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## Communal Autonomy and the Application of Islamic Law

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Europe

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Islamic organizations, claiming to represent the interests of the 8 to 9 million-strong Muslim immigrant communities in Western Europe, have been asserting a human rights claim to communal autonomy to apply Islamic law, the *shari'a*, to their family or personal matters. Always included among the latter are marriage, divorce and inheritance.

► **Elderly Muslim woman walking past police officers as she attends the Friday Prayers at London Central Mosque.**

In 1975, Sheikh Syed Darsh, the head cleric of the Regent's Park Mosque in London, said:

*When a Muslim is prevented from obeying this law he feels that he is failing to fulfil a religious duty. He will not feel at peace with the conscience or the environment in which he lives and this will lead to disenchantment. [...] They [that is Muslims] believe that the British society, with its rich experience of different cultures and ways of life, especially the Islamic way of life which they used to see in India, Malaysia, Nigeria and so many other nations of Islamic orientation, together with their respect for personal and communal freedom, will enable the Muslim migrants to realize their entity within the freedom of British society. When we request the host society to recognize our point of view we are appealing to a tradition of justice and equity well established in this country. The scope of the family law is not wide and does not contradict, in essence, the law here in this country. Both aim at the fulfilment of justice and happiness of the members of the family. Still, there are certain Islamic points which, with understanding and the spirit of accommodation, would not go so far as to create difficulties in the judiciary system. After all, we are asking for their application among themselves, the Muslim community, as our Christian brothers in Islamic countries are following in the family traditions and the Christian point of view. The Qur'an itself has given them this right. (Quoted in Nielsen 1993: 1–2)*

Contrary to the assertion of the learned cleric, it will be argued below that such autonomy would create serious legal, philosophical-theoretical and political problems related to current Western notions of justice and equity.

#### Family matters

The recognized schools of Islamic jurisprudence (*fiqh*) regard marriage as a central institution of Muslim society. In legal terms marriage is not a sacred bond but a civil contract between two free individuals. However, the consent of the guardian to a marriage is considered necessary by some jurists, while others do not consider it obligatory for an adult female. A girl may not be coerced into marrying someone of whom she does not approve, but since traditional law does not prescribe an age limit, even very young individuals can be married. In such a case, it devolves upon the guardian (normally the parents) to decide the terms of the contract.

A Muslim male may have simultaneously up to four wives. Such a right is not subject to any limitations. A man can dissolve marriage by pronouncing his intention to do so three times. There are different ways of doing it, but in principle a man can secure divorce at will even when he is advised to seek reconciliation (Amin 1989: 77). Women can apply for divorce under exceptional circumstances. Allegations of cruelty, insanity and impotence are strong cases for de-

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manding divorce. However, it does not mean that a woman can secure divorce at will. Normally she has to be ready to pay an agreed sum of money to the husband who must agree to her proposal (Doi 1984: 192–7). The *shari'a* does not allow Muslims to marry polytheists or atheists. However, a Muslim male may marry a woman from among the people of the book, that is, Jews, Christians and a now extinct sect, the Sabians. Twelver Shi'ism allows marriage to a Zoroastrian female. On the other hand, a Muslim woman cannot marry a non-Muslim.

As regards inheritance, both male and female dependents and close relatives are given a share in the property of the deceased. Besides the shares of different wives, the distribution among the children of a deceased father follows the principle that the female children inherit one-half of the share of male children. Further, while Muslim wives are entitled to a share, non-Muslim wives are not. However, through a will or testament the husband can gift some property to his non-Muslim wife. Property of a Muslim may not be inherited by non-Muslim children or parents. The property of an apostate cannot be inherited nor can the property of a Muslim be passed on to an apostate (Ibid.: 289–91). As regards children born out of wedlock, according to the Hanafi School (the biggest and considered the most liberal) the illicit child cannot inherit from the father but may inherit from the mother's side. Moreover, children of a deceased son are excluded from inheriting the property from the grandfather. Instead the share is distributed among the siblings of the deceased son. Finally, although Muslims are encouraged to take care of orphans, there is no right to adopt a child. Thus an adopted child cannot inherit property of the adoptive parents (Amin 1989: 81–82). On the other hand, a part of the property can be left to such a child through a testament.

It is quite clear that the *shari'a* laws pertaining to family matters differ radically from the European systems. For example, only the monogamous form of marriage is legally recognized in Europe. Any restrictions on marriage between a Muslim and a non-Muslim cannot be condoned by a Euro-

pean legal system because the Western states have ratified the International Convention on the Elimination of all Forms of Discrimination against Women (1979) which envisages equality between the sexes on all matters. Article 16 unequivocally places women on a par with men in matters of marriage and allows them freely to choose a spouse. Similarly divorce, the rights of the child (born within or outside of wedlock), inheritance and adoption are matters on which traditional discriminatory practices have been eliminated.

Moreover, serious procedural questions arise with regard to the practical application of the *shari'a*. Who would be competent to interpret and enforce Muslim family law? Can non-Muslim judges be competent enough to consider cases involving Islamic law or should the state set up separate courts with Muslim judges to try cases involving disputes over family matters? Even more intractable would be problems stemming from mixed marriages. Additionally, there is a distinct possibility that some Muslims may prefer to seek redress from the mainstream legal system or, worse still, the conflicting parties may appeal to the two different legal systems. Who should decide which court is appropriate for a Muslim?

#### Communal authority

In a theoretical and philosophical sense, the demand for communal autonomy poses serious challenges to current understandings of multiculturalism and pluralism. *Shari'a* rulings on family matters are underpinned by ontological and epistemological values which identify community and revelation as superior to the individual and reason. In sharp contrast, Western European legal systems have been reformed in the light of the Enlightenment values of rationality and secular humanism. The human rights of individuals are a centrepiece of such reformed law. How these diametrically opposite approaches can be reconciled into a coherent system of law is a matter on which more serious work needs to be done. In political terms, it is quite clear that any concession to Muslim separatism under the garb of communal autonomy will provoke a

reaction deriving from xenophobia, in general, and Islamophobia, in particular.

It is worth noting that even among Muslim states there is no agreement on how to apply the *shari'a*, including its rulings on family matters. Saudi Arabia and Iran apply the *shari'a* in a complete sense. Mauritania, Libya and Egypt in principle but not consistently in practice base their legal praxis on the *shari'a*. The United Arab Emirates, Oman and Pakistan recognize the *shari'a* as the supreme law of the land, but deviate from it in practice. Twenty countries retain *shari'a* courts for personal law, while fourteen make reference to it in personal law codifications. Nine countries have abolished all reference to the *shari'a*. These include Eritrea, Senegal, Turkey, and the former Soviet republics having a Muslim majority, including Kazakhstan, Uzbekistan, Kyrgyzstan, Turkmenistan, Tajikistan and Azerbaijan.

It must be remembered that current human rights were won by deprived and disenfranchised people through long-drawn mass struggles. The French Revolution converted obligation-bound subjects of the monarchy into rights-bearing citizens of a republic. Initially it was propertied men from the majority communities who could enjoy the rights of citizenship. Poor men, religious and ethnic minorities and women were extended such rights much later: universal citizenship is a post-World War II phenomenon. It would be ironic and tragic if in the name of communal autonomy claimed by conservative Islamic organizations, Muslim men and women were deprived rights that other citizens or permanent residents of Western societies enjoy. The Western European states have shown understanding of and sympathy towards demands for permission to build mosques and maintain special graveyards. Such matters are truly of a personal nature. However, marriage, divorce and inheritance are matters which require justice and equity for everyone on a universal basis. Islam established impressive standards of justice and rights in the 7<sup>th</sup> century but Muslims need to catch up with developments on the world stage. It is high time to debunk dubious claims to cultural authenticity as a legitimate basis for human rights, and instead engage Muslims in a dialogue for partnership in a world order based on equal and universal rights.

#### References

- Amin, S. H. 1989. *Islamic Law and its Implications for Modern World*. Glasgow: Royston Ltd.  
Doi, Abdur Rahman I. 1984. *Shariah: The Islamic Law*. London: Ta Ha Publishers.  
Nielsen, J.S. 1993. *Emerging Claims of Muslim Populations in Matters of Family Law in Europe*. Birmingham: CSIC Papers.

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