# History and prospect of Islamic Criminal Law with respect to the Human Rights

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# History and prospects of Islamic Criminal Law with respect to the Human Rights

## 1. Introduction

The cultural hemisphere of the Muslim world has been on the spotlight of international interest ever since the events of 9-11. Admittedly, topics in regard of Islamic issues had also been discussed before, but it was the act of terrorism and every step that followed which have moved the topic from the debate podiums of the academic world to a more general public interest. Thus, people of the Western do try to get a better understanding of various aspects regarding especially the Arab part of the Muslim cultural hemisphere in order to ease tensions and prevent further terrorist acts from happening.

The official intentions of the ongoing debate are clear and often repeated in a political agenda that is spearheaded by the United States government: Bringing democracy to Muslim countries and creating stable and prosperous civil societies is on top of that official agenda of western policy if one believes in the political rhetoric of Western politicians. One may doubt whether those are always honest and straightforward. Often, it seems, their own economic and political interests rank much higher on that agenda than the interests of the Middle East. Nevertheless, one may credit them at least with their publicly declared benevolence.

In addition to the West's approach to change and reform one can witness a similar political reform agenda that is expressed by different political groups and individuals from within Islamic societies. There, a veritable reform debate has also been launched by the events of 9/11. One may hesitate to believe in a realistic prospect of such an agenda. But whether those intentions are always honest and realistic or not, they certainly cannot be translated into action without

a better understanding and a more knowledgeable research on specific Islamic issues. This is especially true for the Western hemisphere.

One of the most controversially debated issues within this context is the Islamic criminal law as such, which is "the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself", as Joseph Schacht, an eminent scholar of Islamic jurisprudence has once described it.[1] However, there is a general debate about the Sharia, as it is commonly called, without much understanding of the basic principles of this law which often leads to misconceptions and prejudice. The pictures usually evoked - regarding the Muslim legal practise - are preoccupied with extraordinary cruelty and hardship imposed upon offenders to the law. Cutting off hands as a common practice for thieves or stoning adulteresses are popular images of a very one-sided debate.

This academic work should contribute to dispel these misconceptions and false understanding by giving an inside view into the Islamic Criminal Law that has thus far been so poorly represented, and yet which governs the lives of a substantial portion of the world's population. It aims at making contributions and additions to the existing knowledge but should not be confined to a purely juridical sphere.

Starting with some general remarks on democracy and the separation of State and Religion in the Muslim world one will also have to discuss, at least briefly, some ideas on the interconnection between moral standards and modern legal practise in order to illustrate the philosophical and sociological background that closely relates to the purely juristic matter. This is of paramount importance because the Sharia also constitutes a system of ethics and values which helps to explore the sociological aspects of criminology and penology as they are understood within Islam.

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[1] Schacht, Joseph, Origins of Muhammadan Jurisprudence, Oxford 1950, 124ff.

Philosophically, punishment matters are related to the question pertaining to how far the rights are owned by state for giving sanction to the offender. Sociologically, the question is to what extent that punishment is capable of preventing criminal acts or guaranteeing the public's security. And to the culprit, whether the sentencing has optimal effective capacity to educate and change recidivism attitude. In short, what is the purpose of penalisation and how is it obtained at best?

Besides those very general opening questions that could be asked within the context of any system of laws the present document will go further and provide an overview of how Islam approached and still approaches those fundamental questions. The historic background, including the emergence of Islam and the development of the Islamic system of laws commonly referred to as Sharia Law will be presented as well as all major sources of jurisprudence and different Schools of Law and Thought of the Sharia. If a greater public understood how many of the conflicts of contemporary Islam have their roots in the formative years of Islam itself, it would be less susceptible to inaccurate stereotyping.

Furthermore, the present work aims at re-establishing the fact that Islamic penal laws were conceived in larger interests of society. It says much about Western understanding and attitudes towards the Muslim world that the Islamic Law Code that is known as Sharia is usually reduced to a penal law code that only evokes one-sided images of extremely severe means of penalisation.

In fact, this work will make an effort to show that the Sharia goes far beyond the point of penalisation of criminal acts and covers all parts of Islamic life. It is not restricted to a purely juristic matter as one will see in the course of this present work. Provided that both, the emergence and historic development of the Sharia are at least broadly known, one will finally understand that it was reformative at the time introduced and ethical in nature which is another aspect that should be covered.

The preparing and insightful introduction to the system of criminal procedure in Islam provides a common ground for a further discussion of controversial issues such as Human Rights within Islam. Are modern human right principles and Islamic systems of law supplementary and therefore easy to reconcile? Or do both approaches to justice contradict each other fundamentally?

The big question underlying this work is whether a specific Muslim criminal law can still be applied in Muslim countries. Is there a future for the Sharia, and if yes, how will it look like? What type of criminal law is needed at present and in the future in order to provide for peaceful and stable Islamic societies that apply a law code that meets international and domestic expectations in view of basic human rights as well as general approaches towards justice and equality before the Law?.

Upon which basic principles should criminal law be formulated and which function does the century old Sharia law code exercise within the redefinition and development of a Muslim system of laws? Those are the issues that need to be discussed with full recognition of the past and the content of Islamic Criminal Law and by respecting religious traditions and values that are significant to Muslim societies.

Through this research I would like to explain some important points of Islamic criminal law not just for the non -Muslims but also for Muslims. We ourselves want to learn how to conduct research using scientific methods and logic in order to understand Islamic criminal law. We want to show how Islamic criminal law should be understood through study and analysis. The analysis of law must be changed according to the benefits and interests of the people because God wants to see all his creation living in good way, peacefully, with justice and respect for each other. There are general discussions about the whole of Islamic criminal law without an understanding of the general principle of this law, without which it is not possible to apply Islamic criminal law.

## 2. Religion and State

A separation of state and religion is one pillar of modern democratic societies and a precondition for the establishment of a modern criminal law in the Western World. This principle guarantees - among others - equality and justice before the law. Another important component is the separation of powers, which was first expresses by the Enlightenment philosopher Montesquieu in his "L'ésprit des lois". Both principles - the separation of state and religion and the separation of powers - do ensure a modern criminal law practice under which all human beings are treated equally. It took the Western hemisphere several centuries to achieve this principle even though it is not yet fully realised but commonly accepted.

In the Arab world, a separation of state and religion – comparable to the transformation of Christian societies into secular ones in the course of the past two centuries - has never occurred. This was because the Prophet Muhammad exercised judicial, legislative and executive power himself, which gave rise to the tradition of these powers being exercised by the ruler of Islam (the caliph after the death of the Prophet).

Furthermore, the absence of a Muslim Enlightenment or a similar intellectual movement as a result of the stagnation of Islam intellectual reasoning from the 12$^{th}$ century onwards and the lack of openness to new geographical and scientific hemispheres led to an ever existing state religion that involves all aspects of public and private live. There, all citizens are good Muslims just as all European people used to be Christians. An individual faith such as it came into existence in the Western hemisphere since the 18$^{th}$ century does not exist.

But one has to go back further in history to obtain a full understanding of the different interpretation of state and religion within the Moslem community. Unlike the Christian religion that had to emancipate itself against the state, Islam emerged in accordance with the state from the beginning on. Due to a rapid military expansion, it occupied vast parts of the then known world within one generation or two. More drastically formulated one could say that "Islam started out as a faith determined to conquer and convert the world. Politics and the state

were subsumed into its mission."[2] Only later on, the religion-political project of the Prophet and his early adherents was gradually replaced although it was a change rather in practice than in theory.

This has strong repercussions on the relationship between the two and reinforced their alliance: Problems touching the basis of the state's authority and the source of its law do not arise in Islamic political thought. Political science is closely connected with ethics. But unlike Western thinkers following Greek and Roman traditions of political science and therefore putting moral philosophy at the core of it, Moslem scholars discuss it in terms of theology.

The two centuries following the French Revolution and the total emancipation of Western political science from religious matters saw little change or development in the basis of Islamic political thought. Instead of innovation one can only observe adoption and new strategies as a reaction of the stream of Western intellectual thought. Islamic scholars looked at the West like rabbits stare at the snake: They either identified it as a model that needs to be followed in a tremendous effort to catch up with the West or the regard the cultural hemisphere of Europe and America as an 'other' and enemy.[3]

Of course, there are reasons for this development or rather non-development that all derive from the basic foundation of the Islamic world. Islam is defined as a religion in the first place. The term can be translated into the English language as devotion for God. But Islam also shapes and defines the society and therefore it can become a political system. Very often it is claimed that Islam is both, "state and religion". Islamic scholars justify this strong link by pointing out to the role of the Prophet: He was both, a founder of a new faith and a political ruler. Therefore, he embodied state and religion and caused an inseparable connection between the two. In the Western world, the universal ethic of Christianity has

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[2] Black, Antony, The History of Islamic Political Thought From the Prophet to the Present, Edinburgh 2001, 249ff.

[3] Black, Antony, The History of Islamic Political Thought From the Prophet to the Present, Edinburgh 2001, 279ff.

become a part of national and political ethic. Religion, on the contrary, became an entire privately exercised occupation. This has never occurred in Islam, which did not emerge as an institutionalised "Church" but as a system of society.[4]

This principle - defined by the terms *dīn-wa-daula* or *dīn-wa-dunyā* - claims that Islam is a permanent guide to all aspects of life. As a consequence, political science is "not an independent discipline but a branch of theology."[5] The Moslem *Umma* has to be a religious and political community, individual religious practice is therefore impossible. State and Religion have to act according to the same ethnic, moral and judicial principles. In Islam, the law precedes the state, which exists for the sole purpose of enforcing the law as defined by God and revealed through his prophets and the Koran.

The Koran includes three explicitly defined principles concerning state rule. The presidential idea suggests that one leader should be head of state as a successor to the Prophet. The second idea evokes the principle of consultation. All powers on the executive and legislator level have to exercise their rule on the basis of regulatory consultation. According to the third principle deriving from the Koran, Islam has to be a state religion. That is why only a Muslim can be head of state and the entire law system has to be based on the principles of Islam. It is obviously why those ideas exclude almost automatically the idea of secularism.[6]

The basis of the Islamic state was ideological and its primary purpose of government was the defence and protection of the faith, not the state. That helps to explain the fact that at the heart of Islamic political doctrine is the Islamic community, the *Umma*, that is tied by bounds of faith alone. Therefore, Islam distinguishes in theory, only between believers and non-believers.

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[4] Compare: Iqbal, Muhammed, Die Wiederbelebung des religiösen Denkens im Islam, Berlin 2004.

[5] Lambton, Ann K.S., State and government in Medieval Islam, Oxford 1981, 1ff.

[6] Krämer, Gudrun, Gottes Staat als Republik. Reflexionen zeitgenössischer Muslime zu Islam, Menschenrechten und Demokratie, Baden-Baden 1999, 43ff.

With the *Umma* all are on equal footing. It is the implicit and explicit acceptance of the Sharia with all its implications that made the Muslim part of the *Umma*.[7]

However, the formula "state and religion" (*dīn-wa-daula* or *dīn-wa-dunya* ) does leave some room for interpretation and the – at least – partial exercise of democratic elements and a modern judicial practice. But the phrase "state and religion" often is redefined by Muslim regimes in a sense of "state is religion". This leads to permanent abuses of religion in those societies. Religion is reduced to control the people and preserve political authority.[8]

Nevertheless, one should not generalize and oversimplify the relationship between state and religion in the Arab world. There are tremendous historic and cultural differences that need to be pointed out. The Islam scholar Lorenz Müller underlines the fact that Islam is no static system and no monolithic block that exists out of time and space.[9] Fundamental differences exist for instance between Turkey and its neighbour Iran even though both countries are pillars of the Moslem world.

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[7] Siegmann, H., The state and the individual in Sunni Islam, in: The Muslim World, LIV (1964), 14, 26ff.

[8] Antes, P., Der Islam als politischer Faktor, Hannover 1997, 92ff.

[9] Krämer, Gudrun, Gottes Staat als Republik. Reflexionen zeitgenössischer Muslime zu Islam, Menschenrechten und Demokratie, Baden-Baden (1999), 24ff. / Müller (1996), 67ff.

## 3. Islam and Democracy

Ever since the events of 9-11 the topic "Islam and Democracy" ranks first on the Western agenda that aims at reforming the Arab world. The question whether Islam is capable of adapting to democratic standards of the West is widely discussed by politicians, scholars and an interested public. Unfortunately, this debate often involves stereotypes that oversimplify a definition of democracy as well as Islam. Therefore, it usually is not very helpful finding solutions but rather brings back Huntington's "Clash of Civilisations".

Within the Arab world, a similar debate is led but it has a slightly different focus. Only few oppose democracy completely. On the other hand, even fewer call for a total implementation of Western standards. The focus is not on whether but rather on how and to which extend democratic values can be introduced to Arab societies. This implies the question which kind of democracy is desirable and how it can be adjusted to religious values and traditions. Some Arab scholars point out to traditions that might be comparable to the Western democratic evolution whereas others negate the validity of democracy by defining it as purely western.

Very often, those scholarly receptions are highly idealised and do not reflect the political reality. The Pakistani political scientist Kurshid Ahmads, for instance, describes the Islamic political system as follows:

"The Islamic political order is based on the concept of *Tawhid* and seeks its flowering in the form of vice regency operating through the mechanism of Consultation (Shura) supported by the principles of equality of human kind, rule of law, protection of human rights including those of minorities, accountability of rulers, transparency of political processes as an overriding concern for justice in all its dimensions: legal, political, social, economic, and international."[10]

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[10] Ahmad, Khurshid, Islam and Democracy: Some Conceptual and Contemporary Dimensions, In: Muslim World, Vol. 90/No. 1&2, 1 ff.

Ahmad and numerous others besides him explicitly point out to parallels that mark Western style democracy. However, the reality very often differs from those high ideals. The same author who praised some of the key elements of democracy also makes it clear that "it is intellectually unacceptable and culturally untenable to assume that a particular Western model of democracy must be accepted as an ideal form of polity for the entirety of mankind, particularly for Muslims, who have their own distinct moral and ideological identity and historic-cultural personality."[11]

The appeal of this view for someone who wants Islam and democratic theory to cohere is that the community has tremendous discretion in interpreting Islam and enacting laws that embody its spirit. Democratic decision-making can extend to every area of life and of law. One limitation of this theory, though, is that it is apparently the Muslim community alone that is entrusted with the task of interpreting and applying God's word. That is all well and good for Muslims, but it excludes non-Muslims. If self-rule consists of figuring out what God wants within the framework of Islam, then non-Muslims will not be full-fledged participants. The answer that minorities in any democracy are excluded when they do not share the fundamental values of the majority may be unsatisfying to someone who thinks that equality is a touchstone of democracy. But perhaps non-Muslims could be permitted to participate in the democratic discussion of God's will, even if they are not full members of the community.

The essences of Islam and democracy can be seen as compatible because both are flexible mobile ideas. If democracy was restricted to requiring an absolute sovereignty of the people, it would lack the ability to appeal to people and to cultures that do not place humans at the centre of the universe. But democracy has flourished even where humanism was not the dominant mode of thinking. Modern Western democracy grew up among pious Christians, many of them staunch Calvinists who emphasized man's sinful and fallen nature, and

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[11] Ahmad, op.cit., 2.

themselves grappled with the relationship between democracy and divine sovereignty.

Most Americans today probably believe that God, not man, is the measure of all things. It is doubtful whether the majority of Indians place humans at the centre of the universe, yet democracy thrives in India. The idea of the rule of the people has been flexible enough to place either the people or God or nature as supreme power of a society. On any of these views, the people still govern themselves within the area delineated by their capacities and right Islam has demonstrated a comparable degree of flexibility in its essence. The acknowledgement that God is sovereign turns out to mean different things to different people. It has encompassed the idea of free will for some people, while others have thought that a sovereign God must leave nothing to chance or choice. Rationalist Muslim philosophers thought that God was sovereign in the sense that he was the First Mover.

If the essences of Islam and democracy can be compatible, what about the practical institutional arrangements required by each? In particular, Islam, on most views, requires that the state does not exist in an entirely separate sphere from religion. But can a state that embraces religion be democratic? Britain has no separation of church and state. The Queen is Defender of the faith and head of the Church of England. Anglican bishops sit in the House of Lords, and anyone who wants to change the Book of Common Prayer must go through Parliament to do it. Yet Britain is the cradle of modern democracy.

To take another Western European example, in the German state of Bavaria, schools' classrooms display a crucifix. Furthermore, the comprehensive financial relationship between the State and the Church by the means of church taxes arose another reason point out to a rather incomplete separation of Church and State. Nevertheless, no one seems to think that this makes modern Germany into something other than a democracy.

On the other hand, some people object vociferously to the suggestion that it might be possible to have democracy - especially liberal democracy - without a strict separation of Church and State. They argue that to be just to everyone,

democracy cannot impose one vision of the good life. Liberal democracy requires government to remain neutral about what values matter most, and to leave that decision up to the individual. If religion and the state do not remain separate; the state will inevitably impose or at least encourage the version of the good life preferred by the official religion. The resolute laicism practiced in France is an excellent example illustrating this vision. It also shows how difficult a state's religious neutrality can sometimes be.

It is necessary for a democracy worthy of the name to respect the individual's right to worship as he chooses, and to provide religious liberty for all its inhabitants. But individual religious liberty does not necessarily mean that the government doesn't embrace, endorse, support or fund one religion in particular. The government can support one particular view of the good life. It can give money to synagogues or ashrams or mosques or all of the above. But so long as the government does not force anyone to adopt religious beliefs that he or she rejects, or perform religious actions that are anathema, it has not violated the basic right to religious liberty. Separation of church and state may be very helpful to maintaining religious liberty, as in the United States, but it is not always necessary to it.

With respect to equal political participation, there is no principled reason in Islam to suggest that anyone, Muslim or non-Muslim, man or woman, regardless of race or any other characteristic, should not be permitted to participate equally in collective decision-making. Some Muslims might argue for special participatory status for Muslims or for men. But aside from Kuwait, where the legislature refused to enact the Prince (emir's) decree granting women the vote, women have the vote in every Muslim country where there are elections. That includes Iran, with its Islamism constitution; Arab states like Jordan, Egypt, Algeria, Tunisia, and Morocco; and now even Bahrain, a Gulf monarchy with traditional ways not unlike Saudi Arabia. Even there, it is not generally argued against women's participation at the recent (and at the same time the first) elections on a municipal level. It were rather technical reasons that kept women away from the ballots (not enough truly separated voting rooms) and that are due to be overcome by the next time.

As for Muslim women leaders, Benazir Bhutto was twice elected Prime Minister of Pakistan; Tansu Ciller served as Prime Minister of Turkey; in Bangladesh the current Prime Minister, Khaleda Zia, and the past Prime Minister, now leader of the opposition, Sheikh Hasina Waged, are women; and Indonesia has a woman president in Megawati Sukarnoputri. These women have mixed records both in terms of effectiveness and honesty, but they have been neither better nor worse than male leaders in their countries, and the fact they were elected should dispel the stereotypes that unmitigated sexism prevails everywhere in the Muslim world. There is, admittedly, a saying attributed to the Prophet, according to which a nation that makes a woman its ruler will not succeed; and some Muslims have argued that this bars women from serving as heads of state. But this interpretation is not widespread, and has not stopped Muslim women from being elected.

## 4. Crime and Punishment

### 4.1. Defining punishment

Everybody seems to know what punishment means: Legal offenders are punished by the law. Children that don't behave are eventually punished by their parents. Confronting natural disasters can sometimes be felt as a punishment. Apparently, the term is highly ambivalent. What exactly is punishment and how can it be related to a state's criminal law? Several political scientists as well as law scholars have repeatedly tried to find a satisfying answer to this question. But none of the given answers that are to be found in legal literature comes up with all aspects that should be included.

Following a suggestion made by Hart and Primoratz, legal punishment can be analytical defined as an evil which is imposed on a criminal by a legal authority on purpose. This legal authority has to be authorized by a set of laws which were

broken by the offender.[12] The term "evil" stands for everything that is not desired by people – not just physical pain or theft and other actions usually defined as being criminal but also imprisonment or the negation of basic rights. An evil that is authorized and justified by the public such as imprisonment is the ultimate response to individually committed criminal action. In other words, evil answers evil.

## 4.2. Punitive Theories –Law and Morals

Punitive theories explain why people feel they should punish or why others should be punished. Furthermore, they give reasons for legal action by the state or try to justify it. Emotion and justification almost go into each other. There is only a thin line that distinguishes emotion and the reasonable justification. As a result, putting punishment into an arbiter's hand – usually the state - aims at a canalisation of emotion and at a moderate and balanced sanction.

One fundamental function of penalisation is the idea that it helps a community of men. Punishment holds a community of people together because they believe to agree on what is wrong and what is right. The act of punishment itself – a trial, followed by the execution of the judgement – seems to be a public celebration of common values. It was Emile Durkheim who advocated this thesis for the first time. He concludes that punishment has a religious origin, a mechanical solidarity among all members of a society which brings about the collective moral conscience.[13]

The problem with this interpretation is that it applies to archaic societies more than to modern ones. Larger and advanced societies with a rapid social transformation do have a pluralism of values and moral standards which make it

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[12] Hart, Hart, H.L.A., Prolegomena to the Principles of Punishment, in: Proceedings of the Aristotelian Society 60, 1959/60, 1, 4ff. and Igor Primoratz, Justifying Legal Punishment, New Jersey and London 1989, 1ff.

[13] Durkheim, Emile, Über soziale Arbeitsteilung, Frankfurt 1988, 426ff.

harder for everybody to agree on a common standard. This would explain why moral values are more likely to be referred to in socially and religiously extremely homogeneous societies like the Arab world than in modern Western civilisations. In any case, the relationship between moral values and a legal order is complex and contradictory. It limits individual life styles and creates an atmosphere of restrain – elements often felt in the Muslim world.

One solution to the problem would be to demoralise the system of criminal laws. But however promising that may be, in the end it does not seem to be a feasible solution since a state's legal action is almost always based on somewhat common standards that a community of men agrees upon and that are also rooted on moral ground. In other words, a system of criminal laws always needs to be morally justified, even if it is only the idea that murder or rape should deserve damnation. Admittedly, this connection is less evident in the Western legal system than in Islamic criminal law. Nevertheless, it is present in any legal system.

But the dilemma of a pluralism of values of a society on one side and a demoralisation of a criminal law on the other side can be solved. MacCormick suggests as a first step to view the state instead of a society as an agent that condemns by attributing values. Following this idea, one has to precisely say what the state should aim at. MacCormick puts forward four different models[14]:

The state enforces true morals

The state enforces positive morals

The state enforces everything that guarantees its existence

The state enforces a minimal moral standard

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[14] MacCormick, Neil, Against Moral Disestablishment in: Legal Right and Social Democracy, Oxford 1982, 18 ff..

a) The first model is not feasible within a modern society that has many, often radically differing ideas on morals. Ideas concerning one's personal life are usually very individual. Thus, a true moral standard would never meet the agreement of everybody. The state was never able to find a common moral standard. Therefore, true morals don't exist.

b) Durkheim explicitly advocates the second model saying that actions are criminal if they hurt a community's conviction. Punishment is therefore a publicly exercised wrath or a sentiment of vengeance. In that sense, punishment is a means of defence of a society. This theory helps to explain why certain actions are defined as being criminal even though they did not do any harm to the society. Briefly, the model puts forward the idea that not the true but the ruling moral conviction is enforced. The state's task is to enforce a conviction of a majority of its members.

c) The third model makes the criminal law a tool to enforce the *raison d'état*. Any crime would automatically be defined as an offence against society. Strictly speaking, any crime is seen as an avalanche that threatens to eradicate a state's existence. Those ideas are based upon fears of anarchy and chaos that justify an extremely harsh legal action taken against law offenders. This is typically to be found in Muslim countries that search to preserve their existence by any means and tolerate relatively few offences against the law. On the contrary, in modern societies only few crimes such as high treason are directly linked to the immediate existence of a state. That's why they tend to be more liberal.[15]

d) The most promising approach to separate law and morals is the fourth one. The state limits its role as an arbiter and only penalizes moderately. Under punishment is everything that endangers the public's security or threatens individual rights. This approach can do without any religious or vastly moral impact and does not enforce any ideal. It only focuses on the invulnerability of individual rights.

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[15] Compare to: Devlin, Patrick , The enforcement of Morals, London 1965, 6ff.

As a conclusion one can say that a specific set of moral attitudes are automatically part of any criminal law. In the course of time, Western criminal laws have aimed at limiting these moral standards to a minimum as much as possible in order to ensure a truly free society. Nevertheless, certain moral assumptions and attitudes are still part of the criminal law code and will always be.

In other countries those convictions have not yet made much progress. Especially in the Muslim world, both moral assumptions and a state's legal action do have a strong connection and very often seem to be inseparable. Most countries lack a strong political stability. Therefore, they tend to prefer a mixture of the first three models suggested by MacCormick. The third model serves as a guarantee of a state's existence. The first and in a less righteous society the second one aim at founding a certain sense of community in order to hold the often fragile societies together by the means of religion that interferes with state action on the basis of defining morals.

### 4.3. Criminal Punishment in Islamic Sharia

As a general introduction to this chapter one will need to acknowledge the following before looking at the details of a specific Islamic philosophical and sociological approach to penalisation: The most forceful part of the criticism often evoked is the West's denunciation of the harshness of the *Hadd* (fix punishments) that the Islamic criminal law prescribes. Obviously this stems from their conception of human dignity that evokes a high measure of pity if not even sympathy for law offenders.

For a moment, it seems, some of those Western sociologists forget the heinous deeds of the criminals, their impact on the society and that is why they prescribe lighter punishments. This illustrates at least the impression one gets in Islamic countries from the Western penal code. The kind of judgement advocated in the Western hemisphere might be called positive justice and is a product of the

permanent interaction between expectations and existing conditions, aimed at a gradual improvement of human kind.[16]

Contrary to it, Islamic societies presuppose that man is essentially weak and therefore incapable of rising above personal failings. Therefore, it imposes a rigid code of punishment for the microscopic minority of criminals and ensures an atmosphere of peace and security for the rest of the society. Broadly speaking, one could conclude that Westerners rather focus on the individual and do their best to ensure his rights even if he has offended the law. Muslims, on the other side, pay more attention to the general welfare and are rather ready to sacrifice an individual's welfare on behalf of the community. In short, "Islamic penal laws were conceived in larger interests of society."[17] If this basic difference is kept in mind while striking a comparison between the two, the whole matter can be understood easily.

Any Islamic legal scholar will agree that the purpose of punishment is not vengeance against the culprit. It rather aims at protecting society from the aggressions of legal offenders and to halt transgression and crime. It seeks to prevent further criminal acts and can also be understood as a warning against its repetition by others. In this sense, there is not much difference compared to Western systems of criminal law since both approaches aim at occupying a preventive as well as a curative role.

But in addition to those very general aims, Islam also sees punishment as a necessary requisite of divine justice and the Sharia "as the most prominent distillation of Islamic morals and law."[18] This has to do with the strong connection of religious and state affairs in the Muslim world. Any judicial proceeding operates on the ground of divine affirmation; justice is pronounced in the name of God. It is believed that all penalties following the accusation and

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[16] Rawls, John, The theory of justice, Cambridge, Mass. 1971, 78ff.

[17] Sherwani, A.A.K., Impact of Islamic Penal Laws on the traditional Arab society, New Delhi 1993, 264ff

[18] Forte, David F. Studies in Islamic Law, Oxford 1999, 236ff.

trial of an offender to the law are measured with a divine balance of justice. Punishments are, therefore, harsh where necessary and lenient where appropriate. No matter how harsh the sentence may be, it is viewed as ultimately merciful.

The stated mercifulness in the eyes of the public can be described under various aspects. First of all, a punishment is seen as a remedy for offenders whether obedient or not. It is a mercy for the obedient since it protects him from the powers of evil, prevents disobedience, and saves him from the harm of the crime. Furthermore, an imposed penalty is also a mercy for the disobedient offender because it restrains him from the pursuit of crime and puts a stop to his criminal energy which could, otherwise, do even more harm. Following this stream of thoughts, it is not correct to identify punishment with some form of revenge against the culprit but rather as a reward for his action and a relief for both, the offender and the community. In addition to that, it also serves the betterment of the offender. Within this context, the punishment is not the aim but rather a measure taken in response to a genuine need.

Accusation, trial and punishment are key elements of justice. But when talking about justice, the religious sphere is once more inflicted: “Islam is a religion that believes it has a monopoly over truth and salvation. It is the only faith that divides the world into good and evil.”[19] God is identified as representing and even being the highest justice possible. God is just in all He commands. The exercise of justice is therefore in His will.

Adding to that, the Islamic approach to criminal proceeding is, as above stated, the stand that man is weak and incapable of rising above his personal failings. Betterment can, therefore, only derive from God. A divine authority is invoked to provide the sources and basic principles of the public order. It commands respect and has a lasting impact on the administration of justice.

But justice cannot be achieved without the threat of punishment and its actual implementation. If an offender is left unpunished, it will harm the interests of

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[19] Spalek, Basia, Islam Crime and Criminal Justice, Devon 2002, 39ff.

society and break the divine will. Furthermore, it is an effective deterrent since it helps to prevent further acts of crime in that sense as people will know the severe consequences of any criminal action. This threat is usually sufficient to deter them from committing an act of crime and therefore it represents once more the will of God.

To conclude, one can state that the objective of the Islamic Sharia is the prevention of crime, the strife for a peaceful society and protecting the dignity of individual men. This is achieved by the means of cleansing the culprit's life from all traces of criminal energy, by preventing him from lapsing back, and by threatening others to repeat any criminal act. Thus, punishment, however painful it may be, is in full agreement with the divine will and balanced reason. The pain it causes is seen as necessary to restore health and provide cure just as the pain caused by a surgeon's knife also results in a final remedy.

## 4.4. Crime in Islamic criminal law

Crime as defined in the Shariah consists is legal prohibitions imposed by Allah, whose infringement entails punishment prescribed by him. "Crime as defined in the Shariah is identical with Crime as defined in modern law"[20].

In Islamic criminal laws every thing prohibited by God and his prophet is a Crime. Unlike in Western law where only that which has a specified punishment is a Crime, in Islamic law every crime is punishable but not every punishment is specified. The role of the State is to ensure that, in a person's public conduct, he does not commit a crime or any act likely to lead to one. Islamic law does not empower the State to infringe on the right of an individual citizen. It cannot break into a man's room and punish him for adultery. It cannot plant a camera in a hotel room and punish a man based on a recording of a sexual act or drinking spree. But if a man and a woman choose to have sex where four eye witnesses actually see coitus, or if a man chooses to drink his beer in front of his house

[20] Abdusamed, Kader, Crime and punishment in Islam, Lenasia (South Africa) 1994, 3ff.

instead of inside his living room, the act immediately leaves the realm of private conscience to one of public morals and the state punishes this severely. “Crime is an act or conduct whereby a person breaks the law and (ii) infringes upon the rights of others. In the religious parlance it is called “a sin”.[21]

4.5. Crimes mentioned in Koran and the Sunnah

The classic Sharia identified the most serious crimes as those mentioned in the Koran. “These were considered sins against Allah and carried mandatory punishments.”.[22] These crimes and punishments are:

Adultery: death by stoning.

Highway robbery: execution; crucifixion; exile; imprisonment; or right hand and left foot cut off.

Theft: right hand cut off (second offence: left foot cut off; imprisonment for further offences).

Slander: 80 lashes

Drinking wine or any other intoxicant.

Apostasy.

Rebellion.

Crimes against the person included murder and bodily injury. In these cases, the victim or his male next of kin had the "right of retaliation" where this was possible. This meant, for example, that the male next of kin of a murder victim could execute the murderer after his trial (usually by cutting off his head with a sword). “If someone lost the sight of an eye in an attack, he could retaliate by

[21] Abu Zahra, Mohamed, Crime in Islam, Cairo 1976, 26 ff.

[22] Tahir, Mohamood, Criminal law in Islam, Delhi 1996, 62ff.

putting a red-hot needle into the eye of his attacker who had been found guilty by the law"[23]. But a rule of exactitude required that a retaliator must give the same amount of damage he received. If, even by accident, he injured the person too much, he had broken the law and was subject to punishment. The rule of exactitude discouraged retaliation. Usually, the injured person or his kinsman would agree to accept money or something of value ("blood money") instead of retaliating. In a third category of less serious offences such as gambling and bribery, the judge used his discretion in deciding on a penalty. Punishments would often require the criminal to pay reparation to the victim, receive a certain number of lashes, or be locked up.

## 4.6. Categories crime according to Islamic criminal law

Muslim criminal law arranged punishments for various offences into four broad categories: Kisas, Hudod, Tazeer and Diya

## 4.7. Retaliation (Kisas)

Kisas Punishments means the equal punishment. Kisas punishments are imposed only for premeditated murder and intended crimes other than homicide, which involve the loss of a limb or organ, bearing in mind that the crime and Kisas are equal. It is laid down by the Koran that the Kisas punishment should not exceed the extent of injury or loss sustained by the crime. It states:

"0 believers, prescribed for you is retribution in case of murder. A freeman for a freeman, a slave for a slave. A fema1e for a fema1e. But if his brother pardons a man aught, let the pursuing be honourable and let the payment be with kindness.

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[23] Said, Sabig, Fiqh Al Sunnah, Cairo 1953, 330ff.

That is a lightening granted you by your Lord. And a mercy; and for him who commits aggression after that. For him there awaits a painful chastisement".[24]

"In retaliation there is life for you men possessed of mind haply you will be God fear in".[25]

"And therein we prescribe for them: a 1ife for a life. An eye for an eye. A nose for a nose. An ear for an ear, a tooth for a tooth". [26]

Retaliation meant principle, life for life and limb for limb. Kisas applied to cases of will feel killings and certain type of grave wounding or maiming and gave to the injured party or his heirs a right to inflict a like injury on the wrong doer.

On the other hand Diya meant blood money. For certain unintentional injuries Diya was awarded to the victim on a fixed scale. In such cases where Kisas was available it could be exchanged with blood money or Diya. The injured of his heir could accept Diya or Kissas according to his choice; it means in case of murder, the heirs of the murdered person could accept blood money and forgo his right to claim death on the murderer.

*4.8. Hudood or Hadd*

This word means the limit or boundary. In Muslim criminal law, "it meant the specific penalties for specific offences".[27] The idea was to prescribe, define and fix the nature, quantity or quality of the punishment for certain particular offences, which the society regarded as anti-social or anti-religious. The offences were characterised as being offences against god or offences against public

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[24] Koran, 2:178,194.

[25] Koran, 2:179.

[26] Koran, 5:45.

[27] Mohamed, Shallal, Islamic criminal law, Amman 1996, 25ff.

justice in contradiction to the ‘offences against person.’ The punishment prescribed under Hadd, could not be varied, increased and decreased. The judge had no discretion in the matter but to award the punishment if the offence is abolished. Some of the Hadd punishments were: Death by stoning, amputation of a limb or limbs and flogging. The prescribed punishment for certain crimes were: For Zina or illicit intercourse, death by stoning; for theft, amputation of limb like right hand or left foot; for falsely accusing a married woman of adultery, eighty strips. The Hadd punishment was severe and the object of awarding such punishment was deterrent i.e. to prevent the criminals from committing such crimes, which were injurious to the society or the creatures of the God. In case of Hadd, the injured party could not remit or compound the prescribed penalty as he could do in case of kisas.

The proof of the offence must be very strict and full legal evidence either two or four competent eye-witnessed of proved credit was insisted upon for the conviction of the offender. For example, an offender for the crime of Adultery (Zina) could be punished only if there were four male eye witnesses of actual crime, thus a person could not be punished for Zina unless he defend public decency and committed offence in the open. An accused could be committed for a Hadd offence on his confession but it had to be made four times before (Kadi) judge and it could be retracted at any time. Apart for technical rules of evidence, any doubt would be sufficient to prevent the imposition of Hadd. According to some Jurisprudence, the rules of Hadd are so strict and inflexible that it must be only in rape cases that the infliction of Hadd as of retaliation would be possible and there are only a few instances known in which Hadd has been inflicted.

## 4.9. Tazeer

Means discretionary punishments. These punishments usually consisted of imprisonment exile, corporal punishment, boxing the ear and so on. In case of offence governed with Tazeer, the kinds and amount of punishment was left

entirely to the discretion of the judge who could even invent new punishments according to his whims.[28]

Tazeer could be inflicted in different situations e.g. first, it could be inflicted for offences for which penalty by way of Hadd or Kisas was not prescribed, these offences were not of honesty nature and so were left to the punishment according to the discretion of the judge.

Offences falling under such category were bestiality, sodomy, offences against human life, properly public peace and tranquillity, decency, morality, religion, forgery or deeds and letter with fraudulent design and so on. Actually, the entire Muslim law was based on Tazeer because the Hadd and Kisas had been prescribed for a very few offences only. "The process of trial in cases falling under the category of Tazeer was also simple as compared to the trial procedure in cases falling under Hadd".[29] Tazeer could be inflicted on a confession, evidence of two persons or even on strong presumption. In a sense, the whole past of this criminal law was discretionary and could be regulated by the sovereign. Secondly, Tazeer could be inflicted even in cases falling under Hadd or Kisas, if the proof available for an offence was not such as was required by the law for the award of the prescribed penalty, but nevertheless, was sufficient to establish a strong presumption of guilt, then, instead of Hadd or Kisas, some other punishment was awarded in the discretion of the judge. If because of insufficiency of evidence or some other technical difficulties, Hadd or Kisas could not be awarded, then Tazeer was awarded. Thirdly, the principle of Tazeer covered flagrant crimes, crimes having a dangerous tendency or capable of causing extensive injury to society.

From the above brief survey, though the Muslim law of crime would appear to be very severe on its face, as it sanctioned some cruel punishment like mutilation and stoning, yet as a system the Muslim Law of crime is mild as the law seems to

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[28] Tahir, Mahmood, Criminal Law in Islam, Delhi 1994, 90ff.

[29] Mohamed, Schalal, Islamic Criminal Law, Amman 1996, 54ff.

have been framed with more care to provide for the escape of the criminals than to found conviction on sufficient evidence and to secure the adequate punishment for the offender. The Muslim law of crime contained many illogical ties. It was based on some of those concepts of state and social relations whom the Western thought had already discarded long ago. It suffered from complexities and lack of system.

Muslim law drew no clear distinction between private and public law. Criminal law was regarded more as a branch of private law rather than of public law. Its underlying principle was that it existed mainly to afford redress to the injured; it had not much developed the idea that crime was an offence not only against the injured individual but also against the society as such.

Islamic criminal law divided crimes into two categories: Crime against God, such as drunkenness and adultery, which are regarded as crime of deeper character, and crime against man, as murder and robbery, which were regarded as offences of private nature in which the injured person had to take initiative to claim punishment of the offender. Though the crimes against man were punished by the state, yet the basic notion underlying them was to give satisfaction to the injured rather than to protect the society. The crime against man were, though no less ruinous to the peace and tranquillity in the society than the crime against the God, nevertheless regarded as private wrongs and were left to the discretion or caprice of the individual concerned, which may be characterised as the major weakness of the Islamic criminal law. For example while murder was regarded as an offence against man and so a private offence, drunkenness was deemed to be an act against God and so was regarded as a public offence. This can not convince a modern mind because murder is a serious crime and it strikes the very basis of the existence of a civilized society, it looks rather irrational that murder be treated as a private offence and drunkenness should be deemed to be a public offence.

## 5. The emergence of Islam

A profound knowledge of Socio-cultural traditions within the Moslem world requires at least some basic information on the history of the Arab peninsula where the religion of Mohammed had come from. But before one looks at the emergence of an Arab culture that was quickly spread over vast parts of the then known world by "Allah's warriors", one will have to examine the pre-Islamic situation of the Middle East. Mohammed and his contemporaries did not come out of nowhere. Their cultural and mental socialisation contributed to the development of an Arab culture and also to a system of moral values, social relationships and legal traditions that are partly still in place.

### 5.1. Political and geographical situation before Islam

The Arab peninsula with less than 2500 km in length and proximately 2000 km in width is abroad region consisting of vast deserts and some fertile soil. Geographically, the Arab peninsula is a unique land of many distinctive features peculiar to itself. It is a part of Asia but nevertheless separated from the mainland of this continent. Therefore, it can be identified as a subcontinent by itself. This does not just apply to its geographical conditions but also to its culture and ethnicity. Furthermore it has always been closely related to the three continents surrounding the peninsula. In that sense, it could be seen as a centre of the then known world.

But despite its relatively easy accessibility it never made it too easy for invaders and foreign influence. The difficult topography compresses a mixture of mountains, plateaus, deserts, low land, dreary wasteland and oasis. Arabia is one of the hottest and driest regions in the world. The direct and intense rays of the sun scorch the dreary wastes of the desert without neither shade nor shelter. The heat is further intensified by the hot winds that blow across the country. There is some rainfall in coastal areas, but in the interior of the country the rainfall is

scanty. There may be no rain for several years at a stretch, but then the rain may bust as a violent storm.

Due to the difficult climate and geographical conditions as described above which explain the fact that almost five sixth of Arab peninsula comprehend desert land, the Middle East has never been in the centre of interest of any alien force in the pre-Islamic period. Neither one of the two super powers – the Roman Empire followed by the Byzantine rulers as well as the Persian Empire – took a particular interest in Arabia despite the fact that both empires have embedded their power for a long time in its surrounding areas. However, parts of the Modern Arab world fell under the regime of the two empires: the Eastern regions, from Arab peninsula up to modern Iraq were controlled by the Persians whereas the northern and northwest regions including Syria, Lebanon, Palestine, Israel, Jordan and North Africa all came under the authority of the Roman Empire.

Several theories can be attributed to the fact that both giant empires did not focus their strategic aims at conquering the Arab peninsula and subordinating its Arab inhabitants who led either a nomadic life or enjoyed some clad administration or tribe government. First of all, this region did not promise a profit from an economic point of view. Secondly, a military invasion seemed rather difficult considering water shortage and similar provision defiles. Highly developed civilizations such as the Romans and the Persians that were accustomed to live comfortably in fertile regions apparently were not too much tempted by those prospects.

Both reasons as stated might have caused a certain reluctance of the Romans and Persians to annex the Arab peninsula. In addition the Arab society in those days showed identifying features and characteristics that were scarcely found in other cultures. A somewhat primitive, harsh and cruel hospitality towards guests and a high degree of allegiance and loyalty to their own customs and tribe traditions are part of it. They were brave, materialistic, narrow minded and very sensitive if their dignity, repute and freedom got touched. Those characteristic features deflexed in their habit of burying their daughters alive and killing their own sons if they were considered having cowardliness character. Coward Sons were

considered incapable to defend the dignity, esteem and reputation of their own family and tribe.

The inhabitants of Arabia did not maintain a permanent residence at one place. They always moved nomadically which means they migrated frequently with all their possessions. Slave trading at that time was one of economic activities of the Arab tribes. Slaves were treated rudely and brutally. They were not entitled to their rights as human beings. Women enjoyed a similar social position. They had no right at all and no social standing. A man could marry as many women as he liked and abandon them at any time. The eldest matured son was a legal heir to his father's wives except his natural mother.

Regarding those special characteristics of the Arab heartland and the reluctance of the Roman and Persian Empire to annex it, one understands easier why a territory relatively closed to the epicentres of early civilisation experienced a rather unique and independent development. Those characteristics certainly contributed to the rise of Islam as the dominant religion. Even though it was influenced by the monotheistic expression of faith of the Jewish and Christian believers, it was even more shaped by Arab tribe traditions. Interference of the outside world was relatively small.

## 5.2. Arab societies before Islam

Fazlur Rahman in his book "Conception of Islamic Modern Society"[30] describes the moral concept of the pre-Islamic Arab society by terms such as loyalty, extravagance, bravery, patience, sincerity and respect of self esteem. However, according to the author they had neither a noble moral instinct nor ethnic norm ideas that go along with those principles. As a result, the expression of the above listed character features were corrupted and flowed. In other words, one has to talk of a primitive society defined by pure loyalty based on materialistic consideration.

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[30] Rahman, Fazlur, Conception of Islamic Modern Societies, Delhi 1994,133ff

There was no loftier, further reaching concept about anything at all. This society was implanted in nepotism and a system of blood relations. Thus, it could lead Arabs to sacrifice their life and soul and motivate them to do some horrifying things without relating their action to a system of morals, no matter if good or bad, right or wrong.

Bravery and military courage were in great demand in societies characterised by nepotism as it was a vital device to protect the perpetuity of the tribe and should be implemented without regard of any personal or ethic consideration at all. It compares to animal lust and instinct as unavoidable and uncontrollable biological demands that are used for attacking and destroying tribe enemies. Indeed, their teaching conspicuously suggested the bravery of Arab people not only to hit and attack the enemy without hesitating but also to fertilize an attitude that led to the initiative to kill and ambush. Thus, bravery for Arabs was only another name for vicious acts and savage practice. Therefore, the members of that society were engrossed "in all sorts of vices and evils which were both deep-rooted and universal in nature."[31]

Difficult natural conditions and hardships resulting from scarce sources, disaster, starvation, among others, had taught Arab tribes to be patient. Dealing with the challenges of the dreary deserts of Arabia demanded a special survival strategy. Bravery went along with the crudity of savage wars and the patience to await and sit out difficulties. Thus, patience was not a moral deed in itself but became to be an actual demand of nature, related to the existence of life and as an effort to stay alive.

Moral qualities such as bravery, courage, and patience were strengthened by the life in the desert and caused a high degree of honesty and sincerity as prime features and characteristics. But honesty and sincerity were also preconditions for dignity that was deeply rooted within all Arab tribes. The glorification of the dignity of tribes was taken as source for individual dignity and self esteem of all

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[31] Sherwani, A., Impact of Islamic penal law on the traditional Arab society, New Delhi 1993, 438ff

tribe members. Thus, the dignity of tribe relates to the dignity of its members and it was the highest desire of those individuals to implant, hold on to, and enhance tribe dignity. This odd dignity resulted in a certain spirit of arrogance and solid variety among pagan Arab tribes.[32]

Property was a key feature to defining dignity and honour. The treatment of women in the pre-Islamic period was one result of those definitions. They were considered as personal property. Each tent made a family; a group of families made a clan and group of clans made a tribe. Each tribe was a world by itself, it had its own code of honour, it own concept of law and order. Loyalty to the tribe and the courage to fight with others indicated the degree of honour within the tribe. A tribe's absolute equality offered to all men within the tribe and protection of those who sought refuge were rated as the main virtues.

Tribal loyalties led to inner-tribal rivalries and hostilities; disputes with other tribes arose over live stock possession, pastures, water sources, and horse races. Once the dispute broke out and led to victims on either side, a chain reaction was set up. As a consequence, vendetta became one of the strongest, almost religious, social obligations.

Regarding their faith, Arabs adhered to different forms of polytheism. Each tribe worshiped in its own way. Numerous gods and idols were essential to their expression of faith. But besides praying to idols, they also worshipped celestial objects such as the sun, the moon, and the stars; trees, rocks and other natural objects were seen as holy items as well.

Composing and expressing poetry was used as a means to knock and tease each other. Pagan Arab poetry shows the tribal finalism, chauvinism and triplication of tradition. Furthermore it includes the glorification of individual dignity, the praise of martial arts, combat techniques and weapons.

At that time, Mecca was a centre of economic activities and majority of citizen were traders. Their business links reached out beyond the borders of Mecca to

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[32] Bravmann, M. M., The Spiritual background of early Islam, Leiden 1972, 67ff.

places as far away as Yemen and Syria. A council of elders managed the affairs of the city. Wealth generally derived from the suffering and misery of the poor. Mecca was steeped in materialism, and the people in their race to make money had little conscience of higher moral and social values. A system of excessive interest was used arbitrarily and violently.[33]

## 5.3. The concept of crime and punishment in pre-Islamic Arabia

The basic outline of the pre-Islamic Arab society as given above leads to the question of how crime and punishment were regarded and dealt with before the arrival of Islam. As a general assertion one has to remark that Arabs had a tribal life, a tribal mind and tribal culture which did not encourage the growth of individualism. Its members were purely defined by their tribe. This led to strong repercussions concerning the concept of crime and its resulting punishment within such a society.

For a crime committed by a single offender, revenge was taken from the whole tribe and often set a chain reaction in motion. As a consequence, petty matters sometimes resulted in bloody controversies that often took years to settle. The involved actions such as violence and raiding were regarded as a manly occupation, associated with honour and social prestige. This created an extremely violent atmosphere; regard for human life and weaker elements of society were almost non-existing. All that counted was the right of the stronger because only he could enforce it.

Pre-Islamic societies had their own methods of dispensing justice, based on custom and usage. Centre piece of their archaic judicial system was their belief in blood-ties and the concept of clan loyalty attached to it. Notions of discipline and authority could only exist by the means of blood relationship. It was impossible for them to conceive both vice and virtue outside the tribal context.

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[33] Crone, Patricia, Meccan Trade and the Rise of Islam, New Jersey 1987, 85ff. and Lecker, Michael, Muhammad at Medina. A geographical approach, Jerusalem Studies in Arabic and

Against such background, Islam was established. The new religion focused on improving the social and legal standing especially of the weaker members of society by introducing some concept of authority and respect that was not purely based on blood ties and clan loyalty but traditional human values. If one talks about Islamic societies as societies that reduce certain member groups to an inferior position, one has to take into consideration where it had came from.[34]

By the time Islam was established, it brought about a social upgrading and a real improvement of the legal position of many of its members. Islam intended to detribalize the Arab mind and create a general (human) set of values. Pre-Islamic tribal social order was transformed into an Islamic community that placed itself under the absolute authority of Allah and got orientation by the means of established rules and regulations. This also had repercussions on its legal structure for it made it less arbitrary. Therefore, the pagan Arab society has undergone major structural changes in its ideological orientation, modes of behaviour and ways of life.[35]

## 5.4. The Seventh Century – Arrival of a new religion

While historical knowledge of seventh-century Arabia is not as good as that of first century Palestine, historians know the basic outline of events in Arabia immediately before the coming of Muhammad. To the north and west were Iran, Iraq, Syria and Palestine, all urbanized, advanced societies. Iran and the Byzantine Empire were constantly fighting for control over Iraq and Syria, and the border between these two huge empires fluctuated back and forth, with terrible economic consequences for both. A Roman army had invaded Arabia

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Islam 6, 1985, 29 ff.

[34] Surty, Muhammad Ibraham, The Ethical Code and Organised Procedure of Early Islamic Law Courts, in: Muhammad Abdel Haleem and others, Criminal Justice in Islam, London 2003, 149ff.

[35] Haarmann, Ullrich, Geschichte der arabischen Welt, München 2001, Introduction.

once, in 24 B.C.E., but the desert proved impenetrable and the expedition was a disaster.

In the far south of the Arabian Peninsula was Yemen, a hilly area with more rainfall where frankincense and myrrh - important spices, especially for embalming - were grown. Coffee later became a major source of income for Yemen as well. The spice trade brought wealth to Yemen and it gradually became organized as a country. Yemen established close ties with Abyssinia, an early Christian kingdom that is modern Ethiopia now. Abyssinia even conquered Yemen from about 521 to 575, when it briefly fell under Persian influence. From Abyssinia, Yemen learned of Christianity; from Iran, it was influenced by the Persian cult of Zoroastrianism; and at least one king became a convert to Judaism.

The semiarid hills and arid plains of the Arab peninsula were inhabited by migrating Arab tribes, which had camels and sometimes goats and sheep. The population was divided into clans and tribes that fought each other fiercely at times and protected their own according to an ancient, and often cruel, tribal law. Many tribes believed for instance in killing female babies, so that the first-born would be a son. The desert had occasional oases where little villages, and eventually towns, sprang up. Because of its isolation, civilization spread to the area only slowly, primarily via the caravan trade, because of the war between Byzantium and Persia.[36]

Much of Yemen's spices and many goods from India moved to the Mediterranean overland by the means of caravans. Jews, usually merchants, moved into the area and settled at the oases, where they became numerous. Christian missionaries visited as well. That’s how the Arabs got into contact with the two monotheistic religions and some even converted. A primitive monotheism also sprang up, consisting of Arabs who had rejected polytheism in favour of one God but did not convert to Christianity or Judaism.

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[36] Compare to: Noth, Albrecht and Jürgen, Paul, Der islamische Orient – Grundzüge seiner Geschichte, Würzburg 1998, 74ff

Gradually one town in central Arabia emerged as the principal centre of Arab culture: Mecca. Mecca's merchants came into a position that enabled them to control much of Arabia's caravan trade and turning their home town gradually into the region's economic centre. But Mecca was also a spiritual centre. One reason for that was the black stone cube that covers about thirty feet square called the ka'bah (which is Arabic for cube). It was decorated with 365 idols, representing the same number of gods and goddesses. The ka'bah came to be seen as the centre of Arab religion; every year one month, the month of hajj, became a month when Arabs went on pilgrimage to Mecca. There they met for trade purposes, arranged marriages, sought entertainment, and worshipped at the *ka'bah*. During the month of hajj, warfare was forbidden.

Arab poets composed lyrics to be read at those *hajj* celebrations; pre-Islamic poetry has been preserved and gives us a sample of the language the people spoke. An alphabet for the Arabic language was developed from the Aramaic alphabet which shows the cultural link to the Mediterranean area. However, scripture only received limited use by merchants and poets. Children born on the holy land around the *ka'bah* were automatically considered members of the *Quraysh* tribe, the tribe that controlled the *ka'bah*. The link between the *hajj* celebrations, the *ka'bah*, and the *Quraysh* tribe shows the establishment of social institutions that one-day could have led to a united Arab nation, probably under a *Quraysh* king.[37]

## 5.5. The emergence of a new religion

In the midst of such condition, the Prophet Muhammad was born. According to Moslem believe he came to the different Arab tribes as a messenger of Allah and brought to them the teaching of Islam with new values, norms and orders.

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[37] Monroe, James T., The Poetry of the Sirah Literature, in: Arabic Literature to the end of the Umayyad Period, Cambridge 1983, 73ff.

To carry out the task, the Prophet Muhammad based his message on the divine revelation. “He did not just initiate a new religious cult but altered an entire society. Those alterations included a new faith system, and a different religions practice that was linked to matters of government, social live, and legal practice”[38]. Muhammad reached the top of benevolence values as confirmed by the Holy book. Due to the good example that he provided as a model in the beginning of Islamic history, the Muslim community followed his steps. All that stimulated the rapid emergence of Islam in first decades following the decease of the Prophet. Islam was spread out to all regions of the Mediterranean coast but also eastwards.[39]

The emergence of a new civilization or great changes within a civilization in history can partly be attributed to the factor “religion”. Although the different faith systems in the Mediterranean varied from each other, they all had a great impact on the shaping of civilization within this geographic space. One can even go as far as stating that religion was a source if not a driving motor behind those changes.

The sources of all civilizations have a strong impact on creating a world history route. In social environments that saw a civilization backed up by religious sources, God has sent down messengers in order to transmit religion as we know now. In Arabia, the gap between the transcendental principles of a monotheistic faith and the tribal principles was so great that it was only through a Prophetic function and efforts that it could be resolved.[40] Most of those messengers, or prophets that are accepted by Moslem believers had been part of the Judeo-Christian world long before the arrival of Mohammed. Among others there are prophets such as Moses, Jacob and David. The Koran mentions as many as 25 that had been descended from Judaic religious traditions. This shows how closely

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[38] Masudul, Hasan, History of Islam, New Delhi 1992, 42 ff.

[39] Watt, Montgommery, Muhammad, in: P.M. Holt and Bernard Lewis (ed.): Cambridge History of Islam, Cambridge 1970, 30 ff.

[40] Sherwani, Impact of Islamic Penal Law on the traditional Arab society, New Delhi 1993, 65ff.

the three big monotheistic world religions are interconnected. It helped Islam to emerge as rapidly as it did. On the contrary, this special relationship made it easier for Islamic believers to compete against the other two dominant faiths.[41]

As a matter of fact, the historical development of a specifically Arab society as we know it now is inseparable from the emergence of an Islamic religion. „It is this interplay […] that helps in discovering the real dynamics of the earliest period of Islam."[42] The Arab nations were guided and brought up by Islam. In return, they supported and sponsored the teaching of Islam as their divine religion and helped to spread it worldwide. As a result, Islam and Islamic legal traditions are not just applied in the Middle East but affects an area that spreads from the Strait of Gibraltar to the gates of India and reaches territories as far away as Nigeria and Indonesia.

## 5.6. From the Prophet to Islam

In the year 570 Yemen attempted to invade and conquer Mecca and the area, but the invasion failed. This was the year that the Prophet was born. Muhammad was born into a small, weak clan of the Quraysh tribe. His father was named Abdullah, which means "servant of God." The "*ulláh*" part of the name comes from "Allah," the modern Arabic word for "god". It is not known where the word "Allah" had came from; possibly it is a contraction of *al-iláh*, "the god" (al means "the" in Arabic). At any rate, the name of Muhammad's father may be a clue for us because it sounds like the name *aanf* - a monotheist would be. It suggests that Muhammad's father or grandfather had rejected polytheism.

Whether this had any influence on Muhammad is not known, because Abdullah died before his son was born. Unfortunately for Muhammad, his mother died when he was about six, leaving him an orphan. The boy was raised by his uncle

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[41] Nagel, Tilmann, Geschichte der islamischen Theologie. Von Mohammed bis zur Gegenwart, München 1994.

[42] Sherwani, Impact of Islamic Penal Law on the traditional Arab society, New Delhi 1993, 65ff.

(the father of 'Ali), a caravan operator and merchant. Muhammad was raised a merchant himself, and as a young man was hired by a wealthy widow named Khadjah to run her caravans. At the age of 25 he married her and they had about six children. Their life together was happy; Muhammad married no other women until after Khadija died.

All accounts indicate that Muhammad did not feel any divine call in the beginning of his life. He did not seek out mystical experiences, nor did he meditate or withdraw from life. He was, to put it in modern terms, a successful businessman and family man. However, he did seek solitude from the troubles he found in Mecca, often in a cave on a nearby hillside. In 610 he began to have Visions. In one of them the angel Gabriel came to him and said, “You that are wrapped up in your vestment, arise, and give warning. Magnify your Lord, cleanse your garments, and keep away from all pollution”.[43] Muhammad fled from these experiences and hid himself in his cloak. Once he ran to Khadjah and hid himself in her robes. But Khadjah encouraged him to listen to his revelations, which often came to him again and again.

Khadjah's cousin, Waraqah, who was a Christian, also encouraged him. Finally Muhammad realized that he was receiving messages from God. He began to take them to the people of Mecca, first privately, then more publicly. His message emphasized acceptance of the one, transcendent God; that Muhammad is his messenger; that idol worship and cruelties practiced within the archaic tribal society like the killing of girl babies was forbidden; and that one must prepare oneself for the Day of Judgment. A few, listening to Muhammad, accepted him as a prophet and became the first Muslims. Most Meccans, however, looked at him as a crazy poet and made fun of Muhammad. Their taunts are preserved in the Koran itself.

When Muhammad began to preach against worship of the idols in the ka'bah many Meccans became outwardly hostile, since such preaching undermined the hajj, and therefore their livelihood. Muhammad also condemned the town's

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[43] Hasan, Masudul, History of Islam, New Delhi 1992. 11ff.

economic and social inequalities. After ten years the Muslim community grew slowly but tension increased to the point where the Muslims no longer could be protected by their clans against violence. But without clan protection one was in grave danger, because in the absence of police and courts it was the fear of starting a blood feud that prevented people from killing each other.[44]

In one famous case a non-Muslim tried to force his Muslim slave, Bilál, a black man, to recant. Bilál was tied to the ground and heavy stones were piled on his chest in order to torture him. The torture ended when a Muslim purchased Bilál and then emancipated him. In 615 Muhammad had to send some of his followers to Abyssinia, where the Christian king offered them refuge, an act of generosity that Muslims remember to this day.

In 619, his wife Khadjah died, as did Muhammad's uncle, who had also protected him from murder. This put Muhammad in grave danger. In 620 he was invited to move to the city of Yathrib, two hundred miles to the north, and to become the chief arbitrator of the city's feuding tribes. The situation in Mecca finally became unbearable and Muhammad and two hundred of his followers had to flee the city in 622. This event is called the *hijra* or *hegira* (the Latin pronunciation of the Arabic word) and marks the beginning of Islam as a religion. Dates in the Islamic calendar are reckoned from the *hijra.*

In Medina Muhammad began as leader of one of the town's eight groups, but he gradually emerged as the town's leader, and therefore he was able to implement the social changes that the revelations had demanded. This sets Muhammad off from Jesus in a sharp way; while Jesus was a prophetic figure, he never ruled a state; Muhammad was both prophet and statesman. This makes his career radically different from that of Jesus. But it also has a strong repercussion on the relationship between state and religion and its consequences for a legal system. A true separation of powers is impossible as shown in the chapter “Religion and State” of this work.

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[44] Hamidullah, Muhammad: „ Le Prophète et l’Islam“, Paris 1959, 213ff.

Medina was a large agricultural town containing pagan and Jewish tribes. The pagans embraced Islam but the Jews did not, which prompted *Qur'anic* revelations criticizing Jews and Christians for their obstinacy. Considerable friction arose between the Jews and Muslims and eventually led to the expulsion of the Jewish community from the town. Medina was a trading rival of Mecca, and the inhabitants of Mecca decided to go to war against Medina and their cousin. This made the prophet a military leader and an Islamic warrior and further reinforced the notion of a fusion of state and religious affairs.[45]

Warfare continued sporadically for seven years, with Muslim victories and defeats. In 627, Mecca soldiers besieged Medina for two weeks and almost took the city. Muhammad acquired more allies, however, as tribes became Muslim. In 630 Mecca surrendered to a Muslim army, converted to Islam, and became the centre of an Islamic Arabia. Muhammad and 'Al cleansed the ka'bah of its idols, restoring it to the worship of the one true God. Pilgrimage to Mecca which had existed for centuries before the arrival of Islam as a sort of pagan worship became a Muslim pilgrimage. In the course of next two years, most of Arabia accepted Muhammad as their leader and nominally became Muslim. In 632 Muhammad died at the age of 63, leaving behind him a new and rapidly growing faith.

There is a strong tension in Islam between efforts to view him as an ordinary man and efforts to exalt him as a miracle-working prophet. But for all Muslims, Muhammad is seen as the epitome of Muslim life, and Muslims have long sought to emulate him. His actions are seen as a model. To give but one example, the obligatory Muslim pilgrimage is patterned after Muhammad's pilgrimage in 629. Stories about his actions and words, called *hadith*, circulated and were passed down orally within the Muslim community; within a century or two of Muhammad's death they were written down and closely scrutinized by Muslim scholars for their historical accuracy. The *hadith* became a major pillar of the

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[45] Hammidullah, Le Prophète et l'Islam, Paris 1959, 256 ff.

Muslim tradition, supplementing the Koran itself when it was silent about a crucial matter.[46]

The reign of Muhammad over the Muslim community is viewed as the golden age of Islam. The philosophy of Plato, of all people, gives us a model for how Muhammad is viewed: as a just king. In *The Republic*, Plato discusses the ideal form of government, which he says is rule by a perfect king, one who insures that justice is established, that economic disparities are reduced, and that makes just laws.[47] Muslim scholars, when they translated *The Republic* into Arabic, understood this idea as fitting Muhammad perfectly. Muslims look back with nostalgia to the early days of their community, and seek to reform modern Islamic society to fit the seventh century pattern.

This is an extremely important difference between Islam and Christianity. Christians view the perfect kingdom as something Christ will establish in the latter days; therefore their golden age is still ahead of them. Some see this golden age in very secular terms, as the product of steady social progress. Muslims, however, have their ideal society in the past, and they constantly seek to emulate that example. The numerous traditionalists among them seek to bring back this golden age and, consequently, reject any effort to reform the realm of Islam in general and Sharia as the epitome of Islamic thought in particular. However, whether the world, or even any segment of it can reproduce that golden age before God's Judgment Day comes, remains an open question.[48]

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[46] Endreß, Gerhard, Einführung in die islamische Geschichte, München 1982, 342ff

[47] Compare to Ostenfeld, Eric Nils, Essays on Plato's Republic, Aarhus 1997, 46ff

[48] Serajuddin, Alamgir Muhammad, Sharia Law and Society, Oxford 1999, 109ff

## 5.7. Islam as related to other religions

Islam is the religion founded on the revelation brought to humanity by Muhammad. Muslims see it as the latest chapter in the ongoing religion of God, a religion that can be traced back through Jesus to Moses and Abraham. Therefore, they accept what had been before Muhammad became their prophet and integrated the Judeo-Christian faith into their religion. Muslims consider all three, Abraham, Moses and Jesus, to have been prophets of God and refer to them as Muslims. Thus Islam accepts Christianity and Judaism as true religions, but claims to supersede their truths with a new divine revelation. It understands that change is essential to mankind. Therefore, Moslems are convinced that God always sent his messengers successively to mankind in order to prophecy the changes to be implemented.

Islam, like Judaism and Christianity, believe in the divine origin of government. The creator has periodically chosen human beings to reveal his messages to humankind. Indeed, the Koran refers to many Prophets such as Abraham, Noah, David, Sulimann, Isaac, Jacob, Moses and Jesus. These messages and revelations culminated in Islam and in Mohammed as the last Prophet. The historical evolution and incorporation of prior messages into Islam are clearly stated in the Koran. The Scripture refers to Islam as the religion of Abraham, Jacob, Moses, Jesus and other prophets. It is simply the last of the divine messages to reach human kind through the Prophet Muhammad, who was chosen by the creator as the bearer of his last and all-encompassing revelation. This explains why there exists a strong link between Islam, Christianity and Judaism.

The Koran refers to Christians and Jews as the "People of the Book" because they are the recipients of the Messages of the Creator through Moses and the old Testament prophets and through Jesus, who is believed in Islam to be the fruit of a miracle birth by the Blessed Virgin Mary.

Islam is thus not a new and separate religion, but the culmination of God's spiritual and temporal commands made known to mankind through Moses and Jesus. Hence, Islam continues as the successor and final expression of the Judeo-Christian revelations. Islam therefore considers the spiritual provisions expressed

by the Torah and the Bible. It also considers and protects the believers of these two divine revelations (the people of the book), as long as they live in an Islamic country, under a protective covenant known as *Thimmi*. According to *Thimmi*, Christian and Jewish people that live in the Muslim countries have the right to practice their religious rituals and they are equal to Muslim people in terms of personal rights. It is therefore stated that "not a single instance can be quoted to show that the Holy Prophet ever brought the pressure of the sword to bear on one individual, let alone a whole nation, to embrace Islam. What was not permissible in the case of the Holy Prophet, could not be permissible in that of any one acting in his name and on his behalf."[49] Thus, Islamic law does not place any restriction on the freedoms and practices of other groups and minorities.

However, it cannot be denied that classical Islamic law has distinguished between Muslim and non-Muslim residents under the territorial jurisdiction of Islamic states. This has occurred historically for several reasons such as the superiority of divine law and to guarantee the security of the Islamic state against any external intervention. The Islamic country, under this protective covenant, was obliged to defend and protect the *Thimmis* and their property against any external or internal attack. In return for this practice, the *Thimmi* are asked to pay *Jizya*, which is a tax levied on able *Thimmi* men amounting to 10 percent of the income earned by them while in an Islamic country. If a Thimmi joins with the Muslims in protecting the country, then he is exempt from *Jizya*. This practice must be seen from a political perspective, during a time in which all religions were rivals in order to control the political power of a sovereign state. Islamic law has therefore promoted its principles, rules, regulations and traditions through the Islamic sources of law but also emphasised key-principles such as brotherhood, equality, justice and liberty.[50]

*Many of the adherents to other religions refer to Islam as "Mohammedanism", and its adherents have been termed "Mohammedans" referring to the followers*

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[49] Ali, Maulana Muhammad, The Call of Islam, Lahore 1926, 21ff.

[50] Haleem, Muhammad Abdal, The story of Joseph in the Koran and the Old Testament, in: Islam and Christian Relations, Birmingham 1990, 171ff.

*of the prophet. Neither term is acceptable to Muslims, however, because they do not view themselves as followers of Muhammad, or Muhammad as the founder of their religion. Contrary to this point, the founder is God, and the Koran, their scripture, is seen as the word of God, and not the word of Muhammad.*

*The word Islam comes from the Semitic root Salam, which means submission to a higher power or the peace that comes from that submission. Islam means "submission" in Arabic and refers specifically to submission of one's will to the will of God. "Muslim" means, "one who submits" in Arabic. Thus, indeed, Jesus and Abraham were Muslims, for they submitted their wills to the will of God. Springing from the same Salam root is the Arabic word salám, which means "peace". (Salám is a cognate to the Hebrew word shalom, which also means peace; Hebrew and Arabic are both Semitic languages, and are closely related to each other.) Thus Islam is often referred to as the "religion of peace" as well.*

*From the noun "Islam," in English, is coined the English adjective "Islamic." It is important to learn how to use the words Islam, Islamic and Muslim correctly; one cannot refer to the followers as "Islam's" or the religion as "Muslim."*[51]

[51] Fyzee, Mohamed, Mohammedan law, New Delhi 1974, 2ff

## 6. A short history of the Islamic Criminal Law

The strong link between the three big monotheistic world religions also has repercussions on the Islamic legal tradition and the emergence of a specific Islamic criminal law. Besides Arab tribal traditions which provided an important source of Islamic law, one can also witness the intrusion of Judeo-Christian convictions into the Sharia. Muslim Scholars have repeatedly stated that the Bible as well as the Thorah provided early sources that were taken as a legal reference. However, those references are seen as inconsistent and badly adopted by human kind. Therefore God sent another Prophet to redefine and further express regulations and rules concerning a proper behaviour of human beings. This new revelation also includes a system of punishment in case of law breaking. Thus, God wanted to supersede earlier religious practices and also included legal values by implementing Islam as a new faith.[52]

The Muslim Law as it exists today is the result of continuous process of development of Islam that lasted more than a thousand years. Since Islam is both, state and religion, it is also the basic source of jurisprudence. This source can be subdivided into different branches: According to the classical theory Islamic Law consists of the expressed injunctions of the Koran; of the legislation introduced by the 'practice' (Sunna) of the prophet; and of the opinion of lawyers. In certain cases the opinion of jurists may coincide on a point, and this is known as *ijma* which can be translated as consensus. In other cases it may not - this is called *giyas* or analogical deduction.

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[52] Compare to: Busse, Heribert, Die theologischen Beziehungen des Islams zu Judentum und Christentum, Darmstadt 1988, 169ff

This shows that the Islamic law is not a systematic code, but a living and growing organism which over the time has developed an extremely complex systematic. Nevertheless, there is amongst its different schools a large measure of agreement, because the starting point and the basic principles are identical. Each recognized the orthodoxy of the other. The differences that exist are due to historical, political, economic and cultural reasons but also to the absence of any clear guidance from the Koran and the Sunna. Therefore, for proper appreciation of the Muslim Law, its historical development must be taken into consideration.

As stated above, one must be aware of the two earlier sources of Islam and Islamic legal practice: Arab tribal traditions and habits on the one side and the Judeo-Christian convictions on the other one. In addition to those cultural roots of the early Arabs one also has to take into consideration the numerous groups of converts to Islam that partly retained their customary laws and usages in various spheres of life, though they often contradicted basic principles of Sharia law. Examples are the Berber people of North Africa or some tribes in Kenya and Nigeria that retained their family laws.[53]

Returning to the key areas of Islamic thought, one has to state that the early generations of followers of the Prophet did not recognize an explicit and codified Islamic Law. Until the 8th century, judges were state clerks who passed their judgement on the basis of the two sources mentioned above, a limited Koran exegeses and common sense. The caliphs often issued administrative orders and regulations for many activities and situations and administrative and social problems. Although those regulations generally supplemented Islamic legal principles, on occasions they contradicted it. This is why most theologians did not appreciate the existence of such an outspoken terrestrial office that was paid by the ruler of state.[54]

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[53] Schacht, Joseph, An introduction to Islamic Law, Oxford 1964, 109ff.

[54] Levy, Reuben, The social structure of Islam, Cambridge 1971, 268ff.

As a result, an explicit Islamic Law began to emerge among pious theological scholars and religious authorities. This took place outside the field of common legal practice and was, therefore, rather focused on religious issues than on actual legal challenges. Around 750, with the transfer of power to the caliphs of Baghdad as a result of the Abbaside Revolution, the situation began to change. A reapprochement between the two parties, legal scholars and religious representatives, took place because the rulers themselves increasingly took advantage of the religiously founded legal competence of theological scholars. In exchange, the Islam scholars gave up their suspicion of worldly leaders.

Resulting from this change, the origins of what became later known as Legal Schools started to emerge in the second half of the 8th century in what is now the territory of Iraq. The reason for that development is quite evident: "The ever increasing demand for courts of law by Muslims compelled jurists to compile manuals for judges, so as to enable them to administer justice on the foundations of revealed law."[55] The early leaders of those legal schools of thought became councillors of the Baghdad Caliphs at the same time. This shows the strong link between worldly and religious affairs which illustrated the definition of Islam as "Religion and State" also in the field of legal practice.

At the same time or only little after the rise of a Baghdad legal school of thought, other, provincial schools emerged, too. Each of them had a different focus as to be seen in the following chapters concerning those schools. The School of Kufa, for instance, draw much attention to reasoning whereas the School of Medina rather focused on tradition. Far away from the political centre in Baghdad, those local schools could base their legal practice and jurisdiction on habits and sayings of the Prophet which were later summarized and authenticated by the means of a vast *Hadith* literature corpus which is a collection of the Prophet's acting and saying.

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[55] Surty, Muhammad Ibraham, The Ethical Code and Organised Procedure of Early Islamic Law Courts, in: Muhammad Abdel Haleem and others (ed.): Criminal Justice in Islam, London 2003, 150ff

The two different approaches to legal practice, by the means of reason or by the means of tradition, have repercussions up to today. The first one is most influential in what are today Turkey and the Eastern Mediterranean area whereas the second one is rather applied in countries in North Africa.

The founder of a veritable Islamic legal theory is Muhammad ibn Idris asch-Schafii who had lived around 800. His work focused on merging tradition and reasoning in order to create a true Islamic jurisprudence. It was him who, for the first time, listed the different sources of Islamic Law and arranged them according to priority. His approach as well as the impetus of other Schools of Law, which all accept each other at least within the Sunni community have shaped and codified Islamic Law for centuries. By naming the sources, putting them in a certain hierarchy, fine tuning legal practice and searching for solutions in case of disagreement between different schools and scholars, the Islamic legal authorities have succeeded in creating a very complex but nevertheless working and binding system of Laws that has successful shaped the Muslim world in accordance with its political rulers.

All that began to change with the beginning of a growing influence of European powers and thought. The colonisation of vast parts of the Eastern hemisphere by the Central European powers had a tremendous impact on the evolution of a modern criminal law code that is rooted in the Sharia. English, French, Dutch and other colonial powers set their foot on traditional Muslim ground from the 18th century onwards up to the first half of 20th century. By then, most of the Asian and African countries including Middle-Eastern were colonies of the West.

In order to exercise a more effective administration of criminal justice they implemented reforms within the existing Muslim criminal law. They wanted to abandon the somewhat primitive and archaic character of the traditional law code. As a consequence, “Western ideas and legal principles made a serious inroad into the domain of the Sharia.”[56] The British, for instance, made radical

[56] Serajuddin, Alamgir Muhammad, Sharia Law and Society, Oxford 1999, 3ff.

changes on the Constitution of Criminal judicature as well as the criminal law itself on the Indian subcontinent in 1790. E.g. the then governor in India Corn Wallis abolished the rule under which a murderer was not liable to capital punishment, if he committed the murder by strangling or drowning.

Generally speaking, the existence of legal and cod factory tendency in the Arab world since the nineteenth century has been in support of western and in particular European models rather than Islamic ones. On example is Egypt, a leading Islamic country in the Arab world, where the law of evidence was radically changed. Here, too, the Islamic rules about the duration of gestation were discarded. Proof of legitimacy was made to depend on proof of access witch was made possible even if the child was born six months after marriage. The power of *Kadis* was reduced and the procedure for the observance of Sharia courts was laid down. Similar reforms concerning laws relating to the blood ties and crime were implemented in other Muslim countries such as Algeria, Tunisia, Morocco, Syria, Jordan, Sudan and many African countries.

The Turkish case is different since there, reform came from inside. From 1877 on, the Turks had framed an Ottoman civil code and also made reforms in their law of crime simultaneously with the civil law. These measures were based on "a genuine belief that the only way to save the empire was to introduce European-style reforms."[57] Those reforms were justified on the grounds that they represented a fuller implementation of Islamic norms. As a matter of fact, advocated issues such as 'equality for all' and 'protection of the weak' could come from Western Enlightenment thought as well as from within Islam. A new civil code was based on the Sharia but to a large extent modified by the Sultan's officials and adapted to modern legal convictions. The Sharia was, therefore, reduced to a sort of a family law for Muslims: "There has been a systematic and progressive erosion of the scope and operation of the Sharia Law in almost all

[57] Züricher, Erik J., Turkey. A modern history, London 1998, 59ff.

Muslim countries until at last its jurisdiction is confined to the domain of personal relations including marriage, divorce and inheritance."[58]

The quick adoption of those new models of constitutional and administrative laws, penal, commercial and civil codes has led to little resistance or unrest. Anderson calls this hardly surprising because due to issues of political power and authority the public law of Islam has been less faithfully followed in the history of Islam than the laws regarding family relations which he calls the "very heart of Sharia".[59]

Nevertheless, some changes in terms of returning to older models of law have been taking place over the past decades. Some Arab countries recognized that a return was a proper policy option that would better serve their needs and meet the approval of their population. This movement is coined by the term 'Revivalism' which means a return "to a supposedly original core Islamic praxis".[60] Egypt has gone through such an experience as Adel Omar Sharif has impressively illustrated.[61]

## 7. Sources of Islamic Criminal Law

### 7.1. Some basic notions concerning its origin

In pre- Islamic criminal law code man agreed since the day of social contract to punish those adjudged guilty of committing crime, which was imperative to protect public interest, public peace and public order. Any criminal law is meant

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[58] Serajuddin, Alamgir Muhammad, Sharia Law and Society, Oxford 1999, 3ff.

[59] Anderson, J.N.D. Islamic Law in Modern World, New York 1959, 15ff.

[60] Black, Antony, The History of Islamic Political Thought From the Prophet to the Present, Edinburgh 2001, 279ff.

[61] Sherif, Adel Omar, An overview of the Egyptian judicial system and its history, in: The Yearbook of Islamic Middle Eastern Law. Vol. 5, The Hague 2000, 10ff.

to act as deterrent in order to maintain social peace and order, promote justice and a certain degree of equality and to ensure freedom from criminal assault on their life and property. However, punishment was never uniform; it varied from time to time and from country to country. The basic line of division is drawn between a law corps that focuses on the act of crime itself and one that rather draws attention to the offender.

The tremendous altering of the Arab society brought about by the emergence of Islam also had repercussions on the legal system in general, the social standing of individuals within the Arab society in particular, and notably the criminal law code. Islamic law is by no means comparable to the modern Western system. Instead, it categorizes assaults to it by the types of punishments they engender. Specified punishment (Hadd) is affixed to most offences whereas only some at the judge's discretion. This is - among others - a result of the newly introduced sources of justice that are used up to modern days just as a legal reference and as official law code.[62]

In order to understand the complexity of the Islamic criminal law one has to grasp the ideas behind the different sources of it. This is of paramount importance if one bears in mind that the Sharia is not a law book in the western sense of the word. It is rather a discussion of the duties of the Muslim. In theory, it regulates all aspects of private and public life and forms the basis of political theory. In that sense, it goes far beyond the limits of any Western penal law code.[63]

It is hardly surprising to hear that the Moslem penal law has different sources which do have their origin before the actual emergence of Islam. According to Moslem convictions, Holy Scriptures prior to the Koran had already established some rules and regulations concerning a penal code. The Old Testament or Thorah and the Christian Gospel of the Lord according to the New Testament

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[62] Forte, David, Studies in Islamic law, Oxford1999, 79ff.

[63] Compare to: Becker, C.H,, Islamstudien, Vol. 1, Leipzig 1924, 43ff.

had already prescribed some. But Moslem scholars advocate the thesis that those rules and regulations were badly adopted and often falsely interpreted. As a consequence, only the revelations included in the Koran offered a precisely defined revelation of God's will as to be implanted in a legal system.

For Moslems, the Holy Koran represents the divine word of God revealed to his Apostle. It is the main source of an Islamic criminal law as well as the Islamic law system in general. This includes spiritual but also concrete legal guidance for all sorts of behaviour within a human (Moslem) society. Therefore, for the Muslim "the foundation from which all discussion starts is the law of God, the Sharia. It is prior to the community and state."[64]

In its legal context, the revelation of God by the means of the Holy Koran fixed the rules regarding punishment (Hudod) and retaliation (Kisas).

Since the bases of Islamic government and Law have been laid down in the Sharia and therefore immutable for all times and in all circumstances, no explicit reformulation is to be expected, though new interpretations are given from time to time. For the most part, changes only take place in a very subtle way and for this reason they are difficult to detect and define.

## 7.2. A brief account of different sources

Regarding legal practice in Islamic societies in the course of 14 centuries can leave no doubt about the fact that the Koran is the fundamental inspiration and source of it. But in spite of its tremendous importance for an Islamic legal system, the Koran is not the only foundation. Besides the Scripture one has to look at a few other sources as well. Among the most important are the classic Theory of Tradition (Sunna) and the Consensus of Opinion of Islamic legal scholars. Some Islamic criminal thinkers added Analogy (Qiyas) as the forth source of an Islamic criminal law to the list. However, Analogy does not

[64] Lambton, State and government in medieval Islam, Oxford 1981, Introduction.

represent a fixed law corpus and therefore is not universally accepted as a source. The fundamental principle implied by the idea of Analogy is that everything is permissible unless it is specifically prohibited, condemned, or disproved. Resulting from that type of reasoning, jurists are only unanimous on three of these sources: the Holy Koran, Sunnah and the Consensus, while they differ on the fourth namely, Analogy.

Those four – the Koran, Tradition, Consensus of opinion, and Analogy - form the primary sources of Islamic criminal law. However, another reservation has to be made in view of the enumeration of sources. The *Shiah School* regards only the first two of these sources as integral part of the Islamic criminal law as one shall see in the following chapter. The vital difference between the Koran and the *Sunnah* on one side and the remaining two sources on the other has to be taken into consideration. The Koran and *Sunnah* constitute the basis of Islamic Shariah, and it is those two sources which contain the injunctions validating general principles whereas the remaining two neither constitute the basis of any new law, nor do they lend legitimacy to any new principle. In fact, these last two are instrumental in drawing corollaries from the Koran and the *Sunnah* consistent with their injunctions and in no way repugnant to them.

Moslem jurists treat the sources of Islamic law as the argument by which the injunctions of Sharia are deduced and they have agreed that it becomes effective if an injunction is established by any of the four arguments. The four arguments and the procedure of reasoning based upon them have been arranged in the above order of importance. The Holy Koran was placed on top as the first source of Islamic Sharia. The others follow according to priority. If no injunction referring to a particular legal problem is found in the Holy Koran, recourse will be made to the *Sunna.* If the *Sunna* provides no guidance either, Consensus of the Islamic thinkers will be sought. Should this fail as well, a possible conclusion will be drawn on the basis of analogy. Tradition and Law became fixed at a time of social flux:

“The jurists had now established the terms in which transactions between persons were to be conducted and disputes settled. […] Precise norms for moral, legal and ritual conduct, ranging from contracts to the mode of prayer, with

varying penalties had been revealed by God. This was apparently the strength of Islam in its competition with more 'spiritual' creeds."[65]

Apart the four sources listed above; there are other sources of the Islamic Sharia. However, one has to admit that those secondary sources are highly controversial. Some legal scholars view them as acceptable sources of Islamic criminal law and treat the injunctions established on their basis as binding, while others do not subscribe to this view. The controversial sources referred to are *lstihsan* (Juristic Equity or Juristic preference), *lstislah* (Link), *Masleh Mursilah* (public good or common weal or public advantage or public interest), *Urf* (Custom), Rational argument or *Ijtihad* (individual interpretation and judgement), *Istidlal* (Juristic dedications) and *Fatwa* (religious decisions).

## 7.3. The Koran

The revelations of God represented in the Koran were manifested by divine inspiration, which the Prophet sometimes uttered in the presence of his companions. His words were passed on in the oral tradition of his Arabic culture. To orthodox Muslims, all koranic injunctions are unquestionable. The reason for that dogmatic position on this issue given by Moslem scholars is that it was passed on in exactly the same form as it had been revealed. Therefore, its continuity bears testimony to its authenticity. There was a group of scribes who heard the word of God from prophet and wrote it down. A large number of his companions committed it to memory. A consensus of such a large group of people on falsehood is impossible, as often stated. From numerous companions of the prophet innumerable people heart it and learnt it by heart with such an accuracy that despite long distances and variety of nations not a single letter of the Holy Koran could be changed or replaced. This represents the orthodox point

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[65] Black, Antony, The History of Islamic Political Thought From the Prophet to the Present, Edinburgh 2001, 36ff.

of view and does have a great influence on the way the Koran is used and interpreted as a source of justice.[66]

Some forty years after Muhammad's death the divine revelations were transcribed and established in a written version that has been preserved up to this day without change. The 114 *Suwar* (Plural of *Surah*) chapters were revealed to Muhammad in Mecca and Medina. They vary in length. The Koran is not arranged in the chronological order of its revelation but according to the length of each *Surah*. The longest is first and the shortest last. No one throughout the history of Islam has challenged the accuracy of the Koran.

The Koran is to be considered as the principle source and inspiration of any Islamic law and its importance can by no means be overestimated. "There are some general rules and principles therein on which detailed commandments suitable for the various conditions and times in which Muslims live are based."[67] It provides all basic rules and regulations concerning a Moslem life. Furthermore, it contains the rules by which the Muslim world is governed (or should govern itself) and forms the basis for all relations between Man and God; between individuals, whether Muslim or non-Muslim, as well as between man and things which are part of creation. It also includes the rules by which a Muslim society is organized and governed, and it provides the means to resolve conflicts among individuals and between the individual and the state. As a result, one has to look at an extremely complex system.

Adding to that complexity, one has to bear in mind the historic context which led to the creation of such system of rules and regulations. Besides his role as a religious prophet, Mohammed also became the law-giver of a new society, hence supporting the thesis of an amalgam of religion and state. However, the Prophet had not intended to create a new system of laws but "to teach men what to do and what to avoid in order to pass the reckoning on the day of judgement and to

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[66] Schacht, Joseph, A Revelation of Islamic Tradition, in: Journal of the Royal Asiatic Society of Great Britain and Ireland, 1949, 143 ff.

[67] Ibrahim, Hasan Saeed, Basic Principles of Criminal Procedure under Islamic Sharia, in Muhammad Abdel Haleem and others (ed.): Criminal Justice in Islam, London 2003, 21ff.

enter paradise". In short, "he was not responsible for the final formation of Islamic law.[68]

Starting from this thesis, it can be stated that in the aftermath of God's revelation to his Prophet and the emergence of Islam enough room was left for interpretation. Although no dispute among Muslims arises regarding the fact that the Koran is the primary fundament of the Islamic Law and that its specific provisions are to be scrupulously observed, its detailed application leaves room for controversy. Further supporting the signification of the Holy Scripture, one might add that *Hadith* and *Sunna* are only complementary sources to the Koran and consist of the sayings of the Prophet and the accounts of his deeds.

The *Sunna* helps to explain the Koran but it may not be interpreted or applied in any way, which is inconsistent with the Holy Book. In short, the Koran it is the only original or primary sources of Islamic criminal law. The holy book of Muslims includes direct revelations from God through his Prophet. All the principles, ordinances, teachings and the practices of Islam are drawn from the Koran. Al Koran was revealed to the prophet during 23 years 13 years in Mekka and 10 years in Medina.

In terms of legal regulations and the penalisation as a result from breaking those rules, one has to admit that the Koran was not all that revolutionary. In many cases, rules established by the Koran are only those that had already been in place before the arrival of Islam. In other words, some Arab tribe traditions have made their way into Islamic legal practice and the Koran often only modifies older legal practice or adds to rules that had already existed before. However, a complete and detailed reconstruction of ancient Arab tribe traditions is impossible. That explains why it is hard distinguish between new elements of a specific Islamic legal practice and Arab tribe traditions.

To add further issues to the list of problems regarding the origin and interpretation of the law system implanted by Islam, one has to take into

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[68] Lambton, State and government in medieval Islam, Oxford 1981, 2ff.

consideration that many rules and regulations were formulated in a very brief way. To contemporaries of Mohammed, those formulations might have been sufficient. But due to the evolution of legal circumstances and the alterations the Muslim community has gone through in the course of 14 centuries since the arrival of the Prophet, many of those leave its ready with a sentiment of ambiguity. The fact that Islamic legal scholars tend to come up with different interpretations that all seem to be possible according to the ultimate text established by the Koran further illustrates the problem.

However, there are a few regulations within the system of laws prescribed by the Koran that do not leave room for ambiguity, speculation and individual interpretation. The Arab word under which those could be summarized is *Hadd* (Plural *Hudud*) which can be translated as limit or taboo. Those regulations concern fasting, marriage and inheriting. In the aftermath of the life of the prophet, other categories were added that specifically concern criminal laws. Among the most important ones, one can find sexual offence and libel within that context but also theft and robbery. Those injunctions are unequivocal and leave no room for interpretation.

The text does not leave any room for interpretation, regarding neither the offence itself nor the punishment resulting from it. Concerning sexual offence one can find the penalty of 100 lashes for both the adulterer and the adulteress. Furthermore, the text adds that no one shall have mercy upon them.[69] Those that are accused of libel, have to expect 80 lashes if they cannot provide four persons that have witnessed the act of adultery: "And those who accuse honourable women but bring not four witnesses, scourge them with eighty strips and never afterwards accept their testimony."[70]

The prescribed punishment for thieves is well known within the Western world and often provides a starting point for arguing against the cruelties of Islamic

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[69] Koran, 24,2.

[70] Koran, 24,4.

legal practice. The Koran says that thieves should be cut off their hand as a reward for what they have gained and as warning example before God: “As for the thief both male and female, cut off their hands. It is the reward of their proper deeds, a punishment received from Allah.”[71]

The execution of those penalties is strictly connected to certain conditions that are only partially included in the Koran. Lashes are only to be applied for those sexual offenders that are not married. Those who are married are to be stoned to death. The justification for such a penalty comes from a verse that used to be part of the Koran but has been “lost” later on. The application of lashes leaves room for consideration and moderation, as well. Those that repent after having committed such an offence might be forgiven.[72] As a general rule, Islam is a forgiving religion up to a certain point: “Allah is Mighty, Wise. But who is repentant after his wrongdoing and amends, Allah will relent towards him. Allah is Forgiving, Merciful.”[73] Rules and regulations that are part of the Islamic law corpus and that seem to be extremely harsh, severe and cruel from a Western perspective are not as strictly applied as it seems:

"Avoid condemning the Muslim to *Hudud* (fix punishment) whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam (Ruler) errs it is better that he errs in favour of innocence (pardon) than in Favour of guilt (punishment). The Prophet’s saying. (Hadith).”[74]

However, if the meaning of an injunction is amenable to construction, it might be ambiguous. An example of such injunctions is provided by the following verse: “Women who are divorced shall wait keeping themselves apart three monthly

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[71] Koran, 5,38.

[72] Koran, 5,39.

[73] Koran, 5,38.

[74] Hadith, Sahih of Bukhari , All the prophet saying in this book, vol.8, book 82, 812ff

courses."[75] Here the word course implies menstrual periods as well. A period of cleanliness is referred to and offers thus an ambiguity that might lead to controversy. The verse is open to more than one construction, for it may imply either menstruation or cleanliness.

Another example for an important but nevertheless ambiguous judicial issue that is repeatedly mentioned in the Koran is the question of slavery. For centuries, slavery had been an important part of the Islamic system of laws. There are more than ten hints in the Koran that justify the practice of slavery and even the fact that an owner can take advantage of his female slaves in a sexual way.[76] Nevertheless, even the most zealous Muslims do not think about reintroducing slavery in Moslem societies. The Koran does not just sanction slavery but also describes the freeing of slaves as a merciful act willed by God. Muslim scholars interpret it as a gradual divine will to abandon slavery.

There are no two opinions among the Muslims about the fact that the Holy Koran constitutes Divine Revelations and imposes obedience to Allah on every Muslims. Thus, if one carefully studies the injunctions contained in the following verses of the Holy Koran, one will realize the fact that two different punishments have been laid down as a consequence for violations of injunction. One represents worldly punishment exercised by legal (state) authorities, the other one pertains to life after death. The Koran, for instance, declares homicide unlawful and states it in clear terms: "And slay not the life which Allah has forbidden with right."[77] Two punishments have been prescribed for homicide: One in a temporal context and the other one spiritually:

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[75] Koran,.65,4.

[76] Koran,. 4,25.

[77] Koran,.17,32.

"0' ye who believe! Retaliation is prescribed for you in the matter of the murdered, the freeman for the free man, and slave for the slave, and the female for the female. And for him who is forgiven his (injured) brother, prosecution according to usage and payment unto him in kindness. This is alleviation and a mercy from your Lord. He who transgressed after this will have a painful doom. Who slays a believer of set purpose, will be rewarded Hell forever. Allah is worth against him and cursed him and prepared for him an unlawful doom."[78]

Penal consequences prescribed for robbery and bloodshed are slaying, amputation of limbs and other corporal punishment. Those are all worldly means of punishment while painful doom is the punishment reserved for the hereafter. Allah says:

"The only reward for those who make war upon Allah and His Messenger and strive after corruption in the land will be that they will be killed or crucified or have their hands and feet on alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world and in the Hereafter there will be an awful doom."[79]

Adultery also entails both temporal and heavenly punishment:

"And those who cry not unto any other God along with Allah, nor take the life which Allah has forbidden to save (in course) of justice, Nor commit adultery and who does this shall pay the penalty; the doom will be doubled for him on the Day of Resurrection, and he will abide therein disdained for ever; save him who repents and believes in righteous work; as for such Allah will change their evil deeds to good deeds. Allah is ever forgiving, Merciful."[80]

The emphasis of the Islamic criminal law on both this world and the Hereafter is not without reason. In fact, the very basis of this law calls for such emphasis. As

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[78] Koran,4,92.

[79] Koran,5,33.

[80] Koran,25,68,69,71

a man has a dual nature, soul and body, so jurisdiction has two aspects. According to the Sharia this world is only an ephemeral place of trial, whereas the Hereafter is the eternal abode; man is responsible for his deeds in this world and deserves reward for them in the life hereafter; and if he does good deeds, he will be rewarded accordingly and the other way around. Thus, according to the Islamic conception of law temporal punishment does not exclude super mundane chastisement. Hence the only way to get the latter punishment remitted is to repent and get back to the life of submission and obedience to Allah.[81]

## 7.4. Sunna

According to Muslim theology the second of the two revealed fundamental sources of Islam in general and of the Islamic system of laws after the Koran is the Sunna. Any saying or action of the Prophet or anything approved by him as related in traditions imputed Him constitutes the Sunna. The importance is revealed is apparent from the following verses of the Holy Book: "O you who believe obey Allah and obey the Apostly"[82] and "He who obeys the Apostly have indeed obeyed Allay"[83]. In the centuries following the death of the Prophet, sayings of him and little stories connected to his life were assembled and used as a means of authority. Altogether, they represent the Sunna and are contained within the vast body of *Hadith* literature. Needless to say that the undoubted authority of the Prophet[84] was used for different purposes connected to the enforcement of power and authority.

Early generations of Islamic scholarly thought were already aware of the fact that several of those records had been falsified or altered in order to support certain

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[81] Lambton, State and government in medieval Islam, Oxford 1981 3ff.

[82] Koran, 4,59.

[83] Koran, 4,80.

[84] Compare to: Koran, 59,7 „And whatsoever the Messenger gives you, accept; and whatsoever he forbids you, avoid".

political, legal or theological positions. That is why scholars started to collect them systematically and to prove their authenticity as real sayings of the Prophet. The most important of the tools used to verify the records is known as *isnad* which could be translated as "chain of reporters". Such reports played a crucial role in the development of Sharia and Sunna.[85]

A chain of reporters implies a list of all persons that had contributed in passing down the Prophet's sayings or actions until one reaches the level of contemporaries of Muhammad. Only a complete chain of reporters guarantees the source's authenticity. Furthermore, the reporters have to be trustworthy and they had to be linked to each other as teacher and student. A text may seem to be logical and reasonable but it needs an authentic *isnad* with reliable reporters to be acceptable.

During the lifetime of the prophet and after his death, his companions (*Sahabah*) used to refer to him directly, when quoting his sayings. The successors (*Tabi'un*) followed suit; some of them used to quote the Prophet through the Companions while others would omit the intermediate authority - such a *hadith* was later known as *mursal*. There are two grand Hadith collections assembled in the 9th century that are both referred to as "the true one" or "the authentic one" (*as-Sahîh*). One of them is regarded by Sunni followers as the most important one and incorporates about 7300 *hadiths* chosen from over 90000. Besides the two major collections one can find two minor ones. Altogether, those six form a canonical body of rules and regulations that are constantly referred to. In terms of volume, those six collections represent about 7000 printed pages in a modern edition.

Although the six collections are ranked behind the Holy Koran, their importance for the life and practice of ordinary Moslems goes far beyond it. This is especially true if one considers the legal aspects implied by Sunna. Most of the particularly defined rules of all day life are not included in the Koran but in the

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[85] Black, Antony, The History of Islamic Political Thought from the Prophet to the Present, Edinburgh 2001, 32ff.

Sunna. This concerns all rituals in view of the religious practice but also the dispensation of justice. "The Sunna is thus an integral part of Islamic Law and is consequently as binding on the Muslims as the injunctions contained in the Holy Book."[86]

In general, Sunna can be classified in three different categories: The Prophet's sayings, his practice, and his approbation. His sayings consist of all the observations made by him on any occasion and the conclusions he drew from them. An example would be the legal regulations concerning murder which are as follows: The killing of a Muslim is unlawful unless three conditions are present: renunciation of faith after professing it, adultery after marriage, and unwarranted murder. Furthermore, the Prophet declared that if a person was slain, his or her heirs are allowed the choice between retaliation (*Kisas*) or compensation (*diyat*).

The Prophet's practice consists of his actions. That might include, for instance, the sentencing of an offender by him. Examples taken from the text corpus are the Prophet's pleading guilty of adultery, sentencing of a thief to the amputation of the right hand and passing judgement on evidence of witness and deposition on oath by the plaintiff.

The Prophet's approbation is comprised in the words and deeds of the Prophet's companions. Those are reported to have been endorsed by the Prophet by silence, by refraining from disapproval or by direct approbation. They have become as good as the words and deeds of the Prophet. To give but one example, the Prophet wanted to send one of his companions to Yemen and he asked him how he would decide a case. The asked person replied that he would decide it in accordance with the Koran and the Sunna. However, if the both texts don't provide any guidance, then he would decide it at his own discretion. The Prophet agreed to this and opened a field that enabled his followers to make decisions

[86] Hanif, N., Islamic Concept of Crime and Justice, New Delhi 1999, 13ff.

according to their own judgement and in view of the specific situation. This shows how flexible an Islamic legal code can actually be[87].

The specific legal aspects of Sunna can be summarized as follows: First of all, the six approved text collections support or stress a koranic injunction. In this case the injunction refers both to the Koran and the Sunna. Examples are the prohibition of killing without justification, giving false witness and stealing. All the assertive and prohibitive injunctions are found in the Koran as well as in the Sunna. Furthermore, the Sunna implies an elucidation and interpretation of broad Koranic injunctions or supports absolute Koranic injunctions. It specifies Koranic injunctions. It is an interpretation, qualification and specification at the same time that was designed to elucidate and explain such injunctions as Allah has bestowed upon the Holy Prophet. According to Moslem legal opinion, the Prophet had gained the right from God to specify and interpret the Holy Scripture by the means of his sayings, action and approbation. Therefore, those had become a system of laws designated to be referred in any legal decision-making and showing "that everything a Muslim was required to believe or to do was founded on traditions purporting to prove that Muhammad, by example or precept, had ruled so."[88]

Most of all, the Sunna qualifies the Koranic injunctions and delimits their scope. "Koranic laws are limited, and are delineated in the Sunna for the detailed organisation".[89] For instance, the Koran allows trade and disallows usury. The Sunnah goes a step further and specifies the forms of trade under this injunction. The Koran forbids eating of dead animal and the drinking of blood. But the Sunna qualifies the application of this injunction and identifies the kind of dead animal and blood exempted from this taboo. The Koran also names the children entitled to inheritance. But the Sunna annuls, for instance, the possible claims of

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[87] Oudeh, Shaheed, Criminal law, Vol 1, Delhi 1996, 207 ff.

[88] Guillaume, Alfred, Islam, London 1956, 92ff.

[89] Ibrahim, Saeed Hasan, Basic principles of criminal procedure, London 2003, London 2003, 21ff.

a thief or somebody convicted with murder. Koran also enjoins the amputation of a thief's hand. But the Sunna qualifies this injunction by laying down that the value of a stolen item must be equal to certain, elevated value and that it should have been kept in a safe place. Only in this case, such a gruesome punishment as the cutting off of one's hand is justified.

Besides qualifying and defining the legal measures provided by Koranic injunctions, the Sunna also provides for an injunction that can not be found in the Holy Koran. Hence, any provision of the Sharia that has not emanated from the Koran must originate from the Sunna.[90]

Taking the paramount importance of the Sunna especially for legal decisions into consideration, one realizes that the question of authenticity constantly raises questions if not doubts. Is it unquestionable or doubtful? Modern hadith research has been very sceptical about this issue and doubted the divine providence of it.[91] However, more recent research has tried to trace back scriptures from the time of the collection in the 9th century to the beginnings of Islamic rise.

Nevertheless, for most Islamic scholars it is beyond doubt that the Sunnats have come down from the Holy Prophet since the ceaselessly repeated narration of the same thing by several witnesses and reporters testifies – according to them - its truth. Known tradition is unquestionable in so far as it has come down from one or a few companions of the prophet but its emanation from the Prophet himself is uncertain if the number of those narrating such a tradition from the Prophet falls short of the required number while the number of those reporting it from the Prophet's companions is large enough to include it in the ambit of continuity.

However, all traditions of the Prophet including his sayings, actions and statement which aim at law-making and which have come down to us through authentic sources are undisputedly final and characterized by the highest degree of probability. They constitute the unquestionable and imperative legal source

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[90] Peters, F.E., The Quest for the Historical Muhammad, International Journal of Middle Eastern Studies 23, 1991, 291 ff.

[91] See: Goldziher, Ignaz, Introduction to Islamic Theology and Law, Princeton 1981

for Muslims, whether their emanation from the Prophet is unmistakable or open to question. The successive traditions are binding because they are unmistakably traceable to the prophet. Another argument usually evoked is that all Sunnats that are commonly referred to and the Sunnats reported by minimum number of narrators are also binding because they have been narrated by persons possessing the qualities of fairness and authenticity to the highest degree. Furthermore, the provisions of Sunna are imperative and binding because they have been declared to be so in the Holy Koran:

"O! Ye who believe! Obey Allah and obey the Messenger and those of you who are in authority, and if ye have a dispute concerning any matter refer it to Allah and the Messenger. And if tidings, whether of safety or fear, come unto them, they noise it abroad, whereas if they had referred it to the Messenger and such of them as are in authority those among them who are able to think out the matter would have known it. Who obeys to the Messenger obeys to Allah."[92]

There is another verse to the same effect:

"Obey Allah and the Messenger." And also: "And whatsoever the Messenger gives you, take it. Whatsoever he forbidden, abstain from it."[93]

Once again, according to the Koran injunctions, Sunna is considered to be binding law. During the Prophet's life time and thereafter all his companions agreed on its being obligatory put into effect. All his edicts passed out during his life time were translated by them into practice. They issued what the prophet allowed as lawful and what disallowed as unlawful. And after his demise whenever they faced any problem for which no provision existed in the Holy Koran, they tried to find out the relevant tradition to solve it. The first successor

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[92] Koran 4,59.

[93] Koran 59,7.

to the Prophet (Caliph), Abu Baker, used to enquire if anyone remembered a tradition relating to a problem, which he himself had forgotten. So did the second successor Omar Bin al Kattab and various other companions of the prophet as well as their successors.

However, the question remains which sayings and actions of Prophet constitute the Law and in which way they do so. Everything concerning his individual characteristics, his personal life and most of the hints he gave that are related to all day issues do not constitute Law in a strict sense. On the contrary, all those saying and action of the prophet designed to elucidate divine in junctions to teach and to guide constitute law in them. The examples of such saying and action are as follows: The Prophet said one should offer prayer exactly the same way one can see him do. He also prescribed to learn all religious rites from him. And he also treated the cutting off a thief's right hand from ankle on as an elucidation of a divine injunction[94].

## 7.5. Consensus

Consensus means agreement of all the jurists of Islam on any provision of the Sharia at any time after the demise of the Prophet. Al-Shafii, one of the founders of the fourth Islamic Sunna School, was also instrumental in a second re-definition of Islamic law procedure. At this point we return to the list of sources. After Koran and Sunna, he defined Consensus (*ijma*, literarily translated as 'agreeing upon') as the third source.

But the question whether Consensus represents a valuable source of justice remains even more controversial. First of all, one has to ask for the group of persons that has to agree on a law, or in other words, those that have to define a consensus. Some recognised an *ijma* of the people of Medina as authoritative, whereas others declared that only an ijma of all the Muslims - or, at least, all the learned ones amongst them- was of legal value. The basis of acceptance of the

[94] Oudeh, Shaheed, Islamic criminal law, New Delhi 1996, 221ff.

universal principle of Consensus forms a well-known hadith that says: “My community will not agree on an error”.[95] It means that what Muslims agree to be good is also good in the sight of God.[96]

If all the Jurists of Islam agreed on a provision relating to a particular matter at one and the same or at different times, the obtained consensus would be binding for all adherents to the Muslim faith. It would be treated as the final and positive proof of the provision. Whoever denies its authority is to be considered an un-Believer. But if only a majority of the jurists and not all of them agree on the validity of a legal statement, such a consensus would be binding on the general run of the people, while the scholars may hold different views. This approach demands a final declaration of a head of the state or the man in authority that would make it binding for everybody. In this case it would be incumbent upon everyone to abide thereby.

Consensus usually derives from the Koran and the Sunna. Consensus of jurists on a particular provision is viewed as an unquestionable proof of the harmony with the basic constituents and the spirit of Islamic Law. The Koran and the Sunna have been accorded to the principle of Consensus the status of a binding and obligatory law. The verse referred to in the Koran is:

“O! Ye who believe! Obey Allah and obey the Messenger and those of you who are in authority.”[97]

The phrase, “those in authority” is unanimously taken. It means people in power as well as scholars. All of them are an authority within their own sphere. If the scholars have agreed on a provision, the Koran enjoins that they ought to be obeyed. According to the Sunna the opinion of the community is free of error and Allah looks upon the conclusion unanimously arrived at as good. Hence, the

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[95] Hadith.

[96] Hanif, N., Islamic concept of crime and justice, New Delhi 1999, 14ff.

[97] Koran 4,59.

prophet's saying: “The people of my *Umma* (my nations) will never agree on error.” According to Muslim convictions, Allah does not lead his *Umma* to a consensus on misguidance.

During the Prophet's life the Muslim community respected the Prophet's authority as their spiritual guide, community leader as well as a trusted and respected individual. He intervened in cases of controversy and his counsel was very much solicited; therefore, many of the Muslims took it for granted that the Prophet was always there in case an issue needing clarification. However, this did not negate the benefits of using *Ijtihad* or independent judgement as the starting point for Consensus. There are examples of the Prophet encouraging the believers to apply the principles of *Ijtihad* to their everyday lives. For example, it is reported that when the Prophet appointed Moath bin Jabal as governor of Yemen, he asked him what he would do in case an issue arises to which he is uncertain. Moath said he would first refer to the Koran and then to the teachings of Muhammad. The Prophet then asked him what he would do if there were no clear answer from these sources. Moath answered, to the satisfaction of the Prophet, that he would do the best he could and use his judgement.[98]

In another example to show that independent judgement was encouraged, the Prophet had ordered Muslims in a mission to not pray Asr (midday prayer) except in Qurayza their destination. When the sun was about to set, some said that the Prophet meant for them to hurry up so they arrive in Quryyza before the sunset, but if they are running late, they should pray on the road. Others took the Prophet's words literally and refused to pray until they reached Qurayza which is a place near to the prophet city after the sun set. Later, when they met with the prophet they asked him which interpretation was correct, and he agreed with both.

After the death of the Prophet, it was seen that from the readiness of the Caliphs Abu Baker and Omar to take advice, that it is evident that the right of interpreting the koranic regulations was not the privilege of any special official

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[98] Hasan Uddin, Hashmi, Ijtihad of the Prophet's Companions, Light, 1992, 4ff.

body but could be exercised by anyone who is pious and has a social conscience. To prevent individuals from practicing *ijtihad* haphazardly, al-Shafi'i developed a methodology for using *ijtihad* in his book, *Usul al-fiqh*. Since then, the role of ijtihad has not been in the hands of the laymen but left to a selected few who assume a special role in Islamic law. Today in many Muslim countries, Islamic decisions ranging from personal to political ones are made in the form of fatwas or religious decisions which is a result of this approach.

## 7.6. Analogy

The fourth important source of Islamic criminal law is *Qiyas* which means analogy. One could also translate it as 'measuring' or 'comparing' and it is a method whereby the rule contained in a clear text of the Koran or the Sunna of the Prophet, or even the rule which has been sanctioned by Consensus is extended to cases that are not explicitly covered by the Holy Book or Sunna on the grounds of material similarity in the nature of the two cases. The justification for the use of Analogy in deciding a case is based on the following verse: "Whoever intercedes in a good cause has a share of it and whoever intercedes in an evil cause has a portion of it. And Allah is ever keeper over all things."[99] Thus, Analogy is referred to in respect of problems about which there is no specific provision in the Koran or the Sunna of the Prophet. In such cases, scholars have derived a specific law by the means of analogical deduction on the basis of the provisions of the Koran and the Sunna. It is intended to "a very limited application of common sense."[100] Scholars simply compare it to a similar situation which is described in one of the two. Scholars have developed detailed principles of analogical deductions in the books of Islamic jurisprudence.[101]

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[99] Koran 4,85.

[100] Black, Antony, The History of Islamic Political Thought From the Prophet to the Present, Edinburgh 2001, 35ff.

[101] Schacht, Joseph, Origins of Muhammadan Jurisprudence, Oxford 1950, 292ff

One can define Analogy as a branch of *Ijtihad* "and indeed is considered to be fallible and does, therefore, not rank so high as authority as those on a text of the Holy Book, or Sunna, or Consensus."[102] The Prophet has permitted *Ijtihad* which literally means 'to exert'. Technically it means to exert with a view to form an independent judgement on a legal issue. *ljtihad* is the Islamic method of facing new situations and problems in the light of the general principles of the Koran and the traditions of the Prophet or the Sunnah. Therefore, Analogy can be defined as the one root in which Islamic Law accepts "that reason could play a role".[103]

Apart from Qiyas, there exist other methods of *Ijtihad* such as *Istihsan* and *Masalaha*. The first implies a juristic preference if different interpretations are given. It is a source of Law, freer and wider in scope than the others. The second one represents moral considerations. Both are assumed to have guided the Prophet's own thinking and therefore they do play a role in law-making and judging. Furthermore, they contributed to add elasticity and adaptability to the Islamic system of Laws.

In addition, the practices of the Khulafa-e-Rashidun (first four rulers of Islam), the decisions of the judges and the customs of the people are also considered as sources of Islamic law in matters which are not spelled out in the Koran and the Sunna.

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[102] Hanif, Islamic concept of crime and justice, New Delhi 1999, 16ff.

## 7.7. Problems implied

If tradition and law became fixed with the establishing of the sources of Law as listed above and the classification and inner hierarchy it implies as shown, Islam had a powerful tool in its hand. Antony Black has stated that this was "apparently the strength of Islam in its competition with more 'spiritual' creeds."[104]

But however elaborate the establishment of those laws and restrictions might have been at the time, it also implies far-reaching consequences that rather downplay than uphold the legal competitiveness of Islam in our days. The reason for that is rather simple: If the sources of justice have been fixed ones, it is virtually impossible to alter them or to adapt them in accordance to the challenges that are demanded by different environments and circumstances. It seems hardly possible to change a consensus once agreed upon them ever after. Once a consensus has been passed or an approach to a legal issue has been agreed upon, it remains in a fixed, hardly alterable position.

It could not be undone, for the Prophet has declared that his community will never agree on an error. The only cause for a noticeable change would be the discovery of a new Report deriving from the Prophet and its inclusion in the *hadith* text collection or a re-interpretation of a text passage of the Koran. But the scope for re-interpretation is limited and a rediscovery also seems to be rather unlikely. An approach to do so would reopen questions believed to have been settled already. This would rather stir up new confrontations than meet the agreement of everybody involved into such a process. Taking that into consideration, the Sharia exclusively based on the sources as listed and defined above remains a rather stiff corpus of laws that can only moderately be altered and adjusted to the challenges of an ever faster changing society: "Both logic and reason tell us that no individual nor any penal system in any age can envisage all

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[103] Black, Antony, The History of Islamic Political Thought from the Prophet to the Present, Edinburgh 2001, 34 ff.

[104] Black, Antony, The History of Islamic Political Thought from the Prophet to the Present, Edinburgh 2001, 36ff.

the crimes and penalties that could ever take place, in view of changes in situations and circumstances, nor can any individual or penal system anticipate what might happen in the future."[105]

## 8. Schools of Islamic Criminal Law

After the death of the Prophet Mohammed in 632 A.D. a dispute arose within the Muslim community over the question who would be the successor to the Prophet. Muhammad had not named anyone which caused a serious struggle of power between several would-be successors that all claimed[106] rightful authority in the name of Allah. Immediately after the death of the Prophet, Abu Baker, the father in law of the prophet was elected as the first Caliph by some of the followers of the Prophet. This election of Abu Baker divided the Muslim community into two groups that each had divergent views on the issue. As a consequence, the Shies and the Sunnis emerged as two rivalling branches of Islam. Besides those two major groups some minor ones appeared but are often seen as branches of the Shia.

Altogether six different sections of Islamic faith came into existence. The Sunni community is the largest one and includes approximately 85% of the entire Muslim community, followed by the Shia that represents around 10%. The remaining four groups are dogmatically close to the Shia School and represent the other 5 %: Muotazalah, Kahwarag, Zaydiyah, Jafariah, and Zahiris.

The existence of a heterogeneous Muslim world as a result of the split up after the Prophet's death also translates into the foundation of different Law Schools. But this was not an immediate consequence since those only began to flourish in the century following the arrival of Islam. Originally, no real Islamic Law School but rather a type of legal thought or a certain approach to legal matters had

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[105] Ibraham, Saeed Hasan, Basic principles of criminal procedure, London 2003, 22ff.

[106] Rahim, Mohamed, Encylopedia of Islam, Delhi 1971, 488ff.

emerged that is usually referred to as madh-hab (school of fiqh). Legal judgement was passed out by representatives of the rulers but often did not meet the agreement of religious authorities of early Islam. Theology and jurisprudence did not form yet an indissoluble alliance.

With the emergence of the Abbasids rule, the situation changed. They came into power after the Umayyad rulers (661-750 CE) were overthrown. In comparison to the Umayyad, the new power holders were more supportive of a true Islamic law and aimed at reconciling jurists and theological representatives of the Islam. As a result, the first real Law Schools emerged as we know it today. They succeeded in systemizing Islamic law and purifying the traditions of false components. The about twenty different "facets" of speaking and exercising Law that could be summarized as Madh-hab finally gave way to four major Sunni Schools of Law.

The four Sunni Schools (Schools of Fiqh) of thought (the four Madhahib) are: the *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali*. With regard to legal matters, these four orthodox schools emphasize the various sources of Islamic Law – the Koran, Hadith, Consensus of legal scholars and Analogy – differently and accord different weight to each of them. Therein lays the fundamental disagreement between the four. They compile their own corpus of legal doctrine but nevertheless recognize each other because there is a similarity between them in broad precepts. Differences on particular points occur on the ground of the absence of clear guidelines from the Koran and the Sunna.[107]

The first two schools, *Hanafi* and *Maliki*, were founded towards the end of the first century of Islam by Imam Abu Hanifa in Kufa (Iraq) and Imam Malik in Medina. The Kufans, followed a few years later by the Medinese, ascribed their new doctrines back to earlier jurists within their respective school: "By a literary convention, which found particular favour in Iraq, it was customary for an author

[107] Mahmassani, S., The philosophy of Jurisprudence in Islam, Leiden 1961, 71ff.

or scholar to put his own doctrine or work under the aegis of an ancient authority."[108]

In the following century, the two other schools were founded: the *Shafei* School of Imam Idris al-Shafei in Egypt and the *Hanbali* School of Imam Ahmad ibn Hanbal in Baghdad. As already mentioned, one can identify them by focusing on their differences concerning legal matters. Imam Malik, for instance, preferred a principle known as *Ahal-e-Madinah*, that is the practices of the people of Medina. On the contrary, Imam Ahmad ibn Hanbal of Baghdad did not adopt that principle.

However binding the different legal approaches might be, one should not overestimate them. As a matter of fact, the loyalty to a particular *Madhhab* among Muslims is decreasing. Today *Hanafi*, *Shafi`i*, *Maliki* and *Hanbali* followers pray together and work together. Most scholars state that individual adherents to the Muslim faith are not required to follow a specific Fiqh School. The reason is that nothing can be demanded of a Muslim that cannot be traced back directly to Allah and His Prophet since the existence of different Law Schools reflects a historical and especially political development rather than divine desire. When in need of a Fatwa, Muslims could consult with any scholar regardless of his Madh-hab (School).

Adding to this, Sunni Islam does not possess clerical hierarchies and centralized institutions which may be important when looking at legal authorities. The absence of a hierarchy has been advocated as a source of strength permitting the faith to adapt to local conditions. However, it has also been a weakness that makes it difficult for Sunni Muslims to achieve any significant degree of solidarity. Within the Sunni community one can find different divisions like the Kharjiites, Wahabis, Deobandi, Barelvi, Ahle-Sunnat, Wal Jamat, Ahle Hadith, Ghurba Ahle Hadits, Sunnis of Green Turban and the Sunnis of Brown Turbans. They declare each other wrong and seldom offer prayer behind each other.

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[108] Schacht, Joseph, Pre-Islamic Background and the early development of Jurisprudence, in: Law in the Middle East 28, 1955 London, 43ff.

Among Sunni Muslims, an effective execution of power and the ability to maintain public order are sufficient in order to legitimise authority. This is in stark contrast to the more uncompromising Shia views of government who see it as the sole province of religious leaders. For Sunnis, even a bad Muslim ruler is preferable to chaos and anarchy, and the Sunni religious tradition contains only a limited right to rebel. However, if a ruler commands something that is contrary to God's law, the subject's duty of obedience lapses.

Therefore, the differences between Sunni and Shia and the various sub-divisions had originally a political background. However, those differences were also translated into theological and metaphysical interpretations. In principle, a Sunni approaches God directly; there is no clerical hierarchy. Some duly appointed religious figures, however, exert considerable social and political power. Imams usually are men of importance in their communities but they do not have to obtain any formal training; among the Bedouins, for example, any tribal member may lead communal prayers.

Committees of socially prominent worshipers, comparable to Western Church boards, usually control the mosque-owned land and gifts. In many Arab countries, the administration of *waqfs* (religious endowments) has come under the influence of the state. *Kadi* (judges) and Imams are appointed by the government, a principle that illustrates once more the strong link between state and religious matters.

If jurists were free to go back to the roots of law and interpret them individually in the first two centuries of Islam, this approach stopped with the formation of the four Schools that started defending certain orthodoxy in terms of legal matters. The scope of free interpretation was gradually curtailed and "by the beginning of the 10$^{th}$ century, there was a consensus among the jurists that the principles of law as settled by the recognized schools were sacrosanct and immutable and that there was no any necessity for new legal principles to be deduced."[109]

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[109] Serajuddin, , Alamgir Muhammad, Sharia Law and Society, Oxford 1999 2ff.

## 8.1. Hanafiyyah School

The Hanafiyyah School is the first of the four orthodox Sunni Schools of Law. It distinguishes itself from the other schools by according less authority to oral traditions as a source of legal procedure. Contrarily, it developed the exegesis of the Koran through a method of analogical reasoning known as *Qiyas* which necessitated a careful study of actual conditions in legal thinking. Furthermore, it established the principle that agreements of the Ummah (community) of Islam concerning a specific point in the Islam law codex, as represented by legal and religious Scholars, constituted evidence of the will of God. This process is referred to as *Ijma'*, which means the consensus of the scholars. Thus, the school definitively established the Koran and its resulting principles known as *Ijma'* and *Qiyas* as the basis of Islamic law. In addition to these, Hanafi accepted local customs as a secondary source of the law. On the other side, it refrained from according too much authority to the principle of Tradition as legal source because this source related too heavily to particular conditions of time and space and, therefore, could not easily adapted to new challenges and circumstances. Consequently, von Kremer referred to it as "the highest and loftiest achievement of which Islam was capable."[110]

The Hanafi School of Law was founded by Nu'man Abu Hanifah (699 - 766) in Kufa in what is today Iraq. It derived from the bulk of the ancient school of Kufa and absorbed the ancient school of Basra. Abu Hanifah lived in the period of the successors of the Sahabah (the companions of the Prophet). The Hanafi School was favoured by the first 'Abbasid caliphs in spite of the school's opposition to the power of the caliphs because it had originated in Iraq.

The privileged position which the school enjoyed under the 'Abbasid caliphate was lost with the decline of the 'Abbasid caliphate. However, the rise of the Ottoman Empire led to the revival of Hanafi fortunes. Under the Ottomans,

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[110] von Kremer, Alfred, Geschichte der herrschenden Ideen des Islam, Leipzig 1868, 398ff.

Hanafites were appointed judge and sent from Istanbul, even to countries where the population followed another madhhab. Consequently, the Hanafi madhhab became the only authoritative code of law in the public life and official administration of justice in all the provinces of the Ottoman Empire[111]. Even today the Hanafi code prevails in the former Ottoman countries like Jordan. It is also dominant in Central Asia and India. There are no official figures for the number of followers of the Hanafi School of law. However, it is followed by the vast majority of people in the Muslim world. The big advantage of the Hanafi School (Fiqh) results from the fact that it is easier to understand and act upon than the other systems of Fiqh.

The Koran repeatedly underlines the assumption that God wishes to be gentle and not strict with his followers. The Prophet declared that he had come to the people with a gentle and easy Sharia. Following this, it is Islam's special pride in comparison with other religions, as often stated by Muslim scholars, that it is far removed from principles like monasticism; that its ritual is not rigorous and that its enjoinments are easy to understand and act upon. Within this context, the Hanafi Fiqh is superior to its rivals on similar grounds.

So well known is the fact that Hanafi Fiqh is easy and liberal that poets and writers often employ it as a proverb. A rather curious example of this is a simile used by the Islam scholar Anwari, in which he speaks of the liberties allowed by Abu Hanifah.[112] The simile occurs in an improper context, but the point it makes is clear. On any question - whether pertaining to the duties of worship or to worldly transactions - one finds Abu Hanifah's precepts easy and gentle and those of the other imams difficult and harsh. This becomes evident if one looks at the rules regarding theft for illustration purpose. Those were laid down in the Kitab al-Jinayat (The Criminal Code) and the Kitab al-Hudod (the Penal Code).

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[111] Yozsef, Mousa, Abu Hanifeh , Baghdad 1982, 171ff.

[112] Anwari, M., Die Zeichen Gottes. Die religiöse Welt des Islam, München 1995, 46ff.

It is agreed by all authorities that the punishment for theft is cutting off the right hand. However, the mujtahids have linked the execution of the punishment to certain conditions when defining theft. Regarding the criminal act of theft according to the Hanafi School pardon is allowed at all the time as well as the testimony of women which is granted an equal value than that of men.

A large part of Fiqh deals with prohibitions and permissions. In this connection, there are many precepts of the other imams, which, if they were to be closely followed, would make life unbearable if not impossible, while Abu Hanifah's precepts are easy to follow. For example, according to Shafi'i School, the following acts are impermissible: bathing or performing ablution with water heated on dung-fire; eating out of clay vessels baked on dung-fire; using vessels made of tin, glass, crystal and agate; wearing garments made of wool, sable fur and leather (in which prayer cannot be offered); vessels, chairs and saddles with silver work on them; common sales in which there is no declaration of selling and buying and so on. Abu Hanifah considers all these acts permissible.

The School also contributed largely in adding new restrictions and regulations concerning the proceeding of business and its legal dimensions. Its founder was "fully alive to the new demands on religion as a consequence of the expansion of Muslim political [and economic] power."[113] The primitive civilisations of the Arab Peninsula up to the first centuries of Islam did not know then the world of contracts, legal documents that are written down, legal procedures aiming at the settlement of disputes or the adducing of evidence. Abu Hanifah was the first to introduce rules for all of these. Herein lays the basic idea of the Hanafi School: In an ever altering world with constantly changing circumstances, a system of law needs to be permanently adapted to those new situations and calls for new considerations. Therefore, it "possesses greater power of creative adaptation than any other School of Muhammadan Law."[114]

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[113] Hanif, Islamic concept of crime and justice, New Delhi 1999, 18ff.

[114] von Kremer, Alfred, Geschichte der herrschenden Ideen des Islam, Leipzig 1868, 397ff.

Today, the Sunni Hanafi School is dominant in India, Pakistan, China, and Afghanistan. Most of the Kurds are Sunni Muslims and follow the Hanafi School as well. Furthermore, followers of Imam Abu Hanifa are found among ethnic Kazakhs but also in Turkey, Iraq, Syria, China, North Africa, Egypt and in the Malay. They also constitute the majority of the Muslim population of Albania, the Balkans, Central Asia, Kazakhstan, and Jordan.

## 8.2. Maliki School

The founder of the second Islamic School of Law, Iman Malik bin Anas (715 – 95) came from Medina and had direct access to some of the most trustworthy and reliable authorities on *hadith*. This is because many of the leading companions of Muhammad lived there and narrated sayings and actions of the Holy Prophet. Therefore, his legal approach was heavily influenced by their narrations and the juristic verdict given by them. Malik bin Anas himself became a leading authority on *hadith* in addition to the fame he won as a renowned jurist[115]. Such was his stature that it is said three 'Abbasid caliphs visited him while they were on Pilgrimage to Medina.

As a result of the circumstances Malik bin Anas has been confronted with, the Malikis' concept of ijma' differed from the one of the Hanafis in that they understood it to mean the consensus of the community represented by the people of Medina Prophet City. Imam Malik's major contribution to Islamic law is his book al-Muwatta (The Beaten Path). The Muwatta is a code of law based on the legal practices that were operating in Medina. It covers various areas ranging from prescribed rituals of prayer and fasting to the correct conduct of business relations. The legal code is supported by some 2000 traditions attributed to the Prophet. One could view it a corpus juries because of the density and complexity it includes. It forms the connecting link between the fiqh literature and the vast *hadith* collections of latter days; this is why the School usually assumes an

[115] Abu Zahra, Mohamed, Islam Madahib, Cairo 1981, 231ff.

intermediary position in case of disputes between different scholars of Islamic Law since it refers to both, the legal approach and the principle of tradition as evoked by the *hadith* collections.

Imam Malik's approach did not differ that much from the Hanifite School but he did not place as much reliance on the principle of *Qiyas* and rather leaned to Sunna. However, he upheld the importance of individual judgement when other sources failed. Since Imam Maliki was in a better position than Hanifi in terms of knowing the Laws as laid down by the Prophet and his companions and their successors, he also included more of them into his system.

The School that was founded spread westwards through Malik's disciples and become very influential if not dominant in North Africa and Spain. The second 'Abbasid caliph, al-Mansur (died in 775), even approached the Medinan jurist with the proposal to establish a judicial system that would unite the different judicial methods that were operating at that time throughout the Islamic world.

Despite those tendencies, it lost some of its appeal. Much later, in the Ottoman period, the Maliki School had to cede most of its influence to the Hanafite School because under the Ottomans judicial relevance was especially granted to the latter. North Africa, however, remained faithful to its Malikite heritage. Such was the strength of the local tradition that *kadis* (judges) from both the Hanafite and Malikite traditions cooperated with the local ruler. Following the fall of the Ottoman Empire, Malikiyyah regained its position of ascendancy in the region. Today Malikite doctrine and practice remains widespread throughout North Africa, the Sudan and regions of West and Central Africa.

### 8.3. Shafaiah School

Between the relatively liberal Hanifi School and the more orthodox Maliki School one can observe a few other legal approaches that are all considered to assume a rather conciliatory position. One of the best known examples is the Shafi'I School that was founded by and named after Imam Muhammad bin Idris al-Sharii (767 – 819) who had been a descendant of the Prophet's uncle, Abu

Talib. The intermediary position of his School can at best be observed when looking at his personal background. The founder was a student of a follower of Imam Malik but was also taught law by one of the adherents of Imam Hanifi. Therefore, he came into contact with both Schools and searched an intermediary position between the independent legal investigation that is characterized by the weight it accords to the careful study of an actual condition in legal thinking and on the other side the more conservative traditionalism of his time that found its expression in the study of *hadith*. However, he came to believe in the overriding authority of the traditions from the Prophet and identified them with Sunna.

Baghdad and Cairo were the chief centres of the Shafi'iyyah. From these two cities Shafi'I's teaching spread into various parts of the Islamic world. In the tenth century Mecca and Medina came to be regarded as the School's chief centres outside of Egypt. In the centuries preceding the emergence of the Ottoman Empire the Shafi'is had acquired supremacy in the central lands of Islam. It was only under the Ottoman sultans at the beginning of the sixteenth century that the Shafi'i were replaced by the Hanafites, who were given judicial authority in Constantinople, while Central Asia passed to the Shi'a as a result of the rise of the Safawids in 1501.

In spite of these developments, the people in Egypt, Syria, Jordan, Palestine, Sudan and the Hidjaz (Gulf Area) continued to follow the Shafi'i madhhab. Today it remains predominant in Southern Arabia, Bahrain, Indonesia, East Africa and several parts of Central Asia. Shafi'i is practiced in Malaysia and the Philippines. It is followed by approximately 15% of Muslims worldwide. Additionally, most Kurds in Iraq follow the Shafii School of Sunni Islam. Only a minority, concentrated in parts of the areas of Kirkuk, follow the Hanafi School. In terms of number of adherents and also in terms of importance, the School takes rank next only to the Hanafi School.[116]

The Shaf'i School is considered the easiest School and the Hanbali is considered the hardest in terms of social and personal rule. Hanafi took Shafi as his rival and

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[116] Hanif, Islamic concept of crime and justice, New Delhi 1999, 20ff.

vice versa. Tradition, the Consensus of the Muslim community and reasoning by the principle of Analogy are the chief characteristics of this School. Its founder had taught in both Baghdad and Cairo and followed a somewhat eclectic legal path, laying down the rules for Analogy that were later adopted by other legal schools. He was noticed for his balance in judgement and consideration of views resulting from his intermediary position between the Hanafi and the Maliki School. Within this context, he allowed a more flexible and workable interpretation of the Prophet's dictum that his people would never agree on error.

At the time of Al-Shafi'i, the Prophet's *ahadith* were gathered from different countries, and the disagreements among the scholars increased until Al-Shafi'i wrote his famous book, *Al-Risalah*, which is considered the foundation of Islamic jurisprudence[117]. He was also the first one to write a treatise on the basic principles and methods of jurisprudence.

## 8.4. Hanbali School

The Hanbali School is the fourth important orthodox School of Law within Sunni Islam. Like the other ones it derives its decrees from the Koran and the Sunna, but places them above all forms of Consensus, opinion or inference. That's why it characterized by an uncompromising attitude. However, the school accepts as authoritative an opinion given by a companion of the Prophet, providing there is no disagreement with another companion. In the case of such disagreement, the opinion of the Companion nearest to that of the Koran or the Sunna will prevail.

The Hanbali School of Law was established by Ahmad bin Hanbal (780 - 855). He studied law under different masters, including Imam Shafi'I, the founder of the third school. Hanbal was regarded as more learned in the Traditions than in jurisprudence. His status also derives from his collection and exposition of the *hadiths*. One even has to say that his austerity in life combined with the remarkable erudition in traditional learning gave rise to the study of *hadith*. In

[117] Abu Zahra, Mohamed, History of Islam Law, Cairo 1976, note 2, 275ff.

number of traditions that he collected, no one approached him. Thus, his major contribution to Islamic scholarship is a collection of fifty thousand traditions known as *Musnadul-Imam Hanbal*[118]. With Imam Hanbal, the true evolution of an Islamic Law and the age of independent legal scholars had come to an end. All major contributions that were done afterwards adding to the development of legal science were only supplementary.

In spite of the importance of Hanbal's work his school did not enjoy the popularity of the three preceding Sunni Schools of Law. Hanbal's followers were regarded as reactionary and troublesome on account of their reluctance to give personal opinion on matters of law, their rejection of analogy, their fanatic intolerance of views other than their own, and their exclusion of opponents from power and judicial office. Their unpopularity led to periodic bouts of persecution against them. The later history of the school has been characterised by fluctuations in their fortunes. However, latter Hanbali scholars such as Ibn Taymiyya (died in 1328) and Ibn Qayyim al-Jouzia (died in 1350) did display more tolerance to other views than their predecessors and were instrumental in making the teachings of Hanbali more generally accessible[119].

From time to time Hanbaliyyah became an active and numerically strong school in certain. areas under the jurisdiction of the 'Abbassid Caliphate. Nevertheless, its importance gradually declined under the Ottoman Turks. On the other side, the emergence of the Wahabi in the nineteenth century in Central Arabia and its challenge to Ottoman authority enabled Hanbaliyyah to enjoy a period of revival. Today the school is officially recognised as authoritative in Saudi Arabia and areas within the Persian Gulf.

Today, the government of Saudi Arabia vigorously enforces its prohibition against all forms of public religious expression other than that of those who follow the government’s interpretation and presentation of the Hanbali school of

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[118] Nishi, Purohit, Mohamedan law, Allahabad India 1998, 41ff.

[119] Abu Zahra, History of Islam Law, Cairo 1976, 358ff.

Sunni Islam. This is despite the fact that there are large communities of non-Muslims and Muslims from a variety of doctrinal Schools of Islam residing in Saudi Arabia.

Under the Hanbali interpretation of Shari'a law, judges may discount the testimony of people who are not practicing Muslims or who do not have the correct faith. The explanation of Saudi officials is that their Hanbali School of Islam religiously mandates that they deny other religions the right to function openly on the Arabian Peninsula - a right that is clearly protected under international law.

## 9. Criminal Procedure under Islamic Sharia

### 9.1. Generalities

The bases of a justice system and the numerous procedural processes before, during and after the various trial stages for criminal offences are of much interest to scholars in any system of laws. This is especially true if one studies the Islamic justice system. The reason for that lies within the system: One has to remark that differently from any Western system the Sharia is not just a legal system but an extremely complex legal code based on religious principles that were established in order to regulate the conduct of Muslims in all aspects of life. Criminal affairs are covered by it as well as codes of behaviour, political issues, commercial and domestic practice and - of course - also religious devotion. Hence, one has to bear all those aspects in mind when studying and understanding the content and nature of criminal procedure in Islam.

The initiation and termination of legal proceedings as well as the definition of persons and all institutions involved in it are among the first topics that one could draw attention to when studying Islamic criminal law. This becomes even more important when taking into consideration the fact that many of the elements enlisted differ entirely from any Western system if they exist at all. First of all and as a general rule, Islam views all rights as bestowed by God. Justice is exclusively exercised in His name. Herein lays the reason for all fundamental differences.

Following this very general statement, one can distinguish between two different categories of Justice: The Rights of God as opposed to the Rights of Worshippers. Admittedly, it is not always easy to draw the line between the two. The two categories depend on the extent to which the violated rights are related to the public interest of society. Those granted in the public interest are viewed as Rights of God because they affect His people. In other words, they endanger higher values and welfare and their real damage affects the community as a

whole. On the other side, Rights of Worshippers are those that are bestowed to protect individual interests. However, the suggested distinction is only one of many methods for defining crimes in Islam. It adds to a whole list of distinctive features such as the degree of harm, the time of the crime's commission and other circumstances that might play a role.

An important categorisation of crimes that are persecuted under Islamic rule is founded in the nature of the violated right. The so-called *hudud* crimes affect the Rights of God and violate doctrinal provisions established by the Koran or the Sunna. Some of those criminal acts such as theft and highway robbery easily find their equivalent in the Western world whereas others like adultery and libellous accusation of adultery would not be considered as a violation of law in the modern Western world. However, all Islamic legal scholars agree upon the justification of those crimes. It is, however, heavily disputed whether other violations such as apostasy, consumption of alcohol and attempts to overthrow the government could be considered as a violation of the Rights of God.

Among the criminal acts that affect Rights of Worshippers are all those that endanger another person's life or safeguard. Those are for instance murder, manslaughter, beating and wounding. This category includes all kinds of aggression against a person's life or causing harm to the organs of a person's body. It does not make a difference whether the aggression is deliberate or accidental. All criminal acts involving the Rights of Worshippers are not to be initiated without the consent or even at the request of the victim or the person closest to him. He also controls the termination of the proceeding as long as no Right of God is involved.

From a Western point of view, the possibilities of penalisation are interesting because they differ from any western model. All those criminal acts which result in the principle of parity of punishment following the ancient idea of 'an eye for an eye' are known as *Kisas*. The theological backing is to be found within the verse of the Koran: "The reward of an evil is an evil like thereof".[120] If

[120] Koran 42,40.

compensation is appropriately accorded, it is referred to as *Diya*. The application of *Diya* remains an option and is conditioned by an agreement between the heirs and the offender. In the western world this principle is often stated when evoking the supposed cruelty of the Islamic Sharia and it became known as 'blood money'. It implies the idea that an offender can buy himself off the punishment under the condition of compensating the heirs of his victim if those agree to renounce retaliation and grant forgiveness. Contrarily to the Western attitude concerning this legal practice one could also point out its advantage because it avoids cruelty in the best interest of all persons involved. As a matter of fact it supports the idea of Islam as a forgiving religion. In no comparative penal statue does such an option exist and no other system of laws besides the Islamic criminal law grants the possibility to supersede the principle of 'an eye for an eye'.[121]

Returning to the distinction between the different categories of law, one can remark the there exist criminal acts that affect both the Rights of God and the Rights of Worshippers. They are specified in the Koran or Sunna and include for example the charging of interest, bribery and slander. Those crimes are known as *Tazeer* and have wider scope and range than *Hudud* and *Kisas* crimes. *Tazeer* represents the flexible part of the Islamic system of crime categorisation. It was defined by the caliph, usually in response to the ever changing situation and needs of society. Nevertheless, one has to distinguish between those crimes that are explicitly referred to in the Koran or Sunna and to those that are defined by the rulers. Those falling within the first category are perpetually prohibited whereas all the others can be subject to decriminalisation because they are "man-made".

When looking at the concrete situation of a trial one will observe that the position of a prosecutor – at least when following a Western definition of it - is absent from the Islamic set of institutions. There, the judge carries out the

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[121] Haleem, Muhammad Abdel, Compensation for homicide in Islamic Sharia, in: Haleem, Muhammad Abdel and others (ed.): Criminal Justice in Islam. Judicial Procedure in the Sharia, London 2003, 362ff

investigation because criminal investigations are considered a judicial process rather than an executive one. In other words, the investigation is interrelated with the trial itself. As a result, prosecutorial investigation is completely within the scope and control of the judge and the findings of any external investigator such as the police (the ordinary police commissioner as well as the 'religious' police) can be totally scrutinized. Judges also play an essential role in initiating criminal proceedings. However, the Sharia only demands that an official acting on behalf of the state has to initiate a proceeding without explicitly naming the person or institution. It can be an official of the executive as well as an official of the judiciary, depending on the circumstances of a case. Herein lays an essential weakness of the Islamic system of laws because it does not clearly define and limit the scope of various officials involved in a proceeding. Transparency is therefore almost impossible.[122]

In general, criminal procedures should be as simple and short as possible. Hence, abbreviated proceedings are rather the rule than the exception as long as they do not contradict principles of the Sharia and do not affect the fairness of the criminal proceeding. The brevity and simplicity seems to be an advantage compared with the often extremely long and complex legal action in the Western world. However, there is also a downside to it. Ruling that are once rendered are usually final and there is almost no possibility of appealing against or reconsidering it. There exist no appellate courts. Reconsiderations of judgements are only possible if contradictions with a provision of the Koran or Sunna are found afterwards. On this ground, anyone can make a challenge.

## 9.2. Basic principles

Every system of laws seeks to deliver justice through its various legal institutions. Those institutions are defined by the degree of judicial power that is accorded to them by the state. The most important representation of this legal

[122] Awad, Awad Muhammad:, The rights of the accused under Islamic criminal procedure, in: Bassiouni, Cherif (ed.): The Islamic Criminal Justice System, London 1982, 91 – 109

authority is, especially in the Islamic world, the judge who also exercises the power of investigation. However, his authority depends on the category of crime and the characteristics of each of those categories as described in the chapter above when talking about the distinction between Rights of God and Rights of Worshippers.

In a more general sense, acts of crime could also be defined as legal prohibitions that are prescribed by God and carry definite legal punishments. If an offender is found guilty, a state of execution is obliged by the legal commandments. This implies important repercussions: On the one side, crimes are only defined through prohibition by the law-giver. Consequently, a penalisation can only occur with the permission of the law-giver. The punishment is either a *hadd* which is prescribed by Divine Law or a penalty such as prescribed by the law in which the judge has much of a say.

Therefore, the judge plays an essential role although his authority depends on the category of crime. In the case of crimes of Hudod, the judge has to award the punishment decreed for such a crime. No room for diminishing or adding to it is attributed to him. Therefore, a judge only serves to pronounce the sentence and does not possess any margin of manoeuvre. In other cases, the power of the judge is limited to the implementation of the decreed penalty. Nevertheless, even in case of *diya*, the voluntary principle of compensation the offender and the victim can agree upon, he can order some other punishment in order to safeguard the interests of the community. However, this does not replace or negate the idea of retaliation. Not even the head of state has the authority to relieve punishment in crimes of retaliation by the means of pardon. This right is exclusively reserved to the victim of the crime or his guardian.

The most interesting of the categories of crime is, from the point of view of the judgement, the category of *Tazeer*. The legal authorities determine the type and degree of punishment needed to exercise justice on behalf of the public's interest. Therefore, different penalties may be implemented for one and the same act of crime, depending on the circumstances surrounding the offence of the law. Everything is possible, starting from a word of reprimand if the crime represents only a minor offence and can go up to capital punishment in cases of extreme

severe acts of crime. The judge does not only have to take into account the crime itself but also its effect on society at large. Based on this consideration, he will select the most suitable of the various prescribed penalties.

A judge has an absolute freedom concerning the interpretation and evaluation of penal sources and texts. However, jurists and legal scholars have established a system that should be followed while interpreting and judging the strength of the arguments derived from those legal texts. He may apply legal means such as Analogy and convention but has no power to create a crime or punishment based on those. In other words, the judge has no authority to violate a clear text, independently from the given conditions or considerations. In addition to those principles, one more assumptions should be considered. Under all circumstances, *hudod* should be repealed in case of doubt for it is better to err in granting forgiveness than to err in punishment. As a general rule, not just in Islamic criminal proceedings, doubt favour the accused. The acquittal in a state of doubt and the release of the accused is better for the community and nearer to justice than the penalisation of an innocent person.

## 9.3. The application of Sharia principles in the modern Islamic world

The basic principles of the Islamic criminal law as described above do not necessarily reflect the actual legal situation of most Islamic countries. As a matter of fact, criminal procedure in most of those countries did not derive from Islamic Sharia but was heavily influenced by European models and ideas as a result of the colonial period in the nineteenth and early twentieth century but also the ongoing influence exercised by European values. France and its relationship with some of its former colonies and protectorates in the Arab world is the most important example illustrating this development.

Egypt is often taken as an example for a distinctively Islam nation and in the Western world it is often assumed that its legislation is based on Islamic principles. In fact, the application of the Sharia in Egypt and most of its neighbours only occurred in a limited period between the arrival of Islam and the late nineteenth century. It was then, that new codes of law were introduced,

following European models. After this, the application of Sharia was reduced in most of the countries in the Arab world, especially those that used to be part of the Ottoman Empire. There a process of westernisation had already been launched in the course of the 18th century in an effort to counterbalance the slow decline of the Empire. This process of modernisation was based on the "perception of the technical, military and economic superiority of the west" and "the cultural hegemony of Western powers" [123]. But it also had repercussions on the legal system because the technical and economic development in Europe began to be attributed to the legal and political system. Ottoman reformers looked above all to France as a model.[124] Especially the French and the British, but also the Austro-Hungarians exercised their influence on the region. Taking the Egyptian case, the civil and criminal codes now applied are derived from the French codes.[125]

As a general rule, it is rather difficult to ascertain which countries apply the Sharia and to what extent they do so. The reason for this is the extreme complexity of the Sharia which translates into an affection of all spheres of life. Only Saudi Arabia is generally believed to attempt to apply the Islamic system of laws as extensively as possible.

However, there has been a tendency recently to reintroduce at least some elements of Islamic legislation in many predominantly Muslim countries. This development is motivated by a rising religious conscience in some countries that were once believed to be very modern and westernised by Muslim standards such as Iraq until the Gulf War and pre-revolution Iran. But the call for an Islamic state also arises from the growing respect of traditional values of the Arab world and certainly by all recent political events concerning the war on

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[123] Black, Antony, The History of Islamic Political Thought From the Prophet to the Present, Edinburgh 2001, 272ff.

[124] Shaw, Stanford J, History of the Ottoman Empire and Modern Turkey, Vol. 1, Cambridge 1976, 266ff.

[125] Sherif, Adel Omar, Egypt's Report, in: The Prosecutor of a Permanent International Criminal Court, Freiburg 2000, 291ff.

terror. In Egypt, for instance, the 1971 constitution has already included Islamic Sharia principles as a main source of legislation without going into details.[126]

No matter how far those attempts to introduce Sharia principles have already gone, it can be stated that they have not yet resulted in a tremendous change of the system of government and the practice of public authorities in those countries. Despite the growing influence of Islamic groups, most remain essentially secular by the standard of the Islamic world and as far as the status of religion in those countries permits. However, in order to release some pressure, governmental action is partly (and at least rhetorically) brought into line with the Sharia. But it would be a mistake to assume that the criminal codes have entirely been adapted to the demands of Islam.[127]

Additionally, when observing the influence of religion on criminal codes in Muslim countries, one has to bear in mind that Islamic Sharia does not provide a complete framework of judicial action and proceeding since it is not a particularly developed set of laws but a rather general framework of rules. It lays down the guiding principles but only occasionally dictates precise criminal procedural rules. Therefore, it leaves much room for interpretation in view of many aspects regarding the changing needs of people and the different circumstances they face. The details of those rules are to be determined in dependence of a particular situation but nevertheless have to meet the basic principles of Islam.

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[126] Brown, Nathan, Inscribing the Islamic Sharia in Arab constitutional law, Washington D.C. 2001, 184ff.

[127] See: Malikain, Farhad:, The Concept of Islamic International Criminal Law. A comparative study, London 1994, 11ff.

## 10. Clash of Civilisations?

### 10.1. Human Rights and their global implementation

The first article of the United Nations' declaration of Human Rights says that all human beings are born free and that they can claim the respect of their dignity and inalienable rights. The most elementary ideals and values of human rights are expressed in this article: human dignity, freedom and equality.[128] Those values are universal and to be found in all cultural hemispheres.

Human Rights give an answer to the fundamental question of how human beings should go along with each other. Those basic principles are part of any ethnic or religious system. They can be defined as a "Golden Rule". Nevertheless, they only found their way into the constitutions with the Enlightenment in the end of the 18th century. It was the American Independence and the French Revolution that helped to map out a universal acceptance and recognition of certain inalienable rights. But it took another century and a half to establish those rights on a world level. This took place with the United Nations' Declaration of Human Rights in 1948. Although the 1948 Declaration cannot be defined as a law-making treaty, it is nevertheless considered an integral part of international legal standards and commonly accepted practice.

In the aftermath of 1948, several additional efforts were made in order to translate the Declaration into political action and to fill the rather abstract declaration with concrete illustration. In fact, it was the Declaration that led to regulate many international crime conventions under the United Nations' authority. The 1951 convention to prevent homicide was followed by the international convention to outlaw racial discrimination (1969), the 1975 Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and efforts to end the discrimination of women (1981) and children (1990), to name but a few.

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[128] Article 1 of the Universal Declaration of Human Rights, 1948.

Generally speaking, most principles of the system of international human rights have the effect of customary rules of international law. Therefore, they find their application in all national and international relations of individuals, groups, governments or states.[129]

Regarding criminal proceeding, Article 10 of the Declaration provides a basic guideline. It demands that everybody is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[130]

However, the United Nations Declaration and the various resolutions can only provide for a broad definition, leaving the exact margins of interpretation and its enforcement to the single states.[131] As a matter of fact, there is no general theory or even one definition of human rights as the views and attitudes of the Islamic world as opposed to opinions of the West on this issue show.

## 10.2. Human Rights and Islam

The popular image of Islamic law in the Western world is usually characterized by lashes, cutting hands and capital punishment. In the eyes of many, those elements represent the cruellest hardship possible, give way to a return to the medievalism and therefore contradict the implementation of modern human rights into the Muslim world. The principles of those rights seem to be completely absent in Muslim countries from a superficial Western stand point. However, much depends on the definition of Human Rights and its implementation because there is no general theory of Human Rights.[132]

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[129] Malikain, Farhad, The Concept of Islamic International Criminal Law. A comparative study, London 1994, 160ff.

[130] Article 10 of the Universal Declaration of Human Rights.

[131] Douzinas, C., The End of Human Rights, London 2000, 4ff.

[132] Douzinas, The End of Human Rights, London 2000, 4ff.

The most significant difference between modern westernized attitudes towards human rights and their implementation and an Islamic perspective is the function of religion in general and the position of God in particular. Whereas God hardly finds his place anymore in Western lay societies, he is the seat of justice in the Muslim world. Islam sees God as the ultimate source of justice, which includes the Human Rights. The main goal of God's message to human kind is the attainment of Justice. At this point there is a strong connection between Justice and Islam. But however different the starting point may be, the general outcome is, at least in principle, the same. The advocated key principles emphasise at equality, liberty and justice and brotherhood.[133]

Furthermore, Islam has encouraged two other ideas for the promotion of human rights and human dignity: The principles of compassion and mercy. It is on their basis that the Islamic law presents a universal approach to human rights which is much broader than the list of enumerated modern human rights' standards. Therefore, for Muslims human rights issues are fundamental to the quality of their lives.

Returning to Islam one has to state that according to the Holy Koran, the true Islamic faith cannot be achieved unless Human Rights are secured for every individual and group in a Muslim state. The Koran itself includes more than 20 basic Human Rights such as the right of life, dignity and freedom of human beings, protection against harassment or social security.[134] In the Western world, those principles were only legally recognized in the aftermath of the French Revolution whereas there have been part of Muslim thought for more than a millennium. This is why the Islamic law is not necessarily a positive law arising from international human rights conventions which is essentially based upon acceptance, adherence and ratification by single nations. However, this does not mean that Islamic human rights and the system of international human rights

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[133] Haleem, Muhammad Abdel, Human Rights in Islam and the United Nations Instruments, in: Eugene Cotrane and others , Democracy, the Rule of Law and Islam, The Hague, London, Boston 1999.

[134] Reichelt, A., Islam und Recht, Online: www.arei.purespace.de/recht/rechtsschulen.htm (05.03.2002).

contradict each other or can be seen as inferior or superior to one another. The Islamic standard is based on moral-legal autonomy whereas the second one is grounded on conventional ratification. In practice, the human rights principles should be fulfilled by all states that have long been affected by Islamic human rights provisions.[135]

As a matter of fact, no fundamental law stands in between the application of modern Human Rights and the religious practice of Islam. Islam is a complementary Human Rights system, as P. Antes points out.[136] Members of Muslim societies have to stand firm against any abuse of rules that are part of the Koran and their religion and therefore they also have to accept and implement Human Rights. On the whole, the core principles of those instruments that deal with the principles of criminal justification "have integrated the principles of Islamic Law into the protection of humans according to the principles of brotherhood, equality and justice.[137]

Nevertheless, one has to admit that the weakest point concerning this interpretation is the fact that duties towards the community rank first in the Muslim faith. On the contrary, individual rights in the sense of legal claims rank only second. In order to establish human rights as individual rights within the Muslim community, it is necessary to reverse this set of priorities and to place the concept of individual rights first.[138]

The examples for punishment given above are widely regarded as cruel examples of Islam criminal law and seem to contradict a modern Human Rights practice. Nevertheless, one should not over-simplify at this point. The application of those

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[135] Mayer, Ann Elisabeth, Islam and Human Rights: Tradition and Politics, London 1991, 56ff.

[136] Antes, Peter, Der Islam als politischer Faktor, Hannover 1997, 81ff.

[137] Malekian, The Concept of Islamic International Criminal Law. A comparative study, London 1994, 161ff.

[138] Bassam Tibi, Fundamentalismus im Islam – Eine Gefahr für den Weltfrieden?, Darmstadt 2000, 80ff.

practices varies from country to country. Legal authorities can change the means of punishment and avoid cruelty if circumstances justify such exceptions. However, orthodox hardliners oppose such a practice and call for the one-to-one implementation of the ultimate means of punishment as it is suggested (but not prescribed) by the Sharia. Within this context there have been many challenges from Islamic scholars who have rejected the very notion of western human rights which provokes much concern surrounding tensions between the Islamic interpretations of human rights and the West's stand point.[139]

To add to the complexity of the situation one needs to acknowledge that there is no general rule as a comparison of different Moslem countries easily proves. Furthermore, Western countries also do not always agree on common standards concerning human rights, as the dispute over the death penalty between most European countries and the United States shows. Therefore, the Western view is at least partly biased and does not always fully understand legal practice in the Moslem world.

Much has already been written about the question of the influence of Human Rights regarding Islamic criminal law. As a matter of fact, Islamic law does not necessarily stand in a stark contrast to basic human rights as it is sometimes claimed. Often, it refers to the same principles but does result in a different interpretation. In other cases, advocating certain rights automatically implies the acceptance of obligations referring to those rights. A good example illustrating this point is the free expression of speech.

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[139] Bielefeld, H., Muslim voices in the human rights debate, Human Rights Quarterly 17 (4), 1995, 587 – 617.

## 11. Examples

### 11.1. Freedom of Speech

One of the most essential human rights, the free expression of speech, is addressed by the Koran in order to teach Muslims how freedom of expression and information should be maintained to make such a dialogue fruitful. According to Islam, freedom of expression and information is a basic human right. But Islam goes one step further and condemns spreading lies and false information as well as passiveness and reluctance when the truth should be spoken:

"And do not overlay the truth with falsehood, and do not knowingly suppress the truth"[140]

A believer who is conscious of God should always maintain and defend truth and justice:

"O you who have attained to faith! Be ever steadfast in upholding equity, bearing witness to the truth, for the sake of God, even though it is against your own selves or your parents and kinsfolk.... "[141]

"... Be ever steadfast in your devotion to God, bearing witness to the truth in all equity, and never let hatred lead you into the sins of deviation from Justice[142]

Providing false information about an event which one has witnessed verses in Koran as well as refraining from providing the facts that one knows are both considered grave sins that should be avoided and prevented by every possible means. In that sense, a Moslem interpretation of the freedom of speech and thought involves more than a traditional Western definition. It implies the freedom of expression but also the responsibility to speak the truth.

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[140] Koran 2,42.

[141] Koran 5,12.

[142] Koran 5,12.

Critics usually see this obligation to tell the truth as an assault to individual members of Moslem societies and a means of state oppression. Truth is a relative term and state authorities can see in it a way to condemn disliked are unwelcome comments on political practice. However, this does not reflect the true spirit of this measure which intends to protect individualism. The teachings of the divine message should be revealed to the public and not concealed, even if the message criticizes or condemns an influential party or authority. It is significant that the Arabic word kafir and its origin kafara mean originally "to conceal, or to hide."[143]

The vice of hypocrisy (nifaq) is not less condemned in the Koran than atheists or (kufr) in Arabic language:

"They (the hypocrites) are the real enemies. How perverted are their minds." "Behold, together with those who deny the truth, God will gather in hell the hypocrites [144]

“Verily the hypocrites shall be in the lowest depth of hell”[145] .

Likewise, one who is reluctant to provide the facts is actually concealing the truth and such a person is described as "evil at heart" in the Koran and as "a muted devil" in the tradition of the Prophet. Providing the known facts and cooperating constructively so that truth may prevail are fundamental parts of the Islamic obligation of enjoining the doing of what is right and forbidding the doing of what is wrong. One who provides false information or is reluctant to provide the right information becomes a participant in the prevalence of falsehood and evil. Every believer is a witness and protector of the truth during his/her whole life:

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[143] See the word in a lengthy Arabic dictionary such as Lisan al-Arab; and see the Koranic verses 6:35, 37:14; and 31:32.

[144] Koran 4,141.

[145] Koran 4,138,145.

"... So that you may bear witness to the truth before all humanity...."[146]

God himself is the "ultimate truth" according to the Koran and it is incumbent upon every believer to support the truth in all forms so that it will always prevail. Therefore, freedom of expression and information, constituting both a right and a duty for every believer, should be established and maintained by all Muslims - men and women, rulers and ruled. The Koran orders those who have been entrusted with authority:

"To deliver all that you have been entrusted with unto those who are entitled thereto, and whenever you rule between people to rule with justice" [147]

## 11.2. Freedom of assembly

Since Islam is a religion based on public and joint practice of faith, Muslims are addressed as a community to work together in their efforts for progress. The right of assembly, another basic human right, is thus essential to secure correctional efforts against any powerful supporter of deviation from truth and righteousness:

"And the believers, both men and women, are responsible for (or the supporters of) one another; they all enjoin the doing of what is right and forbid the doing of what is wrong[148]"

"And that there should arise among you a band of people who invite unto all that is good and enjoin the doing of what is right and forbid the doing of what is wrong"[149]

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[146] Koran 3, 79.

[147] Koran 4,58 .5,12.

[148] Koran 2,108.

[149] Koran 3,99.

"But help one another in furthering virtue and God-consciousness, and not in furthering evil and enmity."[150]

"And enjoin upon one another the keeping to truth . . . and enjoin upon one another patience (and firmness) in adversity"[151]

## 11.3. Freedom of thought and believe

The right of free expression and information cannot be separated from the freedom to think and believe. Intellectual and linguistic capabilities characterize human beings, and thus, the right to form and express opinions represents an essential manifestation of human merits and of God's gifts.

The right to express and to be informed should, therefore, be secured by all who are respectful of humanity or grateful to God. Indeed, if one is allowed to think and believe, but not to communicate with others or exchange views, one's freedom of thought and belief is actually restricted. A human being is a social creature with genuine intellectual capabilities. Therefore, he should always consider more than one perspective of an idea and learn to balance the strength and weakness of it. This cannot be done individually or in isolation. Moreover, the basic condition for freedom of expression and information is that it extends to different viewpoints; otherwise, expression is merely an imposition of ideas and exercise in brainwashing.

Many national and international documents which declare human rights acknowledge the fact freedom of thought and freedom of expression are intertwined. The universal declaration of human rights which was issued by the General Assembly of the United Nations in December 1948 has dealt with both

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[150] Koran 5,2.

[151] Koran 5,14.

issues in two successive articles.[152] But freedom of thought and believe are also repeatedly emphasized in the Koran:

"There shall be no coercion in matters of faith"[153]

"And had your Lord so willed, all those who live on earth would have attained to faith - all of them, do you then think that you could compel people to believe?" [154]

Said (Noah): O my people - what do you think? If (it be true that) I am taking my stand on a clear evidence from my Lord . . . to which you have remained blind, can we force it on you even though it is hateful to you?"[155]

"And so (O Prophet) exhort them; your task is only to exhort; you cannot compel"[156]

As long as freedom of expression and information is maintained, different views should be expressed and respected:

"Call you (all humanity) unto your Lord's path with wisdom and goodly exhortation, and Say: argue with them in the most kindly (and convincing manner)"[157]

``Say: o ye reject faith I worship not that which ye worship, nor will ye worship that which I worship, and I will not worship that which ye have been wont to worship, nor will ye worship that which I worship``[158]

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[152] Articles 18,19 of the Universal Declaration of Human Rights.

[153] Koran 2,255.

[154] Koran 10,71.

[155] Koran 10,70.

[156] Koran 10,1.

[157] Koran 2,150; 109,1,2,3,4.

## 11.4. The application of Islamic Criminal Law respecting Human Rights

How can the Islamic Law be applied to modern societies without undermining Muslim characteristics? One will have to distinguish between Al-Sharia and Al-Fiqh al Islami-Islamic Law and Islamic Jurisprudence. The Islamic Law is part of the Koran or the Sunnah. This makes it obligatory for all Muslims. On the contrary, Al-Fiqh al Islamic is a collection of legal opinion. It is a reference for academic purposes and legal practice but by no means is it obligatory. Often it gives several opinions on the same issue within the same school of thought. The four existing different schools of thought further complicate the practice of judicial exercise.

One also has to take into consideration the modifications and alterations that were brought along with the evolution of time. Legal conditions of the early centuries of Islam are by no means comparable to the present situation. The position of women in a society, the modern economic and social challengers or the globalisation of legal thought and practice are elements that can hardly be answered to by referring to a system of laws that roots in the first millennium. Therefore, the modernisation of legal practise is of paramount importance as the Arab scholar Muhammad Asad states: "Because it is restricted to commands and prohibitions expressed in self-evident terms in Koran and Sunnah, the real Sharia is extremely concise and, therefore, easily understandable: and because it is so small in volume, it cannot [provide for] legislation for every contingency of life."[159] Therefore, it does not provide a framework for criminal procedures and judicial processes but merely lays down the guiding principles without attempting to address the details. Those are to be determined by Muslims as

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[158] Koran 109,1,2,3,4,5.

[159] Quoted in: Krämer, Gudrun, Gottes Staat als Republik. Reflexionen zeitgenössischer Muslime zu Islam, Menschenrechten und Demokratie, Baden-Baden 1999, 53ff.

circumstances dictate, within the broad basics of the Sharia and accepting all principles as prescribed by Islam.

Consequently, the Islamic justice system has to provide equal principles of legal proceeding for all individuals irrespectively of their status. Regarding criminal proceedings these include, but to mention a few, the rules of equality, the presumption of innocence until guilt is proven, the question of arbitrary arrest, remand in custody, detention, equality before public hearing and the right to a fair trial before an impartial criminal jurisdiction. Generally speaking, crimes and punishment should only be imposed by virtue of criminal legislation.

Despite the advocated and also in the Muslim world commonly accepted principle of absolute equality there remain slight differences in the procedure of judicial legislation. Those differences are to be found between Muslims and non-Muslims. This happens on the ground of the strong faith attributed to the Islamic philosophy. An Islamic court may base its judgement on an oath taken from the accused. This method, however, is not reliable for those who are non-Muslims.[160]

But despites those minor exceptions one can state that basic rights are, at least in principle and on the grounds of Islamic sources of justice, guaranteed to everybody regardless of his status. The relevance of those principles implemented can also be seen by studying a scholarly resolution on the principles of the Islamic criminal justice system of 1979. It represents a number of basic guidelines of justice with respect to any international human rights standard. According to the text accompanying the agenda, “any departure from the principles (the below) would constitute a serious and grave violation of Sharia Law, international human rights, and the generally accepted principles of international law reflected in the constitutions and laws of most nations of the world.” Some of the given principles are:

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[160] Bassiouni, M. Cherif, Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System, in: Bassiouni (ed): The Islamic Criminal Justice System, London 1982, 23ff.

The right of freedom from arbitrary arrest, detention, torture, or physical annihilation;

The right to be presumed innocent until proven guilty by a fair and impartial tribunal in accordance with the Rule of Law;

The application of the Principle of Legality which calls for the right of the accused to be tried for crimes specified in the Koran or other crimes whose clear and well-established meaning and content are determined by Sharia Law or by a criminal code in conformity therewith;

The right to appear before an appropriate tribunal previously established by law;

The right of a public trial;

The right not to be compelled to testify against oneself;

The right to present evidence and to call witnesses in one's defence;

The right to council on one's own choosing;

The right to decision on the merits based upon legally admissible evidence;

The right to have the decision in the case rendered in public,

The right to benefit from the spirit of Mercy and the goals of rehabilitation and reconciliation in the consideration of the penalty to be imposed

The right to appeal.[161]

As a matter of fact, those established rules represent by no means a legal innovation within the Muslim system of criminal laws. The have always had their place in the main sources of Islamic law. However, they have not always been appropriately exercised in the course of fourteen centuries of Islamic rule.

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[161] Bassiouni, M. Cherif, op.cit.

# 12. The prospect of Islamic criminal law

## 12.1. Fundamentalism and Modernism

The Islamic world of today is sharply divided between modernism and fundamentalism. This is a result of a supposed Western cultural hegemony as well as the Islamic perception of the West as economically and scientifically superior. Islamic intellectuals either justify a proposed effort to catch up with the West as absolutely necessary for the survival or their thoughts are predominated by revivalism, which implies a backward movement to the said true sources of revelation.

Both streams of thought may be defined to a large extent by their relationship to the West. Modernism takes into account what the West has achieved and calls for an adaptation to one's own ideas, values and practices. They advocate a broad interpretation of Islam for harmonising the traditional Islamic teachings and principles with the needs of a modern, progressive society.

Fundamentalism, on the other hand, implies a return to a supposedly original core Islamic concept that rejects Western achievements. The group of traditionalists that is hostile to any modernisation of society and advocates a return has been gaining influence especially since the beginning of the new millennium. As a matter of fact, both movements have been thriving and rivalling with each other for almost two centuries now and are still doing so. Their combat becomes increasingly fierce.

The issue of Sharia as an integral part of the religious, social and cultural life of a Muslim is, of course, in the centre of the struggle described above since it is all inclusive and all persuasive at the same time. Joseph Schacht, a leading scholar of Islamic jurisprudence, has described the principles of Sharia as "the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the

core and kernel of Islam itself."[162] Following this assertion one can easily understand why any proposed change of Islamic jurisprudence or even a moderation of legal views may result in a political earthquake that could threaten the stability of an entire region. Adjustments done to legal systems in the Muslim and especially the Arab world have far graver repercussions than equal measures in the Western hemisphere. The example of Nigeria where an implementation of Sharia principles is sought by the country's Islamic population and which is equally fierce contested by other population groups provides a good example in regard of possible consequences.[163]

Traditionalists view the Sharia as sacrosanct and immutable. All proposed reforms in the realm of Sharia law that aim at a moderation of principles considered as too harsh in a modern world were fiercely rejected. On the other side, members of the reform party in various Islamic countries hailed those projects. They recognize that the closure of the gates with the final establishment of Islamic Law Schools in the 10th century had sad results. On account of this, Islamic law and society remained to a certain degree stagnant for many centuries and the tremendous social changes of modernity quietly passed the Muslim world of different parts of the world by.

To men who believe that the Koran is the very word of God, "the idea of changing or abrogating these fundamental laws is equivalent to apostasy."[164] They call upon the state to forsake values, laws and regulations that are believed to be contrary to the Sharia and view it as the constitution of Islam. How successful such a movement can shows the Wahabi movement in the Arabian Peninsula in the 18th century that has sought to expunge all of Islamic practice that has occurred past the year 1000. They still triumph under the Saudi family.

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[162] Schacht , Origins of Muhammadan Jurisprudence, Oxford 1950, 124 ff.

[163]Levtzion, Nehemia, Patterns of Islamization in West Africa, in: Nehemia Levtzion (ed): Conversion to Islam, New York 1979, 207 ff..

[164] Gibb, H.A.R. Modern Trends in Islam, Chicago 1947, 90ff.

The short-lived but nevertheless radical success of the Taliban in Afghanistan is another, even more threatening example.

The view at past times and the eventual desire to return to those ancient times marks precisely the dividing line between the traditionalists on the one side of the battle field and the modernists on the other side.

## 12.2. Need to change

Despite all intellectual struggling and efforts of traditionalism, an adoption of modern standards of law is inevitable in a world that is rapidly growing together and does not permit any isolationist approach anymore. Therefore, the question of reforming the Islamic legal corpus only calls for a “How?” and not for an “If?” How can the law code of predominantly Islamic countries and societies be adopted to the challenges of the modern world without leaving large groups of people behind? No precise answer can be given to this question because the situation in every Muslim country is a different one and must be taken into consideration.

One possible approach to finding a solution is the legal foundation of Sharia. The sources of Islamic criminal law leave a certain margin of manoeuvre in terms of defining justice. In many fields of justice one can apply modern standards that are in full accordance with Western ideas without contradicting or rejecting legal principles based on the Koran or the Sunna. However, an enormous effort must be made in order to convince even the staunchest advocate of Islamic orthodoxy from the validity of this assertion. It is, nevertheless, of paramount importance to leave as few people as possible behind. One argumentation strategy could, for instance, insist on a stricter theological definition of Islam with less interference with political and judicial aspects. An attempt to radically islamise Muslim societies must under all circumstances be countered.

As a matter of fact, one does not have to start from the scratch. Much of the work has already been done because vast parts of the Islamic world have been introducing European legal measures for the past two centuries already. In many areas of jurisdiction one only needs to go a few steps further by cutting back on archaic measures of penalty or introducing modern human right standards in all fields of justice. The example of Turkey which has recently abandoned death penalty and is making big efforts to meet central European legal standards shows what is possible.

Eclecticism, the device of searching for precedents in the four schools of Islamic law but also in the opinions of individual jurists would already conform to most needs of modern life if one did not take the prescribed rules literally but allowed some fantasy interpreting them. Orthodoxy in legal thought must therefore be superseded by creativity and enough reason to search for a possible solution without harming basic principles of Islam. The totality of the desirable legal rules of all the schools may prove to be quite rich, flexible and progressive and answer most of the challenges and needs of the present age. Many classical jurists permit already to follow one approach to finding a solution in one particular issue and another in others if the conscience so permitted.[165]

The real problem is often to be found on a completely different field which has less to do with religion and jurisprudence. Often, the real problem is not so much incorporated by the rules and restrictions implied by Islam itself but rather questions of power and political authority that withhold ambitions to reform. Islamism is used as a political weapon and issues concerning the Sharia are a superb tool for it in the eyes of many. Shariah is currently being used to justify oppression and tyranny, injustice, and political coups. However, this might backfire one day because "Islam has consistently turned back heterodox movements that see the message of Muhammad entirely in political terms."[166]

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[165] Guillaume, Alfred, Islam, London 1956, 170ff.

[166] Forte, David, Studies in Islamic Law, Oxford 1999, 235ff.

In fact, traditional Islam can comprehend both, reform and orthodoxy. The question about what it takes to be a good Muslim is as old as Islam itself. The same conflict that has occurred at the time following the Prophet is still present. Than and now it takes a period of creativity and liberty to meet the present challenges and reverse Islam's century old decline. As a matter of fact, in the long run the Islamic state always managed to escape the restrictions imposed by a too narrowly defined Sharia rule. If the modern Islamic world does not follow that pattern, it will have long reaching repercussions because the alternative would be a politicised form of Islam, including a narrow minded regard on Sharia principles that led Muslim countries into stagnation, crisis and final downfall.

## 12.3. Examples for a successful adaptation

By the beginning of the 20th century there was a consensus among liberal Islamic thinkers about the necessity to reform and to meet modern legal standards without totally abandoning Islamic restrictions. Their reflection resulted in several legal constitutions within the Muslim world that are still in place and could lead the way to reform.

What those thinkers basically did was to go back to the original sources of Islamic jurisprudence and reinterpreting them in the light of a changed world. They had to overcome strong resistance among more conservative scholars which is why it took about half a century to implement many of their suggestions.

The 1953 Syrian Law of Personal Status, for instance, enacts that the permission to a man already married to take a second wife could be refused on the grounds that he could not support them both. The 1957 Tunisian Law of Personal Status even goes a step further outlawing completely polygamy. It is argued that although the Prophet has permitted the taking of more than one wife in principle, he has also declared that a husband should treat his wives equally and with

complete impartiality. The Tunisian law makers argued that this was not possible under today's circumstances and therefore outlawed polygamy. [167]

The cited examples give an idea of the nature of change and the methodology employed to implement the necessary changes without rejecting Islamic principles. Those modernist reforms have helped to abandon polygamous marriages, taken away much of the husbands power over his wife, enabled wives to seek judicial dissolution of their marriages on certain, well-defined grounds, restricted child-marriages and softened the rigours of inheritance laws. The modern Islamic Personal Statute laws of Syria, Egypt, Jordon, Kuwait and Tunisia imply all similar measures aimed at protecting and asserting a woman's right and at preventing some of the most unfair injustices. Those are significant gains that have enabled Muslims to adapt to the needs of a modern system of laws without loosing the link to tradition and faith. Furthermore, they have helped to lessen tensions implied by the impact of western ideas and values.

There remains, however, the reproach of legal opportunism because modern liberal legal scholars in the Islamic world heavily rely on picking and choosing aspects of Islamic legal sources that fit their needs. On the other side, one could respond to those accusations by stating that orthodox or even fundamental advocates of a more conservative interpretation of Sharia measures do exactly the same.

## 12.4. Problems implied

The major limitation to any pattern of change - however promising it might be - is the fact that reform-minded scholars have failed so far to develop a firm and systematic juristic principle of reform that is capable of dealing with all present needs and that also takes future developments into consideration. But only a suggestion for a systematic layout of a reformed law code, whether it takes its inspiration rather from the traditional Muslim jurisdiction as represented in the

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[167] Coulson, N.J., History of Islamic Law, Edinburgh 1964, 208ff.

Sharia or accords a high priority to Western models, is the starting point from which a true reform can take off.

Adding to that, even the most positive and optimistic thinker must acknowledge that there rest several problems that could not that easily be solved. Portions of the Islam such as prohibitions against apostasy, the oppression of religious minorities in some countries, restrictions on women, and the cruelty of some penalties imposed on criminal offenders violate modern international legal standards and challenge the worldwide implementation of basic human rights. Those are issues that are not that easily to overcome since they are in the core of Islamic thought and practice. They represent prescriptions of the Sharia which cannot be overwritten or easily adapted to the circumstances and demands of modern life by the procedural and eclectic expedience of reform.

In a more general context, the problem lays within the cultural gap between different parts of the world. Due to the globalisation efforts of the past decades, its nations, ethnicities and religious groups have approached each other in terms of economic and social issues. They may also share certain values and lifestyles. But one should not forget that all those ideas derive from the Western hemisphere and are always followed with overwhelming enthusiasm. Especially the Muslim world partly resists a complete immersion into Western models. Even if members of non-western societies are aware of Western lifestyles by the means of modern media and strife for their share in Western consumer societies, they do not necessarily have to share all ideas that come from the economically and politically most advanced and most prosperous parts of the world.

Globalisation does have an impact on all civilisations and permanently contributes to a gradual change. However, globalisation does not automatically imply a unification of values. Within this context it becomes clear why so many non-Europeans and non-Americans resist giving up their own sets of values that are – among others – expressed in a system of laws.

## 13. Conclusion

Advocates of conventional orthodox Muslim societies that resist the adaptation to Western lifestyle and values attribute a high priority to the implementation of legal principles as represented in the Sharia. According to them, only a true Islamic set of laws that is based upon and inspired by the sources of Muslim faith can guarantee the maintenance of Muslim societies and prevent their gradual westernization.

On the other side, it is the reform camp within the Muslim world as well advocates of reform from outside that spearhead the movement aimed at changing the conventional legal proceeding as exercised in many Muslim countries. They argue that only a modern judicial practice can bring about change, modernization and progress in all important fields of life. Therefore, the debate on the Sharia is of paramount importance to the Muslim world and outranks all debated issues in view of a safe, stable and prosperous Islamic world. It is in the centre of the cultural battlefield and therefore draws much attention in- and outside the Islamic world.

However, the debate on the Sharia issue often is superficial and marked by political intentions and religious prejudices. As a consequence, several of the key elements of such a debate are either neglected or circumvented. In other words, an honest scholarly-led debate based on facts and focused on the real needs of the Islamic world as necessary as it is – does not yet take place.

Those facts which are to serve as points of orientation are easy to enlist, as the present work has shown. They should be taken into consideration from both sides - Muslim scholars as well as representatives from outside the Islamic world. A view from within the Islamic world needs to include and acknowledge the following three points:

It is more than doubtful to talk about the Islamic world as one civilisation because it covers such a vast field of different territories, ethnicities, and cultures. They all have their own cultural background and traditions that have

become part of an, at least, localised jurisprudence. Therefore, it is impossible to talk about one Sharia. One should rather allude to different approaches to the Islamic system of laws.

Furthermore, the Islamic jurisprudence is by no means based upon a strictly codified law that could be compared to modern standards. It rather is a divine law inspired by Allah and almost exclusively based on the latter interpretation of the followers of the Prophet. In short, an Islamic legal book such as the German BGB does not exist.

A third point that needs to be made is the fact that there has never been a long period of Islamic history in which an un-compromised "core"-Sharia was implemented. Legal proceeding has always been adapted to the needs and demands of the particular Muslim rulers or governments. This is not just true with the beginning European influence but had been the case earlier on already.

Therefore, one can state that the call for a return to the "Golden Age of Islam" as advocated by orthodox thinkers within the Muslim world is somewhat hypocritical because it refuses to acknowledge the true historical development of Islam and the Sharia and draws an illusion without any link to the historic truth and the demands of a modern society.

But it is not just the radical or fundamental fractions from within Muslim societies that use superficial attitudes and popular images in order to strengthen their points of view. Western civilisations commit the same error by reducing Islam and especially the Islamic criminal law to popular stereotypes without acknowledging the historic and also (at least partly) the legal validity of the set of laws as such. People from the Western hemisphere, should take the following remarks into consideration when giving an opinion on the Islamic Sharia:

The Western civilisation is the only one in world history that has managed to implement its particular sets of values and its ideas concerning public life as such

on a worldwide scale. Today, this process is described as globalisation but in fact it roots in the European expansion movement that had started in the 16th century already. Consequently, Westerners too often assume that other civilisations will automatically and voluntarily throw their set of traditions and values overboard if they do not meet Western standards and expectations. This is, however, neither a realistic nor a fair prospect and therefore it is hardly surprising if Western influence meets such a fierce resistance in several countries. This is especially true in Muslim countries that have their own glamorous civilisation that once used to be far ahead of any European equivalent.

A possible solution is, as so often, a compromising attitude of all parties involved. This compromise, however, should rather be focused on the demands and needs of the Muslim world than on the claims of European and American societies to implement "stante pede" Western legal standards. As a matter of fact, a modern Islamic jurisdiction can in most cases meet the claims and considerations that resulted from Islam and its tradition without contradicting modern human and civil rights standards.

A starting point could be a general reconsideration of all sources of Islamic jurisprudence that would take would have to be based on the original sources of any Islamic legal proceeding. Starting with this idea of going 'ad fontes', one has to see and interpret those sources in the light of contemporary conditions and circumstances, as several Islamic scholars have already done. This effort should be made from within the Islamic world and not infused from outside in order to make it easier for the members of such a legal community to accept. Any system of laws, no matter how it is structured, is only as good as it is accepted by a majority. Besides Islamic predominance on any effort of change that needs to be made, western Islam- and legal scholars could assist if asked. But under no circumstances should western legal proceeding be taken as the one and only possible model.

Many countries already apply modern law codes and accept standards set by human rights conventions and the United Nations. Those examples show what is

possible without removing the Muslim faith and values from those societies. An effort to implement modern norms and values even in view of controversial issues such as religious tolerance, women's rights and others can be successful if it comes from within and not outside and looks promising to those that have to accept and live with it. Without over-generalising this statement one only needs to look at countries such as Turkey where the possible admission to the European Union and the already advanced integration into the western world's community (NATO membership is but one example) has led to the acceptance of many legal standards that are acceptable by Western standards. Even if Turkey is and has always been a special case within the Muslim community, it could serve as an example. Other predominantly Muslim countries, especially in South East Asia, also show what is possible.

Contrarily to the countries just referred to one needs to look at Saudi Arabia and Iran, among others, that prove to be much more afflicted with many tensions. Those are visible in view of the relationship and attitudes towards the West but also from within their own societies. One important reason for those tensions is the effort made in those countries to live a true Muslim's life (or rather what they believe it to be), including the adherence to major legal principles implied by the Sharia. In the long run, it is a hypocritical effort which does not pay off. A society eager to conserve or recreate a legal standard which takes the supposedly glorious past as inspiration is doomed to fail. Instead, one needs to confront the present and try to meet the challenges of the future.

This does not, however, include the negation and eradication of everything that has constituted the old system of laws. Instead, one needs to reconcile the legal traditions of the Muslim world with the demands of today's world. This will serve everybody: At first, the Muslim world itself that needs to create more stable and prosperous societies. A modern legal constitution is of paramount importance within this effort. But also the West will benefit from it in terms of economics and foreign policy.

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GLOSSARY OF SOME ISLAMIC LEGAL TERMS.

| | |
|---|---|
| Baghat | rebels |
| Bayah | oath |
| Diya | blood money, compensation |
| Fatwa | religious decision |
| Fiqh | the Science of the Shariah or jurisprudence |
| Hadd or Hudod | specific penalties fixed with reference to the right of God |
| Hakk Adami | the Right of Man, People |

| | |
|---|---|
| Hakk Allah | the Right of God |
| Haram | prohibited, unlawful, taboo |
| Harbi | enemy |
| Ijma | consensus |
| Ijma al ulama | consensus of Scholars on point of details |
| Ijma Muslim | consensus of all Muslim |
| Ijtihad | the effort of independent judgement |
| Imam | leader of a Muslim Community |
| Isnad | chain of transmitters of a tradition |

| | |
|---|---|
| Istihsan | legal equity, believers |
| Istislah | aim of Mankind in Law, based on the Public interest |
| Jahiliyah | period and time uncertain future and ignorance |
| Jinayat | offence against the person, tort or injury |
| Jizyia | poll tax |
| Kadi | the Islamic judge |
| Kafarah | expiation |
| Khalifa | Caliph, chief of Muslim state |

| | |
|---|---|
| Madhab | School |
| Maten | text |
| Niyah | intention, notion, and aim |
| Muwahhdin | Unitarians |
| Mujtahid | one who exercises independent reasoning; qualified Scholar |
| Gadaf | false accusation of incontinence or defamation, Slander |
| Kisas | retaliation |
| Qiyas | analogy |
| Riddah | apostasy |

| | |
|---|---|
| Sharia | Muslim Law, legal system |
| Sunna | rules of Conduct deduced from the oral precepts, action and decisions of the Prophet<br>or Tradition or model behaviours |
| Sunnah mutawarerah | successively reported Sunnah |
| Sunnah mashoorah | well known Sunnah |
| Sunnah ahad | Sunnah reported by one or a few reported |
| Tazeer | indefinite punishment admitted |
| Thimmi | Non-Muslim Subject, Scripture |
| Ulama | the Religious Scholars of |

| | |
|---|---|
| | Islam |
| Wall- Al - Dam | the next of kindred who has the right to demand retaliation |
| Zakat | alms |
| Zina | adultery, fornication |