



A report on the conference of the Käte Hamburger Centre for Advanced Study "Law as Culture"

Few concepts of Islamic culture arouse so much suspicion and rejection in the West as that of the "Sharia". More a vague symbol than a clear concept, talk of the Sharia evokes images and associations of the repression of women and minorities, archaic penal practices as well as rituals and norms that cannot be reconciled with a "modern" understanding of social life. Sharia is a fighting word signifying a desirable return to the roots of true Islam to some, and the symbol of the threat of Islamist contamination of secular achievements to others. However, Sharia is also a contested concept whose meaning is highly controversial: Which concrete norms underlie the Sharia and what is their relationship to the respective law in force? Who claims say over which actions conform to Sharia, i.e. who actually holds the interpretative power over the meaning of Sharia?

The great global political topicality of these explosive questions is revealed when observing the post-revolutionary countries in the Arabic world, such as Tunisia and Egypt. Having been freed from authoritarian rule, they have now moved on to the phase of drafting a new constitution. Whether these constitutions will really help establish the freedom attained and become veritable *constitutions libertatis* (Hannah Arendt), or whether there is a danger that the Islamist actors will counteract



the wishes of the revolutionaries by attempting to legally implement the "application" of the Sharia was the focus of the conference by the Käte Hamburger Centre for Advanced Study "Law as Culture" held under the title "The Sharia: A Contested Legacy of the 'Arab Revolutions'? Legal Cultures and Change in the Arabic World" on

Thursday, 20 September 2012, and for which academics and activists of international renown gathered for discussion.

Sharia as its own validity culture?

Werner Gephart, director of the Käte Hamburger Centre for Advanced Study, pointed to contemporary political disputes centered on the interpretation and validity of the Sharia in his opening lecture. He therefore considered the question as to the reality



of Sharia not purely academic, but also practical. There is at least academic consensus on the plurality of the Sharia in its interpretation and institutionalization. Following Islamic studies scholar Jan Michiel Otto, Gephart distinguished between a divine Sharia that remains abstract, a classical Sharia as elaborated into a body of legal rules by legal scholars in the two centuries following the death of Mohammed, a Sharia historically imparted up to the 19th Century, and the contemporary, highly diffuse and fragmented form of Sharia. Gephart's main claim was that Sharia could also be conceived as a specific form of "validity culture" due to this plurality. As a religious validity culture, it differs significantly from its secular opponents. It is already misleading,

Gephart continued, to limit the Sharia to the legal sphere, as it rather represents a comprehensive normativity in which law, morals, religion but also manners are intertwined; spheres, therefore, that Western observers are accustomed to clearly separating. The religious foundation for the validity of law puts the Sharia in sharp contrast to secular conceptions of law centered on the belief in legitimacy. The application of Islamic law can be read as a religious act representing the religious identity of Islam. However, if such identity claims are articulated through the medium of law, Gephart concluded, law could no longer fulfill the functions of integration, securing expectations and solving conflicts ideal-typically ascribed to it, as it would become the cause of tension and conflicts itself.

The struggle for women's rights in Islam

Islamic studies scholar Asma Afsaruddin from the University of Bloomington approached the pluralist interpretations of the Sharia by illuminating the struggle for the social recognition of women in her lecture. She did not proceed from the vantage point of contemporary theoretical and political interpretative struggles, but told the story of Umm Omara, a 7th Century Muslim woman who became famous for her courage on the battlefield, but also pronounced herself on the political questions of

her time and stood up for the equal treatment of women. She described the story as remarkable in its typicality for the relative liberalism of Islam in the form it took on in



the early Middle Ages. In many social domains – and supported by the teachings of the Koran – there was extensive equality of women, for instance in the space of public discourse, women's right to hold even higher political office, and much more. If Sunna and Koran are now taken as the basis for denying equal rights to women,

Afsaruddin commented, this is only possible through a one-sided, repressive interpretation. In reality, the progressive liberalism of early Islamic societies gave way from the 10th Century onwards to an increasing hierarchization and patriarchalization. The denial of rights and opportunities to women in the areas of politics, the economy and education shows how the effects of this shift can still be felt today. By analyzing several passages from the Koran, Afsaruddin attempted to show how this discrimination has no basis in the Sharia. She pointed to a certain contemporary form of feminism that explicitly advocates an Islamic interpretative framework in support of women's rights. That conflict with patriarchic interpretations of the text would result is obvious. To the question raised by Syrian-born philosopher Sadik Al-Azm why feminism did not simply put its claim to equal rights on a secular footing, Afsaruddin retorted by referring to the widespread acceptance of religion. While there certainly also are secular movements for civic and women's rights, the acceptance of Koran and Sunna as a binding base of validity is so high in Muslim countries that a religious frame of reference cannot be avoided easily. Werner Gephart pointed to a fundamental problem faced by these social movements: In order to even make alternative readings of the Sharia plausible, the textual understanding of Islam first needs to be revised in such a way that differing interpretations, i.e. a certain contingency even of Holy texts, are considered permissible. This, however, is vehemently disputed by fundamentalists.

Sharia and transitional justice

The following contributions focused more on current developments in the Arabic world. Using the example of Tunisia, Raja Sakrani's lecture revealed how all the efforts and hopes the protestors connected with their revolt are threatened to be perverted by the factual assumption of power by the Islamists. This even though the original motives of the insurgents were not religious but ethical: the 'sanctity' of human life, the desire for dignity, justice and human rights motivated the movement,

whereas the shared pain over their social and political plight – that even drove some individuals sacrifice their life through the symbolically meaningful method of self-immolation – transcended religious and ethnic boundaries. The democratic rise to power of the Islamists, however, led to fatal result that the debate on the new constitution of the country centered on questions pertaining to Islamic “identity” and the binding status of the Sharia instead of the anchoring of human and civil rights. Which path will ultimately be taken remains completely unclear. As Sakrani pointed out, a glance at the constitutional reality of Arabic-Islamic states reveals the manifold possibilities historically pursued in constitutionally anchoring the reference to Islamic law, which cannot be equated to the Sharia in each instance. Sakrani was skeptical in her evaluation of attempts made so far at dealing with the crimes of the past, i.e. including procedures of transitional justice, during the Tunisian process of transformation. As much as democratic transition can forego these measures for reconciliation and truth-finding – as history has shown – the will to pursue this form of processing the past is not evident with those currently in power, even though they created a special ministry for this purpose. Whereas important civil society actors are effectively barred from participating in the process of democratic transition, the economic, judicial and political élite opportunistically try to align themselves with the Islamists. Further, the latter already succeeded in injecting their view into many social areas. The consequence, Sakrani continued, is an unprecedented Islamisation of justice with far-reaching consequences for public and cultural life as certain clothing rules are prescribed and freedom of speech is curtailed. Imagining an absolutely binding Sharia acts as the structuring ideology here – possibly as the militant final defensive reflex of an Islam that deprived itself of its fundamentals through its own enlightenment.



The “neurotic view” of Sharia – a secular critique

Sadik Al-Azm, fellow at the Centre since a year ago, began by reminding, from his own secular perspective, how one cannot speak of a general application of the Sharia in the Muslim world. The Sharia, he stated, rarely has any influence beyond family and civil status law, whereas cultural, economic and social problems are regulated independently of the Sharia. This is a fact that has been seized upon by many Islamists since the 1970s in order to agitate for a re-Islamization of Muslim societies. With their totalitarian conception of a Sharia that must be binding in all social spheres, Al-Azm continued, they undermine the most important achievement of the secular state and even come into conflict with the existing constitutions of Islamic countries. In fact, the constitutions of Egypt or Syria, for instance, pay mere lip service to the Sharia, constantly contravening its provisions in substance and practice.

In some dictatorships, such as Sudan, the reference to Sharia merely serves as a means of legitimizing a de facto martial law, giving their own crimes an Islamic appearance. Al-Azm noted that the Sharia was always susceptible to such abuse particularly due to its normative indeterminacy. His concluding reflections on the possible compatibility of Sharia to modern legal orders revealed how grave the difference between these two validity cultures is. Not only would the archaic penal measures and all elements of theocratic rule have to be dispensed with and the humiliation and discrimination have to be ended, but the problem of the “neurotic view” of Sharia would also have to be dealt with. This view is characterized in its juxtaposition of an “exterior” to the interior of Islam, comprised of “infidels”, “heretics”, “traitors”, “hypocrites” or “atheists”. These categories promote conflict and act in a distorting way when attempting to claim one’s own “identity”. Not only Indian legal scholar Upendra Baxi followed up by asking what such a reformed normative order – desirable though it may be – would still have in common with Sharia. Further, he inquired whether a secular critique such as that delivered by Al-Azm – who made a name for himself as an influential intellectual not only in the Arabic, but also in the Western world – could have any noticeable impact leading to a reform of Islamic conceptions of law. Would such a critique not be limited in its reach to the already enlightened élite? Al-Azm professed not to have given up hope on a long-term, cumulative effect of the critique being felt.

“The right to be a true citizen, with all rights and obligations”

One of the most well-known activists of the Arab Spring followed with a report on her disappointing experiences in the Tunisian process of transformation. Lina Ben Mhenni’s internet blog “A Tunisian Girl”, censored and prohibited under the dictatorship of Ben Ali, was one of the most noticed mouthpieces of the insurgency. In an emotional speech, Ben Mhenni recounted the desperation she and her



comrades-in-arms feel when confronted with the increasing Islamization of Tunisia. The call for social and political rights shaped and united the protests, not the striving for programs motivated by religion or identity politics. For that reason, she described the creeping transformation

of her country into "Tunistan" as unbearable and the reference to the Sharia as a "diversionary tactic of movements, parties and individuals that dream of nothing but absolute, authoritarian and veiled power".

Ben Mhenni's assessment of the importance of social media for the uprising in the subsequent discussion was revealing. While the internet was useful in keeping the protesters informed, the talk of a "Facebook revolution", particularly widespread in the Western press, overestimated its importance. Ultimately, it came down to "real people" that took to the streets and were on location.

A dialectic of reason and revelation

Upendra Baxi, also fellow at the Käte Hamburger Centre for Advanced Study, closed by placing the debate on the Sharia in the context of contemporary discourse on human rights. Whoever wishes to realize the idea of human rights, he stated, must take the forms of human suffering seriously. For this reason, amongst others, fights for more rights tend to be initiated by those affected and not by the "élite" or diplomats. Baxi began, however, by describing the "Indian way" of dealing with the Sharia. Historical attempts at legally "reconstructing" the Sharia have pluralist traits that can be revealing for the constitutional debates in the Arabic world. Not only under the secular influence of colonialism was there a partial coexistence of Muslim and Hindu law: India's postcolonial constitution even "invented" the human right to freedom of conscience and free exercise of religion. In the further course of his lecture, Baxi illustrated how a certain validity culture of Islamic law is incompatible with a similar liberal pluralism. The Sharia, shaped by a dialectic of reason and revelation, possesses a charismatic dimension that escapes liberal conceptions of law. If the Sharia is understood as the revelation of the will of God, this results in the conception of a normatively closed order. However, an interpretation and execution of these normative considerations is possible if reason is understood as something imparted to mankind: This is how it was possible for the legal scholars in the Middle Ages to develop the body of Islamic *fiqh*, i.e. Islamic jurists' law. A conflict between different epistemological conceptions permeating Islam can thus be detected. It is in the nature of Sharia, Baxi continued, that the debates on Sharia have ended in (also constitutional) "fatigue", its normative vagueness making it an "empty significant". The current situation in post-revolutionary societies unfortunately shows how human rights also represent a mere empty significant in the constitutions of many Muslim countries. Instead of "politics for human rights", one is often witness to "politics of human rights" in which the



commitment to human rights is abused solely as legitimation of authoritarian politics. The attempt at formulating a separate Islamic declaration of human rights alone demonstrates how the Sharia represents a contested concept. Following this fruitful conference, that this "struggle for law" is currently headed in a hopeful direction is at least cast in doubt.

Bonn, 25 September 2012