Do Australian Muslims want Shari’ah Law in Australia?

Mehmet Özalp

One of the key emerging issues with respect to Australian Muslims is the apparent incompatibility of Shari’ah Law with Australia’s Western values. In recent years, news and media articles have depicted how Muslims insist on applying Shari’ah Law in Australia. Such coverage invariably implies three messages. First, Islamic law is unfair and discriminates generally against women. Second, Muslims ignore Australian legal norms, values and conventions and insist on the values of Islam, creating conflict in law. Third, media coverage takes a Western legal system as the higher authority in the resolution of any legal and ethical conflict. In the ensuing conversation, talk-back radio ‘shock-jocks’ and their listeners passionately discuss how Muslims and Islam do not fit into Australian society. It is usually at this stage that politicians enter the debate. As an example, former federal Attorney-General Robert McClelland in July 2011 said, ‘There is only one law that’s applicable in Australia – that’s Australian law based on our common law tradition,’ and if there was ever any inconsistency between cultural values and the rule of law ‘then Australian law wins out.’

Mehmet Özalp is Director of the Centre for Islamic Studies and Civilisation at Charles Sturt University, and President of the Islamic Sciences and Research Academy of Australia.
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The question is: do Muslims really want to apply Shari’ah Law in Australia? An immediate ‘yes’ will come from two opposite ends of the religious spectrum in our society. At one end, a small band of Muslims will jump at the opportunity to implement all aspects of Shari’ah Law in Australia. At the other end, a small group of Christians will insist that Muslims want to implement Shari’ah Law wherever they are, irrespective of local laws and norms. Although they are at opposite ends of the religious spectrum, these two minority groups share certain things in common. In the case of Muslims who may insist on applying full Shari’ah Law in Australia, there is an insecurity about their Muslim identity while at the same time a deep anxiety, hate and fear of Western civilisation. They usually refer to a past and to a (cultural and popular) tradition that they want to bring to Australian society today. Examples are always idealistic and chosen from good applications of Islamic law from the history or the time of the Prophet Muhammad. Similarly, but from the opposite end of the spectrum, a minority of evangelical Christians who claim that Muslims want Shari’ah Law in Australia have an insecurity about their Christian identity coupled with a deep anxiety and even fearful disdain of Islamic civilisation. They always refer to contemporary times and to a (cultural and popular) concoction of Islamic modernity which, in their view, should be not be allowed to enter Australian society today. Examples are always bad singular instances somewhere in the Muslim world of the application of Islamic law gone wrong.

Islam itself is a victim of this tension between tradition and modernity. Whatever issue relating to Muslims that we look at today, we find ourselves in this predicament. The issue of Shari’ah Law is no exception. The vast majority of Muslims and non-Muslims takes a position between the two ends of the spectrum and is largely confused about Shari’ah Law. People do not understand what Shari’ah Law means and how it works. They have no idea how it was implemented in Muslim history and how it influenced the development of other legal systems. And they do not consider the factors that created the gap between a traditional application of Shari’ah Law and some modern concoctions of it. Clearing the cloud of confusion requires that we examine all three aspects.

**Definition, scope and sources of Shari’ah Law**

*Shari’ah* literally means ‘a way to a watering hole’. In the Islamic lexicon, *shari’ah* is the divine path and guidance for humanity on earth. In this
sense, it is always fair, just and equitable. The collective effort of Muslims to understand shari'ah is called fiqh which is only an attempt to reach the ideals. “The purpose of Shari’ah is the welfare of people and the purpose of fiqh is to implement shari'ah” in the lives of individuals and society. When Muslim scholars talk about Islamic law they refer to fiqh as the reflection of shari'ah in human understanding. Islamic law (fiqh) was traditionally categorised into three broad fields – religious worship and rituals (ibadat), human relations in civil transactions (muamalat) and a penal code (uqubat). To this general categorisation could be added legal literature dealing with objectives and principles of law (maqasid), state and government (ahkam al-sultaniyyah), and international law, war and peace (‘ilm as-siyar).

In law and ethics the most important agent is the human being. His or her actions occur within an individual and a social framework. There are important teachings of Islam with respect to a human capacity for goodness. The human being has been ‘honoured with goodness’ (Qur’ān, 17:70) in that we are created with the innate capability to recognise goodness and virtue. The human being is created on a sound ‘natural disposition (fitrah) of God upon which He has modelled the humans’ (Qur’ān, 30:30). The human being is created in ‘the best composition’ (Qur’ān, 95:3–6) in that in our humanity we have the capacity to excel. The Qur’ān says that belief in God and doing good will prevent humans from corrupting this capacity. The human being is created as a ‘steward on earth’ (Qur’ān, 2:31–33) charged with the duty of upholding goodness and righteousness. Finally, the human being has been given ‘the trust’ (Qur’ān, 33:72) which is self-awareness and freedom of choice with which comes the duty of stewardship.

At the same time, a human being has embedded in his or her nature a mechanism called nafs which is the egotistical soul that acts as the interface between the spirit and the physical body. All human evil is a product of the unpurified nafs. Although human reason can be trusted to recognise goodness, and although human will is capable of striving to uphold what is right, our choices more often than not are negatively influenced by caprice, emotions, desires and the selfish impulses of the nafs. Some people will not hesitate to lie or to rationalise that they are justified in taking an action in order to prevent harm or attract a benefit even though that action may be the wrong thing to do. We cannot always be trusted to do the right thing at all times.
This observation of the way human nature works has implications in what we deem to be good or right and what we deem to be evil or wrong. There are things, admittedly not many, that can be categorised either as self-evidently good or as self-evidently evil. We don’t need to prove that integrity, selflessness, charity and saving lives, for example, are essentially good. Murder, pedophilia and torture are clearly evil. But many things in life fall into the grey area between what is clearly good and what is clearly evil. In this broad grey area of human action, human nafs interferes with our common sense and reason. Therefore we need independent sources to guide us towards goodness. In Islam, the revealed Word of God, the Qur’ān, and the practical implementation of the Qur’ān, the Sunnah, are the core legal and ethical sources. There are two other fundamental sources of ethics, qiyas and ijma, that help Muslims deal with new and emerging issues of law and ethics.

The Qur’ān (as the Word of God) is the primary source of God’s revelation. It is the source book of Islamic principles and Muslim values. About 600 of its 6,238 verses are related to law; only about 80 can be considered legal verses in the strictest sense of the word.

The second source is the Sunnah (Prophetic practices). Qur’anic principles and values are complemented by the Sunnah of the Prophet Muhammad which is the compendium of narrations (hadith) concerning his words, actions and approvals and his companions’ descriptions of him. The Qur’ān states, ‘if you are to dispute among yourselves about anything,
refer it to God and the Messenger’ (Qur’an, 4:59) and ‘assuredly you have in God’s Messenger an excellent example to follow’ (Qur’an, 33:21).

The third source is *qiyas* (analogical reasoning). When faced with an ethical and legal problem not specifically dealt with in the Qur’an or Sunnah, scholars use their reasoning to search for a parallel in these sources. The key method is the discovery of the operative cause (*illah*) – the reason behind the existing ruling. If a similar cause is identified in the new situation, the ruling is extended to resolve the matter. For example, from the specific prohibition of wine is deduced a broad prohibition on alcohol. The operative cause is the mind-altering nature of all alcoholic drinks. When *qiyas* is not possible, jurists may also use their reason based on custom (*orf*), public interest (*maslaha*) and equity (*istihsan*) to come up with a legal deduction.

The fourth source is *ijma* (consensus). When a certain ruling survives the test of time, more and more jurists accept the same legal opinion thus forming a consensus. If all or the majority of scholars agree on an answer to the same question, the likelihood of the answer being right greatly increases. Consensus then becomes binding.

**Law, public morality and individual conscience**

Drawing a line of demarcation between law and ethics has never been easy. The hallmark of a civil society is a minimal legal zone supported by a strong sense of public morality, widely respected and observed conventions, as well as evidence of active and informed individual conscience. Human actions, hence freedoms, are not absolute and are usually curtailed by law, public scrutiny and the dictates of individual conscience. Islam seeks a balance between these three concentric circles.

In the largest circle, Islam lays responsibility on the individual whose conscience becomes a compass for determining right and wrong. The Qur’an cultivates the development of a sound heart (Qur’an, 26:89). The Prophet Muhammad said, ‘Actions are judged according to intentions.’ Equipped with a sound heart and good intentions, human beings are much more likely to behave in an upright manner with a more noble inner motivation.
Islam’s emphasis on belief in the all-knowing God and the spectre of moral questioning in the afterlife gives a Muslim great motivation to do the right thing, as good deeds are directly linked to human salvation (Qur’ān, 103:2–3).

While there is an individual responsibility for one’s actions, there is also a collective responsibility that society bears towards the individual. In Islam the sick have the right to be visited, the guest has the right to an offering even if that is the most simple food and, if a person gives greetings, one must return the greeting. If no-one properly carries out the funeral services of a deceased person, the whole community is accountable to God.

As the Prophet Muhammad made plain, without law and order there would be anarchy and chaos; society as a whole would descend into barbarism. At the same time there is the ever-present risk that the law might restrict the rights and freedoms of individuals beyond a reasonable degree. In this respect, the life of the Prophet Muhammad again becomes a guiding example for Muslims. The wife of the Prophet Muhammad, Aisha, reported that whenever the Prophet Muhammad was confronted with an issue he always preferred the option that was easier or better for other people. He also remarked, ‘Facilitate (ease) things to people and do not make it hard for them and give them good tidings and do not make them run away’.7

**Higher objectives and principles of Islamic law**

The Islamic legal framework is not yet complete. Even though the Qur’ān and Sunnah provide scholars and jurists with principles of law and ethics, the texts are vast and need to be understood and interpreted. There are three layers of objectives and principles that a jurist must know and apply in order to arrive at a new independent legal opinion (ijtihad).

The first layer is the higher objectives of Shari’ah Law. According to the acclaimed jurist Ash-Shatibi (d. 1388), the teachings of religion and its commands and prohibitions, as laid out in the revelation by the divine and put into practice by the Sunnah, serve a higher purpose: ‘to promote good and to benefit human beings and to protect them from evil, from harm and from subsequent suffering’.8 Therefore all juristic opinion must also serve this higher purpose. This definition of higher objectives of Islamic law is universally accepted by all Muslim jurists.9

The second layer of objectives lies in the protection of five necessities (dharuriyyat) or basic human rights.10 The first is life. Every person has the right to live in safety; every life should be protected by law and by the
state. The second right is property. Earning one’s livelihood and owning and preserving personal property are a fundamental right. The third right is intellect. No-one, whether a person, society or the state, should coerce or remove a person’s ability to think freely. The fourth is religion. There is no compulsion in religion and every person has the right to preserve and transmit their faith to their progeny. The final right is lineage. Everyone has the right to marry and raise a family.

The third layer comprises methodical principles that jurists must use when addressing legal and ethical problems. There are many such principles at the disposal of the jurist. Some of the principles that apply especially to Muslims living in Western countries follow: fundamentally everything is allowed unless explicitly stated otherwise; under the circumstances when absolute justice cannot be fulfilled, relative justice is applied; something that cannot be completely realised is not completely abandoned; a necessity can waive a prohibition only to the degree that the necessity is met; and removal of harm comes before the acquisition of benefit. The Majalla, the nineteenth century Ottoman compendium of Islamic law, lists 99 such principles in its preamble. These principles are the backbone of Islamic legal framework and practice; they provide a solid methodology that is auditable by scholars, jurists and theologians.

**Shari’ah Law in Muslim history**

Shari’ah Law or Islamic law served as the common code of a unified legal system and provided the scales of justice for centuries across lands characterised by demographic, cultural and racial diversity. Shari’ah Law, as a legal system derived from revelation and prophetic example, was regarded as an independent influence that stood above all human authority. This perspective established the ‘rule of law’ concept in theory and practice in the vast Muslim world as early as the seventh century. This was at a time when people in Europe suffered through ‘trial by ordeal’. Shari’ah Law ensured safety and justice and guaranteed human rights. Just as the Western world defines itself as the ‘free world’ today, in the past Muslims identified areas ruled by Muslims under Shari’ah Law as the abode of peace (dar al islam).

Islam came to societies where tribal customs were the only laws in existence. When the fledgling Muslim community established itself in Medina, Qur’anic revelation and the Prophet Muhammad’s practices became the source of social and legal convention for Muslims. For as long as the Prophet
Muhammad was alive there was no need for systematic law or jurisprudence. Whenever the people of Medina had issues, whether religious or temporal, they consulted the Prophet Muhammad directly. The Prophet Muhammad had a school next to the mosque where he personally taught Islam and the Qur’ān to hundreds of his companions. He also stipulated that his governors were to make decisions based on the Qur’ān and on his example.

After the death of the Prophet Muhammad, his companions spread out across the rapidly-expanding Muslim world. The location of each scholarly companion of the Prophet Muhammad became a centre of learning. They taught Islamic practice and gave legal rulings according to the Qur’ān and what they knew from the Sunnah of the Prophet Muhammad. When faced with new situations and unable to find an answer in the religious sources, they used their own judgements to find a solution. In doing so, they took into account the principles of equity and public interest as well as the circumstances of the times, the customs and the culture of the people among whom they were living, just as the Prophet Muhammad had stipulated when he appointed governors.

After the generations of the companions, Islamic law started to develop independent schools of law (madhab). This was due mainly to differences in methodology, geographic separation, variance in the availability of the hadith (the sayings of the Prophet Muhammad) sources and the effect of cultural considerations. Judicious scholars of this time realised the need to standardise religious legal methodology into disciplines based on the primary sources of religion. They started to develop large volumes of deductions from the Qur’ān and the Sunnah of the Prophet Muhammad, covering worship, commercial law, criminal law and civil law in an attempt to identify clearly the rules and regulations of their religion in a comprehensive legal code covering all aspects of life. One such compendium of Islamic law is al-Sarakhsi’s (d. 1096) thirty volume masterpiece Al-Mabsut.13

From Spain to South East Asia, Shari’ah Law or Islamic law served as the common code of a unified legal system and provided justice for centuries. Law was legislated and represented by scholars (ulama) who were meticulous in preserving their independence from the rulers. Islamic law introduced ‘rule of law’ as an important concept of the law’s being above all people, including rulers. It also introduced the concept that people are innocent until proven guilty as a consequence of the consideration of evidence and the accounts of reliable witnesses.
In his book *The House of Wisdom: How Arabs Transformed Western Civilisation*, Jonathan Lyons says that through the Middle Ages when suspects in Europe suffered through ‘trial by ordeal’, Shari’ah Law, Islamic medicine and commerce ensured safety, justice and guaranteed human rights.14 American professor of law John A Makdisi published a 100-page paper titled ‘Islamic Origins of Common Law’ where he traces the origins of Henry II’s legal reforms such as action of debt, *assize of novel disseisin* and trial by jury to Shari’ah Law.15 There is evidence to suggest that Napoleon was influenced by Shari’ah Law in formulating his *Code Napoleon*, published after his three year stint in Egypt.16 These all show that Shari’ah Law or Islamic law was far more progressive during the middle-ages than European law and influenced the development of Western legal systems.

The influence of Islam and the positive interactions between the Muslim world and Europe were not confined to law. They also included science, philosophy, culture, commerce, art and even religion. Mark Graham, in his book *How Islam Created the Modern World*, argues that a shared history and cultural development between the West and the Muslim world are closer than many appreciate.17 The symbiotic relationship is such that Richard W Bulliet in *The Case for Islamo-Christian Civilization* states that Western civilisation can be better described as Islamo-Christian rather than Judeo-Christian.18

**Factors contributing to the modern stagnation of Islamic law**

What went wrong then? Why is there a perception in the Western world that Islamic law is outdated and Muslims are static or monolithic in their approach to law and religion. The assumption is that Islamic law needs to be reformed but that Muslims either are not prepared to change or are unable to bring about change. While the manifestations of Islam in the political and social spheres require a fresh outlook to meet the contemporary needs of Muslims around the world, the apparent stagnation of Islamic law does not stem from Islam but from inertia which is caused by four internal and external factors.

The first is the discouragement of new interpretation since the eleventh century. Some contemporary scholars argue that a moratorium on legal interpretation, the so-called ‘closure of the gates of *ijtihad*’, has frozen Islamic legislation in time. This freeze was proposed and enacted at a time when it was necessary to curtail the proliferation of new schools of law rather than stop the practice of legal interpretation entirely.19 Nevertheless, there is an
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observable slowing of legal interpretation after the eleventh century. By then Islamic law was fully developed and applied. Society was not rapidly changing so there were no major issues arising that needed to be addressed by Islamic law; new interpretations were not warranted. There were also the major social and political challenges associated with the Crusades, the Mongol invasion and the Black Plague. Not surprisingly, these events distracted jurists and theologians and resulted in the stagnation of legal development. After a hiatus of three centuries, legal development resumed and was especially pronounced in the Ottoman Empire. Sultan Mehmet the Conqueror (d. 1481) and Suleyman the Magnificent (d. 1566) produced extensive shari’ah-based laws during their reigns. In the nineteenth century, a major project was initiated to codify Shari’ah Law in the format of contemporary legislation that would meet pressing immediate needs. As a result, sixteen volumes of new legal codes called Majalla were published in 1876. Majalla remained in use in much of the Middle East until after World War II.

The second major factor impeding the development of Islamic law was the destructive impact of European colonisation of the Muslim world. With their political, civil, cultural and religious institutions collapsing around them, Muslims were obliged to struggle for their freedom, their independence and the survival of their religion. They had no time to develop Islamic law to address the needs of modernising Muslim societies. This accounted for another century of inactivity in the development of Islamic law. The gap continues to widen.

The third factor has even greater consequences. When the colonial powers eventually had to leave Muslim territories, the liberating leaders were either dictators or military leaders-turned-politicians who established coercive secular regimes and relied on oppressing the largely conservative public in order to perpetuate their rule. Religious scholars were especially targeted as part of efforts to curb dissent and suppress opposition. Islamic law was replaced by concoctions of Western legal codes and judicial systems. Islamic scholarship was usually relegated to a small faculty in a university with limited career opportunities for the small number of students who could not gain entry into other more prestigious faculties. When Islamic law is not applied, it has no chance to develop. When the most-talented students do not study Islamic law, expertise and the ability to solve problems diminish, thereby creating space for self-imposed reformers and self-declared saviours to fill the gap in religious authority. This saga continues today.
Fourth, while all these forces and factors were having a deleterious effect on Muslim nations, neither their culture nor their society stayed the same. The world has changed dramatically over the past 100 years. Globalisation, mass media and ease of travel accelerated the exposure of Muslims to alternative belief systems, competing cultures and contested social norms. Although Muslims were not against change, the speed of change was daunting and in some places overwhelming. Many scholars felt there were more pressing issues to address rather than devoting time and energy searching for solutions to new legal problems. Even if scholars devised answers to new questions, they did not have the authority to implement them. As a result, most contemporary Islamic legal books are theoretical or limited to the practice of individuals.

Finally, there is ample evidence in our time of hasty and wrong application of Islamic law by Muslim politicians (in Iran, Afghanistan and Sudan for example) who vow to establish an Islamic state in their campaigns to achieve power and change in Muslim societies. When they do achieve power, they attempt to give the impression that an Islamic state has been established. As a matter of priority they implement certain punishments that exist in Shari’ah Law rather than establishing the basis for the introduction of a just legal system. In doing so they implement law from books written centuries ago rather than seeking to harmonise those laws with modern times or preparing society first before implementing certain laws. As a result injustice and harshness emerge rather than the justice and mercy which are intended under the higher objectives of Shari’ah Law.

Contemporary developments in Shari’ah Law

Although Muslims are obliged to live under these restrictions, Shari’ah Law and its application continue to evolve both in theory and in practice. At the very least, it is possible for individuals and communities to practise many aspects of Shari’ah Law as their personal and collective choice.

Muslim scholars and thinkers hold various views about the place of Shari’ah Law in modern societies. Some think that Shari’ah Law can no longer be applied in modern societies. They believe that these laws were more suited to medieval times and societies. Given that most societies have changed dramatically, they hold that Shari’ah Law is no longer applicable. Other Muslims hold a completely opposite view and regard the former view as heretical. They insist that Shari’ah Law is complete and perfect in the way
scholars have previously explained and articulated the laws and regulations, and that not much needs to change. Societies have to conform to Shari’ah Law as it is already defined and not the other way around. And there is an approach that falls between these two: Shari’ah Law is applicable at all times as Shari’ah Law is timeless. According to this approach, the key is to know how to apply it correctly, given changes in time and place.

This third position has given rise to three nuanced approaches. First, identify new issues and apply existing methods of Shari’ah Law to these issues. At the same time, increase the quality of religious scholarship and bring it up to date with the times. Second, identify timeless principles and practices of older applications of rulings of Shari’ah Law and then apply these principles to new problems and issues. Third, completely review the classic methodology of Shari’ah Law with an intention to improve and expand it so that it can address issues more effectively. Rather than delegating the work to individual scholars, new issues should be addressed by committees of scholars of Islamic law and experts in humanities and scientific disciplines.21

The first decade of the present century has witnessed a number of important developments. In 2003, the World Council of Muslim Ulama was established under the leadership of the world renowned Muslim jurist, Sheikh Yusuf Qaradawi. In 2004, under the tutelage of King Abdullah of Jordan, over 500 Muslim scholars and thinkers from around the world debated, agreed and signed the Amman Message, an extraordinary document that outlines a collective response to three key questions: who is a Muslim; who has the authority to excommunicate (takfir) Muslims; and what are the principles of, and preconditions pertaining to, valid religious edicts (fatwa).22 Importantly the Amman Message gives an inclusive definition of Islam, prohibits excommunication and provides specific criteria to be used when identifying illegitimate and unqualified religious edicts. In 2007, 138 Muslim scholars from around the world produced A Common Word between Us and You, a declaration of dialogue with Christians.23 These developments give hope for the future and demonstrate the capacity of Muslim scholars of Islamic law to arrive at a workable consensus over issues of great importance.

Conclusions
A number of important conclusions for Muslims and non-Muslims flow from this discussion. Non-Muslims should appreciate that Shari’ah Law, Islamic law, is a sophisticated legal system that helped improve law and
provide justice throughout the world for more than a millennium. When Europe was improving its legal system, it inevitably considered and was to some degree influenced by the dominant Islamic legal system. One of the primary causes of poor legal and cultural conditions presently observed in the Muslim world was the destructive effect of European colonisation. Appreciating this should have a humbling effect on those who hold an apparent superiority complex and support the prevailing negative narrative about Islam and Muslims that exists in Western societies. At the same time, Muslims around the world should remember the higher objectives of Shari’ah Law, learn more about the complex legal methodology of Islamic law and use it in addressing contemporary issues. More importantly, Western governments and legal institutions should cooperate with Muslim experts to find solutions to the ethical dilemmas of the modern world in which Muslims often find themselves, including in Australia. The issue of Shari’ah Law is symptomatic of deeper issues that affect the relationships between Muslims and Western societies. Until recently, Muslims did not have an historical experience of living as minorities in largely non-Muslim societies. At the same time, Western societies did not have an historical experience of having large minority populations of recognisably different religious communities living among them. More discussion on these issues must be held to develop a new theory for a multi-faith society.

Endnotes

6. Bukhari Bad‘u l-Wahy, p. 1; Muslim, Imara, p. 155; Abu Dawud, Talaq, p. 11.
7. Bukhari, Ilm, 12; Muslim, Jihad, 6.
10. Abou El Fadl, Speaking in God’s Name, p. 154.
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21. Tariq Ramadan suggests this approach in *Radical Reform*.
22. See official website http://www.ammanmessage.com/
23. See official website http://www.acommonword.com/