

Critical thinking

Life, books and arts

Sharia flaws

The Taliban's return calls for an honest discussion about what Islamic law really means—and how to divorce it from coercive power

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When the Taliban recaptured power in Afghanistan in August, Islamic law, or sharia, once again made the headlines. While the Taliban has promised to be milder than it was during its harsh 1990s rule, that is not saying much—and there is every reason to fear for women, minorities and indeed anyone who disagrees with the rulers of the new “Islamic Emirate.” Across the Muslim world, too, from Malaysia to Pakistan to Nigeria, the demand for sharia galvanises Islamists and terrifies human rights defenders, while Arab autocrats often selectively use it to shore up their authority with the veneer of religious legitimacy. But what exactly is sharia, how should it be understood and can it be reformed so that freedom and human rights have a stronger foothold in the Islamic world?

Recent debates on sharia have been dominated by two starkly opposed yet similarly crude points of view. On the one side, some westerners are so alarmed about this “medieval” and “brutal” system of law that they go out of their way to ban it: a laws forbidding the use of sharia has been enacted in Kansas (where there is no demand for it) and Islamic headscarves have been banned in French schools, where religious freedom is too often curbed in the name of secularism. Like Cold War McCarthyites rooting out communism, ▶



anti-sharia activists exaggerate anxieties about a distant threat, suffocating freedom while claiming to defend it.

On the other side, some Muslims are far too defensive, claiming that sharia means nothing but harmless piety and ideal justice; some go further and say it is, in fact, the best protector of women and religious minorities. Yes, there are some bad guys like the Taliban, the argument runs, but they simply misunderstand sharia.

The truth, however, is more complicated than either the grim or the rosy picture.

First, the basics. “Sharia” is an Arabic word that literally means “the way.” In the whole Quran it appears only once: “Now We have set you [Muhammad] on a *sharia*, so follow it.” (45:18) Another similar term arises when the Quran says to Jews, Christians and Muslims: “We have assigned a *shir’atan* and a path for each of you.” (5:48) So the Muslim view is that sharia isn’t necessarily specific to Islam; it is the “way” of any Abrahamic religion.

“There was once nothing exceptional about the Islamic combination of religious law and political authority”

This Abrahamic connection is important, because the precursor to Islamic sharia is really the Jewish halakha. The latter not only has the same literal meaning—“the way”—but also similar strictures. In both sharia and halakha, believers are guided in all spheres of life: on how to pray and fast, what to eat or not (for example, no pork), how to circumcise male children and how to dress. There are also penal codes in both that dictate corporal punishments such as flogging and stoning for various religious and moral offences.

Yet there is a big historical difference between halakha and sharia. Over the last 2,000 years, Jews have lacked a religious state of their own. (Israeli law is technically secular.) Living as minorities under Islamic or Christian rule, rabbis adopted the maxim *dina d’malkhuta dina*, or “the law of the kingdom is the law,” making halakha a matter of individual practice, communal norms and, at most, rabbinical courts that manage family affairs and arbitrate civil disputes. (A similar view has been adopted among Muslims in the west as well, which should soothe the “creeping sharia” anxiety.)



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Yet most Muslims, since the birth of Islam in the seventh century, have lived under Islamic rule. From the first “caliphs,” or successors of the Prophet Muhammad, these were the imperial states that launched wars of conquest, ruled large territories in which Muslims subdued non-Muslims, and where sharia defined the legal system, including the penal code. In other words, unlike the halakha, sharia has had an unbroken relationship with power. It has remained therefore not just a way of life *practised* by faith, but also the law of the land *enforced* by power.

There was nothing exceptional about this Islamic combination of religious law and political authority: separation between the state and religion was unknown in the ancient world. During the long centuries before they lost their sovereignty, Jews had their own “theocracy”—a word coined by the first-century Jewish historian Josephus to define the ideal regime his people wanted to live under. Christianity began as a civil faith, but once it captured power—nothing less than the world superpower, Rome—it soon used it coercively.

The rise of Islamic empires based on sharia, then, was “normal.” It was also, for its time, progressive in some respects. These empires allowed a

Show me the way: above, judges attend the first Arab conference on Islamic law held in Amman, Jordan in 2007. Right, floggers at an Indonesian sharia court

Previous page: judges engaged in theological debate, an illustration of a work by the 16th-century Ottoman judge Mahmud Abd al-Baqi



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religious pluralism that Christian ones often didn't. That is because the Quran honoured Jews and Christians as "the People of the Book"—monotheists whose faith was deemed flawed but legitimate. The result was a hierarchical tolerance that fell short of equal status, but was much better than the forced conversions or persecutions of Christendom. No wonder European Jews repeatedly fled to Islamic lands, such as the Ottoman Empire, where they found a measure of safety and liberty.

Regarding women, too, one really can argue that the sharia, historically speaking, advanced their rights. The Quran, as Islamic feminists such as Asma Barlas have argued, contains some liberating messages for Muslim women, giving them rights in marriage, divorce and inheritance. And while these rights would be whittled down by later male interpreters, Muslim women could own property, for example, centuries before western women. (The Married Women's Property Act in Britain arrived only in 1870.)

Sharia also upheld a value that European liberals such as Montesquieu would much later champion: "separation of powers" or "checks and balances." Since sharia was God's law, all of His creatures, including rulers, were subject to it. The sharia's legal interpretation and judicial implementation lay in the hands of independent scholars who, at least in theory, could act as a check on caliphs and sultans. There are many examples in Islamic history of judges mitigating tyranny—by disallowing political executions, confiscation of property or over-taxation. A sharia court even sentenced

Ottoman Sultan Mehmed II, the conqueror of Constantinople, to pay compensation to a Greek architect he had abused.

Such examples as these led the American orientalist Bernard Lewis—hardly shy in criticising the Muslim world—to observe that "the medieval Islamic world offered vastly more freedom than any of its predecessors, its contemporaries and most of its successors."

Today, Muslim intellectuals reasonably evoke such historic contributions of the sharia to correct western biases against Islam. But in doing so they often overlook the other side of the coin. All the universal values we can discern in classical Islam—religious freedom, women's rights or the rule of law—have progressed further in the past two centuries outside the Islamic world: first as liberal norms in the west, then as "universal human rights." By comparison, sharia has come to seem increasingly archaic. Granting *some* rights to women or religious minorities may have been a remarkably progressive step 1,000 years ago; but depriving them of *equal* rights is now unacceptably oppressive.

That oppressive rigidity is pervasive in traditional interpretations of the sharia, whose primary objective, "the protection of religion," was often understood by medieval jurists as religious coercion.

Take the religious practice most fundamental to Islam: the five-times-a-day prayer prostrating to God. For hundreds of millions of Muslims around the world, this is an act of personal piety that they perform without compulsion. But in ▶

traditional jurisprudence, daily prayers were not just a voluntary act of faith: they were legal obligations. That is why jurists discussed “the punishment of those who give up prayer,” as Al-Mawardi (972–1058) explains in his classic *Ordinances of Government*. Accordingly, the strictest Hanbali school of jurisprudence decreed the death penalty for those who failed to comply. The Shafi’i school also ordained this penalty, but only after giving the accused a chance to repent.

The relatively lenient Hanafis settled for beating with sticks. *Nur al-Idah*, by the 11th-century Hanafi thinker Hasan Shurunbulali, described the punishment in graphic detail: “One who intentionally neglects prayer due to laziness or idleness is to be beaten harshly until blood flows from his body and is then imprisoned during which he is subject to physical pain, until he performs his prayers or dies in confinement. This ruling also applies for one who does not fast [in] Ramadan due to laziness.”

It is worth noting that *Nur al-Idah* has long been a popular text in the Deobandi madrasas of Pakistan, from which the Taliban arose as a radical offshoot. That may also help explain why, in the late 1990s, the Taliban’s ministry for “commanding right and forbidding wrong,” which has recently been revived to replace the women’s ministry, used to whip men into mosques to pray. And today, while the newly reformed ministry promises to be gentler, its guidebook still includes stipulations of “compulsory prayer.”

Many Muslims, especially those living in the west, would find such compulsion bizarre. What would be the point of praying and fasting, they might ask, if it is done under the threat of beating? Many traditional jurists, by contrast, seem to have believed that sincere prayers would follow compulsory ones.

In the same spirit, traditional texts—including the famous *Revival of the Religious Sciences* by the towering 11th-century theologian al-Ghazali—are full of injunctions about punishing drinkers and pouring away their wine. There is also licence in the text to “break musical instruments,” a practice the Taliban revived in the 1990s, and extended to TV sets and video players.

And then there are coercive rules regarding women in such texts. First, they should cover themselves from the head to the ankles—there are disagreements on whether the face veil is “compulsory” or just “recommended.” Women should “obey” their husbands on most issues, including not leaving the house without their permission. And they should not travel without a “male guardian.” Two other offences are especially serious: “apostasy,” or publicly renouncing one’s faith,



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and “blasphemy,” insulting God, the Quran or the Prophet Muhammad. The punishment for both, with some nuance in the details, is execution.

Finally, traditional Sunni jurisprudence also envisions an authoritarian political system in which the Muslim ruler—who must be male and act as the enforcer of sharia—should be “obeyed,” with little room for dissent. Democracy, according to this particular interpretation, is not an option. No wonder the Taliban’s Islamic Emirate of Afghanistan—just like the Kingdom of Saudi Arabia—doesn’t hold free elections. It just has a ruler everyone is expected to follow.

The Taliban’s rise is one bitter chapter in a wider crisis of Islamic civilisation. The broader story is the growing tension between traditional interpretations of sharia and the universalising aspirations of many modern Muslims: the right of every individual to think, speak, dress, behave and live freely, with equal rights under the law, including political participation.

Brutal implementation: the Taliban’s new ministry of “commanding right and forbidding wrong,” which replaced the Ministry of Women’s Affairs

In fairness, the problems in the Muslim world cannot all be ascribed to sharia. Owing to various trajectories of secularisation over the past two centuries, of about 50 Muslim-majority states, only around a dozen have sharia in their penal code, with Saudi Arabia and Iran among the harshest. And even in those cases, the actual implementation is typically not as brutal as under the Taliban, or the terrorist army that calls itself Islamic State, the darkest end of the spectrum.

Yet this relative secularisation is precisely why there are Islamist groups, in almost every Muslim-majority country, which think their society isn't Islamic enough and that the sharia should be somehow "brought back" to solve all society's issues. This Islamist ambition fuels a bitter intra-Muslim culture war and sometimes violent conflicts. It also gives undeserved legitimacy to "modernising" autocrats in the Middle East—like Saudi's Mohammed bin Salman or Egypt's president Abdel Fattah el-Sisi—who get an easy pass from the west as supposedly being the lesser of the two evils.

“Dark moments such as our own are precisely when religions may begin to change”

In fact, there are crucial gaps between the modern world and the pre-modern sharia. The pre-modern states under which the sharia was implemented—as a patchwork with irregular enforcement—were structurally different from today's more uniform, centralised and intrusive nation states. But Islamists couldn't care less about such nuances. For if one believes that “God's law” and it alone must be implemented, the medium of implementation is trivial. If the modern state does not match the sharia, then Islamists will aim to adjust the state—not the sharia.

All that explains why an honest, informed and open-minded discussion about sharia is long overdue, as reformists called “Islamic modernists” have been arguing since the late 19th century. And as a Muslim, the key, I believe, is to realise that the sharia interpretations we have at hand are not fully divine and eternally applicable, but partly human and deeply historical.

That means the Quran decreed amputation of hands for theft because it legislated in the context of early seventh-century Arab society, which had no prisons but only corporal punishment to deter

crime. The Prophet may really have said: “A woman should not travel alone”—the basis of all “male guardianship” laws—but his concern was the bandits in the dangerous Arabian desert. Then, during the centuries Muslims lived under caliphs, sharia was developed in a context of imperial power, constant warfare and patriarchy. Peaceful and tolerant verses of the Quran were taken to be “abrogated” by more martial ones. Muslim jurists understood “commanding right and forbidding wrong” as religious coercion, while it could also be interpreted as proclamation and admonition. It is the same context that produced the fierce penalties for apostasy and blasphemy, which have no basis in the Quran, but are suspiciously similar to the laws of the Byzantine and Sassanid empires.

Only once we historicise sharia, placing its origins and evolution in the context of its times, can we progress. And while claiming no religious authority, here is what I believe the destination should be.

All religious aspects of sharia—such as prayer and fasting, as well as dress codes and sexual mores—should not be enforced by state power, but practised by faith, like the Jewish halakha.

Meanwhile, the political, criminal and economic aspects of sharia should be understood as a historic search for justice. And since justice is a universal value, Muslims should be open to engage with all the steps humanity has taken towards advancing human rights, modern legal norms and liberal democracy, which may converge with the “higher objectives” of sharia.

The resurgence of the Taliban may suggest this is a distant dream. Even worse, many authoritative voices in Islam today are busy “detesting the present, and romanticising the past,” as a professor of Islamic thought, Ebrahim Moosa, observes. The result is a growing gap between Islamic teachings and modern aspirations. And so Islam is now depicted so that it appals and frightens outsiders, rather than inspiring and enchanting them.

Yet such dark moments are precisely when religions may begin to change. It was the horrific religious wars and persecutions of the early 17th century that compelled John Locke to write *A Letter Concerning Toleration*, and to advocate religious liberty and individual freedom under limited governments based on social contracts. Such ideas eventually helped Christianity to outgrow its long and destructive marriage with power. Islam needs the same historic divorce—and this painful century may be our time. **P**

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