

LSE Lecture February 26th 2008

Is Islamic Law ethical?

Ladies and gentlemen, I'd like to thank Ross Cranston for the invitation to speak at the LSE, and Neil Duxbury and Bradley Barlow for their organisation of the event.

When I gave Professor Cranston this title, I had no idea that Islamic law or as is commonly understood in the west, sharia would be in the public spotlight so much – I have the archbishop to thank for that. While I'm pleased that the panic over his comments about a 'constructive accommodation' of Muslim practice has died down, it's unfortunate that the debate about religious law and civil society may also disappear from the public's radar. For I think that fundamental to our understanding of how religion and public life have become such a controversial area over the last decade is the fact that it is precisely the competing claims made by religious law and its ethical values which have become contested issues. Alongside the anxiety felt by many that the leader of the Anglican church said sharia and Britain in the same breath sending alarm bells ringing for politicians, media pundits and religious figures, the other question raised was why was the primate of the Church of England not talking more robustly about a Christian vision for the UK rather than musing about the possibility of different legal systems alongside the civil laws of England? What did this mean for the Christian or the secular majority in the UK? For some of course the hysteria was based on little else than the crude perception that Muslim law was nothing other than stoning of adulterers and chopping of hands – arcane and barbaric laws which have no place in humane and civilised societies.

Such issues raise a central question relevant for all religious communities today ie to what extent can they use scripture and the post scriptural intellectual and social traditions to determine the basis of their contemporary ethical stances, especially if the ethics needs to be a normative ethics. With the advances in sciences and medicine, with an increased awareness of world poverty and the issues of socio-economic justice related with it, with the shift in gender roles and expectations, the social and political impact of modern life and globalisation, the demise of structured and more formal expressions of religious allegiance, those who believe that scripture still contains within its pages all the solutions come across the biggest challenge as

believers: How does one face the challenge of being innovative whilst at the same time staying engaged with legacy of tradition?

This is of acute concern in our globalised world. One of the effects of globalisation and cultural migration has been the influence on religious language to mobilise religious consciousness. Over the last few years we have witnessed how theological language is not an ivory tower exercise which breathes and dies in textbooks. No, it is a living and passionate reality, it travels thousands of miles and echoes within peoples hearts and minds and in so doing affects peoples social, political and political realities at all levels, local, national and international.

In our current climate Islam is perhaps the faith most affected and caught up in the effects of globalisation quite simply because this religion underpins more than most the very tension on which so much of globalisation balances conceptually – modernity and tradition. While I am fully aware that words such as tradition and modernity are hugely contested, since neither is monolithic term and both require active participation to be fostered, for many believers, modernity is a challenge because it demands keeping alive a meaningful interface between the Divine and the secular. Let me say here that the religious and the secular should not be seen in opposition to each other as very often they traverse each others boundaries in our most complex human concerns. But it is hugely important to recognise that modernity has presented itself to Islam and Christianity in historically different ways. While modernity came to the Christian west through the context of the enlightenment, it came to much of the Muslim world through the colossal impact of colonialism from which it would be fair to say much of the Muslim world has never really recovered. Thus, many societies don't live in the post – colonial but rather neo-colonial state.

A few years ago at a conference in Berlin, the German Minister of Interior said to me in a rather cryptic sentence, 'Since the demise of the wall, Islam is the biggest issue in Germany.' He was not referring to legal issues around nationality etc for minorities in Germany. Nor was it the existence of cultural differences between the various minority groups which has been allowed to exist in Germany and indeed most of western Europe for the last 50 years – the issue at hand was the question of values. What was problematic for him along with many in the West is the question - Do

Muslims hold different values which will inevitably clash with the values of liberal democracies and civil societies of the west?

Seen against this background and now through the prism of the war on terror, sharia becomes even more difficult to discuss. Let me try and give some explanation of what sharia can mean. For the ordinary Muslim, sharia is God's law, indispensable for the good obedient and moral life. Sharia is commonly translated as Islamic law and regarded within the Islamic tradition as divine in its quality. Strictly speaking, sharia refers to God's law as it is with God and his Prophet, in which is to be found an ideal of Islamic society. In its simplest definition, however, sharia is not law as we understand law in the modern world ie a set of rules and regulations for the ordering of society. Sharia is contained within the corpus of revelation, both the Qur'an and the deeds of the Prophet, but it developed and was given expression in the hands of the jurists (*fuqaha*) around the 8th century onwards through the intellectual discipline of *fiqh* or understanding. It is through their writings that individual legal schools were created marking the transition from the spoken word to the written text. However, the process by which the words of the early Muslim scholars acquired written form is still relatively unknown and the original formulation of the genre may in fact elude our knowledge forever. A tentative suggestion is that *fiqh* initiated in response to a need for laying down the practical consequences of Islamic monotheism. The need to outline man's duty to God and his fellowmen had its inspiration in the Qur'an and the life/way *sunna* of the Prophet but it became obvious that the nature and scope of man's duties were not entirely self-evident from these primary sources; if they had been the sacred texts would not have become merely the source of law but the law itself. The texts may have contained the law the sharia, but they do not state the law in any legal sense – this was the production of juristic activity. This juristic activity or *fiqh* became the queen of sciences in the Muslim world. The classical period which witnessed the rise of juristic scholarship and the monumental works that seek to define the ideal of God's law occupied the best theological minds. *Fiqh* developed as the apogee of the Islamic sciences incorporating in its development all that was considered the basis of religious knowledge the Qur'an, the Prophet's words, reason and analogical thinking. The aim of the law was not to set down firmly what was right and wrong but to look at all areas of human life and worship as within the boundaries of accepted behaviour and define and elaborate the basic prescriptions of the Qur'an.

The domain of *fiqh* was to interpret sharia - God's ideal law. Although philosophy and theology held their own status in which ethical thought was considered in relation to virtuous action, law in all its different forms remained the primary pious output of the jurists.

Diversity of views on a single issues lay at the heart of this writing. Thus Islamic law developed neither as an unequivocal nor a monolithic expression of God' will. It became rather a scholarly discourse in which religious scholars interpreted the sources in different ways and both agreed and disagreed on essential legal and moral matters. However, their aim was to explore right and moral behaviour not just with respect to worship (*ibadat*) but to all aspects of social relations in life (*mu`amalat*). This included everything from dress, marriage, business transactions to penal law and thus all juristic reflection became to some degree 'sacred' law.

Law occupied a central place in much of the Islamic intellectual tradition. The different discourses around law and its application in various parts of the Muslim world, both formally as state law and informally as social practice, are infact testaments to how Muslims have tried to understand their relationship to God and to one another, through their understanding of shari`a itself. As Schacht said:

Islamic law is the epitome of Islamic thought...The very term *fikh*, 'knowledge', shows that early Islam regarded knowledge of the sacred law as the knowledge *par excellence*. Theology has never been able to achieve a comparable importance in Islam; only mysticism was strong enough to challenge the ascendancy of the Law over the minds of the Muslims, and often proved victorious....it is impossible too understand Islam without understanding Islamic law.¹

However, during recent decades, scholars have focused much attention on the historically prescriptive nature of Islamic law and how much of this tradition can continue to valued as normative law in any real sense. The lament amongst some scholars is that if *shari`a* is positive law, it is not always consistent with the ethical

¹ Joseph Schacht, *An Introduction to Islamic Law*, Clarendon Press, Oxford, 1964, (repr.1993) p.1.

and moral imperatives of the Qur'an itself.² There are those who claim that in regarding the classical heritage as an immutable body of law, Muslims have ignored the essence of Islamic law in society ie whether in application or content, it was always changing. They state that even where modifications have been made, or the laws have been subsumed within post-colonial western legal codes, the Muslim world has tied itself to conceptualising human relations within a largely medieval framework. They call for ridding Muslim governments and societies of arcane expressions of law and returning to only the Qur'an and the exemplary sunna of the Prophet as the true sources of Islamic law which contain eternal principles. Others argue the contrary, that it is indeed this classical heritage wherein lie the principles for developing laws and practices which would be more harmonious with contemporary norms of justice and human dignity. They claim that these juristic works are the repository of pious reflection, by men who had interpreted the fundamental sources of Islam; they contain within them the resources necessary for a re-thinking of social and legal attitudes and thus the revisioning of Islamic societies in line with more contemporary notions and standards of human dignity and universal principles of human freedom.³

The problem here is that many of the thinkers who are calling for a revisiting of the classical sources are criticised for knowing exactly what answers they want before they embark on the process of rethinking. They are criticised for being disingenuous when they talk about inquiry since their own moral positions have usually been formed whether through experience or learning well before they call for a reformulation. The other issue is that the clichéd but still destructive critique of being labelled westernised which usually means not progressive but secular and preaching nothing more than moral relativism becomes their label. This criticism is so threatening that for many it stifles debate before the debate has even started.

² Fazlur Rahman, *Islam*, Chicago, University of Chicago Press, 1979, pp.100,102.

³ Two of the most significant contributors to any reformative, systematic thinking of Islamic law are Khaled Abou el Fadl and Abdullahi An-Na'im. See particularly, Khaled Abou El Fadl, *Speaking in God's Name; Islamic Law, Authority and Women*, OneWorld 2001; Abdullahi An-Na'im, *Towards an Islamic Reformation*, Syracuse University Press, 1996. An-Na'im draws upon the teachings of his mentor and the Sudanese reformer, Mahmoud M.Taha, and focuses on the methodology of abrogation (*naskh*) through which the Meccan and Medinan verses must be re-evaluated for a reconstruction of Islamic law.

A religion where the notion of law, expressed broadly through the word sharia seems to prevail as the fundamental essence of Islamic thought in both popular perception and academic debate, the emphasis on ethics has seen a gradual rise in prominence over the last decade. The idea that law must also be ethical stems quite simply from the view the human condition rests on moral ambiguity and ethics provides guidance for the changing dilemmas of human existence.

My understanding of ethics lies somewhere within the following definitions that ethics is a generic term for various ways of understanding and examining the moral conduct of human behaviour and actions. It is the study of standards of conduct and moral judgement, standards that govern the conduct of members of a group and the branch of philosophy that deals with the distinctions between right and wrong.

Ethics may be implied in Islamic law but it comes under a separate Arabic term *akhlaq*. This term has more to do with correct and appropriate manners of behaviour rather than the philosophical theories of how we should act. In reality there is no single word that reflects ethics as the word has come to mean western philosophical and moral discourse. An obstacle to formulating a comprehensive ethics lay largely in the sentiment that theorizing about right and wrong was not the same as acting upon what was right and abstaining or prohibiting wrong. At the risk of a little generalisation, Semitic culture, Rahman argues saw morality not expressed in terms of propositions but rather in terms of divine dictates and actions. George Makdisi writes of ethics in the Islamic traditionalist doctrine as the quest for a science that seeks to know what actions should be done and which avoided, a practical science it seeks knowledge not for the sake of knowledge, but rather in the Aristotelian sense, knowledge is sought to be applied in practical ways for the whole of a virtuous human life.

Crudely put, the traditionalist stance was that revealed law had priority of place over reasoned law and that good and bad are known through revelation. This was refuted by the philosopher theologians, principally the *mutazila* who claimed that reason had a prior knowledge of good and evil, right and wrong and that the Qur'an only corroborated what reason acknowledged anyway. It was not until the publication of the Miskahwayh's 10th century work 'Treatise on Ethics' *Tahdhib al-Ikhlaq* that

ethics was raised to a fully fledged discipline of philosophy , laying out for the Islamic world a set of reflections equivalent to that of Aristotle's ethics in classical Greece.

Today ethics has become associated with a diverse range of sciences and disciplines. When we ask the question today is Islamic law ethical we don't mean can it distinguish between moral principles, we mean does Islamic law conform to contemporary ideas of human dignity and freedom?

I give here two different examples to show two current views around Islamic law;

The claim is often made that the major reason why sharia is faulted is because the 1948 Universal declaration of Human Rights is the standard through which sharia is evaluated.⁴ Whilst acknowledging the necessity of revisionist thinking in many areas of Islamic laws, for some scholars, their unease with the criticism lies in their claim that the UDHR is essentially a western document, rooted in the political and liberal culture of western society. As such, the UDHR brings its own understanding of what constitutes human dignity. They claim that Islamic law has its own resources for challenging those rules which seem to violate human dignity. But as Ann Mayer says:

International human rights law is not tied to peculiar western values. People from various parts of the world had input into the UDHR- accepting its principles does not mean an endorsement of western civilisation.

International human rights law is at odds with all local particularisms, which means that conservative legal traditions like that of the United states have great difficulties coming to terms with international human rights law. This is why the US often winds up in the same group as Muslim countries who oppose aspects of international human rights law.⁵

⁴ I have elaborated on this argument in more detail in my article, 'Divine Law and Divine love: complimentary or competing claims on human dignity,' in *The God of Love and Human Dignity, Essays in honour of George Newlands*, T&T Clark, Edinburgh, New York, September 2007.

⁵ Ann E Mayer in conversation with Dina Ibrahim, 'Human dignity and Islamic law; Are they compatible?' <http://www.geocities.com/capitolhill/parliamnet/3251/spring>

What has been the most significant aspect of the UDHR is the recognition that 'the inherent dignity and of the equal and inalienable rights of all members of the human family,' is said to be the 'foundation of freedom, justice and peace in the world.' One of these freedoms is Article 18 of UDHR which reads: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

On the issue of freedom of religion, the Qur'anic verses, 'Let there be no compulsion in religion,' (Q2:256) and 'The truth has come from your Lord; let him who will believe and let him who will, reject it,' (Q18:29) are cited to argue that the 'Qur'an overrules compulsion, which violates dignity, even in the acceptance or rejection of Islam itself.'⁶ In Islamic law, freedom of religion is analysed within the context of *riddah* or 'turning away from the faith:'

O you who have attained faith, if you ever abandon your faith, God will bring in time forth (in your place) people whom he loves and who love him.(Q5:54).

Your enemies will not cease to fight you till they have turned you away from your faith. But if any of you should turn away from his faith and die as a denier of truth - for these people, their works will count for nothing in this world and in the life to come (Q2:217).

The concept of apostasy as one who leaves one religion for another, is not particularly developed as such in the Qur'an, nor is any corporeal punishment ascribed to one who turns away from Islam. Verses such as the above must be seen in the wider political picture of Islam as a fledgling faith, where survival of the community was imperative and those who left the faith both formally or informally would be seen as a physical threat, equivalent to sedition or treason against the state. While there is no Divine punishment mentioned in the Qur'an for turning away from Islam, there is some evidence of this in certain disputed *hadith* or prophetic sayings. In addition, the

⁶ Mohammed Hashim Kamali, *The Dignity of Man*, Islamic texts Society, Cambridge 2002, p.37.

concept was enlarged to incorporate other sorts of utterances which could be understood as heretical or blasphemous. This, combined with the juristic judgement that those who left Islam, should be regarded as enemies of Islam, or deniers of God, *kuffar*, meant that from very early on, Muslim law articulated '*irtidad*' or 'turning away' as a serious crime against God, deserving of earthly punishment. While the apostate had the opportunity to repent and return to Islam, either death or imprisonment could be the consequences if the apostate refused. There was ofcourse no penalty for conversion to Islam from other faiths. As Ann Mayer explains:

Pre-modern shari`a rules also provided that apostasy constituted civil death, meaning among other things that the apostate's marriage would be dissolved and the apostate would become incapable of inheriting.⁷

The classical doctrine of apostasy laws incurring serious penalties such as the death penalty has been subject to serious critique by both Muslim and non-Muslim scholars. While no unanimity has been reached and while these laws still form part of the penal code of state legislation in many Muslim countries, they continue to be the focus of both speculation and criticism for failing to comply with international human rights standards. But many scholars have contested that the challenge posed is not simply about the challenge to human rights posed by the UDHR. Instead, they emphasise that what is being violated with such punishments is the inherent teaching of the Qur'an itself which neither states any punishment and which insists on giving absolute freedom of religion to the individual.⁸ Their grievance is that the non-coercive directive of the Qur'an, has been eclipsed by the established and still pervasive rules of the medieval jurists.

This issue is further complicated by the fact that the Qur'an mentions those who follow other religions, notably Jews and Christians as people who also enjoy God's favour:

⁷ Ann E.Mayer, *Islam and Human Rights*, Westview Press, Colorado, 1991,p.141.

⁸ For a comprehensive analysis of apostasy, see Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam*, Ashgate 2004. Also, Wael Hallaq, 'Apostasy,' in *Encyclopaedia of the Quran*, Vol.1, Brill, Leiden, pp.119-122

Those who are believers and those who are Jews and Christians and the Sabians and who believe in God, and the Last day and do good works shall have their reward with their Lord; on them shall be no fear (2:62).

Also, God has created diversity within humanity, as a test of how human beings can live with each other:

O Mankind, we have created you male and female, and appointed you races and tribes, that you may know one another. Surely, the most noble amongst you in the sight of God is the most God fearing of you (Q49:14).

Such verses have been used by many scholars to make the claim that the Qur'an contains an inherent pluralism, the egalitarian spirit of which has been lost in much of the juristic works. Though many have questioned exactly what kind of pluralism, Islamic history shows that co-existence had to be both accepted and managed:

Religious pluralism for the shari`a was not simply a matter of accommodating competing claims to religious truth in the private domain of individual faith. It was and remains inherently a matter of public policy in which a Muslim government must acknowledge and protect the divinely ordained right of each person to determine his or her spiritual destiny without coercion. The recognition of freedom of conscience in matters of faith is the cornerstone of the Koranic notion of religious pluralism, both interreligious and intrareligious.⁹

The combination of apostasy laws and mere tolerance of other faith communities has been largely responsible for the social and theological tensions between Muslims and others in many Islamic societies. Despite the Qur'anic references to coexistence with other faiths, it would be fair to say that the new political society which emerged in the post-Prophetic era, gradually created an exclusionary view of itself in which dialogue with others was not always based on any desire for inclusivity but necessity. Freedom to practice one's religion may have been the ethical directive of the Qur'an, but it didn't always develop sufficiently to mean 'freedom of religion and conscience' as understood in contemporary debates on human rights or human dignity.

⁹ Abdulaziz Sachedina, *The Islamic Roots of Democratic Pluralism*, Oxford university press, 2001, p.25

Marital consent and the infantilisation of gender relations:

The classical legal world did not have the concept of young free and single – this is a modern phenomenon. For the classical world, there was a transition from parental home to marital home and the idea of single people was not really entertained. Today this is a challenge on the social front but also on the moral front. Classical Hanafi law states that an adult, sane and free woman can contract herself in marriage without the consent or approval of her father or guardian. This by its very wording implies female choice and autonomy. But many Muslim societies have developed on the basis of strict segregation laws which have inevitably curtailed the possibility of choice. But women are also denied this freedom because custom and moral codes within cultures disapprove of female autonomy thus making the legal - ethical imperative almost impossible. This leads to forced marriages, denial of womens rights or family pressures to such an extent that abuse of the law becomes systematic since law assumes an inferior position to cultural norms and expectations. In essence culture is presented as law. Thus the law provides the space for manoeuvre and changing circumstances - it is ethically ahead of society... the values of liberty and choice are already there.

Let me conclude that in the UK cultural diversity is expressed largely through religious diversity. While this poses challenges, it still allows us, at times demands that we compare and contrast value systems and different lifestyles so that we can dialogue towards building more universal values and beliefs. We will have to make some choices about what we tolerate and what we keep out. This is fundamentally a debate about ethics. Even diversity has its limits. For all of us, this means in the end having the conviction that our faiths and cultures can have a positive impact and work for the welfare of the wider society. But we must also have the courage and humility to speak out against what the theologian calls the `malfunctions of faith.'