MBS Texte 121

Martin Bucer Seminar

6. Jahrgang
2009

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Apostasy and Sharia

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Table of Contents
Inhaltsverzeichnis

Fundamentals of Islamic Law and jurisprudence 3
Early developments of Islamic law 4
Five Categories of good and bad 5
Sunni and Shiite schools of law 6
Hanifite School 6
Maliki School 6
Shafi'ite School 6
Hanbali School 7
Shiite Schools of law 7
The closing of the door of idjtihad 7
Summary/Application 8
The Author 9
Impressum 10

Reprinted from Christianity & Society Vol. XV (2005) No. 1 , pp. 24-27
Original under http://www.kuyper.org/main/uploads/volume_15_no_1.pdf

1. Aufl. 2009

Apostasy and Sharia

Christine Schirrmacher

Fundamentals of Islamic Law and jurisprudence

Muslim theology considers Islamic law (*shari'ah* means "path to the water well") to be God-given, not of human origin. Muhammad received these laws and rules by revelation. They are summarised in the Koran and tradition. The *sharia* (the body of regulations which must be followd by a Muslim if he wishes to fulfil the requirements of his faith) is considered to be a perfect system of law for the best of mankind at all times and all over the world. Muslim theologians hold that if all peoples were to follow the regulations of the *sharia*, all people would live in perfect peace, harmony and justice.

But since the Koran only deals with a very limited number of legal issues these few cases are insufficient to form the basis of a complete system of regulations that would solve all legal questions which arise in human society. They were insufficient to form the basis of a complete system of regulations even in the seventh century, let alone in modern times. In cases which the Koran does not deal with, Muslim theologians and jurists tried to find guidelines with the help of the *hadith* (Muslim tradition) and the cases described therein. At no time in history has the *sharia* as such been applied completely. Even though Islamic fundamentalists today demand a "return" to the *sharia* in its entirety (as in the Sudan or Saudi-Arabia), the question remains whether this is possible at all. Until modern times the *sharia* has been applied to single areas like family law and in some cases to penal law. It has never been applied in its entirety anywhere.

Thus, the term *sharia* means an *ideal* corpus of law (the God-given laws and rules), which was never put into practice. Today, the law codes of the different Muslim countries are mostly a mixture of Koran regulations, local customary law, elements of law codes dating back to the Persians or the Romans and some elements from European law codifications. In the twentieth century European law compendiums influenced several codifications of Muslim law, so that some countries (especially those which came under colonial rule) adopted parts of the European legal regulations.

The *sharia* in itself comprises legal norms concerning inheritance law, family law, criminal law and property law, but also cultic and ritual regulations (in Arabic: *ibadat*) such as keeping the religious holidays, prayer (in Arabic: *salat*), almsgiving (in Arabic: *zakat*), fasting (in Arabic: *sawm*), the pilgrimage to Mecca (in Arabic: *hadjdj*)

and the "Holy fighting war" (in Arabic: *djihad*). The *sharia* regulates the relationship of the individual towards God, his family and society. This means that whether a Muslim gets married according to the regulations of the *sharia* or whether he will perform prayer in the prescribed way is by no means his personal decision or a question of how much he personally would like to abide by the prescriptions of his faith. Rather, it is a legal issue. This is why there is no "private sphere" in Islam in the literal sense of the word. The *sharia* gives rules not only for practising Islam as a religion, but also for the conduct of daily affairs in one's family and in society: e.g. how to greet each other, how to get married, how to raise children, how to behave towards one's parents, how to keep contracts or how to dress properly is equally prescribed by *sharia* law. This is one of the reasons why apostasy is not considered a "private matter" as would be the case in a Western context.

The Koran itself contains relatively few legislative regulations. It does contain some regulations against unfair business practices and against violating contracts. Moreover, it contains some regulations concerning criminal law such as punishment for theft, murder or adultery. However, the described cases are mostly individual regulations, not part of a systematic law code.

Following Muhammad's death in 632 AD, there was no comprehensive Islamic law code that could have been used to establish a functioning administration and jurisdiction in the quickly expanding Muslim empire. Solutions had to be found to solve this problem.

One starting point were the texts of traditions that were collected in the eighth century. Muhammad's decisions, his likes and dislikes (and also the conduct of his companions) were considered to be of normative value because Muhammad was considered to be the perfect example for his followers. During the rule of the Umayyads, the first Islamic dynasty after Muhammad (661–750), the *sunna* [the tradition] of the prophet and the first four caliphs were considered to be of growing importance for the Muslim community (Arab. *umma*). Since the habits and behaviour of Muhammad were considered to be of divine character also each *hadith* was traced back to Muhammad himself, thus establishing a "chain" of transmitters. Therefore the *sunna* has the same authority in legal matters as the text of the Koran itself.

Early developments of Islamic law

The famous scholar Muhammad ibn Idris ash Shafii (767–820) was the founder and "father" of Islamic jurisprudence (in Arabic: *fiqh*). He was combining the regulations of the Koran and *sunna* of Muhammad as recorded in the *hadith* texts with the early legal practices of the Muslim community. Thus he developed the discipline of Islamic jurisprudence or the "principles of jurisprudence" (in Arabic: *usul al-fiqh*).

According to ash-Shafii, Islamic jurisprudence is based on four elements:

1. The "book" (in Arabic: *al-kitab*), i.e. the Koran.
2. The *sunna* of the prophet (as it is reported in the texts of tradition).
3. Analogies or reasoning (in Arabic: *qiyas*), i.e. decision-making in analogy with cases described in the Koran or *hadith*.
4. Consensus of opinion (in Arabic: *idjma*), i.e. the consensus of all Muslim believers concerning a specific legal question, as they are represented by Muslim theologians.

In principle, these four sources of Muslim law were accepted by all orthodox schools of law, even if these schools of law interpreted them differently or gave one or another element preference over others.

Five Categories of good and bad

Even when we look at those legal questions the Koran deals with, still relatively few things are forbidden or allowed in plain words. Many things seem to be disapproved of, but not forbidden. Therefore Islamic jurisprudence has developed a system which categorises everything a Muslim may do:

(1) *Prescribed or obligatory.* Something may be prescribed (in Arabic: *fard*) or obligatory (in Arabic: *wadjib*), mandatory or required (in Arabic: *lazim*). It may be an obligation for the individual Muslim (in Arabic: *fard al-'ayn*), such as the daily prayer, or for the whole Muslim community (in Arabic: *fard al-kifaya*) such as fighting the *djihad*. Failure to perform something that is obligatory is considered to be sin and should be punished.

(2) *Recommended.* Something may be recommended (in Arabic: *mandub*) or preferred (in Arabic: *mustahabb*), meritorious or desirable. A Muslim who does not perform extra prayer which is recommended on certain religious holidays will not be punished, but one who performs extra prayer will be rewarded by Allah.

(3) *Permissible or allowed*. Something which is permissible or allowed (in Arabic: *mubah*), such as travelling in an aeroplane, is "neutral" because there is no law that forbids it, and those who do such things will not be punished nor reprimanded.

(4) *Reprehensible or not recommended.* Something which is reprehensible or not recommended (in Arabic: *makruh*), such as eating specific types of fish, will not be punished because it is not sin, but neither is it neutral or recommended.

(5) *Forbidden or prohibited.* Something that is forbidden or prohibited (in Arabic: *haram*) is not left to the decision of the individual believer and is not accepted or tolerated by society or the state; e.g. drinking alcohol or getting married to two sister at the same time.

Sunni and Shiite schools of law

Sunni Islam today knows four schools of law (in Arabic: *madhahib*), which were developed during the course of the eighth century AD in the centres of Islamic learning. Each of them is named after its founder or his student. They differ in dogmatics and the interpretation of Koranic regulations. In addition there is mainly one Shiite school of legal thought.

Hanifite School

The Hanifite school of law was founded by Abu Hanifa (ca. 700–767 AD) and became the school of law of the caliph dynasty of the Abbasids (750–1258 AD). It spread from Baghdad, the capital of the Abbasids, eastwards towards India. The Hanifite school became the official school of law of the Ottoman empire. Today it is predominant on the Balkans, in the Caucasus, Afghanistan, Pakistan, Central Asia, India, China, Bangladesh and Turkey. In Austria the Muslim community of the Hanifite school has gained official recognition by the state. The Hanifite school accepts ash-Shafii's four sources of law, but also adds personal reasoning (in Arabic: *ra'i*) to it as well the consideration of what is the best solution to a problem in regard to the well-being of society (in Arabic: *istihsan*). The Hanifite school is the most liberal school.

Maliki School

The Maliki school was founded by Abd Allah Malik ibn Anas (ca. 715–795 AD), a leading jurist of Medina. The Maliki school, which emerged as a counterpart to the Hanifite school, spread mainly to North Africa (Tunisia, Algeria and Morocco), Spain, West Africa and Central Africa. Today the Maliki school may also be found in Upper Egypt, Mauretania, Nigeria, West Africa, Kuwait and Bahrain. Apart from the four sources of jurisprudence of ash-Shafii, the Maliki school of law additionally recognises the "public interest" (in Arabic: *istislah*) to be of importance for a decision.

Shafi'ite School

The Shafi'ite school of law was founded by Muhammad ibn Idris ash-Shafii (767–820 AD). Ash-Shafii was a student of Malik ibn Anas and tried to reconcile the Maliki and the Hanifite school of law. However by attempting so, his own school of law emerged. Ash-Shafii tried to limit the amount of *hadith* texts to those that truly report Muhammd's conduct. One of the characteristics of the Shafi'ite school is the fact that ash-Shafii accepted only the four sources of law mentioned above.

The Shafi'ite school of law was established in Bagdad and Cairo and spread to Syria, Khorasan and Buchara. Today, it can be found mostly in Indonesia, East Africa, Southern Arabia, South East

Asia, Yemen, Malaysia, Singapore, the Philippines, Somalia, Djibouti, Tanzania, Kenya and Uganda.

Hanbali School

The Hanbali school of law was founded by Ahmad ibn Muhammad ibn Hanbal (780–855 AD). He is the author of an extensive *hadith* collection called *al-Musnad*, which contains approximately 80,000 *hadith* texts. Ahmad ibn Hanbal was a student of ash-Shafii and became famous when he argued that the Koran was the non-created word of God. For this belief he was imprisoned and persecuted by the Abbasid Caliph al-Mamun, who held that the Koran was "created."

The Hanbali school is more a mixture of various groups of *hadith* scholars rather than Ahmad ibn Hanbal's own school. In principle this school advocated accepting only the Koran and the *hadith* as the basis of Islamic jurisprudence. It opposed any form of humanly influenced decisions. Until the eighteenth century the Hanbali school did not have any significance. But then Hanbali theologian Muhammad ibn 'Abd al-Wahhab (1703–1792) revived the Hanbali school with the so-called Wahhabi movement, which has strongly influenced not only the whole of the Arabian Peninsula, but also Muslims all over the world.

Shiite Schools of law

The most important Shiite school of law is the school of the "Djafarites" or "Imamites." According to Shiite belief it goes back to the sixth Imam Dja'far as-Sadiq (700–765 AD).

The closing of the door of idjtihad

After the beginning of the tenth century no further school of law came into existence. Legal problems were solved in accordance to the Koran and *hadith* texts, but new sources of law were not accepted. Muslim theologians called this phenomenon later "the closing of the door of *idjtihad*." *Idjtihad* means independent reasoning or analytical thought, i.e. the interpretation of the available sources in order to come to a decision in cases that are not specifically dealt with in the Koran or the *hadith*. It is yet unclear how the closing of the gate of *idjtihad* came about. From the nineteenth century onwards Islamic theologians have demanded the "re-opening of the door of *ijtihad*" in order to be able to address the issues of modern life in an adequate way. Muslim reform theologians of the nineteenth century saw the reason for the decline of the Islamic world in modern times in the fact that the door of *idjtihad* had been closed already in the tenth century and that there was no further possibility of development regarding how to deal with modern legal issues.

Summary/Application

1. *Not practicable*: *Sharia* is not an easy subject to deal with. There are many different opinions among Muslims about what the *sharia* really teaches and how *sharia* should be applied in modern society. In theory, the Muslim world is of the unanimous opinion that the *sharia* is the ideal law and would bring about peace and justice for everyone. But how that can be achieved in a practicable way remains an open question, since the *sharia* has never been fully applied in any Muslim country. Many people in those countries that have tried to apply it (such as Iran) have realised that it has caused a lot of suffering and in fact did not automatically lead to greater wealth or more justice within society.

2. *Process of development?* Since the "door of *idjtihad*" was believed to have been closed in the tenth century AD there is little manoeuvring space for adjusting the *sharia* to modern times. Any discussion about the validity of the *sharia* must be dealt with under the heading of *how* to apply the *sharia* and not *whether* it can be applied to contemporary society.

3. *Variety of application*: Some people in the West would like to have a handbook of *sharia*, so that, for example if there is a case of adultery reported in the press in a country like Nigeria or Sudan, one could turn to one's handbook and ascertain what should happen to the couple involved according to *sharia* law. But there is no such handbook, and moreover, one could never be written. Although *sharia* deals with the case of adultery and gives some guidelines for dealing with it there remain several possibilities regarding the question how to find out what has happened and who would be punished – the woman or also the man? In some cases the woman may be alone publicly accused of adultery and she would be sued at court. But if the woman belongs to a more wealthy, respected family and has some protectors in high positions in the government she would probably not be accused. Perhaps nothing at all will happens as long as the adultery does not come to public notice. Alternatively the family of the woman involved may decide to solve the problem by themselves and either keep the woman in the house and forbid her to leave it any more, or send her away – or even kill her to restore their honour. In this case there will be no "case of adultery" followed up in court – although the *sharia* prescribes a public trial and the proof of four male witnesses or a confession from the woman.

4. *Ways to bypass sharia*: In the case of a divorce, the *sharia* prescribes that the children may remain with her mother as long as they are toddlers (in case of boys) or until puberty (in case of girls), at which point they then "belong" to their father and his family. But if the former husband is not able to care for the children or his second wife will not accept them, he might leave the children with his former wife if she refrains from claiming her "mahr" (i.e. the second part of her dowry, which she should get on the day of her divorce). This is

clearly against the *sharia*, but happens every day in the Muslim world.

5. *Can God tolerate man's failures?* When taking a closer look at the *sharia* and especially the *hadith* texts, one realises that the *hadith* texts very often and very harshly threaten those who do not follow the many detailed regulation of the "sunna" with hell-fire. At the same time, there are many exceptions and ways to bypass individual regulations in order to make the burden of the believer lighter, as the Koran states in several verses. It seems to me that the reason for this harsh law of punishment on the one hand and on the other hand the availability of many ways to avoid following all the regulations is in the concept of sin in Islam. If there is no reason for a Muslim to fail in his duty because he is able to perform what is right at any time if he is only trying hard, there is no reason for God to have mercy on him, and he will be punished with hell-fire.

The Author
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IBAN DE52 3701 0050 0244 3705 07
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Publisher:
Thomas Schirrmacher,
Prof. Dr. phil., Dr. theol., DD.

Editor: Ron Kubsch

Editorial Committee:
Thomas Kinker, Titus Vogt,
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