscientious obedience in a polity is a behaviour that occurs when existing social norms harmonise with the law of a given polity. Accordingly, law becomes legitimate when it reflects the social norms of a polity. Put differently, when the general will – which is the expression of the normative system of a society – dictates the law, it gets assent from the people independent of content and procedure; there is thus a legitimate and moral obligation to obey the law (Higgins, 2004:3-5).

However, this presupposes that the nation-state is a homogenous polity in terms of social norms, which obviously is not the case. The problem is that Muslims do not feel that the general will dictates on their behalf. The question is more pragmatic than theoretical: how do we make Muslims feel included in the general will? This is a political issue of the social contract.

Legal Pluralism – Legitimate Law, Legitimate Nation-state, or Both?

Before the nation-state emerged as the dominant form of organising power, law was “invariably of sub-state provenance” and reflected the cultural and religious diversity that had always existed in societies (Jackson,

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2006:171). The nation-state obscured this diversity by exacerbating a national identity that became unified in a more homogenous culture and often religion, thus suppressing the social diversity. Jackson (2006) argues, furthermore, that law does not have to originate from the nation-state, and that legal pluralism thus can reconcile a diverse society. However, law does not originate from the state; it emerges from the social norms in a given society, and the state acts as a vehicle to express those norms in the form of laws. When different norms compete in a society, can legal systems that correspond to those norms coexist while retaining the political legitimacy of the nation-state? The choice seems to stand between a legitimate nation-state with one body of national law and a homogenous society, or a different form of organising power with multiple bodies of law that correspond to its consenting community. Legal pluralists, on the other hand, argue that there can be a legitimate nation-state and multiple bodies of law that reflect a heterogeneous society.

Legitimate laws stem from the general will of the people. If the people are divided by having multiple general wills, the people will perceive different laws as legitimate – as is the case in plural societies. A nation-state can only have one general will and one legal system for it to be legitimate. A nation-state with multiple general wills is not a state; it is a contradiction. That the same law will apply to each member of society equally is, moreover, an important prerequisite for the rule of law to function properly. Obedience to more than one legal system is to put oneself above the law, because the arbitrary nature of such an act indicates that the law cannot claim authority.

Legal pluralism is, however, an empirical reality. Subsequently, there are empirical problems with legal pluralism. For instance, in crossover situations where the parties in a dispute do not share allegiance to the same legal system, it becomes inherently difficult to decide which legal system is going to arbitrate the dispute (Tamanaha, 2012:40). Furthermore, Twining asserts that the legal pluralism is “not much concerned with normative questions about legitimacy, authority, justification [and] obligatoriness” (2012:121). This can cause political actors to engage in a game of identity politics, and exacerbate identities, which leads to an increasing sense of otherness and alienation (Barzilai, 2008:404-407), and therefore encourage contentious behaviour (Pruitt and Kim, 2004:25-35, 116-118). Moreover, legal pluralism is not inclusive per definition. States can use legal pluralism to promote political control over minorities, which has been the case in the Middle East and elsewhere (Barzilai, 2008:409-416). Specifically for Islam, the empirical reality is that there is not a unified idea of what Sharia is. If Sharia were implemented, it would be unclear which of the many traditions to implement.

Dealing with the Call for Legal Pluralism

If the solution to plural societies in a nation-state is not a plural jurisdiction, what is the alternative? Legal pluralism is, after all, an empirical reality, and so are social diversity and multiculturalism in the nation-states of today. There are two ways to go, both of which aim to achieve a legitimate form of organising power and legitimate laws. Either we keep the nation-state and try to construct a reality in which a multicultural society can nevertheless perceive itself as *one* society, or we abandon the nation-state as the dominant way of organising power and embrace social diversity under another form of statehood and citizenship. The latter seems much less realistic than the former. Even if the nation-state seems to be fading away in a post-national era, we can probably hold on to it a little longer – and realistically, we probably must. How, then, can we deal with the paradox of permitting Sharia alongside national state law, but still retaining legitimate laws in a sovereign nation-state? The answer to how to deal with the call to permit Sharia to govern the lives of Muslims has to do with political representation and (re)interpretation of Sharia. Pragmatically this means that Sharia needs to be accommodated, not permitted.

As argued above, because law serves a political purpose and is always the product of human understanding, knowledge, and reasoning, permitting and implementing the norms of Sharia in the form of law is, accordingly, a matter of political deliberation. In fact, an-Na'im argues “that the idea of an Islamic state to enforce Sharia as positive state law is incoherent because once principles of Sharia are enacted as positive law of a state, they cease to be the religious law of Islam and become the political will of that state” (2013:11f). Instead of demanding Sharia, Muslims have the option to organize politically – which is political and not religious – in accordance with this understanding of Sharia. The legal reforms Muslims would ask for would reflect the normative system of Sharia, which is not very different from the human rights-based normative values of a modern nation-state (Sarwar, 2012:247ff). Thus, permitting legal principles in accordance with Sharia should instead be understood as a matter of political

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compromise in a democratically elected legislature.

Indeed, the medieval forms of punishment must not be asked for. This is why modernisation of *fiqh* is needed – and possible. Once the Islamic jurisprudence is modernised and accepted by Muslims and their fellow citizens, a deliberative political dialogue between equal citizens can take place without exclusion, alienation, or islamophobia. In such a reality, a shared citizenship becomes the common denominator and primary identity marker, as opposed to religion, culture, or ethnicity. Essentially, this is what a democratic nation-state is about, and it is arguably what Rousseau would have wanted his associational state to be like. In such a state, there is no need for unanimity in the political decision-making process and legislation. If the interests of Muslims are represented in a democratically elected legislature – which requires an equal citizenship – religion and Sharia will not matter; only the general will of which every citizen is part will matter. Sharia as a set of moral values will, *ipso facto*, be implemented and permitted if political representation based on citizenship is strengthened. This would result in a general assent for the laws of a nation-state, which is also shared by Muslims, and the call to permit Sharia law is rendered irrelevant. Obviously, this is an idealized scenario, but every political system will be imperfect, and there are strong arguments that the real issue is about representation, citizenship, and political participation – especially if Sharia is understood as proposed in this article.

Conclusion

This article has tried to make the question of whether or not to permit Sharia to govern Muslims in certain aspects of their lives a non-question. It has analysed the jurisprudential history of Sharia in order to establish why it has not modernized and what needs to be done for it to do so. Moreover, it has argued that because Sharia is human and not divine, it always serves a political purpose. To this extent, the implementation of Sharia in nation-states alongside the pre-existing national state law is not helped by legal pluralism and plural jurisdictions. Such an accommodation contradicts the very foundations of the nation-state and would create societies based on otherness; it goes against what legitimizes law of the nation-state, i.e. the general will. Nevertheless, social diversity requires legal flexibility and political compromise. Still, legal pluralism is not about legal flexibility; rather, it is an attempt to save the nation-state while subsequently and unintentionally undermining the legal foundation of it.

Sharia is a set of moral values; it is a normative way of thinking about right and wrong, and what the good in life is. This can definitely serve as a political principle for finding good laws, but those laws may not be taken for granted as divine and absolute. Such laws are the product of human understanding and reasoning, and they represent the political will of people – not the religious will of God. Because of this, I have argued that this debate is actually about representation, citizenship, political compromise, participation, deliberation, and organization. The call for Sharia is actually an expression of political disappointment by Muslims, that the general will does not include them. This might be a difficult suggestion to realize in practice, but I do believe it is the only way in which we can hold on to the nation-state as a form of organizing power. Some argue that we are already living in a post-national era. They are probably right, and the nation-state will not be around eternally. In the meantime, however, we have to address the social problems that exist, and increasingly diverse societies are one such problem. In the case of Sharia – apart from the necessary reinterpretation – the best alternative solution is not legal pluralism; it is to encourage political participation and make representation more effective under an equal citizenship.

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