



## Stellungnahme zur öffentlichen Anhörung am 22. Oktober 2003 in Berlin zum Thema „Islamisches Recht und Menschenrechte“.

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List of questions for the hearing on "Human rights and Islamic law"  
(As at 20.05.03)

### **I. Basic questions on understandings of Sharia**

1. What different views exist on the importance of Sharia with regard to the religious practice of devout Muslims and/or as a binding framework for the political order?

First, one must differentiate between (1) *Shari'a* as they exist in the Qur'an; and (2) *Fiqh* which is Islamic laws derived through human interpretation, mainly those of classical scholars. The term shari'a itself means *path* or the way. In the Qur'an only about eighty plus verses out of almost seven hundred Qur'anic verses are truly legal in nature. Therefore the shari'a laws that are found in all Muslim countries are laws derived from human interpretation of the verses from the Qu'ran and the Sunnah of the Prophet Muhammad.

All devout and faithful Muslims regard the shari'a to be important basis of laws for Muslims. Among contemporary Muslims, there are generally TWO views or perspectives on the importance of the implementation of the shari'a. One may refer to the first view as (1) neo-traditionalist—one that is rather ahistorical and literal in nature; i.e. the neo-traditionalists seek to implement historical or classical shari'a as they are. While the second is (2) modernist view—interpretation of how to implement shari'a within the context of contemporary situations.

2. Are there understandings of Shari'a that do not rule out the existence of a secular legal system where Muslims are in the majority?

Throughout its history in many Muslim countries and civilizations, shari'a has always existed with other sources of laws. In contemporary times, it was the political Islamist movements (or Islamic fundamentalist movements as it is sometimes called) which has rejected the secular legal system and

seek for the implementation of only shari'a laws. Modernist Muslims do not necessarily rule out a secular legal system as long as the laws in them are not contradictory to Islamic principles of justice and religious tolerance.

3. To what extent is an understanding of Shari'a as a binding framework for the political order dependent on whether Muslims constitute a majority or a minority in the country in question?

Again this question assumes that there is only one view of shari'a or one interpretation of how Islamic laws are to be implemented in a political order. Most Muslims believe that shari'a must be implemented if Muslims constitute a majority. They believe that this is what is required of faithful Muslims. If Muslims are a minority, Muslims must strive hard (but peacefully to ensure that they are governed by shari'a at least in terms of family laws.

4. What ideas exist regarding the possibility of limiting the application of a Sharia-based legal system within a country to a certain group - i.e. to the Muslim population - or to certain regions, where Muslims are in the majority?

This question is again problematic. Where Muslims are the minority, ordinary faithful Muslims and also the traditionalists or neo-traditionalists would insist that Muslims are governed by the shari'a especially in the area of personal laws—i.e. laws relating to marriage, divorce, inheritance, etc. In the context of current situation where there is an ascendancy of fundamentalist movements, in a country where Muslims are the majority there will always be a push for the establishment of an Islamic state whereby shari'a laws prevail in all areas of life including those for penal laws. And the Islamic state that these Islamists seek is a theocratic state—a notion that can be also challenged to be “unIslamic”.

5. Who is authorised to give binding interpretations of Shari'a?

In most Muslim countries, and Malaysia included, interpretations of the classical scholars are primarily dominant, particularly of the four main juristic schools (*madhab*). In Malaysia, for example, those authorised to give interpretations of shari'a are Muslims trained in *usul al fiqh* (Islamic jurisprudence) and Islamic theology.

6. To what extent do developments in Islamic theology and legal teachings on the one hand, and the deeply-rooted religious beliefs of the people on the other present opportunities for intercultural dialogue?

Islamic is a religion of tolerance and allows for co-existence of religious pluralism. Intercultural dialogue is not an alien concept. One can draw upon Islamic teachings as well as from practice of the early formative period to draw lessons of intercultural dialogue.

## II. **Practical effects of Shari'a on the shaping of the legal system, with particular reference to Egypt, Tunisia, Nigeria, Iran and Malaysia**

The answers to the following questions are basically intended to clarify the extent to which a legal system based on *Shari'a* is fundamentally at odds with the prohibition of cruel and degrading treatment and the principle of equality, or the prohibition of discrimination, because it implies a differing legal status for men and women, Muslims and "unbelievers".

Please take note that my answers below refer explicitly to the way Shari'a or Muslim laws as interpreted and codified in the Malaysian legal system. But please be reminded that a legal system based on traditionalist or neo-traditionalist perspective of shari'a can often be at odds with principles of equality especially gender equality. However, this is not the only perspective. In fact, at present this perspective is strongly challenged by contemporary modernist Muslims or Islamic scholars and activists. [Please refer to Norani Othman "Shari'a and the Citizenship Rights of Women in a Modern Nation-State: Grounding Human Rights Arguments in Non-Western Cultural Terms" IKMAS Working Papers Series No. 10 (July 1997). A slightly shorter and edited version of this paper has been published as a chapter (chap.7) in Joanne R. Bauer & Daniel A. Bell (eds.) *The East Asian Challenge for Human Rights*, Cambridge: Cambridge University Press 1999]

1. To what extent is the political and legal status of the individual dependent on his or her religion?

In Malaysia the political and legal status of individuals is only dependent on his/her religion in so far as defined by the Malaysian Constitution. The Constitution states that all Muslims shall be governed by Muslim laws for personal or family matters such as marriage, divorce, inheritance, etc. The Constitution also states that all citizens are equal regardless of religion, race and gender.

a. What concrete restrictions are non-Muslims subject to in political life and in their legal transactions, as well as in practising their religion?

There are really no concrete restrictions on non-Muslims either with regard to their legal transactions or in the practice of their religion or faith. In Malaysia, citizens' status and rights are defined by a written Constitution. Constitutionalism prevails. Whatever restrictions in political life that one may find, these are the consequences of political movements that are not democratic in nature or spirit.

- b. What particularities, rights and obligations apply to marriages between Muslims and non-Muslims?

A Muslim is not allowed by the Malaysian Islamic laws to marry a non-Muslim. The non-Muslim party has to undertake a religious conversion before his or her marriage to a Muslim. It must be noted that in classical Islamic history, marriage between monotheists or “people of the book” (referring to Jews, Christians and Muslims) are allowed. However, this practice is often allowed for Muslim male to marry a Christian or Jewish female [for a discussion of this matter please refer to Abdullahi Ahmed An-Nai’im 1990 *Toward an Islamic Reformation: Civil Liberties, Human Rights and international Law*. New York: Syracuse University Press]

- c. To what extent are the custody rights of non-Muslims for their Muslim children restricted?

Custody rights of a non-Muslim parent for their Muslim children is dependent on the religious upbringing of the children; i.e. a non-Muslim mother can have custody rights for children who are legal minors if she can assure the Shari’a court that her children will be brought up as Muslims. However, guardianship rights often favour the Muslim father.

- d. To what extent does the testimony of Muslims in court proceedings carry more weight than that of non-Muslims?

No such discrimination exists under current Malaysian Common law or Muslim laws. However, the Hudud laws that have been introduced (yet to be enforced) in the two States of Kelantan and Trengganu (whereby the Islamic party PAS forms the ruling State government) there are clauses or provisions in those laws which discriminates against the testimony of non-Muslim and also those of Muslim women.

- e. Do non-Muslims enjoy the same opportunities in terms of career choice and running for public office?

Whatever restrictions in opportunities of career choice that occur, they are a consequence of the negotiation and “ethnic bargaining” between political leaders of Malays and non-Malays before acquiring political independence from British colonial rule. Also, there was an explicit understanding that Malays being *bumiputra* (sons/children of the soil i.e. “indigenous” to the Malay peninsula) should be granted some special privileges. Among these is that the Head of government at the Federal level should be a Malay. The Chief Ministers or *Menteri Besar* (Head of governments at the State levels) are also Malay but so far in two of the states in the Federation of Malaysia (i.e. Penang and Sabah) the Chief Ministers are non-Malays given the demographic and political party representation contexts of these two States.

- f. In what way does the legal status of non-Muslim religious or ideological institutions differ from the legal status of Muslim religious institutions?

No difference in legal status. In practice new non-Muslim religious institutions such as Buddhist temples or Christian churches are not as easily established as the mosques.

- g. What restrictions apply to the freedom to convert to another religion or ideology, or to publicly profess one's religion or ideology?

Non-Muslims enjoy freedom of religion as protected by the Constitution. As for Muslims in Malaysia there has been a recent development that is pushing for introduction of "apostasy laws" to punish Muslims who converts to another religion.

- h. To what extent does criticism of certain religious beliefs - including criticism expressed by Muslims themselves - carry the threat of punishment?

These criticisms are currently under threat of punishment if the Apostasy laws (governing Muslims only) are implemented. In recent times there is also a move in Malaysia to ensure that that legal religious opinions (or *fatwa*) of a state-appointed religious authority i.e. the *Mufti* cannot be criticised by ordinary Muslims. [For a discussion and analysis of this problem: please refer to my paper attached with this questionnaire: Norani Othman "Islam and the State in Malaysia: A Problem of Democratization and Pluralism; a paper prepared for the *Constitution, Democracy and Islam Conference* at the German Institute for Federal Studies, University of Hannover, Germany, Dec. 10 -12, 1998].

Criticisms of certain religious beliefs by both Muslims and non-Muslim writers will of course suffer political censure that may result in religious censure not unlike what the novelist Salman Rushdie experienced in 1989.

2. To what extent is the political and legal status of individuals dependent on their gender?

For Muslims in Malaysia the political and legal status of Muslim women is increasingly under threat of being undermined or eroded if the Malaysian government succumb to the demands of the political Islamists to adopt laws or policies which are discriminatory against women. However, the government recently amended Article 8 (2) of the Malaysian Constitution which now explicitly states that there should not be any discrimination due to gender: "...there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law

relating to the acquisition, holding or disposition of property or the establishing or carrying any trade, business, profession, vocation or employment.

However Article 8 (5a) says that “This Article does not invalidate or prohibit any provision regulating personal law.

a. Do actions by women require declarations of consent from their husbands or male relatives? Which actions does this apply to?

Only if one abides by the views of the traditionalist or neo-traditionalists that husbands are “one degree superior” than wives. Therefore according to this view, a good Muslim wife must seek the prior permission of her husband for many of her intended actions or decision which includes going out to work, going out into public space even for such activities as visiting her friends or relatives. There is no legal stipulation on this matter. Of course in practice this practice is not even possible because Muslim women in Malaysia are active participants in the Malaysian labour force and in public life. Economic needs prevail and among urban Muslim middle class dual-income families (i.e. whereby both husbands and wives work) is a common practice. In a survey of about 400 Muslim urban middle class households that I carried out in 1996, approximately in 90 per cent of these households wives are employed in full-time or part-time jobs.

b. Do women enjoy the same opportunities with regard to career choice and running for public office?

Yes they often do. Discrimination is often due to the consequence of “universal patriarchy” and the proverbial “glass ceiling” still existing in Malaysian social life for all ethnic groups.

c. Under what conditions can women acquire property?

No conditions explicitly apply. However, Muslim females are governed by the Islamic rule of fara'id whereby a Muslim daughter inherits only half the proportion of what a son inherits when a parent dies intestate. But a Muslim woman is allowed to inherit whatever portion of property that her parent or parents have left for her in a will. Fara'id ruling applies in cases of intestate.

d. Are there restrictions on the freedom of women or men to choose their desired individual form of cohabitation?

No, absolutely no restriction whatsoever.

- e. What options are open to women to protect themselves against domestic violence?

We have a Domestic Violence Act 1996 that provides protection to women against domestic violence under the Penal Code of the Federation of Malaysia.

- f. Do the rights of men and women differ with regard to divorce, custody rights and maintenance rights - in general and specifically in cases of differing religious affiliation?

There are no differences of rights of men and women for non-Muslims. There are some differences for Muslims mainly due to the more traditionalising interpretations of shari'a adopted by the 14 States of Malaysia. Discrimination sometimes are not caused by the letter of the law but by an orthodox interpretation of some of these laws.

- g. What protection is available to women who have been victims of sexual offences?

The Malaysian Penal Code is the available protection for women against sexual offences such as rape and molestations. We have also "Sexual Harassment" rulings and procedure now being put in operation.

- h. Which definitions of criminal offences differentiate between male and female offenders or victims? Is a gender-based distinction made with regard to the age of criminal responsibility?

No differentiation of criminal offences between gender even under the Hudud laws in the two North-eastern states of Malaysia—Kelantan and Terengganu. Punishments may differ according to marital status. The age of attaining legal majority status is also the same for male and female except under Muslim family laws the age of status of a legal minor is defined by the age of puberty which may be 12 or 13 years for a boy and 9 or 10 years for a girl. This age of a legal minor is defined mainly for the purpose of ascertaining custodial rights of the mother over her male and female child or children. Custody rights favour the mother for children who are legal minors.

- i. What distinctions are made on the basis of gender or religious affiliation in the area of inheritance law?

See my answer above in Question 2 (c)

- j. What is the legal status of widows?

The legal status of widows is no different from widowers. I don't understand this question! Why should there be any difference in the legal status of widows?

k. Does the testimony of women and men carry the same weight in court?

Yes except in the case of a court proceeding under Hudud laws should this set of laws be enforced. [Please refer to answer in Question No. 1(d)]

3. What role do religious courts play? For which groups of people and in what types of legal proceedings do they play a role?

In Malaysia, shari'a laws and the shari'a judicial system applies to all Muslims. These laws are mainly family laws. But since the 1980s with the rise of Islamic resurgence movements and the implementation of the 'Islamisation policy' of the Malaysian government there has been an implementation of Islamic Criminal Offences Acts. These laws are really attempts to criminalise religious sins such as Muslims caught eating in public during the fasting month of Ramadhan, or Muslims partaking alcoholic drinks in public places, or Muslim couples who are not legally married but "living together".

4. As regards any of the above questions, are there significant differences between the legal norms in force and their application?

In their application most of these religious laws seems often to be enforced against people of working class, youths or young people (a reflection of the intermittent "moral anxiety" of Malaysian society). As for "immoral behaviour" young Muslim women are often targets for the application of these "religious laws"

5. To what extent is corporal punishment practised? Is a particular group of persons particularly affected?

See above.

### **III. Legal systems shaped by Shari'a and international human rights conventions**

1. Which international human rights conventions are contravened by any discriminatory provisions in the areas cited under II?

CEDAW mainly whenever discrimination occurs they are often against Muslim women.



2. Which human rights conventions are contravened by the applications of which Sharia-based norms in the fields of criminal law, the law of criminal procedure and the law on the execution of sentences?

If the Hudud laws are implemented or enforced, some of the provisions under those laws are in fact in contradiction to the Malaysian Constitution as well as human rights conventions in so far as those provisions discriminate against women and non-Muslims. There should really be a public debate regarding the nature or definition of equality (Article 8) and liberty of the person (Article 5) found in the Malaysian Constitution.

3. What legal quality, also in the light of obligations under international law, do references to Shari'a have in the constitutions of which countries?

In Malaysia, Malays are defined as Muslims they are to be governed by Muslim family laws. The Constitution also upholds many principles of rights and equality for Malaysians. Thus the Constitution needs to be upheld. Problems of rights, equality and justice arise when only certain interpretations of *shari'a* are adopted in the codification of these Muslim laws. A Constitutional Court is perhaps needed in Malaysia to ensure that in applying this 'cultural right' of Muslims that the principles of equality and civil liberties are not undermined or gradually eroded away.

#### **IV. Possible courses of action**

What are the approaches and courses of action open to German policymakers, in countries whose legal systems make reference to Shari'a, or are based on it, to help ensure, in general, that human rights are respected and religious freedom is safeguarded and, in particular, that men and women are treated equally?

This is really a thorny and sensitive issue especially from a political, inter-cultural and inter-civilisational perspective. All policymakers who support democracy and principles of rights, equality and justice should first and foremost find ways to support Muslim groups or movements within those countries to mount strong and serious challenge to these aberrations or problems. The challenge against Islamic extremism or fundamentalism must be taken up by Muslims themselves and on the basis of a more enlightened Islam. This is, I believe, the more effective and abiding strategy. [Please refer to paper attached : Norani Othman "Human Rights as a Universal Concept in Islam" paper read at the *Seminar On Enriching The Universality Of Human Rights: Islamic Perspectives*, organized by The United Nations Office of the High Commissioner for Human Rights; Geneva, 9 -10 November 1998.

Human rights and religious freedom are too important and must be safeguarded effectively without being unnecessarily exposed to accusations of political intervention or “cultural imperialism”. There is already a growing modernist and democratic movements within many Muslim countries and they must be independent and not being perceived to be sponsored by an external or “foreign power” if they were to grow in influence and strength over their own community of faithful Muslims. Yet they must find the space to have their voices to be heard, first within their country and also at the same time find international support. Perhaps German policymakers may find a way to give support for these progressive movements to network effectively. These movements in South and Southeast Asian Muslim countries should be encouraged to work together with their counterparts in the Middle Eastern Muslim countries.

Muslim women’s groups especially are increasingly leading the way for seeking change in social attitudes and Islamic education as well as reforms in the laws or legal system. Unfortunately such changes and reforms may take time and are often effective in a gradual manner. {Please refer to a paper attached with this questionnaire which demonstrates the problems Muslim women face and the kind of strategies that have been employed in challenging it in the case of Malaysia: Norani Othman, Zainah Anwar & Zaitun Kassim “Muslim Women Challenge Fundamentalism” a draft paper recently presented at a Conference in Bellagio, Italy}.