

ISLAMIC CRIMINAL LAW AND PROCEDURE

An Introduction

**Matthew Lippman,
Sean McConville, and
Mordechai Yerushalmi**



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Foreword by M. Cherif Bassiouni

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Foreword

Contemporary events have highlighted the importance of better knowing and understanding Islam. Regrettably, however, political considerations have in many respects provided a distorted image of Islam as a religion and as a way of life. Among these is the way in which an Islamic criminal justice system should function. The 1979 seizure by the Islamic Republic of Iran of a number of U.S. diplomats offered one demonstration of Islamic law. Another is the manner in which sectarian Muslim groups are conducting their guerrilla war in the tragic conflict in Lebanon. But neither of these unfortunate situations reflects Islamic ideals, certainly not the spirit or letter of Islamic criminal justice.

To the West, Islamic criminal justice often seems harsh and unforgiving: adulterers punished by stoning, for example; or thieves by amputation. Unfortunately, this impression has been reinforced by recent developments in Iran, Pakistan, and the Sudan, where Islamic law has replaced positive secular law, in whole or in part. However, there is more to Islamic criminal justice than these applications would suggest. There are many Islamic judicial and evidentiary safeguards that

have been flouted or ignored, and many practices of contemporary regimes run counter to the teachings and spirit of Islam.

Islam is not merely a system of belief but an integrated way of life based on social and economic justice. It therefore seeks to provide a framework in which the complex and competing needs of individuals and society can be fairly apportioned.

The legal system of Islam is embodied in the *Shari'a*, the law of Islam. That system relies on the Koran as its principal source of divine revelation. It is supplemented by the *Sunna*, the deeds and sayings of the Prophet. There are also a number of other interpretive sources and rules of interpretation and application which have evolved over the fifteen centuries of Islam, although most were developed in the first five centuries of its existence. This is the complex science of *ilm usul al-Figh*, which few except the *Shari'a* -trained jurisconsults can master. In the *Sunni* tradition four major schools of thought have developed, spawning a number of sub-schools spurring further jurisprudential growth. Similarly, the *Shi'a* legal tradition has given rise to several schools of thought. All of these have in common the goal of attaining the quality of justice which the Koran mandates and which the Prophet exemplified in his life. These higher values have always been at the core of Islamic criminal justice.

The quest for justice is difficult, particularly when a criminal justice system must integrate within a single scheme a large number of societal and inter-personal factors. Different periods of Islamic history have revealed different attempts at developing an authentic Islamic criminal justice system, some more successful than others. But no model has yet been developed which can best respond to the contemporary problems of crime and the administration of criminal justice. That quest continues, and only trial and error can shape it to what may be the unattainable higher goals of Islam. Muslim countries must try to develop such a system, but with humility and in the belief that there can be no easy answers or solutions to the complex problems of modern societies.

Fundamentalists throughout the history of Islam have always sought a return to the basic and more simple concepts of justice, but the application of these concepts to modern soci-

ety can neither be as basic nor as simple as fundamentalists would like to believe. It is probably inevitable--given that Islamic law developed in so many different parts of the world and had to accommodate itself to numerous non-Islamic influences over its long history--that today's quest for earlier simplicity should be transitory. As the pendulum swings to more fundamental approaches, practical realities inherent are likely to be overlooked. The pendulum will doubtless swing back and account will be taken of the needs of a modern system of justice, whether they be the development of a computerized system of law, or electronic communication. None of these scientific and technological developments in the administration of criminal justice is incompatible with the basic principles of Islamic criminal justice, nor are modern techniques of legal administration.

Fundamental human rights, universally recognized, are consonant with the *Shari'a*. In fact, the precepts of Islamic criminal justice have always stressed the dual protection of society and the rights of the accused, in the context of preserving the integrity of the legal system. The rules of evidence, which have been elaborated in the Koran and the *Sunna* and in its early applications, have always been a bulwark for the rights of the accused, as have the rules governing the qualifications and conduct of judges and witnesses. Moreover, adherence to what is now known as the "principles of legality" in Islamic legislation finds its expression in the Koran and in the *Sunna*, and Islam has long led the rest of the world in recognizing and applying these principles.

Lastly, what is now called "criminal justice policy" has always been a consideration in the legislative and interpretative approaches of Islamic law. Consider, for example, the concepts of "victim compensation," "victim restitution," and "alternatives to imprisonment," which are deemed among the most advanced examples of criminal justice policy: they have long been part of Islamic law.

There are, of course, differences between the Islamic approach to ascertaining truth and veracity, and Western systems, which tend to place greater emphasis on forms and formalities. But these differences in approach should not

diminish our appreciation of the value of either. The proper balance between truth and the manner of achieving its judicial finding is a never-ending quest which depends on many social realities. The effectiveness of a system ultimately depends on available institutions, structures, personnel, management techniques and other resources.

In the United States there exists a need to know almost everything about the Islamic criminal justice system, because so little is available in English or French. The authors of this text have endeavored to fill part of this gap. Though none of them is a specialized Islamic law scholar, and they have not had the benefit of extensive access to original sources in Arabic, they have nonetheless acquitted themselves well. They have demonstrated a sensitivity to the values of Islam, which is commendable. They have relied mainly on secondary sources to present the general outlines of the system with a focus on some particular aspects of it. The book fulfills its limited objectives, and will be helpful for introducing American students to a vast, complex, and foreign system.

Muslim scholars will no doubt find some grounds for criticism, but oversimplification is inherent in any study of this scope which seeks to make Islamic law accessible to non-Muslim beginners in the field of comparative criminal justice.

It is because I appreciate the genuine efforts of the authors and because I support initiatives to increase the level of awareness and understanding of Islam that I have agreed to write this Foreword. I compliment them, therefore, for their efforts, understanding, and good will.

M. Cherif Bassiouni

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Preface

For more than a generation a ferment has been building in the Islamic world, one of many that have periodically erupted since the religion's founding. The resultant upheavals, changes and confrontations have forced themselves onto the world stage. Conflicts between social and political groups in certain Muslim countries have expressed themselves in the language of Islamic dogmatics, history and jurisprudence. The interests and ambitions of the Muslim and non-Muslim worlds are also prone to religious interpretation, reverting to perspectives and passions which have been obscured and quiet for centuries. And between the great powers, however they are numbered, the turbulence and upset of these clashes and conflicts have introduced new dangers and complications.

As we show in this book, Islam is possessed of many properties and potentialities in the sphere of politics and government. One set of these, as history has repeatedly shown, is this great religion's propensity to produce dramatically successful reformers and far-reaching socio-religious movements. In its literalism and conservatism Islam always stands paradoxically at the ready with the lancet of precise scholarly criticism

of the secular order, and sometimes is also the scabbard from which the revolutionary sword is drawn. Some or all of this must be apparent to anyone who takes more than a passing interest in current world events.

What may be less evident is that Islamic law is a principal focus and jousting-ground for much of the conflict between schools of opinion within the Islamic world; between some rulers and those who seek their overthrow; and between the Muslim and non-Muslim worlds. Islamic law can be the touchstone of legitimacy, the rallying cry of the revolutionary, or the charter and bedrock of a conservative political order. Nationalism, anti-colonialism and modernization, and the political movements they have spawned, all have complex relationships with Islamic law, and -family law apart- no branch of the Islamic teaching touches more intimately upon the everyday life of the ordinary citizen than the criminal law. Yet we have found a marked dearth of accessible information upon this topical and intriguing subject. We have sought to remedy this deficiency in a concise and reasonably simple fashion in our book.

Islamic Criminal Law and Procedure is intended to serve as an introductory reference guide as well as a supplemental text for courses on comparative criminal procedure, comparative legal systems, and comparative politics and Middle Eastern studies. It may be useful both for law school courses on comparative law and for those with a more general interest in Islamic society. Although seeking its primary readership in the United States, the book should also be of interest to English-speaking scholars elsewhere.

Other books that deal with the subject either offer a general discussion of Islamic culture, society and religion and make only passing reference to the law (for example, Malise Ruthven, *Islam in the World*. New York: Oxford University Press, 1984); or they discuss Islamic law in an authoritative but somewhat technical and specialist fashion (M. Cherif Bassiouni, *The Islamic Criminal Justice System*. New York: Oceana, 1982). As a result, those seeking information on comparative criminal justice and politics have difficulty in finding compact and accessible material on Islamic law, procedure and

administration. This is particularly regrettable, given the increased interest in and importance of the Middle East, and the Islamic revival generally. It is our hope, therefore, that this guide will prove useful to the non-specialist, while meeting with more focused scholarly approval.

We are particularly grateful to Robert M. Shagam M.D., who advised and assisted us in computer management, and provided his equipment for the production of the manuscript. Charlotte LeVee designed the maps and figures with skill and understanding, Clarence E. Phillips, Jr. and Josie Bayudan provided prompt typesetting services, and James W. Walker provided excellent layout and design. Our thanks also to Diane S. Yerushalmi, who patiently typed many drafts and who made valuable suggestions and observations. We owe a special debt to Dr. Richard H. Ward, the Vice-Chancellor for Administration at the University of Illinois at Chicago, for his staunch support. The interdisciplinary milieu of the Department of Criminal Justice at the University of Illinois at Chicago also contributed substantially to the initiation and completion of the project. In early discussions Sir Leon Radzinowicz was encouraging and helpful in his suggestions, and Professor Cherif Bassiouni made a number of perceptive and helpful comments on drafts which he read. All this kind assistance notwithstanding, sole responsibility for all errors and omissions rests with us.

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Introduction

Common law, civil law and Islamic law are the three principal contemporary legal traditions, embracing the legal activities and philosophies of the majority of nations. A vast amount of scholarship has been devoted to the common law and civil law codes, but relatively little English language material exists on Islamic law (*Shari'a*). Books on the subject either offer a general discussion of Islamic culture society and religion, and make only passing reference to the law; or they discuss Islamic law in a technical and academic fashion. The lack of accessible information on Islamic law is a particularly serious deficiency, given the increased interest in and importance of the Middle East and the Islamic revival in general. The *Shari'a* is central to an understanding of Islamic philosophy and society and the contemporary conflict between fundamentalism and modernism in the Muslim world.

We attempt here to provide a short, straightforward introduction to Islamic criminal law, procedure and punishment. The major concepts, principles, procedures and practices are discussed, but it should be stressed that Islam is diverse and the law varies among schools and countries. Islam is not mon-

olithic--its local character reflects the influence of culture, custom, language, history and political ideology. Moreover, there is a lack of accessible and reliable information with respect to certain topics and practices.

Islam emerged in the Middle East in the second half of the seventh century A.D. Within two centuries, it had spread to North Africa and Central Asia. Today there are almost 800 million Muslims who constitute a majority in thirty-five countries and a significant minority in twenty others. Nineteen states have declared adherence to Islam in their constitutions.

Islamic criminal law was a progressive step in the development of legal institutions. It modified the pre-Islamic practice of retaliation in which the victim's clan or tribe exacted blood revenge against the family or tribe of the alleged offender. This system of private vengeance often set in motion ever-widening cycles of retaliation between tribes. Muhammad, the Prophet and founder of Islam, replaced blood revenge with a formal system of criminal law, procedure and punishment based upon individual rather than collective responsibility. In its formative stages this approach to criminal justice absorbed elements from ancient Rome, Greece, Persia, Europe, and the Old and New Testaments.

Islamic criminal law is divided into offenses against God and offenses against the rights of man. At its core it is distinguished from common law and civil codes by its religious and virtually unchangeable nature. Unlike the common law, which was elaborated by judges to meet the changing needs of society (particularly economic and social developments), Islamic law is a system based upon "God's commands . . . having an existence independent of society imposed upon society from above."¹ The law's religious derivation and purposes are the basis of its authority, in contrast to European legal systems which derive their standing from an association with the state and its political processes.

The proof of offenses under Islamic law requires the satisfaction of strict evidentiary requirements which establish a certainty of guilt. This certainty is said to legitimate infliction

of the relatively harsh Koranic penalties. In turn, it is claimed that this severity in punishment has produced a low crime rate in Islamic societies.

The *Shari'a* cannot be considered apart from the political and social doctrines and injunctions of Islam which require provision for the spiritual and material welfare of citizens so as to reduce or eliminate the temptation to crime and sin. Wrongdoing in such circumstances may come to be viewed as an inexcusable and unjustified outrage that deserves to be severely punished, since it flies in the face of benign and wholesome social arrangements, and is a transgression against God's moral order. The infliction of penalties such as amputation, whipping, stoning and decapitation encourages offenders to repent in the temporal world, and thus to save their souls on the Day of Judgment. These severe and dramatic punishments also deter crime and express society's desire for retribution.

The *Shari'a's* rigid procedures led secular authorities in the eleventh century A.D. to create alternative mechanisms for the settlement of criminal and civil disputes. Supplementation and displacement were, however, vastly increased by the rise of Western economic and political influence and military power. Thus, through direct colonial rule, or by imitation or influence, by the nineteenth century European codes of law were adopted and adapted by various Islamic states. These borrowings and forced loans relegated the *Shari'a* to a minor role in judicial administration. The *Shari'a*, however, remains central to Islamic identity and is an ideal to which Muslim societies aspire. Its continuing strength is attested to by its revival in the Middle East and parts of Asia.

The importance of the *Shari'a* lies not only in its impact on the Muslim world, but in its anticipation of various developments, and the reinstatement of ancient practices, in Western criminal justice systems. These include provisions such as victim compensation, mandatory punishments, and an emphasis upon equivalency and deterrence in sentencing. The larger value of studying Islamic criminal law lies in the insights provided by a comparison with Western legal systems, and in the developmental jurisprudential issues that are thereby exposed

for examination. Joseph Schacht notes that Islamic law is a “phenomenon so different from all other forms of law . . . that its study is indispensable in order to appreciate adequately the full range of possible legal phenomena.”²

Chapter 1 describes the history and spread of Islam and its beliefs and major divisions. Chapter 2 outlines the origin of Islamic law, its sources and the various schools of Islamic jurisprudence. Chapters 3, 4 and 5 outline substantive criminal law, procedure and punishment. Chapter 6 discusses the contemporary role of the *Shari'a*, and the final chapter identifies a number of issues in Islamic jurisprudence that merit additional study and discussion.

NOTES

1. Noel J. Coulson, *Conflicts and Tensions in Islamic Criminal Justice* (Chicago: University of Chicago Press, 1969), p. 60.
2. Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964), p. v. Other types of “sacred law” include Jewish law, Canon law and various Eastern codes such as Hindu law.