Between Piety and Patriotism: Shari^{c}a and The American Way of Life

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FootNotes

Aaron Rock-Singer

Aaron Rock-Singer is a postdoctoral fellow at the University of Pennsylvania's Perry World House.Read More

In May 2016, a row broke out at the Metropolitan Recreation Center in Williamsburg, New York following an anonymous complaint regarding its summer schedule. The Center had long offered gender-segregated swimming hours for Williamsburg residents who, for religious reasons, could not use the swimming pool while members of the opposite sex were present. This was not a story of Muslims; instead, it was case of how a local communal institution made an accommodation for its large ultra-Orthodox Jewish population.

While such accommodation usually does not make the news, the specter of the "Creeping Shariaziation" of the United States has grown with the election of Donald Trump as President of the United States. Long on the fringes of the Republican Party, this movement against Islamic religious practice and legal accommodations in the United States has grown under the Trump administration. In particular, Frank Gaffney and his think tank, the Center for Security Policy, have found a new political life under Trump, arguing that America faces the threat of Islam's allegedly inhumane, intolerant, and anti-women essence.[1] For Gaffney, the threat is clear: adherence to the Shari^{c}a, or Islamic law, is incompatible with being a faithful American.

This primer seeks to step back from this type of rhetoric and the spate of anti-Muslim incidents in the United States over the past year, to answer a very simple question: what is the Shari^{c}a? How did Muslims understand this term historically? How and why did understandings of Shari^{c}a shift in the 20th century? And do these claims regarding

Shari^{c}a correspond with the actual ideas and practices of the American Muslim community?

Shari^{c}a Throughout History

Historically, Muslims understood the Shari^{c}a as a broad framework within which one could live a proper Islamic life. The Shari^{c}a represented a comprehensive *ethical* system, the bulk of which was not understood as law in the sense of regulations that state authorities must enforce. Instead, acts were divided into five categories: obligatory, recommended, neutral, disapproved, and forbidden. Crucially, it was only those acts that fell into the category of "forbidden" that were to be enforced by the state.[2] Put differently, prior to the last 200 years, the obligations set forth by the Shari^{c}a, though they were obligatory for Muslims, neither assumed nor depended on enforcement by state authorities.

Indeed, a corpus of Islamic law did not arise fully formed from the Quran and the authoritative accounts of the Prophet Muhammad's life, known as the Sunna. Instead, over the first few centuries of Islam, Muslims sought to understand how to apply the Quran's message and the Prophet's model to their lives and societies. The challenge, however, was to balance between Islam's core principles and local realities. As Islam spread beyond the Arabian Peninsula, whether under the Umayyad Empire headquartered in Damascus (661-750) or the Abbasid Empire based in Baghdad (750-1258), the question wasn't how to apply one law to all the lands of Islam, but rather how to balance between broad legal principles and local practices.[3] Over the course of the 8th and 9th centuries, Islamic schools of law within both Sunnism and Shi^{c}ism emerged as Muslims sought to apply Islam to questions of state and society alike.

What is crucial to understand about both Sunni and Shi^{c}i schools of law is that they did not form codes of law. Instead, they worked, based on the model of leading early scholars of Islamic law —after whom each school was named—to answer the questions of the age based on both precedents within the school and local circumstances. As jurists sought to articulate a human understanding of divine will, each school developed a body of precedents and principles known as *Fiqh*.[4] The precedents set by early scholars living in a different time certainly constrained later jurists, but not inescapably so. When necessary, jurists would invoke imperatives that lay outside the precedents—such as the common good (*al-maslaha al-^{c}amma*) or local custom (*^{c}urf*)—to justify a position contrary to established precedents. For example, while jurists traditionally trusted oral testimony over written documents given the ease of forging the latter, a prominent scholar from the city of Damascus, Ibn ^{c}Abidin (d. 1836), ruled that, given the local custom of using documents to keep track of loans among merchants, one must accept such documents lest the entire system of credit among these merchants collapse.[5] Indeed, at times, Muslim scholars even sought to credit early authorities with their contemporary positions.[6] The crucial point in all of this, however, is that up to 1800, the Shari^{c}a was neither a legal code nor cast in stone. Instead, it was a legal system that emphasized precedent not merely as a way of honoring the past but as a means of establishing some level of legal predictability in the present.[7]

The most infamous feature of this pre-modern Islamic legal system is undoubtedly penal law, known as *hudud*. Of particular concern were cases of adultery, illicit sexual relations, apostasy, consumption of intoxicating beverages, rebellion against a legitimate Caliph, robbery, and theft. And, indeed, to our modern ears, certain features of this system sound draconian: one could be killed for apostasy, stoned to death for adultery, or face the amputation of a hand for theft. What is important to understand about these punishments is that they were held to a high evidentiary standard: one needed four credible witnesses to convict. Accordingly, as a matter of practice, *hudud* punishments were rarely enforced.[8]

A Change to the Shari^{c}a

When and how did Shari^{c}a become a *code* of law? This story begins not with an immutable Islamic model transmitted by the Prophet Muhammad, but rather, with colonial intervention in the Middle East in the 19th and early 20th century. It should hardly be surprising that Islam emerged as a rallying call in this context: in the face of colonial

occupiers hailing from Christian-majority countries such as Britain and France, religious identity offered a clear means of distinguishing the native population from foreign occupiers.[9] With the onset of colonial rule, British and French officials made a momentous decision to implement foreign legal codes while limiting religious law to questions of personal status such as marriage and divorce. While Islamists today recall this moment as decisive because it *limited* the role of Shariᶜa, just as important is the shift that they do not mention: that it codified the Shariᶜa. In the place of the relative flexibility and accommodation to local diversity exercised by judges who were tied to local communities, state-appointed graduates of modern law schools, with little knowledge of over a millennium of Islamic legal scholarship, now interpreted a code of Islamic law.[10] Crucially, however, legal codes were not solely a colonial imposition: in the late 19th century, the Ottoman Empire introduced a legal code, based on the dominant Sunni legal school in that area (Hanafism) in an attempt to formalize and define a civil legal code throughout the empire. [11]

As Middle Eastern states gained independence over the first half of the 20th century, new secularist elites, like colonial officials, restricted the Shariᶜa to family law. Notwithstanding their opposition to colonial rule, they were no more interested than their colonial predecessors in empowering Muslim scholars to interpret the Shariᶜa. Instead, these new elites wanted to reshape the legal system to their own liking and in terms that they understood. Looking abroad, they saw the combination of military, political, and economic power that had enabled colonial rulers to take control of their countries, and sought to use law as a tool to expand the reach of their newly independent states. The appeal of a powerfully interventionist state would only grow as the United States and Soviet Union vied for Cold War supremacy.

In the shadow of a codified family law, powerful post-colonial states, and Cold War ideological contestation, Islamists began to argue that Shariᶜa was central to state power. ᶜAbd al-Qadir ᶜAwda, a leading member of the Egyptian Muslim Brotherhood executed in 1954, vaulted the implementation of Shariᶜa as a comprehensive legal code to prominence when he argued in a 1951 book, entitled *Islam and Our Legal Circumstances,* that Muslims had to not merely ignore, but actively challenge, laws that contravened the Shariᶜa.[12] Sayyid Qutb (d. 1966), a leading Muslim Brother jailed and eventually hanged by the ᶜAbd al-Nasir regime, would take this idea in a radical direction, arguing that the vast majority of Egyptian society was not Muslim, and thus incapable of even attempting to apply Islamic law.[13] More broadly, by the 1960s and 1970s, Islamist movements regionally had all begun to call for the application of the Shariᶜa.[14] These calls for Shariᶜa were not, however, calls for the application of specific *Fiqh* traditions; instead, they were calls to return to Islam's foundational sources, the Quran and Sunna, alongside limited engagement with the *Fiqh* traditions produced and preserved by the legal schools.

Shariᶜa in the Present Day

Over the past four decades, these calls to apply Shariᶜa have become increasing popular. Indeed, a 2013 Pew survey found that 91% of Iraqis, 89% of Palestinians, 83% of Moroccans, 74% of Egyptians, and 71% of Jordanians support "making Sharia the law of the land."[15] The prominence of this idea among Islamists and its popularity throughout the Middle East, however, should not lead us to take their basic claims—that Islamic law represents a comprehensive system covering all functions of the modern state—at face value. Instead, when Islamists reach power, they do not carry with them a comprehensive plan for replacing "secular" legislation with the Shariᶜa. Instead, they offer broad principles of governance, promising to review all existing legislation to determine whether or not it is compatible with the Shariᶜa.[16] Far from a set system, the Shariᶜa as Islamists understand it is a set of principles that have yet to be applied in systematic fashion.

Frank Gaffney's primary target, however, is not Islamist organizations throughout the Middle East, but Muslims in the United States. A community whose roots go back to early migration between 1875 and 1912 from Greater Syria (an area that included what is now Syria, Lebanon, Jordan, Israel, and Palestine), Muslim American ranks grew following World War I following the fall of the Ottoman Empire. Between 1947 and 1960, Muslims increasingly arrived not only from the Middle East, but also from Eastern Europe, South Asia, and the Soviet Union. The past 40 years, in turn, have seen, once again, substantial immigration from the Middle East.[17]

The American Muslim community is, as a 2007 Pew survey puts it, “Middle Class and Mostly Mainstream.” In this vein, American Muslims have, by and large, sought to live according to their religious obligations through a set of daily practices that bear little resemblance to the specter of “Creeping Shariᶜazation.” Whether by securing permits to build mosques, observing dietary laws through Halal butcheries and restaurants, or buying shares in Islamic finance companies that allow them to purchase homes or pay for higher education while avoiding interest-bearing loans, American Muslims today work within the American legal system and live devout lives. And like members of so many other religious and ethnic minorities, Muslims have set up a number of political advocacy organizations. There is no evidence, however, that American Muslim organizations have ever attempted to replace the American constitution with an Islamic legal code.

Yet, over the past decade, at times under the cover of “foreign law bans,” states including Oklahoma, Kansas, Louisiana, Tennessee, and Arizona, have sought to defend themselves against the alleged threat posed by the Shariᶜa.[18] Beyond questions of anti-Muslim sentiment, it must be noted that none of these states has significant Muslim populations. Instead, the animus against Shariᶜa is based on the notion that Islam, rather than constituting a religion, represents an “ideology” that, like communism, seeks to threaten American values and institutions.[19]

These accusations, however, aren’t borne out by reality. Instead, as the opening story of gender-segregated swimming in Brooklyn suggests, varied American religious communities seek accommodation within the bounds of the legal system and in their own neighborhoods to live life according to divine dictates. Far from representing a silent threat to an American way of life, American Muslims are quite simply, unremarkable members of a diverse American religious scene.

To learn more about Islam and Islamism, please read ***FPRI on Islam, Islamism, and Beyond****.*

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[1] “Understanding the Shariah Threat Doctrine,” *Center for Security Policy*, accessed 22 March 2017, available at: http://www.centerforsecuritypolicy.org/category/shariah/understanding-shariah-threat-doctrine/

[2] Bernard G. Weiss, *The Spirit of Islamic Law* (London: The University of Georgia Press, 2006), 18-19.

[3] Jonathan P. Berkey, *The Formation of Islam: Religion and Society in the Near East, 600-1800* (New York: Cambridge University Press, 2003), 114-15.

[4] Weiss, *The Spirit of Islamic Law*, 120.

[5] Haim Gerber, *Islamic Law and Culture*, *1600-1840* (London: Brill, 1999), 108-09.

[6] Gerber, *Islamic Law and Culture*, *1600-1840*, 111.

[7] Weiss, *The Spirit of Islamic Law*, 9-10.

[8] Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge, UK: Cambridge University Press, 2005), 6-30.

[9] Juan Cole, *Napoleon’s Egypt: Invading the Middle East* (New York: Palgrave Macmillan, 2007), 198-202.

[10] Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton, NJ: Princeton University Press, 2002), 16-37.

[11] Brinkley Messick: *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkley, CA: University of California Press, 1992), 54-8.

[12] ᶜAbd al-Qadir ᶜAwda, *al-Islam wa-Awdaᶜuna al-Qanuniyya* (Cairo: N.P., 1951), 154.

[13] Sayyid Qutb, *Maʿlim fi al-Tariq* (Cairo: Dar al-Shuruq, 1979), 55-77.

[14] Nathan Brown, “Sharia and State in the Modern Middle East,” *International Journal of Middle East Studies*, 29:3 (1997), 359-76, cit. 371.

[15] “The World’s Muslims: Religion, Politics and Society,” *Pew Research Center*, 30 April 2013. Accessed 22 March 2017, available at: http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-beliefs-about-sharia/

[16] Bruce Rutherford, *Egypt After Mubarak: Liberalism, Islam and Democracy in the Arab World* (Princeton, NJ: Princeton University Press), 106.

[17] Jane I. Smith, *Islam in America* (New York: Columbia University Press, 1999), 51-4.

[18] For example, see Jacob Gershman, “Oklahoma Ban on Sharia law Unconstitutional, US Judge Rules,” *Wall Street Journal* 16 August 2013, accessed 22 March 2017, available at http://blogs.wsj.com/law/2013/08/16/oklahoma-ban-on-sharia-law-unconstitutional-us-judge-rules/

[19] John Hayward, “Frank Gaffney: ‘We Have a Fifth Column, Sharia-Adherent Part of Muslim Community,’” *Breitbart News*, 29 June 2016. Accessed 22 March 2017, available at http://www.breitbart.com/radio/2016/06/29/frank-gaffney-we-have-a-fifth-column-sharia-adherent-part-of-muslim-community/.