

Revisiting the Debates on Shari'a

Muhammad Khalid Masud

Shari'a stands for justice and peace but it is the cruellest irony of modern times that it conjures up fearful images of amputated hands, stoning and lashing in the western media. Regrettably, in the Muslim mind also Shari'a invokes the notions of *hudud*, retribution and punishment. Debates in favor of Shari'a and its implementation take the shape of demonstrations in Pakistan and are associated with suicide bombers, militancy and bloodshed. It is perhaps the absence of serious rational analysis of the issues regarding Shari'a in the public sphere that has turned

these debates to be violent and blood-stained. It is therefore imperative to revisit these debates in order to understand how these debates have degenerated into such ferociously hatred actions and why these debates were not prepared to explore the weaknesses and failures in Muslim societies in realizing the creative and affirmative heritage of Shari'a.

Recent debates on Shari'a are not limited to the Muslim countries; Shari'a is debated in the whole globalized world including South Africa, United States of America, Britain and Canada. Th debates have brought home the fact that we are living in an interdependent globalized world and whereas non-Muslims societies can no longer dismiss Shari'a as irrelevant, Muslims cannot also effectively exercise Shari'a as a modern legal system without taking the global context into consideration. Take the example of Canada. A Dutch scholar Anna Korteweg notes that from 2003 through 2006 a debate developed on the introduction of “sharia law” or sharia arbitration in Ontario, Canada. The issue in its core was about legal principles and practices but it turned into a debate about women’s inequality, and by extension to Canadian national identity and culture. The ensuing public lambasting of Islam reinforced the notion that Islam and gender inequality are

inherently incompatible. Important questions regarding faith-based arbitration were thus ignored, and with it the possibility to improve gender equality (“The Shari'a Debate in Ontario”, ISIM Review 18, 2006, 50). Similarly, invitation by the Archbishop of Canterbury to consider Shari'a as a possible source of law for Muslims in Britain turned into a debate about national integration in Britain, Denmark, France and Australia. The fact that the academic and objective studies in these countries were not influenced by these hysteric outbursts of fears and anxieties about Shari'a becomes irrelevant in the Muslim countries because they do not impact the Muslim world opinion which is easily politicized by the religious establishments to rally against the Western criticism of Shari'a. It helps them to avoid any mention of their weaknesses.

In Muslim history Shari'a has been a rallying point for unity of Muslims. In recent history it has informed Muslim religious identity. Since nineteenth century, it has been entirely politicized as an issue of national identity first by nationalist movements against the colonial regimes and since the end of 1970 by the religious political movements against Westernized regimes and Western allied rulers. Starting from the movement for Nizam-i Mustafa in Pakistan in 1977, take over

of Ka'ba by some young militants in Saudi Arabia and Islamic revolution in Iran in 1979 the issue of Shari'a was politicized more than ever in almost all Muslim countries. The political environment prevented any public and rational debate on Shari'a. Movements for Islamisation of knowledge and laws had failed by 1990 and called for academic and dispassionate analysis of this non accomplishment. However, neither Muslim governments nor the religious establishments allowed such debates. Consequently, frustrated attempts toward exporting Islamic revolution, imposing Shari'a by force and blindly insisting on adherence to Islamization in secular environments generated the ideas of Shari'a as tyrannical and oppressive system of law not only abroad but also within Muslim societies. Shari'a as a modern and just legal system came to sound unabashedly apologetic.

Had Shari'a debates been rational and apolitical we would have been able to address the real issues in the implementation of Shari'a. I tend to believe that such analyses could have enabled us to avoid the bloodshed and violence in Pakistan. We could have prevented the gathering of the dissident groups from other Muslim countries to the frontiers of Pakistan and to gain local support for their respective national politics. Debates on Shari'a could have made us aware of the fault lines

in the social and legal systems in the area and enabled us to separate the political from the socio-legal factors of this fault line. Shari'a movements in the northern states of Pakistan including Malakand, Swat, Waziristan and Bajawr go back to the nineteenth century. These movements by Hadda Mulla Akhund Abdul Ghafur (d. 1878), and his successor Hadda Mulla Najmuddin, who was associated with Sayyid Ahmad Barelawi's Jihad were essentially reform initiatives that took political turn against the British. Tahrik Nifadh Shari'at Muhammadiya as a demand for enforcement of Shari'a was initially a legal issue that turned violent and political in 1990s . The present Tahrik Taliban also began as a movement for enforcement of Shari'a in Swat and Waziristan but gradually became politicized. In general, all of these failed to introduce social and legal reforms. Nevertheless, since these movements were projected as political movements against the westernized regimes their leaders became heroes of the age. Debates about Shari'a have repeatedly ignored to analyze the failure of Shari'a movements or to discuss the issues in the enforcement of Shari'a in the present day globalized world.

The Council of Islamic Ideology and the International Iqbal Institute for Research and Dialogue, International Islamic University collectively took this initiative in

2008 to organize debates revisiting Islamization in Pakistan, especially with reference to Swat and Waziristan in 2008. These debates revealed a strong respect for Shari'a as rule of law and justice. The colonial construction of law and justice has not been able to respond to the needs of Muslim societies. Hegemonic globalism has caused the supporters of Shari'a to pose it as a marker of identity. As a result, Shari'a has assumed the position of an ideology of power. Its religious aspect as submission to God is totally misunderstood in the meaning of forceful imposition of laws.

After three consultative meetings with judges, lawyers, religious scholars, women organizations and media representatives held in November, and December 2008 and in January 2009 that the popular demand for Shari'a grew out of concern for expensive and slow judicial system came to be exploited by religious extremists. Extremists do not carry any background of Islamic law. Government failure in the past to change discriminatory laws has pushed them in total obscurity. Consequently, the structure in Tribal area has been disturbed totally. War has been inflicted upon them from various sources.

The experience of Shari'a implementation initiated in Pakistan in 1979 has raised

some important questions about who has the authority to enforce Shari'a? who would interpret the Shari'a law? and What is the role and jurisdiction of religious scholars once the laws have been codified? Which parts of Shari'a can be *legislated* into formal law? What parts of Shari'a can only be *facilitated* by the State through public policies? What parts of Shari'a are better left to individual believers?

Issues in debates

I would like now to refer to some vital issues that the recent academic debates of these debates have suggested for further analysis.

1. Shari'a and the present epistemological crisis

There is an epistemological crisis especially relating to modern interpretation of Shari'a. Shari'a is now enmeshed with modern secular concepts of law, jurisprudence and justice. Modern notions of justice, judiciary, rights, and equality have challenged the Usul al-fiqh and 'ilm al-kalam which Islamic legal tradition had developed to define and understand Shari'a. This epistemology was based on ancient Greek logic that provided grounds for qiyas and ijihad arranged on the pattern of syllogistic reasoning. Methods of formal logic and syllogistic reasoning

are giving to new methods of reasoning like deontic logic. The conception of four sources and Usul in traditional Islamic jurisprudence has become extremely ambiguous. They do not help understand the normativity of Shari'a. Qur'an and Sunna are primary material sources, yet customary law and urf have been the major source of Islamic law and have played a normative role. They constitute the foundation of a number of legal concepts but they are now losing their relevance because they were derived from the tribal customs. Are the present day international laws and conventions, and the constitution sources of interpreting Shari'a? These and other such issues demand fresh debates on the epistemology of Shari'a.

2. Shari'a as personal law

Constructed as religious law, Shari'a is classified as personal law not bounded by territory. In the pre-modern period as well Muslim jurists have been wrestling with the issues about the personality and territoriality of law with reference to criminal and trade laws between darul harb and darul Islam. Emergence of modern nation-states and permanent presence or settlement of Muslims in secular and non-Muslim countries have raised the question of

personality or territoriality of Shari'a. What is their legal status? Are they citizens, temporary residents, minorities or guests? Should they obey the laws of host countries or the laws of the countries of their origin? It has given birth to a new interpretation of Shari'a which is known as Fiqh al-aqalliyat. This concept of Shari'a questions its universality and also isolates Muslims as legal entities in those countries.

3. Shari'a and State

The institution of modern state raised a number of issues for Shari'a. Demands for implementation of Shari'a have helped Muslims to accepting modern state as sources of legal authority. However, the idea of the sovereignty of state is still contested by the sovereignty and supremacy of Shari'a. The pre-Modern Islamic jurisprudence does not allow the role of legislation to a state or the parliament. The modern state is structured on the notions of separation between the judiciary and the executive. It does not allow discretion in making laws to a judge which the concept of ta'zir allows to a qadi in Islamic law.

4. Shari'a and reform

There is a strong belief that Shari'a is divine and therefore cannot be subjected to reform. The question about what constitutes Shari'a is not discussed because it is assumed to be non-debatable. In the popular parlance Shari'a consists of the Qur'an, Hadith, Ijma' of the Ulama including Fiqh and Madhhab. Reformist Muslims distinguish between Shari'a and Fiqh. Limiting Shari'a to the Qur'an and Hadith, they are in favor of reforming Fiqh where needed. They invoke the principle of ijtiḥād against taqlid. The debates continue defining the requirements and procedure of ijtiḥād. A general agreement of opinion has emerged on the need of collective and institutionalized ijtiḥād. The possible role of parliament is still contested. The concept of ijtiḥād is also associated with the question of religious authority, which according to common understanding lies with the Ulama. A serious debate has been about who qualifies as an 'alim. The intellectual leadership today is often with those who are trained in the Western sciences. The traditional religious establishment insists that only the religious scholars and those trained in madrasas qualify as an 'alim. This debate about religious authority has not taken the requirement of proper Islamic legal education, training as judges and legislators into account. Some madrasas have introduced specialization courses in Ifta, but

generally it is believed that all graduates from madrasas qualify as judges and legislators.

5. Shari'a and globalization

The globalization is posing a host of questions to Shari'a about pluralism, exclusivity and interdependence. Shari'a is believed to be universal but Muslims have come to insist on its applicability to Muslims exclusively. Interaction between Shari'a and modern legal developments is avoided. It has created some very serious tensions with reference to Universal Human Rights, International conventions and treaties relating to women rights, protection of children, marriage, divorce and property. Shari'a is no longer exclusive to Muslims. Global interaction and legal transactions are Shari'a. Not only that Muslims must be prepared to discuss and share Shari'a with the world but Shari'a must be part of syllabi and curricula in world universities.

I have mentioned only a few issues to illustrate the ongoing academic debates. This is not an exhaustive list. It suggests however that we must pay serious attention to Islamic legal education and research. The students of Islamic law in

Madrasas and Universities must study the history, sources and methods of Shari'a law and jurisprudence critically and their relevance to modern globalised world.