Accommodating Muslims in Europe

Opportunities for Minority *Fiqh*[1]

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The research agenda for Islamic law has been best encapsulated by Muhammad Khalid Masud: 'In order to gain greater understanding of the working of law in Islam, a twofold effort is necessary. On the one hand, we must examine how Muslim jurists tried to develop a balance between legal and social norms, and how they rooted the normative basis of *shari'a* in social practices. On the other hand, we need to recognize the significance of the public space for the social construction of Islamic law' (1991: 14). The two issues concerning 'public' space and the balance between 'legal' and 'social' norms are related in complex ways and provide an ideal point of entry to a discussion on the development of minority *fiqh* in contemporary Europe.

The presence of large number of Muslims in Western Europe in the last thirty years has given rise to considerable challenges for Islamic law and Western legal systems. Can the legal rules and institutions of Islamic law be applied to contemporary Western Europe where Muslims are a minority? How should liberal democracies accommodate Muslims who continue to grant authority to Islamic law in their daily lives and social practices? Do the two sources of legal norms conflict, and if so can this conflict be resolved or managed? The satisfactory resolution of these issues depends on developments in a system of Islamic law for Muslim minorities which is often termed minority *fiqh* (*fiqh al-aqalliyat*). It is also dependant on getting the general theory of Islamic law right.

family and inheritance. The European constitution (which is in draft form and includes a Charter of Fundamental Rights), which applies to all EU member states, addresses many of these issues. More significantly, there is now also relevant EU 'hard law' including the Race Directive (2000/43/EC) which ensures non-discrimination on the grounds of race in areas such as employment and the provision of private and social goods. The Framework Directive (2000/78/EC) requires non-discrimination on the grounds of religion in employment and training. Both provisions provide some resources and will generate legal rules that recognize and accommodate some of the key religious practices of individual Muslims.

The term 'legal norms' carries different meaning when used in different contexts. First, legal norms refer to the norms of the domestic or EU legal system, such as rules that require the prohibition of religious discrimination in employment. Second, legal norms refer to the rules of Islamic law or minority *fiqh* that individual Muslims treat as authoritative. It is worth noting that issues about the relationship between legal and social norms arise at both levels. An analysis of whether there has been direct or indirect discrimination against Muslims raises a number of issues about the social practices of Muslims. Questions are likely to arise about social practices such as time off for prayers, wearing headscarves in the workplace and in public places, provision of facilities to allow Muslims to break their fast, and whether a beard is obligatory.[2] Muslims will look to Islamic legal rules such as minority *fiqh* as a guide to their religious practices. Those who interpret and apply legal norms (let us call them the 'Muslim community's legal institutions') will in turn be influenced by social norms that prevail within their community by their perception of the priorities and needs of individual Muslims at that time, and by the context in which they are being asked to interpret and apply Islamic legal rules. The two systems—the domestic and European institutions on the one hand, and the Muslim community institutions on the other, are likely to influence each other.

Professor Masud writes: ' […] in order to translate *shari'a* into a working law, even in the form of *fiqh*, it has to dig deep in social norms for its normative bases. Legal norms cannot be realized without their foundations in the social norms' (Masud 2001: 14). This insight is especially important in the context of minority *fiqh* in contemporary Europe where Islamic legal rules are dependant on social acceptance rather than enforcement through state authority or coercion. Local Muslim communities in Europe have and will need to construct imaginative ways to adapt themselves to the inter-face between Islamic legal rules and the majority legal system. Where there is no conflict between the two systems this encounter can be amicable and Islamic legal rules

Public space

The contemporary motivation for making some public space available for the construction, recognition and application of Islamic law for European Muslims lies in the principle that European liberal democracies must be tolerant of minorities. Historically, this principle of tolerance took the form of allowing minorities individual political rights that ensured them a protected private space within which they were free to choose their own social practices. For example, Muslims are free to practice their religion in private. This principle was subsequently given greater force by the non-discrimination principle which ensured that as well as the right to act as they wanted in private, it was important to accommodate minorities, even if in a limited way, in key areas such as employment and education. In some countries there are arrangements which prevent discrimination against Muslim women who wear a headscarf or which allow Muslims to pray and fast whilst at work or at university. Finally, and most recently, the principle of tolerance of minorities has taken the form of multiculturalism which is the idea that minority cultures and practices should be accommodated within the public sphere. Muslims may, for example, be invited to participate in public ceremonies or the State may officially recognize some Islamic religious festivals.

Balancing legal and social norms

Individual member states of the European Union (EU) have responded in different ways to diverse cultural and religious minorities. The UK and the Netherlands, for example, have opted for modest multicultural policies which seek to accommodate (where possible) the most pressing needs of religious minorities such as Muslims. Other legal systems have responded with more assimilationist measures. Space exists for the application of Islamic law in the private sphere such as in realms of

may be comfortably accommodated. In Britain, for example, the double tax (stamp duty) has been eliminated for those who prefer Islamic mortgages. There are also well known examples of accommodation in areas such as family law. The new EU anti-discrimination legislation will facilitate the process of modest accommodation of Islamic legal rules within European States.

The inter-face between the two systems also provides Muslim communities with an opportunity. Professor Masud has noted: 'At 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 ideal of the *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' (ibid.: 6). The development of minority *fiqh* within a framework of European constitutional values which take freedom, tolerance and equality as their starting point may not be as problematic as some may imagine. It may provide a catalyst for re-discovering the ideals which underpin legal norms within the Islamic tradition.

Tackling conflicts

Not only national and European, but also the institutions of Muslim communities have good reason to avoid conflict between the different levels of social and legal norms. These conflicts are a substantial barrier to Muslim minorities identifying with domestic/EU legal and political institutions. The goal of overcoming the social exclusion of Muslims is a key issue for the majority and the minority. Conflict has the potential to cause harm to individuals and hinder the integration of Muslims into the economic, social and political mainstream in Europe. Ensuring greater access to economic and social goods is also a priority for Muslims who recognize that access to basic resources is a pre-requisite to moral and spiritual excellence. But what happens when there is a conflict? The spectre of a conflict between Islamic legal rules and the requirements of domestic /EU law raises the most profound challenges. The personal anguish of those who are unable to comply with their legal obligations as citizens and their obligations as members of a religious community should not be under-estimated. How should such conflicts be resolved?

First, if the main reason for providing 'public space' or recognition to Islamic law within European states is to facilitate the freedom and equality of minorities then this provides a useful guide for resolving conflicts. One way of resolving any conflict is to take the motivation for providing this 'public space' within which Islamic law can serve as the foundation for analysis. The reason that domestic/EU legal (and non-legal institutions) are interested in Islamic law is purely instrumental: it is part of their aim to ensure freedom, tolerance and equal treatment of a significant minority group within the European Union. This provides a realistic framework for negotiating the inter-face between domestic and EU institutions and the demands of European Muslims to be governed by minority *fiqh*. The principles of freedom and equality (whether in domestic or European constitutional documents) provide the absolute minimum level for protection. Any calls for the accommodation of Islamic legal norms in contemporary Europe must accept these principles as non-negotiable principles of European constitutional values. It may mean that in certain cases where the norms of Islamic law conflict with European values, individual Muslims will not be able to insist on the accommodation of their values. For example, Muslims cannot simultaneously rely on anti-discrimination law to advance their interests and at the same time argue against gender equality or core values such as freedom of expression.

Conflict between the values of European constitutionalism and the demands of the Muslim community needs to be tackled explicitly rather than ignored. Muslims need to undertake a debate within their own communities about their priorities: e.g. what legal rules must be accommodated and how should those rules be interpreted? Most challenging will be questions about how Muslims should react when faced with conflicts between their legal norms and the fundamental non-negotiable principles of domestic and EU law. Successful resolutions of these often intractable conflicts will be a painful process which requires compromise and political maturity. However, this is the inevitable price that Muslims must pay as they move away from social isolation and into participation in the mainstream of European societies. The debate needs to be broad and involve the full diversity of Muslims, some of whom (such as women) have been excluded or marginalized in decision-making. In addition, Muslims must become involved in public debate and mainstream political processes to articulate their demands. This means that they must enter into a much needed discussion with the majority about the exact terms of the their status as citizens in their countries and the European Union. If it is to be viable and stable, any process of accommodation or multiculturalism must pay attention not only to the needs of the minority but also to the views of the majority.

The public space provided by developments in the European Union for the construction of Islamic law may ensure greater coalescence between the social norms of European Muslims and BOTH (a) legal norms of the domestic/EU system; and (b) the legal norms of Islamic law/minority *fiqh*. This has substantial benefits for both systems. The EU is committed to freedom and equality for minorities, as represented in its constitutional values and anti-discrimination law. Accommodation of the key demands of Muslims through a recognition of some aspects of minority *fiqh* could ensure a greater coalescence between the experience of individual Muslims in their daily lives (where they are guided by Islamic legal rules) and their experience of majority normative legal and political institutions. The result may be a higher degree of willing co-operation and identification with these institutions.

In this way domestic and European institutions can recognize Islamic legal norms as important because they provide freely chosen normative guidance in the lives of Muslim citizens. Muslim community institutions need to use this insight as the starting point for their own analysis. Muslims communities in Europe need to develop mechanisms for decision making that allow greater participation by the public and especially by those who have been previously marginalised in decision making. Specialists and scholars of Islam need to understand and respond to the social facts about the people who look to them for guidance—the 'here and now' of the lives of European Muslims. This may have the great benefit of ensuring that the authority of minority *fiqh* within Muslim communities derives from its acceptability to individual Muslims rather than the exercise of coercive power. The contemporary public space for developing minority *fiqh*—within the limits of European constitutionalism—provides European Muslims with some attractive opportunities.

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Notes

1. This paper is an extract from a paper presented at the seminar in honour of Professor Khaled Masud on Minority *Fiqh* at ISIM in Leiden, April 2003. I am grateful to Professor Masud and the participants in the seminar for their thoughtful comments.
2. For an example of the Code of Practice on Religious Discrimination, 'Religion or Belief and the Workplace', see http://www.acas.org.uk/publications/pdf/guide_religionB.pdf (accessed on 19 November 2003)