

Inaugural Lecture

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Muslim Jurists' Quest for the Normative Basis of Shari'a

Muhammad Khalid Masud, ISIM Chair at Leiden University and Academic Director of the ISIM, delivered his inaugural lecture on 'Muslim Jurists' Quest for the Normative Basis of Shari'a' on 20 October 2000. In the lecture, he argued that the conception of the Shari'a as divine law has problematized the binding nature of law in Islam because it conceals its material bases in the social norms. It also obscures Muslim jurists' continuous efforts to maintain general acceptance of Islamic law by bringing the legal norms closer to social norms. He argued that the current debates on the Shari'a are also triggered by this conception as it ignores the inner contradictions between legal and social norms emerging in contemporary Muslim societies. The following contains a few excerpts from this lecture.



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Islamists regard the Shari'a as binding for all Muslims simply because it is divine. This conception of Islamic law is quite close to the theories of legal positivism. It is not by coincidence that those who hold this view also believe in the necessity of the Islamic state and define sovereignty in the framework of law and authority. For Sayyid Qutb, a major Islamist ideologue, the sovereignty of God is synonymous with the sovereignty of the Shari'a. The Islamists call for a reconstruction of the Shari'a, which is not founded on the traditional Fiqh, but rather on a new interpretation of the Sunna. They insist on the elimination of the artificial legal norms created during the colonial period and under the dictates of nationalism and modernity. In order to understand the modernity of the Islamist view, it must be compared with the traditionalist view of the Shari'a.

On the social level, slaves, women and non-Muslims suffered most from the inner contradictions between Shari'a ideals and social norms in Muslim cultures. The ideals of Shari'a called for freedom, equality and justice, but social stratifications in Muslim societies on the basis of status, sex and religion did not allow these ideals to be fulfilled. Under the impact of these social norms, Islamic law developed a legal structure of multiple personal status. As the then global legal culture also adhered to a similar hierarchical approach to legal rights, the contradictions remained unchallenged.

The contradictions in Shari'a law, as manifested in the differential treatment of

women, non-Muslims and slaves, became unavoidably conspicuous only in the 19th century. As one may notice from the debates on the abolition of slavery in the early 19th century in the Muslim world, the conception of Shari'a as divine did not allow reform in the Islamic laws on slavery. The problem is that when these social norms were assimilated into the Shari'a, they also came to be considered immutable or divine, due to the conception of the Shari'a as divine.

On a religious level, the Sufis, pietist Muslim mystics, were the first to point out the contradiction between legal norms and Islamic ethical values. The Sufis were critical of the jurists' literal and legalist approach to religious obligation. They suggested an emphasis on the inner meanings of the Shari'a and personal commitment as a motive for obedience to Shari'a laws, instead of punishment and coercion. They criticized jurists' reliance on worldly power. Contrary to the jurists, who lived in the world of text, the Sufis were closer to the masses and their norms. In most Muslim societies, Sufis represented a popular and liberal view of Islam.

It should be noted that although ideas of liberalism, democracy, and public reason have certainly progressed from the medieval period, they are still too absorbed in discussing the phenomenon of law making and are thus less focused on the acceptability of law and its role for the general masses. Rawls, who stresses the significance of the role of liberal and reasonable people in the

development of law, found it difficult even to include non-Europeans in this category. He had to create a new category of 'decent people' to include Muslims. Lawyers, philosophers, and Muslim jurists are not ready to include the masses in the category of reasonable people. Fred D'Agostino, the author of a 1996 Oxford publication on *Free Public Reason*, dismisses the role of the general public and proposes a 'community of interpreters as the custodians of public reason.'

The basic element in a legal system is its being accepted by the people to which it applies. For this reason, public participation in law making and law reform is inevitable. In Muslim societies today, the construction of the Shari'a is no longer an intellectual exercise conducted by specialists. In fact, an increasing proportion of the Muslim populace is already participating in this exercise. Non-*ulama*, neo-*ulama* and lay persons including women and the youth are contributing their voices to legal issues. In Muslim communities that live as minorities, new constructions of the Shari'a and Fiqh have emerged. ◆

This lecture is soon to be published by the ISIM. For more information, please contact the ISIM Secretariat.