

A Dozen Questions about the Islamic Sharia Some Things You Wanted to Know about Islamic Law but Were Too Embarrassed to Ask

Nathan J. Brown, George Washington University

**This memo is part of POMEPS Studies 24: New Challenges to Public and Policy Engagement. [Click here to download the entire publication as a free, open access PDF and to see each of the individual memos.](#)*

In 1993, I received a call from a producer at WCBS Radio in New York. The all-news station had just received reports that some followers of `Umar `Abd al-Rahman had been arrested by the Federal Bureau of Investigation for plotting to set off bombs in New York, including in two Hudson River tunnels. The producer needed someone to go on the air immediately. I said I was unlikely the right person to ask – for the local New York audience the most likely question was “Are the subways and tunnels safe?” and I simply could not say anything useful. I could say something about who `Umar `Abd al-Rahman was, something about the ideology of his supporters, and something about the political environment in Egypt and the Middle East which had produced them. I could say nothing about the safety of the subways, the plausibility of the FBI evidence, or any of the most immediate questions New Yorkers would likely wish be focused on. The desperate producer paid careful attention and assured me that if I went on air, the presenter would not ask if the subways are safe but only pose those questions I said I could speak to. Thirty seconds later, I was on the air and heard the first question: “Professor Brown, New Yorkers want to know: are the subways safe?”

Sometimes we cannot control the questions we are asked. WCBS asked me a question I should not have answered (and did not). But sometimes we should not avoid answering questions when we do have expertise that can contribute to understanding.

In this guide, I have assembled twelve questions about the Islamic sharia. Most are not ones I would immediately address if I could choose. But even if these questions are not where I would choose to start, they remain good questions and are better addressed directly than avoided. And unlike the one about the New York subway, I can give answers to all of them.

This is, I hope, a work in progress. Its intended audience consists of interested non-specialists. I am making it available now with the hope that I will receive constructive feedback on how to improve it. I am also beginning to compile a list of helpful links so that the guide can provide some guidance on what sort of sources to consult and what they are likely to provide.

Comments and suggestions from potential users and from other specialists are very much welcome.

1. What is the sharia?

It sort of means “Islamic law.” That is not a bad translation. But it can be misleading, sometimes leading people to expect a very clear set of rules. The sharia is more of a dialogue among religious experts about what Muslims should do in particular situations.

Those who follow Islam look to divine guidance for instructions on how to live their lives. The sharia is that guidance. In most of this guide, we will focus on sharia as law, but let us consider the broader sense of sharia, which I might translate as “the Islamic way of doing things.”

The Qur’an itself – a text all Muslims regard as divine – contains some direct instructions to believers. Muhammad, the human being that Muslims believe God chose to be the messenger and bring the Qur’an to humanity, is also believed to have given guidance to Muslims for all time. He did this partly by example and partly by addressing

practical questions as they arose. Accounts of his words and actions, and sometimes the actions of those closest to him, were collected and assessed for their accuracy. In the first few centuries of Islam, Muslim scholars probed these texts for their instructional content.

These instructions covered all sorts of areas – how to pray, how to make business arrangements, what obligations husbands and wives have to each other, what constitutes a crime, what evidence is needed to convict someone of a crime, what punishments should be inflicted, and many other human activities. The instructions cover not simply what is forbidden and what is required but also what is discouraged but not quite banned or what is desirable but not quite required.

Almost every aspect of Islamic law is the subject of nonstop discussion and debate among Muslim scholars. Even something very basic – forbidding alcohol – is the subject of widespread but not universal agreement. All authorities agree that wine is off limits as is drunkenness. The texts are completely clear on those points. But what about a sip –not enough to get drunk? Most authorities would say that there is no loophole there. But one longstanding minority view is that such consumption is deeply frowned upon but not strictly forbidden.

Many of these categories do not involve law in the sense of rules enforced by the state. Some are meant to be instructions for individual practices; others are designed to be used by judges to adjudicate cases before them.

It may be possible to find a Muslim who says, “I am a Muslim, but I do not believe in the sharia,” but such a statement would not make much sense to most other Muslims; it would almost be tantamount to saying “I am a Christian but do not believe in Jesus.” In policy terms, as I explore below, barring Muslims who believe in sharia from entering

the United States – as one political leader proposed in 2016 – would effectively exclude almost all of them.

2. If the sharia consists of God's instructions, does that mean it can never change?

In theory, yes; in practice, no.

The sharia may not change, but nobody doubts that human understanding of it always has and always will change. Sometimes Muslims make this point by explaining the distinction between sharia – which is of divine origin – and fiqh (generally translated as “jurisprudence”) – which is a human undertaking.

Fiqh was developed within the schools of law that arose in the religion's early years. The early scholars of fiqh set down some basic rulings and methods. Their students, their students' students, and subsequent generations were expected to color within those lines, leading some to come to claim that Islamic law is “frozen.” But, of course, all kinds of new interpretations were developed within those schools over time. Rulings sometimes evolved without scholars explicitly saying so, and ways of applying those rulings could fundamentally change their meaning. So there was actually much more evolution and dynamism among the schools than the picture of a frozen sharia implies. And scholars often drew on, or deferred to, local practice or traditions, making the application of sharia more flexible in practice than it might have appeared from scholarly tomes.

In the modern period, however, the pace of change has picked up considerably for three reasons. First, there are many more actors, some quite new (muftis, universities, parliaments, secular courts, lay people) working to interpret Islamic law, bringing a wider range of debates about what the sharia instructs Muslims to do.

Second, the older schools of law are less isolated from each other than they used to be. Traditionally, jurists tended to operate within their own schools, but over the past century, scholars have come to dip more heavily across school boundaries to devise appropriate rulings.

Third, two traditionally valid tools of interpretation have become far more freewheeling in the hands of some. “Public interest” (maslaha mursala) was used by some of the traditional schools (to varying degrees) to select an interpretation that aligned with the broader goals of the sharia and the needs of the community. Similarly, some scholars have used the “goals” (maqasid) of the sharia. In earlier periods, scholars would use such goals (such as the preservation of life, religion, or property) to guide their interpretations of the sources. Traditional schools used these tools conservatively and only by trained experts; however, players less constrained by a traditional school could use them to justify a wide range of new interpretations.

3. So anybody can interpret the sharia?

In practice, yes; in theory, only those trained to do so.

But as we have just seen, the number of those claiming the training (and what constitutes training) has rapidly expanded in recent decades. Recently, Sunni traditional schools have lost some ground to unconventional religious leaders, while Shi’a religious authority has increased in hierarchy.

It is rare to find anyone within Sunni Islam who says his or her interpretation of sharia is final or binding on all Muslims. However, most Sunnis believe that they should at least attempt to comply with sharia, and some consult experts to answer their questions about what is required. Those answers are called fatwas. The term has entered English and is sometimes used with menacing overtones, but most fatwas are technical answers to abstract questions (if a merchant sold some goods to a buyer and

immediately after the transaction changed his mind, can he cancel the sale?) In most forms of Sunni Islam, only scholars trained in one of the various classical schools have issued fatwas. But there is little way of regulating who can issue a fatwa, although many states have tried.

In the most common form of Shi'i Islam, recent centuries have seen a bit more hierarchy develop. In Iran, Iraq, and for most Shia of the Gulf (such as in Bahrain), senior religious authorities are held to serve as "sources of imitation" – that is, their followers are supposed to treat their teachings as authoritative guidance (these authorities carry the title "Grand Ayatollah"). A fatwa from a Grand Ayatollah is to be accepted as the final word by his followers, at least for the life of the Ayatollah, since only living scholars can be sources of imitation.

In both Sunni and Shia Islam, a fatwa generally carries no legal force; it is simply a scholarly opinion. But this can be precisely the source of its moral weight. Because a fatwa is not issued in order to determine the outcome of a particular case, it can be answered based on scholarship alone. Such at least is its aura and perhaps why ordinary Muslims so often seek religious guidance from those who have no formal state authority. This also helps explain why the Islamic sharia is taught and transmitted across generations not in terms of state law codes (as civil law systems, like those in most of Europe, are taught) or in terms of actual court cases and precedents (as common law systems in the Anglo-American world are taught), but in terms of scholarly writings.

There are a few exceptions where fatwas do hold legal force, for instance, Egyptian courts are required to consult the country's grand mufti when they mete out a death sentence.

4. It sounds like sharia could be anything anybody wants it to be. How can that be law?

Because someone in a position of political authority might say it is.

As we have portrayed it, the Islamic sharia does not sound so much like a legal system but instead like an intellectual tradition. That it is. But is it ever law in the sense of rules enforced by the state?

Yes. Sometimes states appoint officials or legislative bodies to rule or write laws in accordance with their understanding of the sharia. That is, when they write laws, they claim that they are following the shari`a. In such cases, Muslims are free to believe whatever they like, but when it comes to enforcement, officials enforce the law that has been written down.

5. Where is sharia implemented?

Everywhere, but hardly anywhere.

Most majority Muslim states today would claim to adhere to the Islamic legal tradition, but most laws on the books today do not come from Islamic legal sources. How did this happen? And what does it mean for the sharia?

Until the twentieth century, it was fairly common for Muslim rulers to appoint judges and then allow them to rule in accordance with their own understanding of the sharia.

Sometimes rulers would submit their own edicts to the sharia courts for consideration, adjudicate cases themselves, or form specialized courts for disputes between specific groups (like merchants). Non-Muslims and foreign citizens might have their own courts for their own communities.

Only a few countries have the first category of courts today, in which those with Islamic legal training adjudicate cases based on their understanding of the sharia. The “sharia courts” that do exist often restrict their jurisdiction to specific issues (generally family law).

In most Muslim countries today, the laws enforced are those written by states. Many have comprehensive codes of law, based sometimes on European civil codes. Some states formerly ruled by Great Britain have been influenced by common law.

In all such cases, rulers or legislators often explain that they are operating within the bounds of the Islamic sharia; their goal is to allow Muslims to live the Islamic way. That means avoiding any law that clearly violates the sharia, drawing from the sharia in a few areas such as family law, observing the clearest sharia provisions, and taking whatever steps they see as necessary without violating the sharia to maintain order and the public good.

In one other area of law – finance – some states have endeavored to adopt laws that provide a framework for “Islamic finance,” to allow individuals and companies the legal basis to practice business according to the sharia without imposing it on everyone. Islamic finance is based on some distinct principles, such as requiring that those who provide funds cannot expect to be repaid with fixed interest; instead, they must participate in some of the risk of the enterprise they are funding. In practice, many Islamic financial practices and instruments have developed in ways that closely resemble those of non-Islamic finance.

The Islamic sharia often has general influence in three other areas. First, it is often mentioned in constitutional texts, with real symbolic value but uncertain legal meaning.

Second, it often influences the way that rights are understood. Freedom of religion, for instance, generally does not protect public blasphemy. And since religion often informs

family law, religious freedom often means the right to pick which officially recognized religion one subscribes to rather than a fully individual freedom of conscience.

Finally, Islamic law still has strong symbolic appeal among some constituencies so that politicians might call for the application of criminal penalties in a manner consistent with classically derived punishments (emphasizing corporal punishment) rather than modern civil codes (emphasizing incarceration), though such steps are more frequently discussed than actually taken.

6. Do Muslims want to bring sharia to America?

Most Muslims want to live within the bounds of the sharia but very few want to substitute it for the U.S. legal system.

Most Muslims in America are satisfied practicing their religion under the current legal system. A few very religious Muslims in America have sought to find ways to make sharia legally binding in their private lives by asking that U.S. courts enforce private agreements that Muslim family law be followed. In this sense, they are acting perfectly in accordance with the legal order. Such tools require the consent of the parties and can only be enforced by the regular courts if they are consistent with U.S. law and public policy.

In short, there is no effort to supplant the legal system with a fully sharia-based one.

Nevertheless, some American political leaders have suggested some kind of sharia-based screening in which Muslims would be required to renounce any attempt to supplant the U.S. constitution with the sharia. Not only would such a requirement based on a misunderstanding of what American Muslims want, it would be difficult to avoid

affecting all kinds of mainstream groups that place great value on their understanding of God's instructions. For instance, the Republican party's 2016 platform stated: "man-made law must be consistent with God-given, natural rights, and if God-given natural, inalienable right come in conflict with government, court, or human-granted rights, God-given natural, inalienable rights always prevail."

7. Is sharia unfair to women?

The sharia treats men and women differently in family relations. And that can certainly be unfair at times if fairness is seen as requiring equality (as it often does in liberal societies). Actual practice varies quite considerably, however, because it does not depend only on the legal rules derived from the sharia but also how they are applied and interpreted. Generally, social, legal, and political factors have a very great impact on how favorably husbands, wives, and other family members are treated.

The provisions of Islamic law have been developed by those who betray the attitude that men and women are different ("complementary" according to the Qur'an) and have different rights and duties. Men should provide and protect; women should obey. In general, husbands can divorce their wives at will; they can also be married to more than one woman at the same time. Wives have far more restricted rights of divorce. Daughters' shares of inheritance is less.

These arrangements are certainly not equal, but they do provide women with the ability to make some claims and demand some protections. Husbands who abuse them or fail to provide are violating their rights. Women are allowed to earn income and own their own property but are not expected to contribute financially to the household.

Determining the actual balance in practice depends on three factors.

First, what social customs prevail? In some societies (or in some families) women's ownership of property is a legal fiction because males insist on exercising control. In others, that ownership is real and places them in a potentially powerful position. In some societies (or in some marriages), the groom promises a significant sum of money to be paid in the event of divorce or death. The effect is to make it financially difficult for a husband to divorce his wife; it also means that if he provides his wife with grounds for seeking a court-ordered divorce by abusing or abandoning her, he incurs significant financial loss. Divorce in some such instances can be more threatening to the husband than to the wife. Without accounting for what customs prevail and what the arrangements of a specific marriage are, it is difficult to say in the abstract who holds how much power.

Second, what law is on the books? Since Islamic jurisprudence offers a large body of possible rules to adopt and enforce, there is actually wide latitude for states to adopt practices with very different implications.

Third, how do those in charge of enforcing the law (courts and police) behave? Does a divorced woman have a realistic chance of obtaining an amount a husband pledged? How do police and judges treat allegations of abuse?

Because such practical questions have such enormous implications, most of those who criticize existing practices as unfair to women seek not to abandon the sharia basis of family law but instead to adopt interpretations and encourage practices to address the claimed imbalance.

8. Does sharia require that apostates be killed?

Muslim political authorities almost never have executed apostates. But apostasy is still seen as a grave, if rarely punished, offense.

Why is it so offensive? And why, if it is deemed so offensive, is little done about it? The dominant classical position might be summed up as: “In theory, apostates should be killed, but precisely because the punishment is so severe, the procedural requirements to prove apostasy should be extremely difficult to meet.” The official answer in most Muslim majority states is simpler “No” because apostasy is not against the law.

But apostasy is not taken lightly.

What explains these attitudes? According to their accounts, the early Muslim community was often the target of attacks by non-Muslim enemies. In that context, apostasy was more than a matter of personal belief but treated as an embrace of the enemy. The basic sources of Islamic law suggest that such betrayal be punished with execution. But precisely because it is so serious – and because tossing around charges of apostasy can be so disruptive – scholars held that it could only be proven in front of legitimate political authorities. In practice, issuing a death sentence requires that an apostate publicly and explicitly repudiate Islam before an authorized judge. Unsurprisingly, this has been very rare.

A minority position (though one increasingly voiced in the modern world in which individual freedom of conscience is often seen as a core value) interprets the texts to allow Muslims to renounce Islam privately. As long as they do not actively endanger the community, any punishment will come in the next world.

Muslim majority states rarely criminalize apostasy. Instead, they create obstacles: they may refuse to recognize Muslim conversion; continue to judge those who might consider themselves former Muslims according to Islamic personal status law; and criminalize attempts to convert Muslims away from Islam.

It may seem that the (almost impossibly) high standards of proof and the more lenient interpretations are devices for evading the letter of the law. But historically most

scholars have insisted the precise opposite: that there are clear sharia based instructions to be stringent with evidence in cases where the punishment is severe and that they are acting consistently with both the spirit and the letter of God's guidance.

Yet there are some who interpret the strictures on apostasy with considerably more enthusiasm. The practice of declaring someone an apostate (takfir) has become more common on the radical fringes even as many mainstream scholars denounce it. The Islamic State, as we will see in more detail, considers itself a legitimate government, able and very willing to adjudicate such cases and enforce capital punishment.

9. Does sharia mean that thieves get their hands chopped off?

It can, though it very rarely does.

The sharia includes a category of law that might be considered the rough equivalent of criminal law – offenses against the society, rather than a specific person. Someone who kills another person, for instance, is not only expected to pay restitution but also suffer penalties imposed by the ruler who acts to defend the interests of society.

The traditional schools worked out penalties for such cases and were aided in doing so by some fairly clear texts. For many criminal matters, the room for interpretation is much less than it is for financial or family law. And many penalties are corporal in nature. Thus thieves should lose their hands.

But few do. Most states actually find other criminal penalties. As we just saw with apostasy, sharia courts generally used very high evidentiary standards and searched for extenuating circumstances as ways of avoiding levying the prescribed penalties in many cases. An accused thief might claim ownership and thus throw enough doubt on the case to escape the most severe punishment. Some scholars have found guidance in a tradition in which an early (and exemplary) Caliph suspended corporal punishment for

theft during a time of famine. This has allowed them to construct a gaping loophole allowing rulers to avoid harsh corporal punishment on the grounds that times are hard.

But most of all, governments in most Muslim-majority countries have simply written laws that use imprisonment and fines for criminal offenses rather than corporal punishment. Since sharia-based penalties are to be imposed by political authorities, not by vigilantes, most traditional authorities have accepted that there is no recourse in such a case except to offer advice to the authorities to follow the sharia. A few radicals have seized on the failure to implement such rules as evidence that current regimes are not ruling in an Islamic fashion, but most authorities denounce these radical ideas as dangerous takfir (accusation of apostasy, as explored above).

10. Does sharia require military jihad?

In principle, it does provide for it. But for most authorities, sharia-based jurisprudence about jihad in the military sense has atrophied.

Early Muslim communities' engagement in warfare created the context for a fairly robust set of legal rules about war. However, existing political authorities look not so much to the Islamic legal tradition, but to contemporary understandings of international relations to make decisions about war and peace. And even internally, some provisions of Islamic jurisprudence – such as excluding non-Muslims from military service but instead requiring a tax payment – have been forgotten for centuries by most states.

The term “jihad” can refer to any pious struggle (and thus has positive connotations) or more narrowly to military action to defend the faith. It is common for some political and military leaders to use the general vocabulary of jihad to give any martial sentiments a religious ring. But the extensive law of militaristic jihad has been relegated to the bookshelf by all but the radicals.

These radicals have revived the doctrine of jihad in two ways. First, they claim that jihad is a duty on each Muslim when his or her homeland is threatened, and since they claim that existing regimes are not Islamic, they see the entire Islamic world as so threatened. Every Muslim should therefore dust off the law books on jihad.

And second, the Islamic State, by proclaiming that it is a state (unlike al-Qaeda, which never did), also asserts it has the duty to organize jihad on a communal and international level.

11. If the actions of radicals are outside the mainstream of interpretations of the sharia, do more mainstream figures denounce the radical interpretations and actions, like beheadings of prisoners?

Yes. Ad nauseum.

12. So how do you explain ISIS, al-Qaeda, and all that?

Radical interpretations have gained some traction in the past few years. They have done so by reviving aspects of the Islamic legal tradition that had seemed anachronistic to many and insisting on literal applications of some provisions that had been interpreted in softer ways by mainstream authorities. In sum, they present themselves as uncompromising advocates of God's true message and dismiss others as coopted, overly bookish, or corrupted armchair scholars.

Such arguments have always been available. Why does anybody listen today? Of course, most Muslims do not, but some do.

One reason such groups have found an audience is that many more traditionally-minded scholars are seen as too close to existing regimes. In most Muslim-majority countries, large religious institutions are state financed and

administered. Most include religious education as part of their mandatory curriculum for Muslim students and make some effort to oversee mosques, sermons, and religious charity. The official religious establishment still holds enormous sway, but it is left open to the charge that its scholars favor interpretations based on the source of their paychecks.

A second reason is that education has spread and allowed many individual Muslims the ability to read original sources themselves, hear a wider variety of voices, and rely less on their local scholars. Some have found their way to radical ideas that would shock traditional scholars.

A third reason has to do with the growing popularity of a trend to read the Qur'an and other core texts as literally as possible. A variety of modern approaches have popularized the idea that the original meaning of clear sharia-based rules must be recovered from the literal meaning of the texts, cutting down the scope for human interpretation. The brand of Islam sponsored by the Saudi government (often termed "Wahhabi") prides itself on its devotion to the text. Such literalism does not always lead in a radical direction, but even if it does may not be consistent in its application. While, most of the Saudi religious establishment can be very restrictive, it is still anything but radical toward the rulers.

And a final reason is a deep political alienation among many citizens of some Muslim-majority societies. Such alienation has many roots – domestically, a sense that political authority is corrupt and unaccountable and that public policy performance has been poor; internationally, a sense of an unjust global order – and seems to produce an audience for extremists who promote their way as authentic, moral, proven, and true to God's teaching.

Thus it is possible to interpret some sharia-based ideas in a radical fashion, though the reasons for doing so are generally more political and social than religious in nature.

Nathan J. Brown is a professor of political science and international affairs and director of the Institute for Middle East Studies at George Washington University. He is a nonresident senior fellow at the Carnegie Endowment for International Peace.

Source:

<https://pomeps.org/2017/03/13/a-dozen-questions-about-the-islamic-sharia-some-things-you-wanted-to-know-about-islamic-law-but-were-too-embarrassed-to-ask/>