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Lecture critique

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Sharia courts have been a hot button issue for Muslims and the political right in Euro-America for decades. It is a topic that tests the limits of multiculturalism and women's rights in liberal democracies.

With the arrival of millions of immigrants in following World War II, countries in Europe and North America were called upon to accommodate Muslims' legal practices. Some Muslims believe that the legal systems of their new societies have not provided them with their cultural needs to regulate their family affairs in accordance with their religious values. The calls for multicultural accommodation in family law matters have been faced with fierce opposition from the political right, making the issue a contentious topic that has been weaponized during the debate over migration, identity and liberal democratic values.

Unofficial socio-legal orders originating in Islamic law exist in several European countries, but what makes Anna Marotta's study particularly important is that she covers the UK which arguably has the highest level of systematization of sharia in family law in the West.

The empirical research for this book was carried out during several stays in England and consisted of interviews with some of the main actors of the conflict, meetings with academic experts, and a spatial analysis of areas where Muslim populations reside (p. 16).

Before I address the book's main themes, a word about its structure is in order. In the first chapter, the author presents an overview of sharia to the uninitiated. She illustrates the indeterminacy of Islamic law and argues that some aspects of it are compatible with human rights while others are not (p. 4). Despite incompatibilities between Western human rights discourses and Islamic family law, many Muslims in Britain and other European jurisdictions do not take their disputes to national courts. They prefer to resolve their family disputes amicably in accordance with Islamic law (p. 5).

The second chapter focuses on sharia courts and their institutionalization in England, while the third chapter analyses five court cases to explore the interactions between courts of law and the providers of Islamic justice. The fourth chapter focuses on the geopolitical conflict prompted by sharia courts. This chapter illustrates the ways in which the speech delivered by the Archbishop of Canterbury, Rowan Williams, in February 2008 gave rise to a heated debate in English politics.

In what follows, I will focus on the book's main themes, which are as listed below:

- Is Sharia divine or man-made Law?
- The role of "minority jurisprudence" among Western Muslims
- Stricter Interpretations of Islamic Law
- Sharia courts and women's rights

Is sharia divine or man-made?

According to Marotta, her study is comparative. She compares Islamic law to the Western legal tradition which includes the common law and civil law systems. The Western legal tradition is marked by the principle of the rule of law, according to which all persons, institutions, and entities are accountable to laws which are equally enforced and independently adjudicated. These laws are deemed to be consistent with international human rights standards, while in Islamic law, human law is subordinate to divine revelation and therefore it does not treat human rights discourses as points of reference (p. 10-11).

“In Islamic tradition, on the contrary, the relationship between law and religion results in the subordination of human law to the principles of the divine revelation which is recognized as *sharia*. Although social organisation is governed by law, religious rules formally prevail. Positive law is to come to terms with *sharia*, but there is a wide room for interpretation by legal scholars” (p. 11).

I would argue that while the above view of Islamic law as being divine in its substantive rules has prevailed in Islamic legal historiography for centuries, some contemporary Islamic legal historians have recently argued that despite the claim of the divine origins of Islamic law, much of its substantive rules are based on human endeavors that were subsequently given a divine garb.[1] Conceding the divine origins of most of Islamic law to conservatives forecloses any possibility of reimagining much of the legacy of interpretation that created Islamic law.

This is not to say that Islamic law does not have rules that are based on clear verses of the Qur’an or accepted Prophetic traditions, but rather to propose that these rules represent the minority of Islamic law. Even a radical medieval Salafi jurist such as Ibn Qayyim al-Jawziyya (d. 1351) claimed that many of the rules of custody, for instance, are not based on the divine sources at all, and therefore Islamic jurisprudence of child law could be radically overhauled.[2]

Much of the recent secondary literature of Islamic law suggests that the causes of legal pluralism include personal reasoning and regional legal traditions. To some scholars, the phenomenon of fabrication of Prophetic reports, which is confirmed by both traditional and secondary sources, was nothing more than an attempt to endow personal interpretations of the law or regional legal traditions with an air of divinity and legitimacy.[3] I believe that discussing the divine roots of Islamic law in the context of the sharia courts would have been an effective way to challenge conservative interpretations of Islamic law.

The role of “minority jurisprudence” among Western Muslims

As the author points out, one of the main functions of Islamic Alternative Dispute Resolution (ADR) known as sharia courts is to help women obtain religious divorces to be able to remarry according to their faith because civil divorces are not recognized by Islamic law. The interviewees focus on the responsibility of English courts to accommodate sharia courts. No reference is made to reform. The reader might wonder why there are no attempts on the part of sharia councils to develop a minority jurisprudence (*Fiqh al-Aqalliyat*[4]) whereby divorces issued by English courts are recognized by Muslim authorities?

Accepting English civil divorces as valid Islamic divorces would dismantle the entire system of Islamic law and its patriarchal underpinnings. To say that a woman can get a no-fault divorce that does not correspond to Islamic *khul*’ is to strip men of their patriarchal power where according to traditional premodern Islamic law, only the man has the power to dissolve marriage unless there is clear evidence of harm to the wife. In 2000, when Egypt allowed a wife to seek a no-fault divorce despite the husband’s will, there was a huge backlash from conservative religious scholars who argued that the legislation was incompatible with the four Sunni schools of jurisprudence.[5]

It is telling that the sharia courts are dubbed, most clearly in a derogatory manner, by some members of the Muslim community as ‘*khul councils*’, because they are mainly helpful for women who want to obtain a religious marriage dissolution (p. 109).

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The author presents English society and those who support a euro-centric view of human rights as the source of the problem. They bear most of the responsibility for politicizing this issue, while the Muslim religious establishment does not bear any responsibility for their lack of interest in reforming patriarchal structures that have more to do with the historical formation of Islamic law than any rarified Islamic quality.

Stricter Interpretations of Islamic Law

Marotta rightly argues that there is agreement among modern scholars about the diversity of sharia and the fact that it is not a code (p. 22). The lack of a sharia code and the prevalence of divergent interpretations (*ikhtilâf*) on many substantive legal issues points to an important characteristic of sharia: indeterminacy. The danger of this reality of Islamic law is that it can be manipulated in many directions, towards stricter application or more lenient. It also fails to meet an important characteristic of Western legal systems, that is, predictability.

Aware of this fundamental critique of sharia, the UK Board of Sharia Councils was created in 2014 to bring about consistency among Islamic ADR institutions in England. According to its director Dr Dubayan, "it was very important that the Sharia Council's spoke with unification on all matters relating to Sharia Issues within the United Kingdom" (p. 119).

The author reveals the complexity of the issue by saying that while a literalist interpretation of Islamic law produces laws that are incompatible with English law, there are instances in which sharia was flexibly interpreted in accordance with different times and places (p. 4).

The danger of this indeterminacy is that weaker constituencies in Muslim societies end up bearing the brunt of stricter interpretation. This is an issue that supports the view of some of the critics of sharia courts. It is part of the reason that faith-based arbitration councils were banned in the Canadian province of Ontario.[6]

Another important point made by the author is that the laws applied by sharia courts tend to be more conservative than those applied in Muslim countries. She juxtaposes this phenomenon towards more strict interpretations with *minority jurisprudence*, which is often associated with more progressive approaches to Islamic law. One could argue that the progressive minority jurisprudence approach is virtually limited to the halls of academia, whereas the actual lived experiences of Western Muslims, at least in Marotta's study, are represented by a much more conservative approach to law. This approach is hailed by its proponents as more 'Islamic' than the more progressive approaches of both Muslim-majority countries.

According to Mrs Hasan, one of the interviewees, there are two reasons for this state of affairs: the lack of training in England for some scholars working within Islamic ADR structures, and the fear of losing their identity (p. 112). This empirical insight provided by the author challenges the notion of minority jurisprudence, which was promoted by its proponents as the way forward for Islamic law. The main premise is that Muslim minorities in the West live in democratic systems. They are, therefore, able to go further in reforming Islamic law than Muslims in non-democratic Muslim-majority countries.

Shaykh Siddiqi, by contrast, explained this conservatism as the result of the fact that sharia courts in the UK are uncorrupt, unlike Muslim countries. He suggested that the less conservative interpretations of Muslim-majority states are the result of the corruption of their regimes. The notion that governments in Muslim-majority countries only choose more broad interpretations of Islamic law to accommodate western human rights discourses due to their dishonesty is a common

trope among conservatives. Only Muslims in the Diaspora, according to this view, implement the right sharia, since their Muslim-majority counterparts have no freedom to do so.

Shaykh Sidiqi's view is rather shocking and should be cause for concern for the Muslim community. Why are they more conservative than Muslim-majority countries? What is their legal methodology? Is it salafi? In other words, do they reject the four Sunni schools or abide by a strict Hanbali/Wahhabi approach to law? According to the website of the Sharee Council Dewsbury, decisions are made in accordance with the Qur'an, the Sunna and English law (p. 113). In other words, the council members exercise *ijtihad*, rather than follow (*taqlid*) the four Sunni schools of jurisprudence.

While the Sharee Council Dewsbury follows a seemingly salafi approach, since decisions are made "in accordance with the Qur'an, the sunna and English law" (p. 113), the Fiqh Council of Birmingham follows the Hanafi school of jurisprudence (p. 115). The Sharia Council Midlands claims to base its decisions on the Qur'an and the Sunnah (p. 114).

Marotta argues that despite differences in doctrines, procedures, and gender dynamics, all the ADR institutions that she examined contain a "growing number of marginal Islamic structures which encourage the entry of extremists in this field, with the media riding on the wave of links between Islamic ADR institutions and radical Islamists" (p. 119).

Sharia courts and women's rights

A question that is raised throughout the book, albeit often indirectly, is whether Sharia courts are good for women. The author points to some problems that put women's rights at risk. She cites Bano's *Women and Shari'ah Councils* where the latter argues that scholars did not address female applicants directly but rather through male family members (p. 118).

Marotta discusses a controversial newspaper article published in the *Independent* in 2015 about a Dutch doctoral dissertation on sharia courts. The study was carried out by Machteld Zee, a Dutch legal scholar, under the title, *Choosing Sharia? Multiculturalism, Islamic Fundamentalism, and British Sharia Councils.* The article claimed sharia courts in Britain condemn women to 'marital captivity' and fail to report domestic violence. The *Independent* later affirmed that a parallel British legal system is in operation (p. 205-6).

In her study, Zee explores two confronting ideologies in Europe: multiculturalism and Islamic fundamentalism. She addresses how *sharia councils* represent a threat to liberal democratic values, especially women's rights. Through her research, she found a tendency in sharia councils to condone domestic violence and decide child custody cases in contradiction to English law. Zee criticizes suggestions made by the Archbishop Williams and Lord Phillips allowing Muslims to choose the relevant jurisdiction to solve certain disputes. According to the researcher, they have a "romanticised" view of communal values (p. 205-6).

Archbishop Rowan Williams had called in 2008 for 'transformative accommodation' of Muslims in aspects of marital law, regulation of financial transactions, and mediation and conflict resolution. He placed emphasis on the plurality of interpretation by sharia itself (p. 163-4). What is striking about Williams' argument is its implicit equation of plurality with progressiveness or liberalism. The same undertones can be detected in a pamphlet issued by the Islamic Sharia Council (ISC) and penned by Mrs Khola Hasan in response to an anti-sharia bill. "Sharia Law is not a static, monolithic, outdated or oppressive system". It is "an innately pluralistic philosophy that, during its fabulous 1200-year history, adapted to continuously meet the needs of its diverse and changing international community" (p. 186).

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Sharia's pluralism does not equal progressiveness. Indeed, it has been manipulated in so many directions, including progressive and fundamentalist. Criticisms of the way sharia is applied in the UK include handling inheritance disputes by giving sons twice as much as daughters in line with the letter of premodern sharia and condoning certain levels of domestic violence. To this charge, Mrs Hasan stated, "Domestic violence was defined as a crime under Islamic law as much as it is under English law" (p. 188).

One cannot help but think that Mrs Hasan's statement is disingenuous. In premodern Islamic law, a man has a 'right' to 'discipline' the wife, though there are limits to this right. It cannot be exercised without justification, and it should not lead to clear bodily harm. I am surprised the author did not challenge this claim by Hasan. Needless to say, Islamic law is not monolithic and therefore this premodern interpretation could be challenged by contemporary Muslims, for example, through *minority jurisprudence*, a dirty word in some sharia council circles.

The answer is not to deny the existence of this dominant jurisprudence in Islamic law as Mrs Hasan did. She goes further by making a bold claim that "the Quran does not permit violence against women for any reason by their husbands" (p. 214). Students of Islamic law, whether traditionally or Western trained, agree that virtually all Muslim jurists past and present understand verse 4:34 as permitting limited forms of violence when necessary. The verse reads:

> Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially. And righteous women are devoutly obedient and, when alone, protective of what Allah has entrusted them with. And if you sense ill-conduct from your women, advise them first, if they persist, do not share their beds, but if they still persist, then discipline them [gently]. But if they change their ways, do not be unjust to them. Surely Allah is Most High, All-Great.

The part interpreted as "discipline them gently" according to the translation of Quran.com, is literally "beat them". This verse, despite prophetic traditions urging men not to hit their wives, has given rise to the dominant law in premodern Islamic law. Here I would like to agree with Mrs Hasan that Islamic law is not monolithic or static. This law could and should change, especially in putting the emphasis on the "historical circumstances" (*asbâb al-nuzûl*) surrounding the revelation, as well as the "higher intents and purposes of Islamic Law" (*mâqsid al-shariah*). But this should take place with full awareness that it is part of the legacy of Islamic law. This awareness will help us understand that conservative voices in our midst support this position and that not all critiques of Islamic law are to be rejected out of hand as Islamophobic[7].

Unfortunately, based on the evidence of the book, it is clear that many conservative interpretations are maintained. Take, for instance, the case of the undercover reporter who in 2013 told the scholar Dr Suhaib Hasan that she had been beaten by her husband and asked him what to do. Dr Hasan, told her: "Police, that is the very, very last resort, if he becomes so aggressive, starts hitting you, punching you, of course you have to report it to the police that is not allowed". He encouraged the victim to ask her husband if she had provoked his reaction because of her cooking, for instance (p. 190).

This approach is not restricted to Dr Suhaib. It is based on the aforementioned premodern interpretation that the man has a 'right' to discipline his recalcitrant wife with two restrictions. The first is that his disciplining is justified by the wife's "rebellious behaviour" (*nushûz*) and that the hitting should not leave any physical marks.

On the 4th of May 2014, *The Sun* published an investigation into the leading members of the ISC and consisted of data collected from the Internet, including videos and statements made by leading members of the ISC. These statements revealed extreme views about gender equality, domestic violence and non-Muslims (p. 198). According to *The Sun*, Dr Haitham Al-Haddad argued that men

who beat their wives should not be challenged, and encouraged victims of domestic abuse not to call the police. He also considered gender equality ‘a very evil thing’; and called democracy ‘filthy’ (p. 198).

Despite all the real challenges to women’s rights raised by the media, the author states, “The behaviour of the media seems to confirm the existence of a strategy that takes every opportunity to spread and strengthen a negative image of the ISC.” (p. 200). She adds, “The existence – at least at certain moments – of a conservative vision (which is attributable to some scholars) within the ISC, cannot be denied… Likewise, on the other hand, it is undeniable that a part of British society is committed to prove, by any means, that the functioning of bodies such as the ISC is a danger to women’s rights.” (p. 191)

The author concludes, “Even if some media reports may be true, negative episodes attributable to either one or more *sharia courts* (or only to some of their members) should not lead to the conclusion that *sharia courts* necessarily act against the law of the land, as a certain propaganda would like the public at large to believe” (p. 234). The author does not seem to have fully accepted some media critiques of sharia as valid. Although it is clear that there is a polemical element to the media coverage of sharia councils, each critique should be viewed on its own merit without attributing motivation.

This is not to say that Muslims in the UK cannot adjudicate their family disputes according to sharia, but rather that this multiculturalist imperative should be balanced with women’s rights and the UK’s international treaty obligations, such as The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Islamic law is not doomed to be incompatible with British values, but the existence of some areas of incompatibility must be acknowledged, confronted and debated, if the goal is to create an Islamic legal system that is good for all Muslims. Blaming the media, rather than conservatives within sharia councils, sends the wrong signal to moderate Muslims, many of whom are critical of the way in which Islamic law had been hijacked by conservatives who are committed to 1400 years of the hermeneutical endeavors of men.

To conclude, the author’s work should be lauded for uncovering this complex topic and showing some facets of it that will be pondered by students of Islamic law and human rights for years to come. I believe that some of the media critiques of sharia councils should be assessed on their own merits rather than rejected out of hand as polemical discourse created by the political right. These critiques of the media suggest that there is so much at risk and that it is the responsibility of both sides of the debate to create a system that serves the needs of all Muslims equally.

Whether the reader agrees with the author’s take on where the problem lies and what course of action should be taken to address this debate, the book will offer them food for thought. Students of law and social sciences will benefit from both the interviews conducted by the author and her coverage of the media debate. The book also has much to offer British policy makers who wish to understand the religious foundations that give rise to sharia courts.

Biographic Note

Harith Al-Dabbagh est professeur de droit comparé à l’Université de Montréal. Ses travaux les plus récents s’intéressent aux phénomènes liés au pluralisme juridique, notamment à l’interaction entre le droit et la religion en Occident et en terre d’Islam. Il est détenteur d’un LL.B. en Irak, d’une maîtrise et d’un doctorat en droit en France. Il fut auparavant avocat, maître-assistant à l’Université de Mossoul (Irak) et enseignant-chercheur à l’Université de Saint-Étienne (France). Site Web et publications : (https://aldabbagh.openum.ca/)

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Notes

[1] See for instance: David R. Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law* (New Haven: American Oriental Society, 2011), 1-14; Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 1-33; Sherman A. Jackson, "Fiction and Formalism: Toward a Functional Analysis of Uṣūl al-Fiqh," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 177-201.

[2] Al-Jawziyya, *I'lam Al-Muwaqqi'in 'an Rabb Al-'Alamin*, (Dammam: Dar Ibn Aljawzi Publishing, 2002), 6:482-484; 5:253-256.

[3] See for example Ahmed Fekry Ibrahim, "Legal Pluralism in Sunni Islamic Law: The Causes and Functions of Juristic Disagreement," in *Routledge Handbook of Islamic Law*, eds. Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan (London: Routledge, 2019), 208-218.

[4] *Fiqh al-aqalliyyat* is a legal doctrine introduced in the 1990s by Taha Jabir Al-Alwani and Yusuf Al-Qaradawi on the premise that Muslim minorities living in non-Muslim-majority countries have unique needs compared to Muslims residing in Islamic countries. The goal of this new jurisprudence is to assist Muslim minorities, especially in the West, find solutions to their unique circumstances in non-Muslim societies. For more information, read, for instance, Susanne Olsson, *Minority Jurisprudence in Islam*: *Muslim Communities in the West* (London: I.B. Tauris, 2016), 295 p.

[5] Harith Al-Dabbagh, "Lever le voile sur la Charia : L'interprétation judiciaire de la référence constitutionnelle", in *Itinéraires du droit et terres des hommes*. *Mélanges en l'honneur de Jean-Marie Breton*, ed. Alioune Badara Fall (Paris: Mare & Martin, 2017), 83-105.

[6] In 1991, the Canadian province passed the Arbitration Act, which allowed for legal arbitration outside of Ontarian family law. Some Christian and Jewish groups conducted religious arbitration under this law, raising no eyebrows. The controversy only started when an Islamic group declared in 2003 its plan to set up sharia arbitration, causing a heated public debate with public opinion being firmly against sharia arbitration. In 2006, the province of Ontario banned all faith-based arbitrations. Maryam Razavy, "Canadian Responses to Islamic Law: The Faith-based Arbitration Debates", *Religious Studies and Theology* 32, n°1 (2013): 101-117.

[7] For a discussion of the 'hitting verse', see: Amina Wadud, *Inside the Gender Jihad : Women's reform in Islam* (Oxford: Oneworld, 2006); Manuela Marin, "Disciplining Wives: A Historical Reading of Qur'ân 4:34" *Studia Islamica,* n° 97 (2003): 5-40.