

Law, Crime And Society
In Islamic Jurisprudence

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I. Introduction

Belief in law has a firm grounding in Western philosophy. Developing in the Judeo-Christian religion was the idea of divine purpose that gradually unfolds in human history. Greek rationalism reinforced this idea declaring that "nature makes nothing in vain," and that the universe is governed by intelligible laws that are capable of being grasped by the human mind. The emergence of Aristotelian science was a culmination of these notions. Western societies later continued their firm support for the positivist theory of law which not only reflected their concern for orderly conduct but also their increasing need to identify, isolate, and repress future endangering elements, the emergence of which could threaten their survival. Thus, societies to this day carry the arduous

The author - who is a Christian - had the unique opportunity of spending part of his sabbatical leave in the Kingdom of Saudi Arabia and the Arab Republic of Egypt (Dec. 20, 1983 - March 11, 1984) where he pursued social and criminal justice research. He had the privilege of meeting with numerous leaders in Islamic jurisprudence, several university professors, and many members of the police establishment in each country. Many parts of this article were developed as a result of the author's interviews with those leading individuals. Specific information relating to crime rates in the two countries, judicial procedures and rules of evidence, methods of policing and prison systems, are all in the possession of the author who would be pleased to share with interested scholars upon request. The author is grateful to the officials in the Saudi Arabian and Egyptian Ministries of Higher Education and Interior for granting him this invaluable opportunity to study social systems and criminal justice procedures in their respective countries. A number of more specific publications concerning this topic of Islamics are also in progress at this time and will soon appear in different publications (God willing!).

responsibility of choosing the kind of laws that are consistent with their intellectual history and at the same time can provide them with optimal security and protection through their efficacy and convenience. Quinney theorized in his study of the "Ideology of Law" that few people of Western civilization, for instance, would be able to accept the idea of a world that is not constantly regulated by man-made laws or the laws of nature. Quinney retorted that "such an idea is unthinkable and the tenuous existence of our society would likely fall apart if we admitted the possibility of such a reality."¹ Quinney concluded his enlightening critique of contemporary social systems by suggesting that "only with a revision of present Western thought, can today's view of social order be freed from the dead hand of the legalistic mentality," which he considers most disturbing to the stability of present societies.²

Much of contemporary literature on the impact and utility of laws has tended to focus on the Western-style promulgation of positive laws and mandatory compliance with case laws. This might prove too narrow a focus. Feeley, in his analysis of the concept of laws in social science, argues that the focus of Western law is incomplete and misses perhaps the most important way in which law intrudes into people's lives. Western law, Feeley emphasizes, overlooks the power of law to resolve issues through anticipatory reaction and informal application. He further argues that:

The genius and the power and the importance of legal authority is precisely because it is self-applying and self-mobilizing. By this I mean that the focus of the primary social control function of law is not found in the specific orders emanating from the occasional 'trouble cases'. . . . Rather the law is most often set in motion by people who apply it to themselves and to each other without benefit of explicit mobilization of legal institutions. The basic aspect of law and social control is found in the

unheralded response and anticipation to abstract sets of rules which intrude in the lives of people and get them to do things they would otherwise not do.³

Feeley proceeds by pointing out that many legal researchers today, often captured by such terms as compliance, legal effectiveness, and control, have diverged from the traditional preoccupation with formal legal doctrines and judicial decision making, to address the broader question of the true effects of law on society at large. Consequently, Feeley adds, an increasing number of socio-legal scholars are beginning to react against this narrow focus on "legal mobilization" (Law) and "trouble cases" (Courts) in legal philosophy. He continues to say that within recent years, there has been a growing recognition among criminologists that the central questions of law and social control may not be the study of criminals, the activities of police, or with court procedures, but rather with the realization of safety and justice the law can produce. While many people embark on breaking the law with some of them discovered, and a few of them apprehended, it would be only logical to ask why do others comply with the law? How many citizens do in fact decline to engage in criminal activity and why? Can it be merely fear of criminal sanctions or could it be also, because of their compliance with a higher divine or natural law, whether consciously, preconsciously, or subconsciously? Hence, the need for an expanded view of the law, as perhaps a moralizing and socializing instrument, that can foster a milieu of social fortitude capable of sustaining moral good and resisting evil through a concerted commitment by community members.

In contrast to the bluntness and directness of Western penal codes which contain an exhaustive enumeration of prohibitions, an expanded view of the law as an instrument to promote collective goodness and deter

individual deviance seems to work effectively in Islamic societies. Such laws, like in the doctrines of Islam, do not present an elaborate listing of all offenses nor prescribe a well defined penalty except in the more serious ones. The overriding aim of these laws is to develop and reinforce a docile benevolent community. Furthermore, by using a host of severe punishments and noble teachings, Islamic law seeks to rehabilitate non-conformists and create a collective spiritual propensity through which people (believers) must filter their thinking and organize their lives. As a case in point, the Quran induces general goodness by stating:

And let there be from you a nation who invite to goodness, enjoin right conduct and forbid evil.⁴

Another example is the Islamic teaching on justice. God, in the Quran, commanded Moslems to solve disputes peacefully, amicably, and with the clear aim of achieving justice. Toward these goals, the Quran encouraged witnesses to come forward and directed disputing parties to resort to arbitration by their peers. The Quran stated:

O ye who believe stand out firmly for God as witnesses to fair dealing and let not the hatred of others to make you swerve to wrong and depart from justice. Be just and fear God for God is well acquainted with all that ye do.⁵

Another example is the Islamic teaching denouncing lying, hypocrisy, and double talk. The Quran stated:

The hypocrites think they are over-reaching God. But he will over-reach them. When they stand up to prayer, they stand without earnestness. . . to be seen by men, but little do they hold God in remembrance. The hypocrites will be in the lowest depth of the fire: no helper will thou find for them.⁶

Another example is Islam's attempt to promote temperance among the society of believers. The Quran stated:

Satan's plan is to excite enmity and hatred between you with intoxicants and gambling and (thus) hinder you from the remembrance of God and from prayer. Will ye not then abstain?⁷

Another example is the Quran's command to all believers to act trustworthily in one's dealings with others. The Quran stated:

Ye that believe betray not the trust of God and the Apostle, nor misappropriate knowingly things entrusted to you.⁸

The fundamental task of an Islamic community, subsequently, would be to actively form and preserve such a benevolent community by practicing what is good and abstaining from that which is blameworthy. Moreover, by faithfully upholding these values on a daily basis, both as individuals doing business with each other, as well as by the community as a whole, Moslems believe they can achieve perfect social harmony.

Islamic law is considered to be holy, moral, and just, and the expression of this perception is found primarily in the Quranic principle of "Hudud Allah" or divine limitations. These constitute the checks and balances placed upon man in his endeavors to afford maximum personal freedom and to tolerate only those limited restrictions which distinguish an organized society from anarchy. "Hudud Allah" are restraints placed on the freedom of citizens to ensure a "scheme of ordered liberty" and, at the same time, prevent arbitrary or undue transgression on individual and social freedom. While these limitations operate, in theory, as safeguards against the abuse of the human rights of others, their rigorous application under the reality of Islamic law has contributed to the development of an almost crime-free society.⁹

Tables 1 and 2 provide a brief summary of the official crime rates in the Kingdom of Saudi Arabia and the Arab Republic of Egypt -- cited here merely as examples. A comparison between these figures and comparable figures in other countries, mainly in the United States, should not present a difficult task to the interested researcher.

The Kingdom of Saudi Arabia, with a current population of twelve million people, including an estimated six million of foreign ex-patriots who are attributed with a higher crime rate than native Moslems, shows the following official crime rate:¹⁰

Table 1
Official Crime Rates in the Kingdom of Saudi Arabia

Year	Population	Number of Murders	Rate Per 100,000	Number of Property Crimes	Rate Per 100,000	Number of Sexual Offenses	Rate Per 100,000
1966	5,662,000	169	3	879	1.6	380	7
1967	5,815,000	154	3	905	1.6	459	8
1968	5,973,000	74	1	905	1.6	300	5
1969	6,135,000	40	1	791	1.3	321	5
1970	6,301,000	49	1	854	1.4	392	6
1971	6,472,000	41	1	791	1.2	345	5
1972	6,647,000	54	1	980	1.5	346	5
1973	6,827,000	39	1	973	1.4	323	5
1974	7,012,000	54	1	948	1.4	239	4
1975	7,201,000	70	1	873	1.2	328	5

The Arab Republic of Egypt which currently claims a population of forty-five million people shows the following official figures for felony crimes:¹¹

Table 2

Official Crime Rates in The United Arab Republic of Egypt

Year	Population	Number of Murders	Rate Per 100,000	Number of Felony Thefts	Rate Per 100,000	Number of Sexual Offenses	Rate Per 100,000
1966	30,146,000	1164	3.80	114	.038	132	.044
1967	30,830,000	1174	3.81	111	.028	152	.050
1968	31,542,000	1545	4.90	213	.068	170	.054
1969	32,227,000	1451	4.51	252	.079	182	.057
1970	33,017,000	1224	3.71	240	.073	166	.051
1971	33,780,000	1220	3.62	207	.062	143	.043
1972	34,560,000	1229	3.56	289	.084	138	.040
1973	35,356,000	1241	3.52	203	.048	122	.035
1974	36,175,000	1261	3.49	243	.068	131	.037
1975	37,011,000	1289	3.49	275	.075	138	.038
1976	37,866,000	1348	3.56	341	.091	152	.041
1977	38,845,000	1353	3.49	377	.098	112	.029
1978	39,882,000	1145	2.88	223	.057	116	.030
1979	40,965,000	1022	2.50	174	.043	129	.032
1980	42,103,000	914	2.18	172	.033	128	.031
1981	43,201,000	772	1.79	157	.037	116	.027

The central entity and the conditio sine qua non in Islamic jurisprudence is the Shariah, or Divine Law. The Shariah operates on the basis of its powerful influence on the human conscience and its ability to penetrate man's social and psychological defenses. It can thus turn man

away from sin and cultivate his love and appreciation for what is good and spiritually beautiful. Islamic jurists criticize positive laws for their emphasis on legal philosophy which even with the use of modern science have failed to change human conscience or made men want to favor moral behavior. They, furthermore, contend that the most positive laws can do is suppress the overt conduct of people by inflicting harsh punishment. On the other hand, these jurists believe, that the mystical force of Divine Law is capable of preempting anti-social behavior by inspiring good and neutralizing evil before it prompts man to commit an offense -- thus, the Shariah's dual role as an immunizing influence and a purifying agent.

To fully realize the role of Shariah, one must accept the notion that man, according to Shariah philosophy, is God's trustee on earth and that he represents God as his creation. Hence, man owes a duty of maintenance, prudence, and judicious use of himself and in the exercise of his endowed faculties. Furthermore, man owes a duty of care for the preservation of community justice and morality, which provides the foundation of a spiritual community. These principles are enunciated in the Quran in terms of a set of interrelated duties rather than a bill of rights. For instance, one's duty to preserve the life and property of others necessitates one's obligation to respect humanity and honor the rights of ownership. This, in turn, obligates contestants to seek peaceful arbitration and appreciate the tenets of fairness. This would eventually institutionalize a peaceful community bonded together by humanity and justice.

The concept of a spiritual community in Islam is perceived as a unique structure bent on the dissemination of virtue and the eradication of vice. It assumes a multi-dimensional entity. It assumes moral, political, economic, and social aspects. In its moral sense, the community is held

responsible for constantly upholding virtue and denouncing vice. In its political sense, the community is a justice-inspired and justice-oriented system. In its social sense, the community sanctifies the family unit as the nucleus of a pious society. In its economic sense, the community is sustained by honest labor and productivity. When Moslems earnestly adhere to the divine laws of Shariah, they are not only ensuring that their individual interests are met but also the preeminence of a dynamic and benevolent society.

Unlike positive laws, obedience to Shariah is not only motivated by fear of the here and now worldly punishment. The potential offender is constantly reminded of the punishment in the hereafter. Therefore, to avoid such a destiny, Moslems must willingly conform with the minute rules of Islam, avoid the temptation of compromising situations, and strive to assimilate with the pious community of believers. The Islamic ruler (elder), on the other hand, must make every effort to maintain a piety-oriented realm. This can be achieved by sustaining a just system bent on the cultivation of benevolent manners, the promotion of justice and equity, the safeguarding of human rights and equality, and the eradication of mischief through harsh and swift punishments. Toward that end, the execution of punishment including beheading in murder cases and amputation of the hand in theft cases are carried out in public and are generally cheered by the public who see it as a purifying procedure that gives "new life" to society as a whole. The resulting environment would be one of a true unity of believers bonded together by religious fellowship, mutual respect, common adherence to the law, and the absence of crime.

Recognition of the value of such a peaceful environment has not been limited to the Islamic culture alone. Such a perspective has, for instance, been the central focus of the preventive theory of law in the

United States and deeply permeated contemporary socio-criminological research (Gibb, 1975; Zimring and Hawkins, 1973; Tittle and Logan, 1973). Andenaes, who focused on general preventive effects, convincingly argues that the primary concern for students of criminal law should be the identification of general prevention conditions through examining and studying "the psychology of those obedient to the law rather than the psychology of criminals."¹² The significance and implications of Andenaes' argument were further articulated by Jack Gibb in Crime, Punishment and Deterrence, (1975), who was able to isolate a number of properties and factors that could lead to the development of a comprehensive theory of prevention through deterrence. The possibility of a national adoption, let alone enforcement of such a theory, if verified, under our Western system of laws remains a serious question for researchers to ponder.

II. The Concept of Legality in Islam

In Western political and legal thought, the origin and relationship of law and state has always been a matter of controversy. Consequently, the practical tension between natural law and positive law was not quite reconciled. In the Hebraic conception any positive law that was contrary to divine law lacked validity and was ignored; man-made sanctions could not prevail against God's law. According to the Greek view, however, there developed a moral obligation to obey the law of the state even when that law seemed to be immoral. The prevailing view of modern nations toward law obviously comes close to the Greek conception. In fact, this view has tended to dominate most stances toward law and order since Greek times. Two issues related to this view however, remain unresolved: the question of legitimacy in terms of the final authority to determine justice; and the

continuing medieval scholastic controversy over the supremacy of Divine law known only by revelation, and human law which was rational and known through reason.¹³ St. Thomas Aquinas, in the 13th century, emphasized the need to abide with "eternal law" which he identified as part of the nature of God, existing in him, and exemplifies divine wisdom. St. Thomas argued that Divine law is the source of all law including natural law since it is ordained by God as universal dictates of right reason in their entirety and constitute the natural direction to the pursuit of man's good. From Divine Law the human will receives its moral beliefs and obligations without the "capricious imposition" of other laws. St. Thomas further explains that Divine Law can only be received by special revelations from God, such as those found in the Bible. These, he concludes, exceed man's ability, and complement natural law by providing man with laws beyond his competence to judge.

Jacques Maritain denounced modern anthropocentric humanism that considers man as the central fact or the final aim of the universe. That theory of man, a likely product of materialism and positivism, rejects absolute truth and values. Maritain described it as a theory of "modern man who knew truths -- without the truth."¹⁴ In his criticism of the theory, Maritain accused secular humanism writers (Descartes, Locke, Rousseau) with intellectual hypocrisy. While the theory construed man as "divine granting him dignity and basic human rights -- he is without God. While man is construed to be endowed with peace and fraternity -- he is without Christ, and while man is construed to have brotherly love -- he is devoid of the love of God." Modern man under human laws, contended Maritain, leads to a "life in common without common good," and claims liberty "but not with self-mastery, moral responsibility or free will."

Man, Maritain further contended, has become enslaved to the law of matter, he looks for "happiness but without purpose, claims democracy but without brotherly love. Bankrupt in principles, and without true values, man is left to a universe of words, a nominalistic universe."¹⁵

Marx, Darwin, Freud and Nietzsche later contributed to this scenario of anthropocentric humanism. Marxism presented the picture of a godless temporal salvation which alienated man by dissolving his individuality into a collective organization devoid of free will, eternal destiny, and the spirit of God. Marxism's intoxication with matter left God as a mere "particle of the social whole" and man was sacrificed to the Gods of industry and economics. Darwin later furthered the animalization of man, interpreted reason and freedom of will as merely illusionary, wherein human dignity is exchanged for a species sprouting from the "geneological tree of monkeys." Freud added his psychoanalytical touch to the scenario of a world "beheaded of reason" by further reducing the human personality and characterizing "spiritual men endowed with poetic creation, human devotion, and religious faith as only the sublimation of sexual libido or an outgrowth of matter."¹⁶ Nietzsche exasperated the already pitiful scenario of secular humanism with his philosophy of irrationalism, despising intelligence, eradicating the value of truth and declaring the death of God. Rejecting optimism, morality, freedom, dignity, peace, justice, and goodness, Nietzsche's philosophy, not surprisingly, led to the ushering of Nazism, racism, and demonic religiosity.

In opposition to this view, theocentric humanism championed by John Calvin sought to construct a new society built upon Christian values by reconciling the temporal with the divine. As a result, a new Christendom was created in order to restore the true image of man, not in separation from God, but a part of Him. This new God-centered humanism sought to

integrate the human and the divine and pursued an evangelical concern for humanity "which ought not be limited to the spiritual but to become incarnate and promote the ideals of true brotherhood among men."¹⁷ While Calvin eventually sided in favor of the state as a law-making and a law-enforcing entity, he clearly considered it a theological creation. "If man had not brought the fall upon himself," Calvin declared, "a legal order on earth would not be necessary." But because man "failed to remain in the integrity of his original nature, the temporal state must exist and secure its power if for no other reason than to protect the sovereignty of God's order."¹⁸

The Puritans regarded themselves as an elite chosen by God to represent Him on earth. They, in fact, held that the positions of their elected leaders were ordained by God. Once elected, the governor and the magistrates were granted power through divine authority. This idea was forcefully expressed to the Puritans by Governor John Winthrop when he declared that the determination of law belongs properly to God: "He is the only law giver, but He has given power and gifts to man to interpret commonwealth, and subordinately to other magistrates and judges according to their several places."¹⁹ The logical conclusion of the Puritan covenant was clearly the assignment of government to a God-picked theocracy.

By the time of the French Revolution, clerical judges had achieved extensive power in criminalizing deeds which were not mentioned or logically inferred from written texts, and were thus capable of choosing at will the most suitable penalty "as the case may require." But the Declaration of the Rights of Man (1789) proclaimed the legality principle in order to negate unabashed arbitrariness by judges and finally the Roman rule of legality, Nullum Crimen Nulla Poena Sine Lege, was resurrected. The principle protects against the abuse of power by informing the public what

is permitted or forbidden, the rights of the individual and the rights of the community, as well as the extent of penalty to be imposed for each offense.²⁰ While this of course has been expressly acknowledged by all nation states, history demonstrates that it has also been violated by most nation states -- thus, the need again for that total environment of decency that must bind the ruled and the rulers with a common bond of goodness.

Throughout history, documents of legality declared in constitutions, statutes, and court decisions often failed to deliver the promised protection against unfairness, corruption, and oppression by powerful ruling elites. Regardless of the best intentions of many worldly rulers, congresses, and high courts, the practice of government lawlessness has continued. Not to mention the disasters of fascist, communist, and authoritarian regimes, many democratic states have at times degenerated under political, economic, or social pressures into sophisticated machines of injustice. Furthermore, the use of man-made laws seemed always to present an easy way to suppress the human rights of people whenever the political interests of leaders were seriously endangered or when public demands for more freedom, equality, or justice were deemed too much to concede.

In contrast to all that has been mentioned, Islamic Shariah (Divine Law), forms the cornerstone of Islamic jurisprudence and offers a formidable and everlasting covenant for human governance. It is not designed for a chosen people at a given period of time or for a given nation on the globe. It cannot be modified by a human ruler under any circumstance. The principles laid down by the Shariah supercede those of any human law. It is perennial and adoptable to all situations. It contains governing principles for public and private conduct, for social and economic behavior, and for national and international relations. It is

fixed in nature but flexible in application. It provides rules for the external conduct of people as well as for their internal conscience. It seeks to balance the welfare of the individual with that of society. It is equally binding on the practices of the ruled as well as those of the rulers. Originating directly from God's sovereignty, there is no dispute among Moslems as to its legality or authority and it remains valid universally and at all times. Shariah is neither considered a legal theory nor a social contract. It is accepted by all Moslems as a Divine mandate.

III. Basic Concepts of Islam

Throughout its history of over fourteen centuries, Islam has been undeservingly perceived by many Western observers as a rather crude though potent religion which has less to offer to the civilized world by its system of jurisprudence than the other two monotheistic sister faiths. A number of reasons can be cited for this misconception. First, unlike Christianity and Judaism, Islam seems to have sprung so abruptly from an obscure desert location hardly known for its legal culture or social integrity. Second, unlike Christianity and Judaism, the nation of Islam when still in its crawling age, plunged itself into a series of European conquests (Jihad) that stunningly subjugated many Christian populations forcing their embarrassed kings to submit to a seemingly undisciplined corps of warmongers. Thirdly, Islamic theological scholars in their subsequent literary stage always directed their teachings to each other instead of sharing it with their counterparts in the Western world. Many of the latter, apparently frustrated with the monumental difficulty of having to master the Arabic language, were unable to maintain a continuing

interest in learning such an alien theology and consequently gave up on it altogether, perpetuating an intellectual barrier of lack of understanding and bias.

It is clearly ironic that Western civilization that continued to ignore Islamic theological and legal teachings seemed, nevertheless, impressed, if not thrilled, with Islamic contributions to other areas like the sciences, the humanities, and philosophy. Such acknowledged contributors included Averros (ibn-Rushd), a philosopher to whom St. Thomas Aquinas was indebted; al-Farabi, a political scientist who gained the reputation of being the "second teacher," with Aristotle being the first; al-Razi and Avicenna (ibn-Sina) whose writings constituted the standard medicine textbooks in Europe until the eighteenth century including the first medical encyclopedia called al-Qanun; the chemist Jabir ibn-Hayyan (Gebir to medieval Europeans) who experimented in 776 A.D. In fact, the universal use of such words of Arabic origin like chemistry, alcohol, antimony, and algebra demonstrates the indebtedness of the Western world to medieval Moslem scientists.

The failure of medieval European scholars (and consequently modern legal philosophers) to study and research Islamic theology and its related fields of jurisprudence and socio-legal systems may not have been intentional but has certainly left numerous gaps in contemporary Western literature relating to the philosophies of law, crime, and society. Justice Jackson perhaps eloquently stated this view saying:

Greater barriers have discouraged any general interest in Islamic Law. Though our debt to (Islamic) culture is exhibited in the customary enumeration to our astonishing output of law reports, we long held the impression that the Moslem world had nothing to contribute to what was inside the covers. Islamic Law was regarded as a speculative rather than of practical

interest and received attention from a relatively few specialists and scholars. But a review of the reasons we have deemed such knowledge too alien but useful to us show the reasons why we should abandon the smug belief that the Moslem experience has nothing to teach us.²¹

Every religion in the world has been named either after its founder or after the community or nation in which it was born. For instance, Christianity takes its name from its prophet Jesus Christ; Buddhism from its founder, Gautama Buddha; Zoroastrianism from its founder Zoroaster; and Judaism from the tribe of Judah where it originated. Only Islam, perhaps, has the distinction of having no such association with any particular person or people or country: nor is it perceived the product of any human mind. It is a universal religion and its objective is to create and cultivate a community of believers in God (Islam).²²

Islam is an attributive title. Anyone who possesses this attribute regardless of race, country, or community, is a Moslem. The word Islam in Arabic simply means submission or surrender to God. It is also a derivative of the word Selm (peace), wherefore the traditional Islamic greeting Al-Salam Aleikum (may peace be on you).²³ The full import of the meaning of Islam departs from any identifying label generally given to a belief. The idea of submission to God, and only God, through the full recognition of Him as Creator establishes one's total acceptance of His Divine Sovereignty.

The crux of Islam is submission to the Will of God through which universal order and peace can be brought about. Furthermore, it is believed that only through the harmonization of man's will, with the will of God, can the perfect actualization of human life be achieved under an all-embracing Divine guidance. On the other hand, a departmentalization of

human conduct into religious and secular, sacred and profane, spiritual and material, is contrary to Islamic doctrine since man's limited judgement will always fall short of God's plan for creation. In Islam, religion and behavior cease to be autonomous categories; they become two sides of the same coin. Each human act must reflect God's will, and at the same time, is regulated by His guiding rules. All human activities, therefore, receive a transcendent dimension: they become purposeful and sacred, earthly and heavenly, for this day and for the hereafter. Good deeds earn man righteousness with God and bad deeds take away in the same manner.

In order to institutionalize this broad, all-encompassing belief in submission to the will of God, Islamic jurists have advocated and emphasized three principles: the Unity of God, the Unity of Mankind, and the Unity of Religion.²⁴

1. The Unity of God: There is but one God, referred to as Allah.

This belief in a central deity of exclusive prerogatives, qualities and attributes, the beginning and the end of everything, is, hence, undefinable. This one and only Creator, who is not born and who does not give birth, is the Creator of Mankind and the universe and, hence, the true "sovereign."

2. The Unity of Mankind: Allah, the Creator, has created a single mankind through a process of development, which followed the creation of Adam and Eve. This common source of origin represents the Unity of Mankind. The Quran stated, "Oh Mankind! Lo! we have created you male and female, and have made you nations and tribes that you may know one another. Lo! the noblest of you in the sight of Allah is the best in conduct." The ethnological universality of mankind is the essence of humanity, for it

reflects the ideal unity of all human creatures who emanate from the same source and will revert to the same end.

3. The Unity of Religion: There is but one religion under the Islamic concept, since to enlightened Moslems Islam is not a new religion but a return to one. The Quran states:

Say, Oh Moslems, we believe in Allah and that which is revealed unto Abraham and Ishmael and Isaac and Jacob and the tribes and that which Moses and Jesus received and that which the prophet received from the Lord. We make no distinction between any of them and unto them we have surrendered. (We are Moslems).²⁵

Observance of these principles forms the "modal behavior" of a practicing Moslem and has been traditionally manifested in the concept of worship. In Islam, the practice of worship is a required social, as well as religious, duty. As stated by Ibn Taymiya, it means blindfold obedience, humbleness and pure love of God both explicitly and implicitly. This involves all walks of life in compliance with the Shariah and in pursuit of God's favor.²⁶ On this basis, worship must be perceived as a behavior that comprehends all that pleases God in words or deeds, whether expressed or concealed, such as saying prayers regularly; giving Zakat (charity); fasting; pilgrimage; telling the truth; fulfillment of trust; kindness to parents and relatives; keeping promises; good treatment of one's neighbors, orphans, the poor, wayfarers, and the possessions of others, and the like.

Worship must also be internalized in terms of one's devotion to the love of God and His Apostle, fear of God, faithfulness to Islam, being patient with God's judgements, praising God for His blessings, having trust in God, having faith in His mercy and fear of His punishment. Thus, worship, according to this concept, includes obedience to God and

resignation to His will in all matters of religion whether they are obligations or optional matters (Nawafel), and Moslem relationship with others during peace or war time.

Appropriate Moslem worship, furthermore, is not just limited to the fulfillment of religious and social mandates, such as saying prayers, giving charity, fasting, pilgrimage, recital of the Quran, etc., but has a much wider concept. Worship, indeed, has an economic dimension as well, which is closely similiar to the Christian theory of work ethics. A man who labors earnestly for himself and his family in pursuit of a legitimate livelihood is considered a worshipper of God. It is narrated that a man passed briskly by the Prophet and his companions. Some of them commented "O God's Apostle! Would it not have been better if this man's energy and zeal were for the cause of God?" The Prophet replied: "If he is using his energy in pursuit of a livelihood for his little children, his old parents or for himself then he is indeed using his energy for the cause of God; but if he is just showing off and swaggering he will be satisfying the cause of Satan."²⁷

Allah, or God becomes, obviously, the sovereign, if not the raison d'etre, of the Islamic state. von Grunebaum speaks of Him in terms of the staats-gedanka, the ruler and governor of the world, including the state. The state, as well as the hereafter is His creation and all men and things respond to Him. This, according to von Grunebaum, justifies and upholds the continuance of an Islamic commonwealth: a super community of believers where the spiritual power, the legal power, and the political power reside in God. He is the sole source of authority, with the Caliph (Imam or leader), acting as His deputy on earth.²⁸ While this view may appear to justify the belief that Islam is a theocracy, this is not in accord with

pure Islamic doctrine since theocracies are man-made regimes sitting in the interpretation and implementation of God's rules. Theocratic systems have consistently given rise to the inevitable controversy of the separation between church and state. While Islam does not authorize a human institution for lawmaking, and thus fundamentally negates the anthropomorphic implication of theocracy in the realm of faith, it may, nevertheless, best fit the description of a theo-democracy. The Islamic state does not derive its sovereignty from the people, but from God, and therefore does only grant the people the limited amount of liberties deemed befitting by God. Also, since the Islamic state encompasses both the religious and the temporal spheres and comes into existence through the acclamation process of the Caliph, Amir, (or head of state), it is not marked theoretically by any serious controversy between the state and the people. According to Islamic polity, the State, the Amir, and the Umma (public), are all animated by the moral duty to preserve stability, fraternity, equality, and justice in the Islamic realm.

In order to establish justice, and in accordance with Islamic doctrine, the head of the Islamic state has a two-fold judicial function: one positive; and the other negative. His positive functions relate to the establishment of peace in the state, maintenance of concord among the various sections of the people, and the protection of the weak against the strong. His negative functions concern punishment of the evil-doers and the restitution of the rights of the injured. For the dispensation of justice, the Head of the State has to appoint Qadis (judges), well-versed in Shariah law, God-fearing, and of irreproachable character and sterling piety. The Qadis who apply Divine Law consider themselves responsible only to God Almighty and, as such, should dispense justice equitably and

speedily. Since the Qadi's court is regarded as God's court, no preferential treatment is to be given even to the highest in the State. "The King can do no wrong" does not hold good in an Islamic state so far as the dispensation of justice is concerned. Under Islamic law, no one can claim exemption from appearance in the court or even a preferential seat in the court. Recording of deposition of influential persons through commission is not allowed by Islamic law. The Islamic law lays out easy procedures for the conduct of cases, and speedy justice is to be meted out to the rich and poor alike, free of cost.²⁹

IV. Islamic Law and Islamic Morality

In Western legal traditions, the state is sovereign and the legislature is the law giver. Furthermore, in adherence to the principle of legality, a written set of laws -- civil and criminal -- must enumerate well defined offenses and assign specific penalties. Such codes are made to reflect the ideology of the government in office, the values of the community at the time, as well as the unavoidable terms of compromise between diverse interest groups, without which it becomes almost impossible for any sensible document to pass the parliamentary test of democracy.

In Islamic legal tradition, there is only one law giver: God. The law is a command by God in the form of a communication regarding human conduct, either demanding, authorizing, or prohibiting it. The Islamic code for human behavior is characterized chiefly by direct reliance in its legal foundation, universal principles, and summary provisions upon inspired Shariah. Shariah is the Arabic word for law and originally meant a pathway. It may roughly be translated as "the path in which God wishes men

to walk." The prescriptions of the Shariah are perceived to have been ordained by God as His eternal will. It is, thus, the standard of right and wrong in human affairs, and it provides an all-inclusive scale of religious valuation for conduct. Every human deed falls under the prescriptive of the law, without exception. Human actions, under Shariah law are classified as: obligatory (fard); meritorious or recommended (mandub); indifferent, that is bringing neither reward nor punishment (mubah); reprehensible, that is not punishable but disapproved (makruh); and forbidden (haram).³⁰

The assumption underlying the Shariah is that men are incapable of discriminating right and wrong by their own unaided power. It was for this reason that guidance was sent to them through prophets. God has decreed a pathway for men based upon His sovereign will. Such decrees are not subordinated to rational considerations, nor are they to be judged by a standard of human reason.

In its content, the Shariah is much more than modern laws in their positive nature. Not only does it deal with matters of religious ritual, but it regulates every aspect of political, social, and private life. At the other extreme, the Shariah even prescribes permissible and forbidden types of food, the manner of a Moslem's dress, and acceptable social manners.³¹ These, however, must be seen in light of the previously mentioned classification of obligatory, recommended, indifferent, reprehensible, and forbidden conduct.

There are four sources of the Shariah:

- a) the Quran, or the Holy Book of Islam
- b) the Sunna, or the authentic tradition of Prophet Muhammed
- c) the Ijma, or the consensus of opinion
- d) the Qiyas, or judgement upon juristic analogy

The Quran:

The articles and deliberations of the Quran were not recorded in written form but are considered to be revealed to Prophet Muhammed in the form of clear commandments and prohibitions associated with the causes and circumstances which occasioned them according to the situation. The Quran represents the eternal Speech of God, the expression of His truth and His will for the universe. Taking into consideration its Divine origin and the purity of its text, it is regarded as the foundation on which rests the whole super-structure of Islamic law. Also, as such, it is considered the chief source from which Islamic law is derived and is the root of all other sources of Islamic legislation. Al-shatby, a famous scholar of Islamic jurisprudence stated in his book Al-muwafaqat:

The Holy Quran is in spirit and character the epitome of Shariah; it is the chief pillar that sustains the Islamic faith, the divine spring of wisdom, the sign of apostlehood, the revealing light of eyesight and insight and there is no other path to approach God or salvation except through it.³²

The Quran contains 114 Surats (chapters) which include 6342 verses, of which 500 verses conclusively regulate judicial matters. Each of these judicial verses bears an injunction -- either an order ('amr) or a prohibition (nahi). Out of each judicial verse, a decision (hukm) arises which is analogous to an article of judgement.³³ Non-judicial verses fall in two categories; decisive and allegorical. The first category pertains to the practice of Islamic faith (belief in God, the angels, the Prophet, the Day of Judgement). The other category comprises those verses which are capable of different interpretations. The Quran opposed wrong-doing in all its forms and warned that such behavior must lead to the decline of human

society. Wrong-doing was defined as any violation of a law, a command, or duty, and was classified in terms of three categories: wrong-doing against God, like denying His existence; wrong-doing against other people, like committing murder, theft, or rape; and wrong-doing against one's self, like drinking alcohol in private and failure to fast during the month of Ramadan. Quranic judicial verses requiring or prohibiting a particular conduct are represented, for example, by verses demanding justice:

God commands justice, the doing of good and liberality to kith and kin, and He forbids all shameful deeds and injustice, and transgression. He instructs you that ye may receive admonition.³⁴

And verses forbidding wrong:

Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong.³⁵

And verses prohibiting murder:

Nor take life - which God hath made sacred except for just cause. And if anyone is slain wrongfully we have given his heir authority to demand retaliation. Or to forgive: but let him not exceed bounds in the matter of taking life: for he is helped by the law.³⁶

And verses authorizing lax talionis:

In the law of equality (retaliation) there is (the saving) of life.³⁷

And verses punishing adultery:

The woman and the man guilty of adultery or fornication, flog each of them with a hundred lashes. Let not compassion move you in their case, (it is) a matter prescribed by God.³⁸

And verses punishing theft:

As to the thief, male or female, cut off his or her hand.³⁹

And verses specifying the personal nature of criminal responsibility:

Whoever works righteousness benefits his own
soul. Whoever works evil, it is against his own
soul.⁴⁰

The Sunna (Sayings and Traditions of the Prophet)

The Sunna comes next to the Quran in Islamic legislative sources. It is the collected spoken words (Hadith) by the prophet Muhammed and the account of acts he did or refrained from doing (tradition). A Hadith consists of two parts: the text (matn), and substantiation by the chain of transmitters (isnad). Isnad means foundation, or basis, and consists of a list of names of men through whom the particular saying or act was passed down. In order to discover whether a Hadith was authentically derived from the prophet, the students of Hadith (muhaddithun) must minutely examine each link in the chain of transmission. They must ask such questions as whether the men who claimed to have learned the saying from others had actually met them and whether they were trustworthy and reliable characters who would tell the truth. Based on its degree of authenticity, recorded Hadith is divided among the sound (sahih), the good (hasan), and the weak (daif).⁴¹

While Sunna falls outside the realm of Divine revelation, it is still considered sacred and divinely inspired on the basis of the Quranic verse obligating believers to "obey Allah and obey the messenger." Another verse in the Quran which gave divine legitimacy to Hadith stated, "they will not believe in truth until they make thee judge of what is in dispute between them."⁴²

In judicial matters, the Sunna explained and complemented Quranic dictums and articulated undetailed duties. The Sunna, for instance, categorized the degrees of homicide as murder, manslaughter, and assault

leading to death. It also legislated the controversial areas of provocation and self defense in violent crimes. In the area of criminal evidence, it was left to the Sunna to determine the rules of evidence in retaliation crimes stipulating the required number of witnesses, their qualifications, and the weight of their testimony.

Examples of Hadith pertaining to criminal offenses and criminal procedures include:⁴³

A man is still committed to the tenets of his faith until he commits murder.

Whoever does not associate a partner with God and does not slay unjustly shall enter Paradise.

He who forgives his offender is elevated by one more step and his sins reduced by one step.

Any intoxicant is prohibited and even a small amount that intoxicates is prohibited.

Three classes of offenders are not to be punished: the child before coming of age, the sleeper until he wakes up, and the insane until he becomes sensible.

The truthful, honest merchant is with the prophets and the truthful ones and the martyrs.

With the growth of Islam after the death of the prophet (632 A.D.), Sunna acquired significant importance since Moslems found themselves confronted with religious and legal problems that the Quran alone did not resolve. Hence, the second source of Shariah was established and recognized as a road map for understanding religious dogma and simplifying judicial complexities. A provision of Sunna today has the same legal weight a Quranic text has in Islamic jurisprudence.

The Ijma (Consensus of Opinion)

Ijma is the consensus of opinion reached by Moslem scholars after the death of the Prophet on any matter related to Islamic worship (ibadat), to

one's duties to other men, or to the society at large (muamalat). Ijma as a source of law comes second to the primary sources of the Quran and Sunna. If neither primary authority can help, then resort to Ijma must be attempted.

During the rapid evolution of the Islamic society, believers often encountered an obscure Quranic passage or were faced with an apparently contradictory text, to which there was no available Hadith to explain. In anticipation of such a situation, Islam established the tradition of Ijma, or a collective agreement. The community, viewed as the totality of all Moslems, would delegate the responsibility of legislating proper conduct to its representatives of pious elders. Historically, Ijma was first exercised by the consensus of opinion among the immediate companions of the prophet, then later among his disciples, then among their followers and those who followed.⁴⁴

The practice of Ijma as a legitimate source of Islamic legislation developed from the emphasis on the role of the Islamic community. In various Hadith, the prophet reportedly said: "my community shall never unite upon error," and "everlastingly until the will of God intervenes, there shall be some in my community who will not cease to solemnly uphold the truth."⁴⁵ Based on this, it became perfectly appropriate for the community of believers to legislate controversial matters by the unanimous opinion of its jurists. Such decisions gradually acquired the same weight assigned to Quranic text and Hadith with, however, one weakness: Ijma, like Western positive laws was revocable by a new consensus, therefore, unstable.⁴⁶

Three rules, nevertheless, must be met for appropriate Ijma:

- a) the participation of a reasonable number of jurists in each debate since consensus could not be reached without varied opinions on the issue.
- b) all participants must reach a unanimous decision on the judicial judgment irrespective of their age, knowledge (ilm), or the communities they represent. A majority decision of any form cannot suffice.
- c) each participating jurist should express his viewpoint clearly and openly concerning the judgment in an opening statement. Consensus would then follow provided no inconsistency develops. In another school of thought an agreement by silence on a certain subject would be permissible if no objection was raised after the presentation by the initial scholar.

Ijma rules became instrumental in building up the body of Islamic jurisprudence during the second century of the Hijra and beyond. Today, they underlie the laws and decrees of the Islamic state, especially in the areas of the application of justice, due process, equal protection, criminal evidence and criminal procedure, and the discretion of judges to pass sentences in inferior criminal cases.

Qiyas:

Qiyas is analogical reasoning. It is based on the inference that if two or more elements agree with one another in one or more respects they will agree in yet more respects. If, in a certain respect, a particular judgement was passed and the reason for passing was indisputably acknowledged, it then follows that the same judgement could be applied to a similar incident if its cause was similar. Unlike stare decisis in Western legal philosophy, however, Qiyas is a specifically Semitic mode of logic which is limited to only two terms: from like-to-like and from like-to-contrary, from more-to-more and from more-to-less. In this form it deviated considerably from Aristotelian syllogism which applied a universal intermediary term as well.⁴⁷ In Qiyas the judgement must lie where the

cause lies and identical incidents must necessitate identical judgements.⁴⁸

Proponents of Qiyas in Islamic jurisprudence found it most useful in furthering the application of justice in a rapidly growing nation hungry for a more detailed social structuring. Without the use of some form of reasoning, they point out, the system would be untenably rigid. For instance, injury to the skull which lays the bone bare is punished according to Hadith, but, without Qiyas, lesser injuries would be left unpunished.⁴⁹ Furthermore, they argue, the Quran had frequently applied the concept of equality to identical cases which means that identical occurrences may be equally judged. Moreover, it is confirmed that the Prophet had allowed Muaaz ibn Jahal to exercise his best judicial judgement in applying the law; which is but one aspect of intellectual reasoning. Opponents of Qiyas, on the other hand, vigorously contested the legality of analogical reasoning on the basis of the Holy verse: "We have neglected nothing in the book," (surat al-Qamor, LIX:2). God's creatures, they argue, may not make up for God's silence on any given subject. They insist that God obviously must have a supreme reason for His silence.

Unlike Ijma, Qiyas is largely a product of individual initiative by a jurist. While it ranks lower than Ijma in the hierarchy of Islamic legislation, it has been used extensively in affixing punishment in the Ta'azir category of crimes for which no defined penalties were prescribed. The validity of Qiyas today is considered an indisputed matter in Moslem countries which apply Islamic law, since in the absence of a Shariah rule, this adaptable method of analogical reasoning becomes essential for the resolution of every day conflicts and the administration of new technology.

V. Typology of Crime in Islamic Jurisprudence

Crime in Islamic law is the commission of a prohibited act or the omission of a duty that is commanded. It is punishable by death, equal retaliation, chastisement, banishment, or any discretionary punitive measure. In defining crime both Western law and the Islamic Shariah do not differ.

Some major differences, however, exist between the Western theory and application of criminal law and the Islamic practice. The Islamic Shariah, as mentioned earlier, is primarily designed and used as a moralizing instrument as well as a preventive agent. This is achieved by a five-prong approach: a) the Shariah, through numerous and repetitive texts, endeavors to reform the individual and purify his conscience with sublime Islamic ideals and lofty morals; b) the Shariah warns people against committing offenses and admonishes the offender with dreadful punishment in this world and in the hereafter; c) the Shariah commands Moslems to assist one another "on the path of righteousness and piety" by offering counsel, moral support, and the exchange of religious teaching; d) the Shariah not only prohibits the commission of a crime but in a sense blocks the way leading to it, as for example, prohibiting the use of intoxicants and minimizing possible encounters between the sexes; e) the Shariah, in anticipation of man's fallibility and his human weakness, prepares Moslems for a more plausible lifestyle. It, for example, urges marriage at a young age, condones controlled polygamy, and requires the well-to-do to contribute financially to the needs of the less fortunate on a regular basis.

Nevertheless, this preventive role of Shariah ceases once spiritual heed is ignored and violations are inevitably committed. The law is then applied forcefully and penalties are meted in a certain, swift, and severe manner. For instance, the Shariah punishment for murder is death, the punishment for theft is hand amputation, and the punishment for an unmarried adulteress is one hundred lashes and exile for one year, while the punishment for a married adulteress is stoning. Islamic law, while in agreement with the rationale behind the Western theory of punishment as primarily an instrument of general and specific deterrence, relies on severe punishment to ensure the continuity of a spiritual society. Also, since such severe punishments have a definite tangible impact, they are commonly publicized to prevent the growth of a climate conducive to a disorderly and materialistic society -- thus, the social immunization effect of the law mentioned earlier. Notwithstanding the appearance of extreme harshness, however, the Shariah law maintains the ultimate weapon of compassion and mercy by encouraging repentance of criminals and foregoing punishment altogether, including capital punishment, if the mischievous person gives himself up and repents before he is brought to trial. The Quran stated:

Except for those who repent before they fall into your power: In that case, know that God is oft-forgiving, most merciful.⁵⁰

There are three categories of crimes in Shariah: (1) Hudud Crimes; (2) Kisas Crimes; (3) Ta'azir Crimes.

Hudud (Limitation) Crimes

These are grave crimes committed against "God's rights." The prosecution of such crimes is mandatory and punishment must be meted exactly as prescribed in the Quran. Once guilt has been proven, no human

judge, governor, or ruler can increase, reduce, probate or suspend the sentence. There are seven Hudud crimes: adultery; defamation (slander); alcoholism (and drinking alcoholic beverages); theft; highway robbery; apostasy, and rebellion against Islam (Islamic systems). Some major Hudud offenses, of a criminal nature, will be briefly discussed:

- a) Adultery: Islam forbade adultery which was a widely practiced behavior among pre-Islamic tribal society. Also, since early Moslems paid particular attention to the preservation of a clear and honorable blood line among their community of believers, committing adultery was strongly condemned since such a behavior could cast a doubt on the purity of their society. Offspring may not know who their natural parents are and family units would disintegrate. The Shariah law requires for guilt in the cases of adultery that the crime must have been witnessed by four eyewitnesses or confessed to by the parties themselves. Since it is almost impossible to satisfy the prerequisite of eyewitnesses unless the crime was committed in public, the Had penalty is usually exacted only if the adulterer or the adulteress confessed to having committed the crime. The penalty of adultery, according to Shariah, varies on the basis of whether the party to the offense was married or unmarried (fornication). For the unmarried party the penalty of fornication is exacted in Quranic text:

The woman and the man guilty of adultery or fornication, flog each of them with a hundred lashes. Let not compassion move you. [It is] prescribed by God.⁵¹

As for the married party the penalty for adultery is exacted in Quranic text:

Flog both of them with a hundred lashes and stone them.⁵²

- b) Theft: Islamic law treats all property crimes including robbery, burglary, theft, and illegal entry under the generic term of theft. Property crimes are considered heinous since community life, especially during its early times, was based on mutual trust among believers and security measures were unnecessary. Furthermore, the crime obviously could cause a great deal of alarm and disruption to a spiritual society that practiced brotherhood and socially thrived on hospitality and generosity. The Shariah punishment for the generic offense of theft was prescribed in the Quranic text:

As to the thief, male or female, cut off his or her hands.⁵³

- c) Highway Robbery: This crime was specifically mentioned in the Shariah and its penalty was made particularly severe in order to eradicate the possibility of its occurrence. The prohibition centered on highway robberies committed against traders traveling in pursuit of commerce, pilgrims on their way to Mecca, and moving nomads in search of livelihood -- hence, the extremely severe punishment designed to safeguard safety on the roads and enhance economic development in the Islamic domain. The Shariah law prohibiting highway robbery stemmed from the Quranic text forbidding "mischief through the land," which stated:

The punishment of those who wage war against God. . . and strive with might and main for mischief through the land is: execution or crucifixion, or cutting off of hands and feet from opposite sides, or exile from the land.⁵⁴

d) Alcohol Drinking: Islamic law forbade alcohol drinking because it was believed to have a destructive influence on a pious society. Admonished as the "handiwork of Satan," it was attributed with befogging the mind and causing people to be indifferent to moral and religious values. Furthermore, Islam condemned drinking since it can interfere with one's daily obligation to pray five times a day, thus making praying individuals incoherent during prayer and failing to grasp that peak experience with God. The Shariah law treats alcohol drinking as a crime of "mischief through the land" previously mentioned and is punished by flogging and/or exile from the land.

Kisas (Retaliation) Crimes

These are serious crimes committed against individuals. They are specifically mentioned in the Quran but their penalty is not specifically stipulated. Therefore, while their prosecution is mandatory, punishment could be negotiated, or forgiven entirely by the victim or his family. These crimes are: murder; voluntary homicide (manslaughter); involuntary homicide (manslaughter); and criminal negligence. They also include assault, battery, and other infringements on the person. A Diyya payment (blood money) could be accepted by the victim or his family as restitution in lieu of the execution of punishment in this category.

The most serious crime in the Kisas category is murder, since it was one of the most common crimes before the advent of Islam. During those times, murder was committed for an infinite number of reasons ranging from defense of honor, to self-defense, to raiding and looting, to the mere demonstration of bravado. Hence, the Quran stipulated: "never should a believer kill a believer; but (if it so happens) by mistake, compensation

is due."⁵⁵ The punishment for murder was prescribed by the Quranic verse that stated:

If a man kills a believer intentionally, his recompense is Hell to abide therein forever, and the wrath and the curse of God are upon him, and a dreadful penalty is prepared for him.⁵⁶

The elements of the crime of murder in Shariah law are: a) the legal element which is the presence of a Shariah text prohibiting murder; b) the physical element which is represented in the act of killing whether by commission or by omission; and c) the moral element which is the criminal intent. This third element has raised more debate in Islamic criminal jurisprudence than perhaps any other issue. The body of Islamic jurisprudence includes so many contradictions in this respect that some modern jurists no longer insist on premeditation in murder. Nevertheless, the view which requires a specific intent in the crime of murder can be safely considered the centerist and most prevailing opinion today.

The punishment of murder as a Kisas crime committed against the person is exacted by equal retaliation or the acceptance of a monetary Diyya, as compensation. Whereas Judaism previously insisted on retaliation and Christianity allowed only compensation, Islamic law resorted to a happy medium. While it decreed the infliction of Kisas to attain justice without reprisal and appease the victim's kith and kin without vengeance, it provided the opportunity for the victim or his family to accept Diyya which, in return, would augment one's favor with God. Urging the acceptance of Diyya has also been practiced by trial judges in order to avoid injustice, especially when the determination of an equal Kisas becomes difficult to exact. Acceptance of Diyya today has become more of a common practice in murder and injury cases, if only to gain more

righteousness in Heaven in adherence to God's word, "if anyone remits the retaliation by way of charity, it is an act of atonement."⁵⁷

Ta'azir (Rehabilitation) Crimes

This category is an open-ended one which includes all other inappropriate behavior whether it is currently criminalized or might be in the future, as long as it is not part of the Hudud or Kisas categories. The criminalization of behavior included in this category has been the product of legislative Ijma, or consensus, in order to prevent physical, social, moral, or religious harm to an individual or to the society as a whole. One of the most recent additions to this category in the Kingdom of Saudi Arabia is the spinning of wheels by a juvenile driver.

Penalties for these crimes are of a rehabilitative nature and vary from imprisonment to corporal punishment, or the payment of restitution. Prosecution in such cases and the imposition of punishment is considered discretionary and is left to the state and its elders to determine in light of the amount of damage caused, the circumstances of the offender, and the social significance of the offense. This category includes fraud, embezzlement, and violation of state or city rules. Consideration by the trial judge of extenuating or mitigating factors involved in the offense, is expected and is widely used by Islamic courts today.

Ta'azir punishments can also be applied in cases of Hudud crimes if evidence was insufficient to prove guilt. For example, guilt in theft crimes must be based on a voluntary confession by the perpetrator or by the testimony of two eyewitnesses in open court. If such evidence was not available, an Islamic judge, based on his insight in the case, may sentence the accused to a Ta'azir punishment instead. Such a punishment would not likely be as severe as the original Had penalty.

It is also believed that some Ta'azir punishments can be imposed for behavior which does not quite meet the traditional definition of a Ta'azir crime. Such cases might include simple lying, disrespect of the elderly, wearing peculiar clothes, or acting rowdy in public. Punishment is then meted by the ruler or judge in his capacity as "custodian of the faith" under the "exceptional rule" which allows for measures to be taken "in the interest of the community," against individuals who, through a noncriminal behavior or because of a particular circumstance, have caused social harm. For example, Omar Ibn Al-Khattab, the second Calif after the death of the prophet, reportedly ordered that a Moslem named Nasr Ibn Hajaj get his hair shaved off and be banished to a far place because he was reportedly too handsome looking with plenty of sex appeal, and Moslem women adored him. While a ruling of this kind would be totally inappropriate under today's Western philosophy, such a decision might not be totally inconceivable if perceived as an administrative act, or a matter of convenience necessary to maintain discipline, for instance, at a military base.

Major Typological Differences:

While each of the three aforementioned categories is different in a juristic sense, punishment for each category could be equally severe. For instance, the punishment for adultery by an unmarried woman (a Hudud crime) is one hundred lashes and banishment for a year, while the punishment for the crime of espionage (a Ta'azir crime) could be death. Nevertheless, several juristic differences exist between the three categories:

- a) once a Hudud crime is established, the offender cannot be acquitted or his punishment commuted to a lesser punishment. This

is based on the fact that Hudud crimes are specifically presented as crimes against God's prerogative and their punishment is fixed by a Quranic sentence.

- b) once a Hudud crime is established (with the exception of defamation) no one could intercede regardless of his political or social eminence. On the other hand, Kisas crimes and Ta'azir crimes are intercedable by the victim or his family or by the state under stipulated conditions.
- c) Hudud crimes, as prerogatives of God, do not require or even need the filing of legal action (except in defamation and theft) by the victim or his family or by the state. The Imam (theological leader) or, to this matter, any citizen in the realm can take immediate action and bring the defendant to trial. In Kisas and Ta'azir cases a legal action must be initiated by the harmed party or by the state on behalf of the society.
- d) Hudud punishments must not be meted if the judge harbored any doubts regarding the crime. Guilt must be proven conclusively beyond a shadow of a doubt. On the other hand, Kisas and Ta'azir crimes do not require such a stringent requirement of proof.
- e) Hudud punishments can only be established against adults who are mentally sane while Kisas and Ta'azir punishments could be meted with the same severity on juveniles and the mentally insane, since the purpose is obviously disciplinary in nature and seeks to reinforce social deterrence in the Islamic community.
- f) Kisas crimes which are violations of the rights of individuals have the distinct feature of being restitutionable. Once a sentence has been pronounced, it becomes the victim's right (or

his family's) to insist on its execution in full, in part, to accept Diyya (blood money) as compensation, or to forgive the transgressor altogether. If the victim or his family choose the full execution of the sentence, then the punishment must be the infliction of similar physical harm on the body of the defendant equivalent to that inflicted on the victim. For instance, if the right leg of the victim was lost as a result of a fight, then the right leg of the defendant must be cut off in retaliation. Furthermore, the Shariah technically allows Kisas punishment to be administered by the victim or his kin if such a person can convince the sentencing judge that he is able to carry out the sentence efficiently. Otherwise, a professional executioner is assigned by the state to carry out the sentence in public on behalf of the harmed victim and his family.

In the practice of Islamic justice, corporal punishments are carried out soon after the sentence has been declared and without undue delay. If such a sentence involved capital punishment, then the sentence must be automatically reviewed by the court of Ifta (the highest court of Islamic interpretation) prior to its confirmation by the ruler of the land. The offender is usually taken to a public square for the execution. After announcing the sentence and allowing the condemned person his last wish, he is beheaded with a sword. The public in presence usually watch sternly and reflect on God's power in cleansing their community and purifying their souls. The prophet was quoted in a Hadith as saying that, "a Had carried out is better to a community than forty days of rain."⁵⁸

VI. Conclusion

Islam has been, and remains, an alien religion to the Western mind. Furthermore, the supremacy of Divine Law as practiced in Moslem societies has been overridden in most modern states and replaced by a set of positive laws based on a convenient social contract between the rulers and the ruled. Moreover, the continuing application of Islamic criminal sanctions including public executions, public amputation of the hand, and public flogging of criminals may have contributed to the bewilderment of many Western jurists and observers today.

The fact of the matter remains that occurrences of crime and mischief under Islamic laws are far fewer than their counterparts, even in Western societies especially known for their docility and renunciation of violence. Islamic jurists explain this phenomenon in terms of the failure of Western social thought to reestablish and uphold a system of social order based on Divine justice, social benevolence, and piety. They argue that as long as such a system is absent, Western nations will continue to pay for a high rate of crime, suffer from social injustice, and experience political instability.

Islamic jurisprudence is an extension of the teachings of Islam which are based on Shariah or Divine Law as revealed to Prophet Mohammed and recorded in the Holy Book of Quran. Practicing Moslems firmly believe that Shariah is not merely a body of metaphysical doctrines or even a set of rules of individual conduct, but indeed a way of life which is permeated with God-consciousness and is oriented toward actualizing good and the eradication of evil, culminating in an integrated spiritual community. Unlike positive law in secular states, Shariah law forms the cornerstone of

Islamic jurisprudence and offers Moslem societies a formidable and everlasting covenant for human governance. It contains principles for sacred and secular conduct, for social and moral behavior, as well as for political and economic relations. It seeks to balance the welfare of the individual with that of society and is binding on the practices of the ruled as well as those of the rulers.

The sources of Shariah law are the Quran, the Sunna, the Ijma, and the Qiyyas. Together, they form the body of obligations, injunctions, and commands which serve the function of penal codes and codes of criminal procedures in the Western sense, as well as the articles of civil law, family code, and tort law, known under positive legislations. Crimes under Shariah law are classified in a different manner from Western laws which traditionally categorize them in relation to the extent of punishment prescribed for their commission. Under Islamic law, crimes are categorized in terms of being against God, against others, and against the society. Punishment across the three categories could be equally severe but may vary according to the amount of spiritual, physical, or social harm they precipitate or bring about.

While punishment under Islamic law could be as harsh and as widely publicized as the carrying out of public execution and hand amputation for murder or theft respectively, the Shariah law, on the other hand, offers total amnesty, even in the most serious offenses, if the accused repented and gave himself up before he was brought to account for his deed. The law also allows and encourages acceptance of restitution (Diyya) in crimes committed against others (Kisas offenses) or against the community (Ta'azir offenses). The reward for accepting Diyya by the victim or his family is added righteousness before God.

The key to Islamic justice, however, is the judge. His responsibility is awesome, since under Islamic doctrine he is accountable only to Allah (God) for the discharge of his duties. He is to rule equitably among all persons, rich and poor, mighty and weak. Having to interpret not only the human behavior of those brought in front of him, but also the spiritual commands of Him in the Highest, the proper choice of qualified judges becomes imperative for a stable society. This is especially so, in light of the famous Moslem tradition that says, "you can give an unjust law to a just judge, but you cannot give a just law to an unjust judge."

NOTES

1. Richard Quinney, "The Ideology of Law: Notes for a Radical Alternative to Legal Oppression," The Sociology of Law, Butterworth, 1972, p. 39.
2. Ibid.
3. Malcolm M. Feeley, "The Concept of Laws in Social Sciences," Law and Society Review, Vol. 10, 1976, pp. 497-523.
4. Quran, Chapter 5, verse 104.
5. Quran, Chapter 5, verse 9.
6. Quran, Chapter 5, verse 142.
7. Quran, Chapter 5, verse 94.
8. Quran, Chapter 7, verse 27.
9. Cherif Bassiouni, editor, The Islamic Criminal Justice System, Oceana, N.Y., 1982, p. 13.
10. The Effect of Islamic Legislation on Crime Prevention, Proceedings of the Symposium held in Riyadh, Saudi Arabia, October, 9-13, 1976, Ministry of Interior, The Kingdom of Saudi Arabia, pp. 500-504.
11. Public Security Report, Ministry of Interior, Cairo, Egypt, 1981, pp. 2-3.
12. Feeley, op. cit.
13. Quinney, op. cit., pp. 46-48. This historical part has been virtually summarized from Richard Quinney's article.
14. William S. Sahakian, Ethics: Introduction to Theories and Problems, Barnes & Nobel College Outline Series, N.Y., 1974, p. 84.
15. Jacques Maritain, "Christian Humanism," The Range of Reason, Scribner, N.Y., 1952, p. 187.

16. Sahakian, op. cit., p. 88.
17. Quinney, op. cit., p. 47.
18. Ibid.
19. Ibid., p. 19.
20. Taymour Kamal, "The Principle of Legality and its Application in Islamic Criminal Justice," Bassiouni (ed.), The Islamic Criminal Justice System, op. cit., p. 149.
21. Justice Jackson, "Forward" to Law in the Middle East, M. Khadduri, (ed.), 1955.
22. Abul Ala Mawdudi, Towards Understanding Islam, Quran House, Kenya, 1980, p. 17.
23. Bassiouni, op. cit., p. 6.
24. Ibid., p. 7. This brief discussion of these three principles has been taken from Cherif Bassiouni's article.
25. Quran, Chapter 11, verse 136.
26. The Effect of Islamic Legislation on Crime Prevention, op. cit., p. 201.
27. Ibid., p. 203.
28. Gustav E. von Grunebaum, Medieval Islam, 5th ed., 1962, pp. 142-154.
29. Farooq Hassan, The Concept of State and Law in Islam, University Press of America Inc., Washington, D.C. 1981, p. 43.
30. American Encyclopedia, Vol. 15, p. 499.
31. Ibid.
32. The Effect of Islamic Legislation on Crime Prevention, op. cit., p. 54.
33. Bassiouni, op. cit., p. 152.

34. Quran, Chapter 16, verse 90.
35. Quran, Chapter 3, verse 104.
36. Quran, Chapter 17, verse 33.
37. Quran, Chapter 2, verse 179.
38. Quran, Chapter 24, verse 2.
39. Quran, Chapter 4, verse 41.
40. Quran, Chapter 41, verse 46.
41. American Encyclopedia, op. cit., p. 496.
42. Bassiouni, op. cit., p. 153.
43. These have been gleaned from The Effects of Islamic Legislation on Crime Prevention, op. cit.
44. Bassiouni, op. cit., p. 154.
45. Ibid., p. 155.
46. Ibid.
47. Ibid., p. 156.
48. Ibid.
49. Ibid.
50. Quran, Chapter 5, verse 37.
51. Quran, Chapter 24, verse 2.
52. Hadith.
53. Quran, Chapter 5, verse 41.
54. Quran, Chapter 5, verse 36.
55. Quran, Chapter 5, verse 48.
56. Quran, Chapter 4, verse 93.
57. Quran, Chapter 5, verse 48.

58. The Effect of Islamic Legislation on Crime Prevention, op. cit., p. 424. Also, readers should note that this practice of public beheading is only carried out in fundamentalist Islamic states like the Kingdom of Saudi Arabia, some Gulf States, and was recently decreed in the Republic of Sudan. Other Islamic States including Egypt, Syria, Jordan, and the Maghreb (Morocco, Algeria, Tunisia) carry out capital punishment sentences inside the confinement of state prisons without public attendance.

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