
From Law to Ethics: the Process of Modernization and Reinterpreting the Shari'a in Bosnia

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This paper attempts to discuss the heritage of the interpretation of Shari'a in Bosnia and Herzegovina (henceforth: Bosnia) in modern times and its relevance for the Muslims of Western Europe.

1. The interpretation of *Shari'a* in modern Bosnia: Main features and methods

Modern history of Bosnia began with the Ottoman reforms of *Tanzimat* (1839-1876).¹ These reforms met fierce resistance of the Bosnian Muslims (Bosniaks) who considered them as opposite to the established Islamic order. Only after 1850 were these reforms gradually introduced, by a combination of the use of force (during the time of Osmanpaša Latas) as well as the use of Islamic teachings as a legitimate ground for change (the mission of Ahmed Djewdet-paša).

The Austro-Hungarian occupation of Bosnia in 1878 marked the beginning of the second phase of the modernization of this country. In this case the modernization project was justified by referring to the European historical experience. Radical changes were introduced into system of government, law, economy, social structure, communications, and urban development of the lifestyle of the population of Bosnia.

The initial reaction of the Bosnian Muslim *Ulama* and masses was rejection, which gradually gave room to selective adoption of change. Rejection of innovation was generally a manifestation of *taqlid* mentality which prevailed in that time in Bosnia. Theoretical justification of change which gradually found its way into Bosnian learned circles was provided by the doctrine of Islamic reformism (*al-islam wa'l-tajdid*), and its ideas spread into Bosnia during the last decade of the 19th century and beginning of the 20th century. Ideas of this intellectual orientation spread to Bosnia by the means of reformist publications and Bosnian students who studied in the main centers at that time of the Muslim world as well as in the centers of higher learning of the Habsburg Monarchy. From the beginning of the 20th century Islamic religious modernism became the most vocal and gradually the most influential intellectual orientation among educated Bosnian Muslims.

During the Habsburg times this orientation became predominant among *Shari'a* judges in Bosnia. This was a result of the fact that *Shari'a* judges were educated in a school known as *Mekteb-i nuwwab*, established in Sarajevo in 1887 with the aim to provide modern educated judges for *Shari'a* courts in Bosnia. Consequently, the curriculum of this school included *Shari'a* courses, Oriental and European languages, civil law and humanities. *Shari'a* judges educated in this school were instrumental in the reform of *Shari'a* courts and *Shari'a* law administered in Bosnia until 1946.² The most important reforms introduced into *Shari'a* judiciary were: incorporation of *Shari'a* courts into the court system of a non-Muslim country, the adoption of the system of appellation, adoption of many technical features of Austro-Hungarian procedural law, representation of parties by lawyers and the like. The most important reforms introduced into *Shari'a* personal law administered in Bosnia were: codification of Islamic personal law following the model of Ahmad Qadri-paša's codex in Egypt, selective adoption of other legal opinions than Hanafi *mazhab* by resorting to the method of *takhayyur* (dissolution of

¹ This part is drawn mainly on author's *The Bosniaks and the Challenges of Modernity* (Sarajevo: El-Kalem, 1999).

² See Fikret Karčić, *Šerijatski sudovi u Kraljevini Jugoslaviji 1918-1941* (Sarajevo: Islamski teološki fakultet, 1986).

marriage of missing person, giving right to wife to initiate dissolution of marriage, restriction of polygamous marriages and the like), modernization of the management of *waqf* properties etc.

Legal reasoning of modern Muslim scholars in Bosnia during this time was characterized by the shift toward the view that *ijtihad* is the right of each Muslim generation, use of comparative method in *Shari'a* studies (comparison between Muslim legal schools and comparison between Islamic law as such and European legal systems), and the development of adequate Islamic legal terminology in Bosnian language since previously this law was taught in Arabic and Turkish language. In dealing with this last task Bosnian Muslims scholars collaborated with Austro-Hungarian jurists.

A new situation emerged in Bosnia after the World War Two and the establishment of the Socialist government. Marxists interpreted concept of a secular state was accepted and consequently all religious laws were abolished. In 1946 a special law abolishing *Shari'a* courts was issued. Bosnian Muslim scholars found themselves facing an unprecedented situation: what is the relevance of Islamic law for Muslims living in a country without *Shari'a* courts? Answer to this question was sought (1) in the differentiation between religious, ethical and legal aspects of *Shari'a* norms, and (2) the emphasis on objectives and principles of *Shari'a* rather than particular rules and sanctions for their breach. The first approach aimed to underline that *Shari'a* norm is not a typical legal norm, but rather a rule of behavior with religious, ethical and sometimes legal consequences. In secular societies, in the absence of legal consequences of *Shari'a* norms, the religious and ethical aspect is still relevant. Thus, *Shari'a* rules in Bosnia have transformed themselves into religious and ethical norms and as such they are relevant for Muslims. This differentiation was similar to the difference between validity of rules in canonic law for civil forum (*pro foro civili*) and for religious forum (*pro foro religiosi*).

The second approach was based on the differentiation between various elements of the system of Islamic norms. This system consists of particular norms (*al-ahkam al-juziyya*), general norms (*al-ahkam al-kulliyya*) and objectives of the whole system (*maqasid al-Shari'a*). Objectives are on the top of the whole system and they serve as a criterion of interpretation of particular norms. Reformist oriented Muslim scholars in Bosnia in their views very frequently referred to general rules and objectives of *Shari'a* stating that these objectives are unchangeable and, thus, relevant for Muslims regardless of the change of place and time. In addition, some particular *Shari'a* norms, as understood in classical Islamic jurisprudence, were contextually interpreted and their implementation was limited to the existence of social context for which they were intended.

This second approach used by modern Muslim scholars in Bosnia corresponds to the methodology of change in Islamic jurisprudence, developed generally in the Muslim world within the framework of Islamic religious modernism. The first approach, however, even though not sufficiently developed and elaborated, is specific for Muslims living in secular societies and deserves further study.

Examples

Taqlid mentality

Petition of notables of Bosnia asking from the Sultan preservation of Janissary corps: "We have received the Sublime Imperial *firman* sent by Omer effendi ordering the abolishment of Janissaries. We have understood the order. Our forefathers and we, from the time of *fath* until now, were obedient to *Shari'a* and *Qanun*. We have been always and in all affairs loyal to the orders of Sultan. We never opposed nor rebelled. We are not going to do that now...

Now, when the abolishment of Janissaries happened, we also hope that the Sultan will spread wings of his mercy and goodness and stop and abolish **all innovations**, that he will preserve old system and military organization showing in that way his mercy toward us..."³ (Sarajevo, October 1826).

[Introduction of regular army by the Ottoman Sultan was labeled here as an **innovation** (*bid'a*)]

Method of *takhayyur* (selection of other *madhahhib*)

Circular of the Supreme *Sharia* Court in Sarajevo no. 234 dated 27 January 1917 instructed subordinate courts to apply *Hanbali* rules with regards to the dissolution of marriage of absent persons (*ghaib*) if the maintenance of the wife is not provided.⁴

Shift toward *ijtihad*

The first voices for the reinterpretation of Islamic law were heard from the circle of Muslim reformist intellectuals formed in 1890s.

The earliest elaboration of this call could be considered the article "Nešto o šerijatu" (A few words about *Sharia*) by Ibrahim Fejić published in "Misbah" (15/11/1913 and 9/1/1914). The author urged for reinterpretation of some *Sharia* rules related to civil transactions in order to allow modern banking. *Sharia* rules, he wrote, have a purpose to regulate human relations and needs. When those relations and needs change, rules should be changed as well. Changing rules is more appropriate than to resort to legal fictions (*hiyal*) as some *Ulama* did in order to bridge gap between ideals and reality.⁵

In the 1960's, theoretical support for *Ijtihad* became the official position of the Supreme Islamic Authorities in Sarajevo expressed through the writings of its main ideologue Husein effendi Džozo (1912-1982). The best example of these discourses are *fatawa* of Husein effendi Džozo published successively under the title "Pitanja i odgovori" (Questions and Answers) in the "Glasnik Vrhovnog islamskog starješinstva" during the period between 1965-1977 and 1979.

Husein effendi as the main proponent of *Ijtihadi* orientation has never claimed the right of *Ijtihad* for himself. In his *fatawa* he frequently cited a number of different views living the petitioner to choose by his own consciousness. Sometimes he suggested temporary solutions until some respectable Islamic international forum come up with a new *ijtihad*. For instance, asked about banking transactions and usury (*riba*) he answered: "Until Islamic high forums come up with a definitive answer with regard to *riba*, we have two options. First, to resort to the principle *Necessity makes unlawful things lawful*. Second, we can apply the rule of *dar al-harb*, namely that usury is allowed for Muslims living in a Non-Muslim country, since he is allowed to acquire wealth in a way which is lawful in that land."⁶

Emphasize on Maqasid al-Sharia

Using of Objectives of *Sharia*, not only for the better understanding of the Islamic normative system but also for the purpose of deriving new rules, was introduced in Bosnia by the writings of Husein effendi Džozo. That is evident from the following case. Husein effendi was asked: Is it sinful to give financial donation for the system of antihailstone protection? Could such an action be considered as a deed against Gods will?

He answered that the use of certain measures for preventing and protecting people from hailstones is permissible from *Sharia* point of view. The evidence is the following: "Basic rule in *usul al-fiqh* is that the whole Islamic teaching could be subsumed to one sole objective-protection and improvement of

³ Fikret Karčić, *The Bosniaks and the Challenges of Modernity*, 39-40.

⁴ Fikret Karčić, *Duštveno-pravni aspekt islamskog reformizma* (Sarajevo: Islamski teološki fakultet, 1990), 209.

⁵ Fikret Karčić, *Društveno-pravni aspekt islamskog reformizma*, 202

⁶ Husein Džozo, *Fetve (Pitanja i odgovori)*, priredili Mehmed Bećović i Džemo Mujović (Novi Pazar: Publik Press, 1996), 185-186.

life, wealth, dignity and honor". (Religion as one of *al-kulliyat al-khamsa* is omitted here- Fikret Karčić). Thus, preserving and protecting wealth (*mal*) is one of the most fundamental objectives of Islamic teaching and, at the same time, obligations of each Muslim. Consequently, Muslims are obliged to apply all scientific measures in order to improve their economy... It will be sinful not to take necessary steps for the protection and improvement of economy. That will be a kind of self-destruction and suicide, and Islam forbids suicide. Thus, providing anti-hailstones protection is legitimate and does not constitute interference with Gods affairs.⁷

Differentiation between religious-ethical and legal norms

This differentiation could be seen in some *fatawa* and writings of Husein effendi Djozo, even though he has never elaborated them theoretically. (Similarly to early Muslim scholars, Husein effendi was engaged in trying to offer a solution for some issues of his time and by doing that he was not in position to systematize his methodology.)

When asked about a man who wanted to repay his debt to his creditor, and by his own will wished to increase the due amount, taking into consideration devaluation of the national currency, Husein effendi answered that accepting that will be in accordance with "legal and judicial justice" (*hukman*) but not in accordance with demands of "/religious/ethical justice" (*diyanatai*). This last kind of justice is, by his words, "Gods evaluation of human deeds".⁸

Emphasis on ethics in the Constitution of the Islamic Community in Bosnia and Herzegovina of 1977⁹

Article 7

The aim of the Islamic Community is that all its members live in accordance with Islamic norms. The aim of the Islamic Community will be achieved through promotion of good and avert from evil.

Article 9

The Islamic Community takes care of Islamic upbringing and education of its members and strives for the preservation of values of marriage and family life.

2. The relevance of the Bosnian experience in interpreting the *Shari'a* in Western Europe

The relevance of the Bosnian experience in interpreting the *Shari'a* for Muslims in Western Europe could be sought in two important aspects:

- 1) the nature and place of the *Shari'a* vis-à-vis the state and society and
- 2) developments in interpreting the *Shari'a*

As for the first aspect, Bosnian Muslims have as we have seen, passed in their history through two phases. In the first phase (1878-1946) they enjoyed the status of a recognized religious community with the right to apply the *Shari'a* in personal matters by the means of state *Shari'a* courts. In that sense their status was similar to the status of other Muslim minorities living within non-Muslim states. Such a position could be described as Muslim *dhimmis* of non-Muslim states. In the second phase (1946-present day) Bosnian Muslims lived in a secular state, first in a Socialist, and after 1990 in an emerging democracy. The *Shari'a* courts were abolished by the state's will, not by the choice of the Muslim community. Muslims accepted that fact and tried to find a *modus vivendi* with the new political

⁷ Husein Djozo, *Fetve*, 465

⁸ Husein Djozo, *Fetve*, 62.

⁹ Ustav Islamske Zajednice u BIH (Sarajevo: Rijaset Islamske zajednice u Bosni i Hercegovini, 1418/1997)- translation is author's.

and legal system. Half a century of history showed that Islam can survive in the absence of a legal protection of Muslim family patterns. The survival and preservation of the Islamic identity was achieved through continuous functioning of religion, ethics and customs. It should be also noted that during that period the process of secularization heavily affected the Muslim community, not because of a weakness of the Muslim faith but due to the fact that that process was state sponsored. A lesson from the Bosnian experience for Muslims in Western Europe could be if human rights and liberties are guaranteed in a given country and there is no state or public pressure on Muslims, their identity could be preserved without instance of separate personal laws. In such situations *Shari'a* norms will be followed based on free choice of individuals and advisory function of Muslim communal bodies. That model, which will give preference to individual and social ethics to the law, will be in our view, more adequate to contemporary liberal democracy than the old model of protected minority. Besides, that model will better suit to the position of Muslims as fully integrated citizens of European states, where territoriality of laws is a norm, than insistence of pre-modern personality of laws.

As for the second aspect, our brief survey of the history of Islamic law in Bosnia showed that the prominent Bosnian Muslim scholars in modern times shifted from the predominant *Taqlid* mentality to *Ijtihadi* paradigm. The methods employed to bring changes into existing *Shari'a* law mainly corresponded to those used in other Muslim countries influenced by Islamic reformist movements. One method- differentiation between religious-ethical and legal norms- is worth of further studying. Even though this differentiation was known to classical Muslim scholars, it acquired a new dimension in contemporary times. Our view is that this differentiation could be a very significant for Muslims living in Western Europe.

However, prominent Bosnian Muslim scholars such as Husein effendi Djozo, who advocated the use of these methods, were not in a position to build a systematic theory of reform. They remained at the level of casuistic dealing with the emergency of life and challenges of their time. In the immediate time which followed the demise of Husein effendi Djozo in 1982 there was no scholars of younger generation with similar competence, orientation and zeal to continue his efforts and systematize his views. The turbulent times of the 1990's, which brought a threat to the very existence of Bosnian Muslims, further prevented such developments.

In the meantime, new trends in the interpretation of Islam appeared in Bosnia. Their main characteristics were among others, conservatism and the discontinuity with modern developments of Islamic thought in Bosnia. Proponents of such views are mainly graduates of Middle Eastern universities and they promoted *Salafi* views or insist on premodern *Hanafi* positions. They disseminate their views through alternative print and electronic media. The heritage of Islamic reformism in Bosnia and the very concept of the 'Islamic tradition of Bosniaks' are seen by them as unaccepted modernism or syncretism.

Facing new challenges within the Muslim community, mainstream Bosnian Muslim scholars are now in need to carefully analyze, evaluate, systematize and further develop the heritage of modern Islamic thought in Bosnia. By doing this, we believe, they will make this heritage more accessible and acceptable to the Muslims of Western Europe. Namely, for this heritage to be relevant for Western Europe it is necessary to differentiate between its elements which are peculiar to Bosnia and those which are significant for contemporary European context. Muslims of Western Europe are heterogeneous in terms of their ethnic origin, *madhbab*, and social position and thus, only a part of Bosnian Islamic heritage which transcend particularities of Bosnian soil will have enduring significance.

Debating the relationship between Muslims in Western Europe and the *Shari'a* several points should be made. First, the *Shari'a* understood as Divinely ordained way of life is relevant for every Muslim. It is impossible to be a Muslim without acceptance of the *Shari'a* as an ideal norm of behavior. The question is how the *Shari'a* will be interpreted and which role will play in society. The answer to both

questions should be given by competent Muslims scholars and Muslim communities at large. Second, the *Shari'a* sciences possess their own foundation, philosophy and methodology. They possess some answers how to balance between unchangeable and changeable elements, aims and means, general and particular. Bringing dynamism into *Shari'a* sciences, especially *Usul al fiqh*, is a necessary prerequisite for offering solutions for new challenges. Third, proper interpretation and application of *Shari'a* norms to contemporary situation cannot be based on textual studies without adequate knowledge of social reality (*Fiqh al-waqi'*). Only the combination of two kinds of knowledge may bring proper application of properly understood norms. Fourth, the dilemma is not either *Shari'a* or secular state. It is possible to have *Shari'a* in a secular state if we: (1) understand *Shari'a* as an Islamic normative system which includes religious, ethical and legal norms. In a secular state, only religious and ethical norms will be relevant while legal norms will transform themselves into ethical ones; (2) understand secular state as 'neutrality with respect' whereby religious norms are not state laws and neither state laws become religion. Bearing in mind these principles we may conclude that Muslims of Western Europe are facing important challenge how to keep authenticity of Islamic teaching which constituent part is *Shari'a*, its correlation with European context and the role of Islamic normative system within the framework of modern state and society. In search for an answer, Bosnian Islamic heritage maybe a source of inspiration.

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