

# Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law

by Matthew Lippman\*

In English, Islam means "submission" or "surrender." In relation to the Islamic religion, it means that individuals should submit or surrender to God's will. Islamic law, *Shari'a*, provides the "path to follow" for salvation.<sup>1</sup>

Today, the Moslem world is witnessing a resurgence of Islamic fundamentalism.<sup>2</sup> A central and controversial tenet of this movement is the incorporation of Koranic criminal law and procedure into domestic legal systems.<sup>3</sup> Professor Joseph Schacht writes that law "remains an important, if not the most important, element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western Ideas."<sup>4</sup>

This article outlines the evolution and substance of Islamic criminal law and procedure and reviews some of the human rights issues raised by the return to Koranic criminal law.<sup>5</sup>

## I. THE EVOLUTION OF ISLAMIC CRIMINAL LAW

In pre-Islamic Arabia, criminal offenses were punished when the victim's tribe exacted "blood revenge" (*lex talionis*) against the tribe of the alleged of-

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<sup>1</sup> Yamani, *The Eternal Shari'a*, 12 N.Y.U. J. INT'L L. & POL. 205 (1979); Note, *Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development*, 18 COLUM. J. TRANSNAT'L L. 413-16 (1979) [hereinafter *Islamic Law and Modern Government*].

<sup>2</sup> See generally G. JANSEN, *MILITANT ISLAM* (1979); G. KEPEL, *MUSLIM EXTREMISM IN EGYPT: THE PROPHET AND PHARAOH* (1984).

<sup>3</sup> See D. LAMB, *THE ARABS JOURNEY BEYOND THE MIRAGE* 111-21 (1987).

<sup>4</sup> J. SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 1 (1964).

<sup>5</sup> Islam is a sacred law which may be distinguished from secular legal systems as follows: (a) Islamic Law is derived from, and its legitimacy is based upon, religious text rather than legislative enactment or judicial opinion; (b) it possesses an immutable, fixed content; (c) it is comprised of specific legal rules rather than broad elastic principles; (d) it has a nonutilitarian approach to rules and punishment—criminal law is designed primarily to assure salvation and religious purity rather than societal security; (e) textual interpretation is the responsibility of religious scholars, and there is no recognition of judicial precedent; (f) primary reliance is placed upon religious obligation, belief, and practice rather than upon the coercive force of law to maintain social stability; (g) the criminal law primarily is applied to Moslems, while non-Moslems are exempt from various obligations and do not enjoy certain rights; (h) it is a utopian ideal; the fact that it is not applied in practice is a concession to societal imperfection and does not call its eternal validity into question. See generally *id.*

fender. This "retaliation" was severe. For example, retaliation for murder was death; for theft, amputation; and for adultery, stoning to death or flogging, along with the blackening of the adulterer's face. The retaliation varied according to the relative social positions of the tribes. Thus, a socially superior tribe punished two victims in lieu of one, a male instead of a female, and a free man in place of a slave. The parties could agree to arbitrate the dispute and satisfy the grievance through mutually agreed upon compensation (usually paid in camels). In practice, this system of blood revenge led to escalating cycles of retaliation and tribal conflict. Arbitration was usually a last resort following a protracted conflict.<sup>6</sup>

The terminology and practices of pre-Islamic Arabia form the foundation of Koranic criminal law, procedure, and punishment. Islam, however, was reformist in aspiration. It replaced blood revenge with uniform criminal offenses, punishments, and procedures which stressed individual rather than collective responsibility.<sup>7</sup>

The Prophet Muhammad received the first in a series of divine revelations (which extended over a period of twenty-two years) in 616 A.D. These revelations were preserved in the Koran and constitute the core of Islam.<sup>8</sup> The Koran is a religious rather than a legal document. It is designed to "regulate not the relationship of man with his fellows but his relationship with his Creator."<sup>9</sup> Compassion for the weak, fairness and good faith in commerce, and the fair administration of justice all are set forth as desirable norms of behavior rather than as legally enforceable rules.<sup>10</sup>

The Koran encompasses 6,342 verses, the vast majority of which are concerned with religious duties and with the ritual practices of prayer, fasting, and pilgrimage. One analyst concludes that conventional legal topics are addressed in roughly 225 verses: family and civil law in seventy verses; constitutional law in ten verses; penal law in thirty; legal jurisdiction and procedure in thirteen; economic and financial administration in ten; and international relations in twenty-five verses.<sup>11</sup>

During the Medinan period, Muhammad and his four successors<sup>12</sup> supplemented the Koran with *ad hoc* solutions to legal disputes, but made no attempt

<sup>6</sup> M. SHARIF, CRIMES AND PUNISHMENT IN ISLAM 7-10 (1972).

<sup>7</sup> See generally M. KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 5-11 (1986).

<sup>8</sup> See generally P. MANSFIELD, THE ARABS 19-40 (1986).

<sup>9</sup> N. COULSON, A HISTORY OF ISLAMIC LAW 12 (1964).

<sup>10</sup> *Id.* at 11.

<sup>11</sup> Khan, *Juristic Classification of Islamic Law*, 6 HOUS. J. INT'L L. 23, 27 (1983).

<sup>12</sup> Muhammad died in 632 and was succeeded by Abu Bakr, 632-634 A.D.; Umar, 634-644 A.D.; Uthman, 644-656 A.D.; and Ali, 656-661 A.D. See generally N. COULSON, *supra* note 9.

to elaborate a comprehensive code.<sup>13</sup> It is to this golden age of Koranic primacy that contemporary fundamentalists seek to return.

#### A. *The Umayyad Dynasty*

The Umayyad dynasty (661–750 A.D.) transferred the seat of Muslim power to Damascus. As a result, the Islamic empire extended from Spain across North Africa and the Middle East to the borders of China.<sup>14</sup> Faced with administering a vast bureaucratic organization, the Caliphs delegated territorial power to subordinates who exercised administrative control—governors, military commanders, treasury officials, and water and market inspectors. Governors exercised plenary judicial authority and usually delegated dispute settlement to their legal secretary (*qadi*) whose decisions were subject to gubernatorial review. The *qadi* was also in charge of the granary and usually served as the chief of police and master of the treasury. It was not until the end of the Umayyad period that the *qadi* became exclusively concerned with judicial affairs.<sup>15</sup>

The *qadi*'s decisions were based on "sound opinion" (*ra'y*) as derived from local customs and laws, administrative regulations, the Koran, and Islamic norms. Each case was considered on its own merits, and there was no attempt to develop a consistent methodology or to adhere to precedent. As a result, the law developed differently in different parts of the Islamic empire. For example, in Medina Arabian tribal custom, females had to contract marriage through their guardians, but the Persian influence in western Iraq allowed women to create their own marriage contracts without the intervention of a guardian.<sup>16</sup>

By the turn of the century (715–720), *qadis* increasingly began to be drawn from the community of pious Muslims. A group of religious scholars who objected to the pragmatism of the Umayyad courts undertook the task of conforming legal rules to the Koran. The task of translating these Koranic injunctions into practice, however, was complicated by the fact that they developed "not in close connexion with the practice, but as the expression of a religious ideal in opposition to it."<sup>17</sup>

Disagreements between religious scholars prompted the development of separate schools which were distinguished by minor differences in their interpretation of religious texts and duties. The Traditionalists were the most conservative of the schools. They argued that only the Koran and the recorded words and acts of the Prophet (the *Sunna*) were to be consulted in the formulation of

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<sup>13</sup> J. SCHACHT, *supra* note 4, at 26.

<sup>14</sup> *Id.* at 27.

<sup>15</sup> *Id.* at 29.

<sup>16</sup> *Id.* at 30.

<sup>17</sup> N. COULSON, *supra* note 9, at 27.

legal rules, and they rejected interpretative reasoning and reliance upon subsidiary sources.<sup>18</sup>

The mutual tolerance and orthodoxy of the schools' divergent views were ensured by their acceptance of the so-called classical theory of jurisprudence, which recognized four sources from which Islamic law could be derived. The so-called four roots (*usul*) are the Koran, *Sunna*, consensus of the scholars (*Ijmā*), and rule by analogy (*Kiyās*).<sup>19</sup> The unity of Islamic law thus is based on an agreement as to the sources of law and an acceptance of a diversity of methodology and doctrine. Significantly, judicial decisions were not included as a source of *Shari'a*, guaranteeing that the development of Islamic law would stress intellectual and theological consistency rather than social utility.

By the beginning of the fourth century of the *hijra*, the Muslim calendar, (approximately 900 A.D.)

the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all.<sup>20</sup>

The so-called closing of the door of *Itjihad* (reasoning) resulted in the rule of *taqlid* (imitation), where doctrine is not to be derived independently, but is to be based upon the teachings of one of the recognized schools.<sup>21</sup> The teachings of the various schools are contained in handbooks dating from the late medieval period as amended by the opinions (*Fatwa*) of legal specialists (*Muftis*).<sup>22</sup> The closing of the door of *Itjihad* guaranteed stability in doctrine but resulted in a *Shari'a* which "fits the social and economic conditions of the early Abbāsīd period"<sup>23</sup> and which "has grown more and more out of touch with later developments of state and society."<sup>24</sup>

#### B. *The Abbāsīd Dynasty*

The Medinan Abbāsīds rose to power (A.D. 750) by attacking Umayyad rule as "impious and unIslamic and by promising a more Islamic sociopolitical or-

<sup>18</sup> J. SCHACHT, *supra* note 4, at 33-36.

<sup>19</sup> *Id.* at 60; N. COULSON, *supra* note 9, at 76. The four primary extant Sunni schools are *Shafi'i*, *Hanifa*, *Maliki*, and *Hanbali*.

<sup>20</sup> J. SCHACHT, *supra* note 4, at 70-71.

<sup>21</sup> *Id.* at 71-75.

<sup>22</sup> *Id.* at 71.

<sup>23</sup> *Id.* at 75.

<sup>24</sup> *Id.*

der.”<sup>25</sup> The Abbāsids were aligned politically with the Islamic schools and their ascendancy led to the appointment of religious scholars (*ulama*) as *qadis* and as legal advisors to the caliphate.

By the time of the Abbāsīd dynasty, *qadis* were full-time judicial officials and were free from gubernatorial and political control.<sup>26</sup> The chief *qadi* was appointed, but he appointed and supervised the other *qadis*. In practice, however, *qadis* were subject to dismissal at the discretion of the central government, which also controlled the jurisdiction of the *Shari'a* courts and which was responsible for executing the courts' judgments.<sup>27</sup>

The rigidity and limited scope of Koranic law and procedure prevented the effective and efficient ordering of society. This led to the creation of supplementary judicial institutions (*Mazalim* jurisdiction) with concurrent jurisdiction over *Shari'a* offenses and supplementary jurisdiction over newly created secular offenses.<sup>28</sup> In addition, parties to a conflict involving a minor criminal offense had the option of following the traditional practice of submitting their case to an arbitrator whose judgment was subject to review by a *qadi*.<sup>29</sup>

In areas concerning primarily civil matters, power was delegated to several individuals. The Inspector of the Marketplace (*Muhtasib*) was given summary jurisdiction over petty commercial matters and was authorized to impose summary punishment on drunks and thieves; the Master of Complaints (*Sahib al-Mazalim*) had jurisdiction over real property; the Master of the Treasury heard tax matters. The jurisdiction between *Shari'a* and *Mazalim* courts varied—in some territories the *qadi* had concurrent jurisdiction with *Mazalim* courts while in others his jurisdiction was limited and often confined to family matters.<sup>30</sup>

The criminal law “was the obvious sphere where political interests could not tolerate the cumbersome nature of *Shari'a* procedure.”<sup>31</sup> The *Wali al-jara'i* was established as a secular court in charge of crimes.<sup>32</sup> This court was not bound by Koranic standards of proof, evidence, procedure, and punishment and “in general could take such measures to discover guilt, including the extortion of confessions, as [it] saw fit.”<sup>33</sup>

<sup>25</sup> J. ESPOSITO, *ISLAM AND POLITICS* 15 (1984).

<sup>26</sup> J. SCHACHT, *supra* note 4, at 50–51.

<sup>27</sup> *Id.*

<sup>28</sup> N. COULSON, *CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE* 66–70 (1969) [hereinafter *CONFLICTS AND TENSIONS*].

<sup>29</sup> J. SCHACHT, *supra* note 4, at 189.

<sup>30</sup> *CONFLICTS AND TENSIONS*, *supra* note 28, at 66–67.

<sup>31</sup> N. COULSON, *supra* note 9, at 127. These procedures are discussed *infra* at footnotes 201–25. These procedures include the following: the oath, eyewitness testimony, stringent qualifications for witnesses, prohibition on cross-examination, dismissal of cases when the offense charged is not proven rather than conviction on a lesser included offense, and the absence of juries and appeal.

<sup>32</sup> *Id.* at 127–28.

<sup>33</sup> *Id.* at 128.

By the end of the Abbāsid period (in the tenth century) the *Shari'a*, with the exception of family law, generally had been supplemented or replaced by secular law as applied by *Mazalim* tribunals.<sup>34</sup> "[I]t was weakest, and in some respects even nonexistent, on penal law, taxation, constitutional law, and the law of war; and the law of contracts and obligations stands in the middle."<sup>35</sup> This secular law was an amalgam of the *Shari'a*, administrative decrees, custom, and principles drawn from other legal systems.<sup>36</sup>

In most Islamic countries legal theory accommodated practice. The *ulama* accepted that the "ever-increasing corruption of contemporary conditions" excused adherence to the *Shari'a* as "long as the sacred Law received formal recognition as a religious ideal, it did not insist on being fully applied in practice."<sup>37</sup> Still, the *Shari'a* continued to possess "enormous prestige and unquestioned ascendancy"<sup>38</sup> and "could not abandon its claim to exclusive theoretical validity . . . ."<sup>39</sup>

### C. *The Introduction of Western Law*

By the sixteenth century three major Muslim empires had emerged: the Sunni Ottoman in West Asia and Eastern Europe, the Shi Safavid in Persia, and the Sunni Mughal in the Indian subcontinent.<sup>40</sup> The *Shari'a* "was the official law of the empire" and "defined the norms of life."<sup>41</sup> In practice, however, the *Mazalim* courts adjudicated most legal matters, and the *Shari'a* courts were restricted to issues of personal status: marriage, divorce, inheritance, and religious endowment.<sup>42</sup>

Western law made its initial impact through a system of capitulations (treaties) pursuant to which citizens of European powers residing in the Ottoman empire were governed by the laws of their own countries. European codes were also frequently applied in commercial disputes between westerners and Muslims, and over time Islamic lawyers and judges gained a familiarity with foreign law. The increasing commercial trade and improving relationship between Europe and the Middle East gradually led to the wholesale adoption of western legal codes. These codes offered a readily available solution to problems of commerce,

<sup>34</sup> J. SCHACHT, *supra* note 4, at 76.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 76-85.

<sup>37</sup> *Id.* at 84.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> J. ESPOSITO, *supra* note 25, at 24.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 24, 25.

corporate formation, and liability. By permitting European merchants to follow familiar laws and practices, the codes facilitated trade.<sup>43</sup>

Large-scale reception of European law occurred in the Ottoman empire during the so-called Tanzimat reforms of 1839–1876. French statutes provided the model for the 1850 Ottoman commercial code, which included a provision for the payment of interest, and for the Ottoman Penal Code, which abolished the severe Koranic punishments, with the exception of the death penalty for apostasy (the rejection of Islam). This was followed by incorporation of the French codes of commercial procedure in 1861, maritime commerce in 1863, and by adoption of a new system of secular, civil courts.<sup>44</sup>

In a series of enactments beginning in 1875, Egypt adopted the French penal, commercial, civil, and maritime codes and established a system of secular courts to apply them.<sup>45</sup> English, French, German, Italian, and Swiss codes gradually spread throughout the Middle East, and the remaining vestiges of the *Shari'a* began to disappear. Some countries, however, continued to apply the *Shari'a* in family law, succession, *waqf* (charitable donations), and the law of gifts.<sup>46</sup>

As a result, "laws of European origin today form a vital and integral part of the legal systems of most Middle Eastern countries."<sup>47</sup> The Arabian Peninsula, however, "remained generally immune to the influence of European laws"<sup>48</sup> and, until relatively recently, the *Shari'a* remained, in both practice and theory, the fundamental law in the Gulf states.<sup>49</sup>

Outside the Middle East, western law was spread primarily by occupying colonial powers. The French imposed their civil and criminal codes in Algeria (*Droit Musulman Algerien*) and restricted the *Shari'a* to matters of personal status. A similar policy was followed by the Dutch in Indonesia. In India and in the Sudan, Great Britain initially preserved the indigenous legal systems, but gradually introduced the common law. The symbiosis of Islamic judges and English law resulted in the development of unique codes such as the Anglo-Muhammadan law that forms the basis of the legal system in contemporary Pakistan.<sup>50</sup>

The disparity between the Islamic ideal and reality historically has led to fundamentalist, revivalist movements which have attacked the secularism and corruption of Muslim societies and regimes. These movements have had a utopian vision of a return to the Median age of the Prophet and the Rightly

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<sup>43</sup> N. COULSON, *supra* note 9, at 149–51.

<sup>44</sup> *Id.* at 151.

<sup>45</sup> *Id.* at 152.

<sup>46</sup> *Id.* at 154.

<sup>47</sup> *Id.* at 152.

<sup>48</sup> *Id.* at 154.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 154–62; J. SCHACHT, *supra* note 4, at 94–99.

Guided Caliphs.<sup>51</sup> They have claimed that the central function of government is the enforcement of God's law and the creation of a social order based upon Koranic principles. According to these movements, when the ruler fails to adhere to the *Shari'a*, the obligation of political obedience lapses and is replaced by a duty of disobedience and resistance.<sup>52</sup> Thus, Islam historically "is full of movements that sought simultaneously to restore what they saw as the true doctrine of Islam and to overthrow the existing political order."<sup>53</sup>

The contemporary world is witnessing a "Second Islamic Revolution" against western influence.<sup>54</sup> Fundamentalists claim that only a return to Islam will protect Muslims against the influence of the western media,<sup>55</sup> secular education,<sup>56</sup> foreign economic penetration<sup>57</sup> and nationalism,<sup>58</sup> all of which threaten to submerge the Islamic world under a wave of "conspicuous consumption and the cult of economic growth, hedonism and permissiveness."<sup>59</sup> This is the new *Jahiliyya* (pre-Islamic time or barbarity)—a society based upon the misguided law of man rather than on the law of God. The so-called *Jahiliyya* verse of the Koran warns that "[w]hoso judges not according to what God has sent down—they are the evildoers."<sup>60</sup> The solution is said to lie neither in nationalism nor in Pan-Arabism but in the creation of a community of believers (*Umma*) united by the faith.<sup>61</sup>

"The linchpin of this reformatory enterprise is the slogan of the 'application of Muslim law' (*tatbiq al-Shari'a*), or in its up-to-date, and somewhat pared-down form, 'codification of Muslim Law' (*taqnin al-Shari'a*)."<sup>62</sup> This movement is neither inherently revolutionary nor conservative—it may be used to generate either opposition against or support for a regime. Malise Ruthven writes that "Islamic reassertion is thus a bridge as well as a sword, a means of healing the social and cultural fissures resulting from the imposition of western culture as

<sup>51</sup> J. ESPOSITO, *supra* note 25, at 31–33, 54–57.

<sup>52</sup> *Id.* at 26–28.

<sup>53</sup> E. MORTIMER, *FAITH AND POWER THE POLITICS OF ISLAM* 40 (1982). See generally G. KEPEL, *supra* note 2.

<sup>54</sup> E. SIVAN, *RADICAL ISLAM MEDIEVAL THEOLOGY AND MODERN POLITICS* 45 (1985). The author suggests that the first "Islamic Revolution" was the struggle against colonialism. *Id.*

<sup>55</sup> *Id.* at 3–6.

<sup>56</sup> *Id.* at 6–10.

<sup>57</sup> *Id.* at 10–12.

<sup>58</sup> J. ESPOSITO, *supra* note 25, at 232–34.

<sup>59</sup> E. SIVAN, *supra* note 54, at 138.

<sup>60</sup> KORAN V: 48. Koranic quotations are based upon *THE KORAN INTERPRETED* (A. Arberry trans. 1955). The translation and sequence of verses varies in different versions of the Koran. See generally E. SIVAN, *supra* note 54, at 97, 149–52.

<sup>61</sup> See generally E. SIVAN, *supra* note 54.

<sup>62</sup> *Id.* at 143.



well as the source of a vocabulary that can be used to dethrone rulers or justify their assassination.”<sup>63</sup>

## II. ISLAMIC CRIMINAL LAW AND PROCEDURE

### A. Sources

The primary sources of the *Shari'a* are the Koran, *Sunna*, consensus (*Ijmā*), and analogical reasoning (*Qiyas*). The Koran is the word of God as revealed by the Angel Gabriel to the Prophet Muhammad and recorded by scribes and edited by scholars. It is the primary source of Islamic law.<sup>64</sup>

The next most authoritative source is the *Sunna*, or the tradition of the Prophet. The *Sunna* are the recorded statements, judgments, and acts of the Prophet which explain, elaborate, and supplement the Koran. Each verse (*Hadith*) is linked to the Prophet through a chain of authorities (*isnad*). *Hadiths* are ranked according to their degree of authenticity as sound (*sahih*), good (*hasan*), and weak (*daif*).<sup>65</sup>

The Prophet Muhammad in his last sermon stated, “O people, bear in mind what I am saying, for I might not see you again. I have left you two things. If you hold fast to them never will you go astray after me. They are: God’s Book and His Prophet’s *Sunnah*.”<sup>66</sup> Other supplementary sources have been “a matter of controversy as to . . . validity or definition . . . [S]ome jurists . . . considered the Holy Book . . . as the sole basic source of all Islamic jurisprudence.”<sup>67</sup> Following the Prophet’s death, the Companions of the Prophet at times found the Koran and *Sunna* ambiguous or seemingly contradictory. In such cases jurists often resorted to the science of interpretation (*ilm usul al-fih*).<sup>68</sup>

Consensus or collective agreement among scholars is based on the Koranic recognition that “[y]ou are the best nation ever brought forth to men, bidding honour, and forbidding dishonour, and believing in God.”<sup>69</sup> A rule by consensus requires (a) participation of a reasonable number of jurists, (b) who reach a unanimous decision, (c) based upon an unequivocal statement of agreement by each jurist.<sup>70</sup> Consensus is the basis for setting compensation for injury to a woman at half that of a free Muslim male.<sup>71</sup> Analogical reasoning is used to

<sup>63</sup> M. RUTHVEN, *ISLAM IN THE WORLD* 361 (1984).

<sup>64</sup> *Id.* at 101–40.

<sup>65</sup> *Id.* at 148–56.

<sup>66</sup> Khan, *supra* note 11, at 24.

<sup>67</sup> *Id.*

<sup>68</sup> C. BASSIOUNI, *INTRODUCTION TO ISLAM* 28 (1985).

<sup>69</sup> KORAN III: 110.

<sup>70</sup> J. SCHACHT, *supra* note 4, at 30.

<sup>71</sup> Kamel, *The Principle of Legality and its Application in Islamic Criminal Justice*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 149–55 (C. Bassiouni ed. 1982).

broaden an existing rule to encompass (arguably) analogous situations.<sup>72</sup> Analogy was used to expand the Koranic prohibition of alcohol to narcotics based on the fact that both substances produce similar harms.<sup>73</sup>

Other subsidiary techniques of reasoning have been used to expand and elaborate the *Shari'a* texts. Public interest (*al-istislah*) was invoked in Tunisia to abolish polygamy on the grounds that it is impossible for a husband to be "just" in his relations with each of his many wives.<sup>74</sup> Preference (*al-istihsan*) has been relied upon when the Koran, *Sunna*, and recognized techniques of reasoning have suggested various possible results to a problem, and a jurist has followed the rule he "prefers."<sup>75</sup> Most schools, for instance, proscribe the drinking of alcohol while some maintain it is "strong" drinks which are prohibited, and others insist (prefer) that only drinks from grapes and palm trees should be subject to prohibition.<sup>76</sup> Custom (*al-urf*) has been invoked to conform the *Shari'a* to the prevailing practice in a community.<sup>77</sup> For example, customs (and the law) differ as to whether women must be veiled or cover various portions of their body.<sup>78</sup> These diverse sources and methodologies have combined to shape Islamic criminal law and procedure.

## B. Criminal Law

Criminal acts are divided into three categories. *Hudud* offenses are crimes against God whose punishment is specified in the Koran and the *Sunna*.<sup>79</sup> As God's agent, the state initiates the prosecution of the accused. *Qesas* are crimes of physical assault and murder punishable by retaliation—the return of life for a life in case of murder.<sup>80</sup> The victim or the surviving heirs may waive the punishment and ask for compensation (blood-money or *diyya*) or pardon the offender.<sup>81</sup> *Ta'azir* are offenses whose punishments are not fixed by the Koran or *Sunna* and are within the discretion of the *qadi*.<sup>82</sup>

<sup>72</sup> *Id.* at 156.

<sup>73</sup> D. PERETZ, R. MOENCH & S. MOHSEN, *ISLAM LEGACY OF THE PAST, CHALLENGE OF THE FUTURE* 109 (1984) [hereinafter *ISLAM LEGACY*].

<sup>74</sup> Khadduri, *The Maslaha (Public Interest) and Illa (cause) in Islamic Law*, 12 INT'L L. & POL. 213, 216 (1979); see also KORAN IV: 3.

<sup>75</sup> N. COULSON, *supra* note 9, at 60.

<sup>76</sup> *ISLAM LEGACY*, *supra* note 73, at 108; see also KORAN V: 93.

<sup>77</sup> Khan, *supra* note 11, at 23. See generally E. MORTIMER, *supra* note 53, at 400.

<sup>78</sup> E. MORTIMER, *supra* note 53, at 400–01; see also KORAN XXIV: 30, 31.

<sup>79</sup> See generally Mansour, *Hudud Crimes*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 195, 195–201 (C. Bassiouni ed. 1982).

<sup>80</sup> M. SIDDIQI, *THE PENAL LAW OF ISLAM* 52 (1979).

<sup>81</sup> See generally Bassiouni, *Qesas Crimes*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 203, 203–05 (C. Bassiouni ed. 1982).

<sup>82</sup> See generally Benmelha, *Ta'azir Crimes*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 211, 211–55 (C. Bassiouni ed. 1982).

*Qesas* and *Ta'azir* are offenses against the person and are private wrongs. The victim or heirs initiate prosecution of *Qesas* and, as noted, may waive punishment and ask for compensation or pardon the offender. The state initiates prosecution of *Ta'azir* (according to most jurists) as part of the ruler's responsibility to maintain public order and welfare. The victim of *Ta'azir* may request the sovereign to exercise the power of grace or pardon (*'afw*), and the sovereign, at his discretion, may choose not to punish the offender.<sup>83</sup>

### 1. *Hudud* Offenses

There are seven *Hudud* offenses. Theft (*saraqah*) is the taking of the property of another whose value is equal to the prescribed amount (*nisab*), usually set at ten dirhams (about 75 cents). The property must be taken from the custody of another in a secret manner, and the thief must obtain full possession of the property. The custody requirement is fulfilled by the property being under guard or in a place of safekeeping, for instance, in a house. Thievery is punished severely since it deprives an individual of his property and creates fear, distrust, and apprehension in the community.<sup>84</sup> The Koran advises, "they shall be slaughtered . . . their hands . . . shall . . . be . . . struck off . . . . That is degradation for them in this world; and in the world to come awaits them a mighty chastisement . . . ." <sup>85</sup> The first and second acts of theft are punishable by amputation of the hands, and it is generally agreed that the third and fourth offenses are punishable by amputation of the feet. Some scholars maintain that the third offense should result in imprisonment until the offender reforms.<sup>86</sup>

Muslims are obligated to give alms to the poor (*zakah*), and the state is required to provide for the poor. A thief who steals to survive is not subject to *Hudud*.<sup>87</sup> During a famine, Omar Ibn Al-Khattab suspended amputation because people were forced to steal in order to survive.<sup>88</sup> Theft of some items is not subject to the *Hudud* penalty and is punished by *Ta'azir*: immovables (e.g., land and items affixed to land); items available in large quantities (e.g., wood, hay, fruit, grains, game, and fish); objects normally not subject to ownership (e.g., fish, birds); perishables (e.g., meat, eggs); religious icons and texts (e.g., the Koran); property deemed to be of no value (e.g., pork, alcohol); musical instruments used for idle amusements; and objects not categorized as property (e.g., children). Also excluded from *Hudud* is theft by an individual's husband, wife, near

<sup>83</sup> ISLAM LEGACY, *supra* note 73, at 112.

<sup>84</sup> M. SIDDIQI, *supra* note 80, at 127.

<sup>85</sup> KORAN V: 38.

<sup>86</sup> M. SIDDIQI, *supra* note 80, at 127-28.

<sup>87</sup> *Id.* at 134-37.

<sup>88</sup> *Id.* at 137.

relative, guest, or slave.<sup>89</sup> Other property offenses such as embezzlement (the misappropriation of property by an individual who initially obtained lawful possession, such as a bank cashier) or obtaining property by false pretenses (trickery) are *Ta'azir* offenses.<sup>90</sup>

The crime of *zina* includes both adultery (sexual relations between individuals, at least one of whom is married) and fornication (sexual relations between unmarried individuals). The Koran requires four male eyewitnesses or four confessions on four separate occasions by the defendant in open court to sustain a *zina* conviction. Other offenses require only two eyewitnesses or confessions.<sup>91</sup>

Adultery and fornication undermine marriage and may lead to family conflict, jealousy, divorce, illegitimate births, and the spread of disease. The encouragement and state monetary support for early marriage and the sanctioning of polygamy are thought to make fornication and adultery unnecessary.<sup>92</sup> Married persons who commit *zina* are punished by stoning to death and unmarried persons by one hundred lashes. The additional penalties of flogging for married persons and exile for unmarried persons are required by some jurists.<sup>93</sup>

The lodging of charges of *zina* is constrained by the fact that an individual who falsely accuses a Muslim of *zina* is criminally punished for the offense of defamation (*qazaf*). In addition to false accusations of fornication, defamation encompasses impugning the legitimacy of a woman's child. Eighty lashes is the penalty for a free individual and forty lashes for a slave.<sup>94</sup> The Koran states: "[A]nd those who cast it up on women in wedlock, and then bring not four witnesses, scourge them with eighty stripes, and do not accept any testimony of theirs ever—they are ungodly."<sup>95</sup> A husband's defamation under oath of his wife (*li'an*) results in divorce and is not subject to punishment.<sup>96</sup>

Highway robbery (*haraba*) is punishable by amputation and, in some cases, execution.<sup>97</sup> This offense interferes with commerce and creates fear among travelers.<sup>98</sup> The Koran states: "[T]his is the recompense of those who fight against God and His Messenger, and hasten about the earth, to do corruption there: they shall be slaughtered, or crucified, or their hands and feet shall alternately be struck off, or they shall be banished from the land."<sup>99</sup>

<sup>89</sup> *Id.* at 129–37.

<sup>90</sup> Mansour, *supra* note 79, at 199.

<sup>91</sup> *Id.*

<sup>92</sup> M. SIDDIQI, *supra* note 80, at 6–8.

<sup>93</sup> *Id.* at 53–59.

<sup>94</sup> J. SCHACHT, *supra* note 4, at 179.

<sup>95</sup> KORAN XXIV: 4.

<sup>96</sup> J. SCHACHT, *supra* note 4, at 165.

<sup>97</sup> M. SIDDIQI, *supra* note 80, at 141.

<sup>98</sup> *Id.* at 140.

<sup>99</sup> KORAN V: 33, 34.

An unrepentant bandit who takes property has his right hand and left foot amputated for the first offense and left hand and right foot amputated for the second offense. A bandit who murders is beheaded while a bandit who murders and plunders is punished by beheading followed by the display of the body in a crucifixion-like form. Banding together with intent to plunder and murder is penalized by a discretionary penalty, usually imprisonment until the individual repents.<sup>100</sup> A *qadi* may impose the additional punishment of banishment, which is interpreted to mean imprisonment, internal exile, or expulsion (of non-citizens) from the state. A bandit who voluntarily surrenders and repents may be pardoned for the crime of banditry and punished only for additional offenses he may have committed, such as assault or theft.<sup>101</sup>

Drinking wine or intoxicating beverages (*khamr*) is punishable by eighty lashes, although the *Shafi'i* school sets the penalty at forty lashes.<sup>102</sup> Alcohol is thought to induce indolence and inattentiveness to religious duties.<sup>103</sup> The Koran admonishes Muslims: "O believers, wine and arrow-shuffling, idols and divining arrows are an abomination, some of Satan's work; . . . so avoid it; . . . Satan only desires to precipitate enmity and hatred and to bar you from the remembrance of God, and from prayer."<sup>104</sup> A *Hadith* admonishes: "He who drinks wine, whip him."<sup>105</sup>

Most scholars argue that all alcoholic beverages are prohibited. The *Hanafi* school, however, only considers drinks made from grapes to be prohibited and permits the drinking of other alcoholic drinks "until they cause intoxication."<sup>106</sup> This view, in part, is supported by the story that Ali (the first governor of Yemen appointed by Muhammad) offered wine to his guests, then prosecuted those who became inebriated. When the guests protested, Ali explained, "the punishment is not for drinking, it's for being drunk."<sup>107</sup>

The prohibition on alcohol has been extended by analogy to drugs, based on the fact that "drugs have the same effect on the human mind as alcohol, and they therefore produce the same public harm that led to the prohibition of the former."<sup>108</sup> Islam does not punish individuals addicted to alcohol or drugs. Addicts are denied a place in heaven as idol worshippers, but they are permitted to use drugs or alcohol while overcoming their addiction. Once having been

<sup>100</sup> M. SIDDIQI, *supra* note 80, at 141.

<sup>101</sup> *Id.*

<sup>102</sup> Kamel, *supra* note 71, at 165.

<sup>103</sup> ISLAM LEGACY, *supra* note 73, at 107, 108.

<sup>104</sup> KORAN V: 90, 91.

<sup>105</sup> Mansour, *supra* note 79, at 200.

<sup>106</sup> ISLAM LEGACY, *supra* note 73, at 108.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 109.

cured of their dependency, they will be punished by *Hudud* if they return to their venal habit.<sup>109</sup>

Apostasy (*ridda*) is the voluntary renunciation of Islam by a member of the Islamic faith, and is punishable by death. An individual commits apostasy by converting to a non-Islamic religion or to idol worship, or by rejecting any of the tenets of Islam.<sup>110</sup> The apostate is given the opportunity (usually three days) to reconsider his or her rejection of Islam. A male apostate who persists in his views is executed, but a female apostate is imprisoned until she renounces her views and affirms her adherence to Islam.<sup>111</sup>

The Koran states: "[A]nd whosoever of you turns from his religion, and dies disbelieving—their works have failed in this world and the next; those are the inhabitants of the Fire; therein they shall dwell forever."<sup>112</sup> The death penalty for apostasy, in part, is based on the language of a *Hadith*: "Whoever changes his religion, kill him . . ."<sup>113</sup> Apostates are considered legally dead, and if they escape to a non-Muslim territory, their property is distributed among their Muslim heirs.<sup>114</sup> The harsh punishment for apostasy is based on the belief that abandonment of Islam constitutes high treason.<sup>115</sup> Some jurists contend that punishment of apostasy also emphasizes the gravity of converting to Islam and discourages conversion by individuals who seek to create discord within the Islamic community.<sup>116</sup>

Rebellion, *baghi*, is the intentional, forceful overthrow or attempted overthrow of the legitimate leader (*Imam*) of the Islamic state: it is a "war against Allah and His Messenger."<sup>117</sup> The *Imam* is obligated to consider the rebels' demands; if the demands lack merit, he is required to call upon the rebels to heed his request that they end their rebellion. The *Imam* is legally justified in ordering the army to attack rebels who refuse to lay down their arms.<sup>118</sup>

Rebels who are killed are considered to have been punished by *Hudud*; rebels who surrender or who are arrested are subjected to *Ta'azir*; while rebels who are captured in combat are executed. If the rebels' allegations possess merit and the *Imam* has deviated from Islamic principles, he is removed from office and subjected to *Ta'azir* punishment. In such a case, the rebels are absolved from guilt.<sup>119</sup>

<sup>109</sup> *Id.*

<sup>110</sup> M. SIDDIQI, *supra* note 80, at 95.

<sup>111</sup> *Id.* at 109.

<sup>112</sup> KORAN II: 217.

<sup>113</sup> Kamel, *supra* note 71, at 166.

<sup>114</sup> M. SIDDIQI, *supra* note 80, at 106.

<sup>115</sup> *Id.* at 108–09.

<sup>116</sup> ISLAM LEGACY, *supra* note 73, at 106.

<sup>117</sup> M. SIDDIQI, *supra* note 80, at 140.

<sup>118</sup> Mansour, *supra* note 79, at 197, 198.

<sup>119</sup> *Id.*

## 2. *Qesas* Offenses

*Qesas* means "equality" or "equivalence."<sup>120</sup> *Qesas* are divided into crimes against the person (murder) and crimes against the body (bodily injury). *Qesas* crimes include murder, voluntary killing, involuntary killing, intentional physical injury or maiming, and unintentional physical injury or maiming.<sup>121</sup>

Islam considers murder to be the most serious crime against the person. Muhammad reportedly stated that his first act on the Day of Judgment would be to punish murderers by making them suffer the torment of Hell: "[N]or slay the soul God has forbidden except by right."<sup>122</sup> The Koran warns that "whoso slays a believer wilfully, his recompense is Hell, therein dwelling forever, and God . . . will curse him, and prepare for him a mighty chastisement."<sup>123</sup> The murderer is executed unless the victim's family demands compensation (*diyya*) or pardons the offender. The Koran urges: "O Believers, prescribed for you is retaliation, touching the slain . . ."<sup>124</sup>

Islam recognizes various types of homicide. Willful murder (or murder with deliberate intent, *Qatl al-'Amd*) is the deliberate killing of another with a lethal weapon or instrument such as a club, a sharp stone, or fire. The offender is subject to retaliation or, if remitted, compensation and a loss of any rights of inheritance from the victim. Imam Abu Hanifa applies the death penalty to a Muslim who kills a non-Muslim, but Imam al-Shafi'i points out that the prophet said, "[a] Muslim shall not suffer death for an unbeliever."<sup>125</sup>

Voluntary manslaughter (*Qata Shibu'l-'Amd*) is the killing of an individual with an instrument which is not recognized as a lethal weapon. Punishment for this offense consists of religious expiation (atonement through acts such as fasting, giving alms to the poor, the freeing of slaves) and blood-money. Moreover, the slayer is prohibited from inheriting the victim's property.<sup>126</sup>

Homicide by misadventure or mistake (*Qatl al-Khata'*) is a lethal act which inadvertently or through error results in death. There may be error (misadventure) in act or in intention. Error in act occurs, for instance, when an individual shoots at a target and inadvertently kills a bystander. Error in intention occurs when an individual shoots at what he or she believes to be an animal, but which turns out to be an individual. Homicide by misadventure has been extended to encompass killings resulting from unconscious acts, such as an individual who rolls over in his sleep and suffocates his spouse. The slayer by misadventure is

<sup>120</sup> Bassiouni, *supra* note 81, at 203.

<sup>121</sup> *Id.*

<sup>122</sup> KORAN XXV: 68, 69.

<sup>123</sup> KORAN IV: 93.

<sup>124</sup> KORAN II: 178.

<sup>125</sup> M. SIDDIQI, *supra* note 80, at 149.

<sup>126</sup> *Id.* at 152, 153.

required to free a Muslim slave, or fast two months and pay compensation. The offender is also prohibited from inheriting property from the victim. As with all homicides, the victim's heirs have the discretion to pardon the killer.<sup>127</sup>

Homicide by intermediate cause (*Qatl bi-Sabab*) is death resulting from an independent cause—a wall collapses or an individual falls into an open well. In such cases, the owner or builder is strictly liable and is required to pay a fine.<sup>128</sup>

Battery or the infliction of bodily harm, like intentional murder, is subject to retaliation if it results in serious, permanent injury or physical disfigurement. The Koran states: "And therein We prescribed for them: 'a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds retaliation.'" <sup>129</sup>

In the case of wounds, the offender's punishment is the infliction of the identical harm as was inflicted on the victim.<sup>130</sup> There is, however, no retaliation for injury to the tongue, bones (other than teeth), sexual organs, or for the removal of the eye from its socket since such injuries are difficult to replicate. The latter injuries require compensation.<sup>131</sup> Neither is there normally retaliation for acts whereby a male inflicts bodily injury upon a female,<sup>132</sup> or where a free person inflicts bodily injury upon a slave. Nor is retaliation allowed for injuries inflicted by one slave upon another.<sup>133</sup> Retaliation applies between Muslims and non-Muslims.<sup>134</sup> The Koran and *Sunna* do not specify the amount of compensation required for injuries. Jurists generally agree on a schedule of compensation which specifies the value of human life and of various bodily parts.<sup>135</sup>

### 3. *Ta'azir* Offenses

*Ta'azir* means chastisement and denotes offenses for which the Koran or *Sunna* does not prescribe a penalty.<sup>136</sup> The *qadi's* power to punish *Ta'azir* offenses stems from the sovereign's duty to protect the public welfare.<sup>137</sup> A *Ta'azir* offense threatens one of the five essential guarantees of Islam—the practice of religion, the development of the mind, the right to procreation, the right to personal security, and the right to possess property and wealth.<sup>138</sup>

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 153.

<sup>129</sup> KORAN V: 45.

<sup>130</sup> M. SIDDIQI, *supra* note 80, at 154.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 155.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 155–57.

<sup>136</sup> Benmelha, *supra* note 82, at 212.

<sup>137</sup> *Id.* at 213.

<sup>138</sup> *Id.* at 213–14.



There are four instances in which *Ta'azir* punishment is usually inflicted:

(1) *Ta'azir* punishment is inflicted for acts which do not meet the technical requirements of *Hudud* or *Qesas*, such as theft of an item which is not of sufficient value to qualify as a *Hudud* offense, attempted adultery, or assault;<sup>139</sup>

(2) Criminal offenses, normally punished by *Hudud*, which due to extenuating circumstances (such as theft among relatives) or doubt (a failure of proof at trial, such as insufficient witnesses), in practice often are punished by *Ta'azir*. In theory, however, the *qadi* is not authorized to exercise such discretion and must convict or acquit the offender;<sup>140</sup>

(3) *Ta'azir* punishment is inflicted for acts condemned in the Koran and *Sunna* or contrary to the public welfare which are not subject to *Hudud* or *Qesas*: consumption of pork, usury, breach of trust by a public authority, false testimony, bribery, contempt of court, sodomy, and misleading the public through sorcery, fortune telling, astrology, or palmistry;<sup>141</sup>

(4) Several acts which violate social norms and mores, such as the use of obscenity, provocative dress, loud and disorderly behavior, or a wife's refusal to obey her husband are punished by the *Ta'azir*.<sup>142</sup>

*Ta'azir* offenses are punished in accordance with the *qadi*'s view of the seriousness of the offense, the offender's background and the public interest in deterring such conduct.<sup>143</sup> The range of possible punishments are contained in the Koran and include reprimand, threats, boycott (isolation from community activities or internal exile), public disclosure of the offense, fines, imprisonment, flogging, and the death penalty (imposed for espionage).<sup>144</sup> Some jurists recognize the right of the ruler, at the request of the victim, to pardon a *Ta'azir* offense. Others contend *Ta'azir* is voided when an offender repents and demonstrates an adherence to Islam.<sup>145</sup>

### C. Criminal Procedure

Procedural safeguards are prescribed neither in the Koran nor in the *Sunna*, but are left to the discretion of the ruler who is responsible for the public welfare. The ruler's formulation of procedural rules, however, is guided by various Koranic principles.<sup>146</sup>

<sup>139</sup> *Id.* at 212–13.

<sup>140</sup> *Id.* at 213.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> M. SIDDIQI, *supra* note 80, at 164, 165.

<sup>144</sup> *Id.* at 164–76.

<sup>145</sup> Benmelha, *supra* note 82, at 223, 224.

<sup>146</sup> Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 91, 93 (C. Bassiouni ed. 1982).

*Respect for the individual is the central precept of Islam.* The individual is regarded as the most sacred of Allah's creations and therefore must be treated with justice and charity. The warning against persecution of individuals reportedly is repeated 299 times in the Koran;<sup>147</sup> the phrase justice and equality (*al quest*) appears at least sixteen times.<sup>148</sup>

*Free men are equal before the law and are entitled to equal protection from the law.* The law is to be applied uniformly regardless of religious or economic status. Muhammad observed that "[m]en are equal as the teeth of a comb. No Arab individual is superior to a non-Arab except in piety."<sup>149</sup> The Prophet promised that if his own daughter Fatimma committed theft that she would be treated as any other criminal and subjected to *Hudud* punishment (amputation).<sup>150</sup>

The primary exception to the egalitarian principle is slavery. Slaves are granted less protection than the free, while also being excused from certain forms of criminal liability.<sup>151</sup> Non-Muslims (*dhimmi*) receive the full protection of the criminal law, but as non-believers are not subject to the *Hudud* punishment for drinking or defamation.<sup>152</sup> In general, non-Muslims may not testify against Muslims.<sup>153</sup> Women are singled out for special treatment—the testimony of two women is worth that of one man; the compensation due for injury to a woman is one-half that which is due for the identical injury to a male; and women are treated more leniently than are men in the infliction of some *Hudud* penalties.<sup>154</sup>

*Judicial and governmental decisions must conform to the Shari'a.* A governmental or judicial decision must be consistent with the *Shari'a*; otherwise it is a nullity. The Koran urges, "[f]ollow what has been sent down to you from your Lord, and follow no friends other than He . . . ." <sup>155</sup> "Judgment belongs only to God; He has commanded that you shall not serve any but Him."<sup>156</sup> Moreover, "[w]hoso judges not according to what God has sent down—they are the unbelievers."<sup>157</sup>

<sup>147</sup> Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 4, 19 (C. Bassiouni ed. 1982) [hereinafter *Sources of Islamic Law*].

<sup>148</sup> al-Saleh, *The Right of the Individual to Personal Security in Islam*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 55, 80 (C. Bassiouni ed. 1982).

<sup>149</sup> *Id.* at 80.

<sup>150</sup> al-Awwa, *The Basis of Islamic Penal Legislation*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 127, 140 (C. Bassiouni ed. 1982).

<sup>151</sup> J. SCHACHT, *supra* note 4, at 127–29.

<sup>152</sup> *Id.* at 132.

<sup>153</sup> *Id.*

<sup>154</sup> *See id.* at 126, 127.

<sup>155</sup> KORAN VII: 3.

<sup>156</sup> KORAN XII: 40.

<sup>157</sup> KORAN V: 47.

*Law is not to be applied retroactively.* The Koran states: "We never chastise, until We send forth a Messenger."<sup>158</sup> This verse is interpreted to require that individuals be informed of the provisions of a law before they are prosecuted or punished for violating the law's requirements. The Prophet did not apply the *Shari'a* to individuals who, prior to their acceptance of Islam, violated the Koranic prohibitions against being married to two sisters at the same time, being married to their father's former wives, or usury. However, most jurists argue that a law which benefits the accused may be applied retroactively.<sup>159</sup>

*The accused is presumed innocent until proven guilty.* The burden of proof rests upon the accuser, and doubt is to be resolved in favor of the accused. The Prophet stated that "[h]ad men been believed only according to their allegations, some persons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof."<sup>160</sup> Aicha, the wife of the Prophet, reportedly admonished Muslims to "[a]void condemning the Muslim to *Hudud* whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favor of innocence [pardon] than in favor of guilt [punishment]."<sup>161</sup>

*Punishment fits the crime.* The individual is to be punished in accordance with the harm inflicted upon humanity, society, and God. The penalties for *Hudud* offenses are specified in the Koran. *Qesas* require an equivalence between the crime and its punishment. The punishment of *Ta'azir* is usually guided by community consensus (*Ijmā*), by custom (*al-urf*), or by analogy to offenses with fixed penalties (*Qiyas*).<sup>162</sup>

Jurists agree that based on *Shari'a* principles,<sup>163</sup> the accused is to be free from pre-trial detention, is not to be compelled to confess, is to be given the opportunity to be represented by an attorney, and is to be free from warrantless searches and seizures.

## 1. Pre-Trial Detention

The system of pre-trial detention and release on monetary bail is generally not recognized in the *Shari'a*. Islamic jurists appear to agree that the accused should not be detained prior to trial since an accusation of guilt alone is not sufficient to justify an accused's incarceration. Pre-trial detention also interferes with an individual's freedom of movement which is protected by the Koran:

<sup>158</sup> KORAN XVII: 15.

<sup>159</sup> al-Saleh, *supra* note 148, at 63.

<sup>160</sup> *Id.* at 67.

<sup>161</sup> *Sources of Islamic Law*, *supra* note 147, at 26.

<sup>162</sup> See M. SIDDIQI, *supra* note 80, at 50-52.

<sup>163</sup> See *infra* notes 164-85.

"[I]t is He who made the earth submissive to you; therefore walk in its tracts, and eat of His provision . . . ." <sup>164</sup>

## 2. Pre-Trial Interrogation

Pre-trial interrogation is conducted by the minister of complaints. As under the common law, the accused has the right to refuse to answer questions and the accused's silence may not be used as evidence of guilt.<sup>165</sup> The accused is to be treated humanely and is to be encouraged to deny his or her guilt.<sup>166</sup> When an individual confessed to adultery, the Prophet urged retraction of the confession: "Maybe you only kissed her? Maybe you only touched her?" The Prophet also coaxed a woman accused of theft to withdraw her confession: "Did you steal? I do not think you did. Say, no."<sup>167</sup>

The Koran explicitly prohibits the use of beatings, torture, or inhuman treatment to extract a confession. This type of treatment violates the dignity of the accused, results in a loss of confidence in the Islamic system of justice, and creates a risk of false confessions. The use of torture is a sin.<sup>168</sup> The Prophet warned that "God shall torture on the Day of Recompense those who inflict torture on people in life,"<sup>169</sup> and one scholar admonished that "[i]t is better that they should face God with their offenses than I should have to meet God for torturing them."<sup>170</sup>

The majority of jurists would exclude from evidence confessions obtained by force or deceit. This is based on the belief that a "source determines the offshoot"<sup>171</sup> and a "right cannot arise out of wrong."<sup>172</sup> The jurist Ibn Hazm would permit confessions obtained by psychological manipulation or by deceit to be introduced into evidence.<sup>173</sup> A minority of *Hanafi* jurists would also permit the introduction into evidence of confessions extracted by force from "evil" or "immoral" offenders (provided there is no wounding of the flesh and exposure of bones) on the grounds that it is necessary to halt the spread of corruption.<sup>174</sup> Others, while excluding confessions obtained by force from evidence, would permit the use of evidence uncovered as a result of the confession. The accused

<sup>164</sup> KORAN LXVII: 15.

<sup>165</sup> Awad, *supra* note 146, at 106.

<sup>166</sup> al-Saleh, *supra* note 148, at 73.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 72.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Awad, *supra* note 146, at 107.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 106.

would retain the right to seek retaliation against the investigative officials responsible for forcibly extracting the confession.<sup>175</sup>

### 3. Right to Present Evidence and to Assistance of Counsel

The Islamic criminal justice system recognizes the right of both the plaintiff and the accused to present evidence at trial and to have the privilege of being represented by counsel during pre-trial interrogation, at trial, and, upon conviction, at the execution of the sentence. The privilege of counsel is based upon the Islamic theory of "protected interests" which guarantees an individual's freedom of religion; the right to self-preservation; freedom of thought, expression, and knowledge; the right to procreation; and the right to property. The right of self-preservation includes the safeguarding of individual liberty and dignity and the protection of individual well-being.<sup>176</sup> The theory of "protected interests" recognizes the right of an individual to receive the assistance of others in safeguarding his or her interests. This right of assistance forms the basis of the right to counsel. Professor Osman Abd Malek al-Saleh writes: "It is clear that the principle of preservation of self is enhanced by extension of the right to counsel to those accused of crimes, as it provides the accused with the means to establish innocence and to defend himself."<sup>177</sup>

The rights of individuals or their attorneys to present evidence finds support in the *Sunna*. When granting Ali the governorship of Yemen the Prophet advised Ali: "If two adversaries come for arbitration, do not rule for the one, before you have similarly heard from the other."<sup>178</sup> The Caliph Umar ibn Abd al-Azziz advised judges: "If an adversary whose eye has been blinded by another comes to you, do not rule until the other person attends. For perhaps the latter had been blinded in both eyes."<sup>179</sup>

The accused and his or her attorney are to be informed of the offenses which are being charged and of the inculpatory and exculpatory evidence. The accused has the right to attend all proceedings relating to the charges, to be informed of what occurs at proceedings which he or she fails to attend, and to be provided the opportunity to present rebuttal evidence to investigators.<sup>180</sup>

### 4. Search and Seizure

Islam recognizes the privacy and sanctity of person, effects, correspondence, and names. The Koran admonishes believers: "[D]o not enter houses other than

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<sup>175</sup> *Id.* at 106-07.

<sup>176</sup> al-Saleh, *supra* note 148, at 83.

<sup>177</sup> *Id.*

<sup>178</sup> Awad, *supra* note 146, at 97.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 95.

your houses until you first ask leave and salute the people thereof . . .”<sup>181</sup> The Prophet states: “If a person looks at you without your permission and you pelt him with a stone and put out his eye, no guilt will be on you.”<sup>182</sup>

The individual and his home, possessions, and correspondence may only be searched by investigative officials if required by the public interest in the maintenance of social order and safety. The search must be authorized by a warrant issued by the minister of complaints based upon probable cause that the accused committed a criminal offense.<sup>183</sup> A finding of probable cause must be based either upon the testimony of a trustworthy witness or upon evidence that, for instance, “the smell of alcohol and noise of intoxicated persons emanates from inside a house.”<sup>184</sup> Evidence discovered pursuant to a search not authorized by a warrant generally is inadmissible at trial.<sup>185</sup>

The Islamic criminal justice system thus places limitations upon the pre-trial investigative process. Individuals are free from pre-trial detention, receive cautionary warnings, are safeguarded from coercion and abuse during the interrogation process, and have a right to legal representation. Searches require warrants based upon probable cause. These due process or natural justice protections appear to be based on the dignity of the individual and the desire to achieve just results. The prosecuting authorities or complainant thus must establish a case by obtaining evidence through independent investigation.

#### D. *The Qadi and the Rules of Evidence*

##### 1. *The Qadi*

In addition to pre-trial procedural protections, the qualifications and character of the *qadi* and the strict requirements of Islamic rules of evidence help to ensure that the accused receives a fair trial. As previously noted, Caliphs of the Umayyad dynasty (661–750 A.D.) delegated judicial power to provincial governors as well as to administrative officials such as treasury officials and market inspectors. Provincial governors, in turn, delegated their judicial powers to their legal secretary (*qadi*) who mediated disputes.<sup>186</sup> During the Abbāsid dynasty the *qadi* was appointed and dismissed by secular authorities,<sup>187</sup> but increasingly became an independent religious judge whose decisions were free from secular review, control, or influence.<sup>188</sup>

<sup>181</sup> KORAN XXIV, 27, 28.

<sup>182</sup> al-Saleh, *supra* note 148, at 68.

<sup>183</sup> *Id.* at 69.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 69–70.

<sup>186</sup> Shapiro, *Islam and Appeal*, 68 CAL. L. REV. 350, 364 (1980).

<sup>187</sup> *Id.* at 378–79.

<sup>188</sup> *Id.* at 365.

The *qadi* must be a male (although the *Hanafi* permit a female to serve as *qadi* under limited circumstances). He must possess recognized intelligence, wisdom, and religious piety (*adala*), and be well versed in the *Shari'a*. He must be above reproach in his personal behavior and should not accept favors or gifts or attend private feasts or celebrations.<sup>189</sup> Some scholars contend that the *qadi* should be from a wealthy family so that he will be in a position to reject bribes and will be sufficiently secure to make unpopular rulings.<sup>190</sup>

The *qadi* is accountable to Allah. Omar, the Third Caliph, admonished that "[w]e have set thee as a viceroy in the earth, therefore, judge aright between mankind and follow not desire that it beguile thee away from the way of Allah."<sup>191</sup> The *qadi* is to be "strong without being harsh, lenient without being weak, of such disposition that a strong and influential person should not expect injustice from him and a weak one should not become hopeless of his Justice. He should be sober, intelligent . . . pious and . . . should not be a tyrant and snubbing."<sup>192</sup> It is a common saying in the Islamic tradition that you can give an unjust law to a just judge, but you cannot give a just law to an unjust judge.<sup>193</sup>

The *qadi* customarily convenes the *Shari'a* court in the mosque, either facing or with his back to the *qiblah* (the direction of Muslim prayer), so as to emphasize the relationship between the *Shari'a* court and the Islamic religion. He recites a prayer prior to the proceedings. The litigants sit in front of the *qadi* on their knees and are required to conduct themselves in a respectful manner.<sup>194</sup> The *qadi* is to dress in a dignified fashion, such as in a black turban and fine gown, and he is to preside over the court with "downward eyes, deep silence, little speech, almost no movement, and no gesture . . ."<sup>195</sup> Unjustified criticism of the *qadi* is a *Ta'azir* offense punishable as defamation of the *qadi*.<sup>196</sup>

The *qadi* has a duty to render a just judgment consistent with Koranic principles. Although there is no appeal from the *qadi's* decision, a defendant may appeal to the ruler following the execution of the sentence. If it is determined the defendant was wrongfully punished, the *qadi* will be removed from office and the same punishment which was wrongfully imposed on the defendant will be inflicted upon the *qadi*; also, the defendant will be compensated.<sup>197</sup> If the appellant is found to have lodged a false appeal, he is subject to a *Ta'azir* punishment for lying.<sup>198</sup> A successor to a *qadi* also has the prerogative to release

<sup>189</sup> Azad, *Conduct and Qualities of a Qadi*, 24 ISLAMIC STUDIES 51, 56-57 (1985).

<sup>190</sup> *Id.* at 52.

<sup>191</sup> *Sources of Islamic Law*, *supra* note 147, at 39.

<sup>192</sup> Azad, *supra* note 189, at 59.

<sup>193</sup> *Sources of Islamic Law*, *supra* note 147, at 39.

<sup>194</sup> Azad, *supra* note 189, at 54.

<sup>195</sup> *Id.*

<sup>196</sup> M. SIDDIQI, *supra* note 80, at 183.

<sup>197</sup> *Id.*; al-Saleh, *supra* note 148, at 84.

<sup>198</sup> M. SIDDIQI, *supra* note 80, at 183.

individuals he concludes have been improperly convicted and imprisoned by his predecessor.<sup>199</sup>

## 2. Rules of Evidence

In addition to the accused's procedural protections and the high standards of personal and judicial conduct to which the *qadi* must adhere, the integrity of the Islamic criminal process is safeguarded by the fact that the rules of evidence are particularly stringent. It is claimed that this ensures that criminal convictions and punishments are imposed only in cases in which there is a certainty of guilt.<sup>200</sup> Islamic law thus shares the Anglo-American view that it is preferable to allow several guilty offenders to escape punishment rather than to allow an innocent person to be wrongfully convicted and punished.<sup>201</sup>

Under common law tradition, a jury or judge is exposed to a mass of evidence and must assess its weight and credibility to determine if the defendant's guilt is beyond a reasonable doubt. Islamic law, by contrast, only permits the introduction of evidence which is considered to possess a high degree of direct reliability.

A criminal case is opened by the plaintiff presenting his or her allegations against the defendant. If the defendant denies guilt, the plaintiff or state presents the prosecution witnesses. Four witnesses are required to establish adultery while two witnesses are required to establish other offenses.<sup>202</sup>

An individual who lodges a charge of adultery but fails to present four eyewitnesses is subject to the *Hudud* offense of defamation (*Qazhf*), punishable by eighty lashes. The witnesses must testify to having viewed the act of carnal conjunction and agree on the time, place, and identity of the parties.<sup>203</sup> A husband is privileged to bring a charge of adultery against his wife which is not supported by the four witnesses. If she denies her guilt, a divorce is ordered.<sup>204</sup>

Witnesses must be male Muslims, although certain jurists, in isolated instances (involving property or employment), permit the testimony of two female witnesses to be substituted for that of a single male witness.<sup>205</sup> Women are viewed as having "weakness of understanding . . . want of memory and incapacity of governing . . . ."<sup>206</sup>

Witnesses must be sane (both when observing an alleged criminal offense and when testifying); of legal age (having reached either puberty or fifteen years of

<sup>199</sup> J. SCHACHT, *supra* note 4, at 189.

<sup>200</sup> CONFLICTS AND TENSIONS, *supra* note 28, at 64-65.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 63-65.

<sup>203</sup> M. SIDDIQI, *supra* note 80, at 69.

<sup>204</sup> R. ROBERTS, THE SOCIAL LAWS OF THE QORAN 34, 35 (1971).

<sup>205</sup> M. SIDDIQI, *supra* note 80, at 45.

<sup>206</sup> *Id.*



age); free; neither dumb, mute, nor blind; and must not have been punished for a serious offense or have engaged in sinful behavior. They must be of good character and integrity (*adl*) and their righteousness and sense of honor must be beyond reproach.<sup>207</sup> Witnesses may not testify in cases involving immediate family members or in cases in which they have an interest.<sup>208</sup>

A witness has a duty to testify truthfully. Bearing false witness is a *Ta'azir* offense punishable by *tashir* (public labeling), which entails parading the offender through the city and proclaiming that he is not to be trusted.<sup>209</sup> There appears to be no duty upon a Muslim to testify in cases in which a conviction may result in corporal punishment. The Prophet stated it was commendable "to assist in the prevention of corporal punishment."<sup>210</sup>

A witness' testimony must begin with the phrase *ashhadu* ("I bear witness") indicating that he is testifying as to matters he has personally seen and that he is certain of the truthfulness of his testimony. No other phrase (e.g., "I know" or "I am certain") is acceptable. All witnesses must concur in the description of time, place, and circumstances of an offense in order to support a conviction.<sup>211</sup> Hearsay evidence is inadmissible; an individual may not testify concerning an event which another individual allegedly observed. Documents have no independent evidentiary value.<sup>212</sup>

The rules require that a defendant's guilt be established by direct rather than by circumstantial evidence. A homicide, for instance, may not be established by witnesses testifying that they overheard a violent struggle, saw the accused emerge from his house with a blood-stained knife, and then discovered the victim's body.<sup>213</sup>

Jurists differ as to whether a *qadi* may rely (circumstantially) upon presumptions to establish a defendant's guilt. The *Maliki* school permits fornication to be legally established by the birth of a child to a female who has never been married and who has not lodged an allegation of rape.<sup>214</sup> Possession of stolen property and the odor of alcohol on the breath are recognized by some scholars as presumptions which establish the crimes of theft and the drinking of alcohol.<sup>215</sup>

In those cases in which the complainant is unable to produce the required witnesses or the witnesses disagree as to the details of the offense, the *qadi*

<sup>207</sup> Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM*, 109, 117 (C. Bassiouni ed. 1982).

<sup>208</sup> *Id.* at 118.

<sup>209</sup> M. SIDIQI, *supra* note 80, at 49, 167, 168, 179, 180.

<sup>210</sup> *Id.* at 44.

<sup>211</sup> *Id.* at 45, 46.

<sup>212</sup> *Id.* at 46.

<sup>213</sup> *CONFLICTS AND TENSIONS*, *supra* note 28, at 62.

<sup>214</sup> *Id.*

<sup>215</sup> Salama, *supra* note 207, at 121.

customarily requests that the defendant take a holy oath denying the plaintiff's allegations. There is no established form for the oath; however, it usually is sworn before two notaries in a mosque. If the defendant takes the oath, the case is dismissed. If the defendant declines to take the oath following three requests, judgment is entered for the plaintiff.<sup>216</sup> Some jurists will enter a judgment for the plaintiff only if the plaintiff takes a holy oath following the defendant's failure to do so.<sup>217</sup>

Practicing Muslims believe that Allah severely punishes those who swear false oaths. Lawrence Rosen, in his study of *Shari'a* courts in Morocco, found that it was not unusual for a story to be maintained "right up to the moment of oath-taking and then [for the witness] to stop, refuse the oath, and surrender the case. Even the fear of mistakenly swearing what the person thinks is true, but about which he possesses some slight doubt may prevent an innocent party from taking the oaths."<sup>218</sup>

Holy oaths are used as an investigative device where a murder has occurred and the killer is unknown (*Quesama*). The inhabitants of the neighborhood or the owner and inhabitants of the house where the body is found are required to swear fifty oaths (either fifty people or fifty oaths) that they did not commit the murder and that they do not know the identity of the killer. They are imprisoned until they swear to the oath. Once having sworn, they pay compensation to the victim's heirs.<sup>219</sup>

Confessions are the third major form of evidence in *Shari'a* courts. A confession must be given in open court as many times as the number of witnesses required to prove the defendant's guilt. Each confession must be given at a separate hearing.<sup>220</sup> Pressure, deception, coercion, abuse, or encouragement by the *qadi* nullifies a confession.<sup>221</sup>

The person confessing must be sane (capable of understanding the admission and comprehending the confession's legal consequences) and of mature age.<sup>222</sup> A confession must describe the criminal act in detail and must be corroborated. A confession is not admissible against a codefendant<sup>223</sup> and may be withdrawn at any time prior to the execution of the sentence. Such withdrawal will nullify the judgment of guilt.<sup>224</sup>

<sup>216</sup> CONFLICTS AND TENSIONS, *supra* note 28, at 63.

<sup>217</sup> *Id.*

<sup>218</sup> Rosen, *Equity and Discretion in a Modern Islamic Legal System*, 15 L. & Soc'y 217, 227 (1980-1981).

<sup>219</sup> J. SCHACHT, *supra* note 4, at 184.

<sup>220</sup> Salama, *supra* note 207, at 119, 120.

<sup>221</sup> *Id.* at 119.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 120.

<sup>224</sup> *Id.*

In modern practice the *qadi* may attempt to circumvent these rigid rules. In cases in which the evidence fails to establish the *Hudud* offense (e.g., theft), the *qadi* may find the defendant guilty of a lesser *Ta'azir* offense (e.g., larceny by trick or deceit). The *qadi* is also known to exercise discretion during the punishment stage. In cases involving sexual offenses, the *qadi* may dismiss the charges on the condition that the male marry the female victim.<sup>225</sup>

### III. THE *SHARI'A* AND HUMAN RIGHTS

The incorporation of the *Shari'a* into domestic criminal codes presents various human rights issues.<sup>226</sup> Most Islamic scholars view the *Shari'a* as consistent with the requirements of international human rights instruments. Professor Cherif Bassiouni notes that in Islamic jurisprudence "the dignity of man is foremost for he is the prize creation of Allah; equality and justice are therefore a natural corollary."<sup>227</sup> Professor Bassiouni writes that the *Shari'a* is a "policy-oriented system"<sup>228</sup> and "[i]t is not as has been represented, or . . . practiced by some states which purport to apply Islamic law, a rigid and repressive system . . . . In fact, many of the most forward looking concepts in today's criminal justice system have been the mainstay of the Islamic approach for centuries."<sup>229</sup>

The First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System concluded "that all the guarantees of human rights set forth in international conventions and reflecting the current international consensus on the minimum standards of any humane penal justice system, are by no means incompatible with the letter and spirit of Islamic law."<sup>230</sup> The Conference recognized that "for western jurists certain aspects of the Islamic system are difficult to reconcile with their concept of penal justice."<sup>231</sup> Professor Abdullahi Ahmen El Naïem of the University of Khartoum in Sunda reflects this "western" view in his contention that

[s]ome aspects of the traditional Islamic *Shari'a*, as understood and practiced by all shades of traditional opinion, and which are binding

<sup>225</sup> Rosen, *supra* note 218, at 234-35.

<sup>226</sup> See generally Offences Against Property (Enforcement of Hudood) Ordinance No. IV of 1979; Offence of Zina (Enforcement of Hudood) Ordinance No. VII of 1979; Offence of Qazf (Enforcement of Hadd) Ordinance No. VIII of 1979; Execution of Punishment of Whipping Ordinance No. IX of 1979.

<sup>227</sup> *Sources of Islamic Law*, *supra* note 147, at 19.

<sup>228</sup> *Id.* at 5.

<sup>229</sup> *Id.*

<sup>230</sup> *Summary Report of the First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 237 app. at 239 (C. Bassiouni ed. 1982) [hereinafter *Summary Report*]. See generally M. KHADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* 233-39 (1984).

<sup>231</sup> *Summary Report*, *supra* note 230, at 239.

on all Muslims regardless of local social and cultural variations, are clearly inconsistent with modern universal standards of human rights. These aspects, moreover, cannot be reformed within the traditional framework . . . . The choice facing the modern Muslim, therefore, is either to insist on enforcing the totality of *Shari'a* regardless of standards of human rights, or to seek a radical reform within Islam that will reconcile the *Shari'a* with present-day human rights requirements and expectations.<sup>232</sup>

Professor Naiem argues that this radical reform can be achieved by making a distinction between Islam and the traditional *Shari'a*. *Shari'a* "is merely a level of Islam best suited to the needs and expectations of a previous stage of human development. It should be possible therefore, to evolve new principles of *Shari'a* to address the needs and expectations of this day and age."<sup>233</sup>

This *neo-Itjihad* (new reasoning) solution, however, is contrary to the essence of Islam which posits that the individual has a duty to seek salvation through surrender to Allah and which provides for few individual rights. The *Shari'a* is the path to salvation, and it is God's right to demand obedience and to punish deviance.<sup>234</sup> The head of state is God's "properly constituted political authority, representing the rule of divine wisdom. . . ."<sup>235</sup> whose governance "guarantees the welfare of the subject in this world and in the world to come."<sup>236</sup> It follows that

the interests of the State and not those of the individual will constitute the supreme criterion of the law . . . . From this point of view, then, Islamic legal theory appears much closer akin to the principles upon which Plato's Republic was founded than to the modern Western ideal which considers "the evolution of the individual as the ultimate measure of things."<sup>237</sup>

Thus, Islam does not recognize the inalienable, inherent rights of humanity. Instead, rights "are neither intrinsic nor universal: they depend on man's acts rather than inhere in his existence; they are applicable to one who submits—literally, the Muslim—while they are less, if at all, applicable to one who does not submit."<sup>238</sup> Even the rights granted to believers are limited, comprising

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<sup>232</sup> El Naiem, *A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 75, 76–77 (1984).

<sup>233</sup> *Id.* at 87.

<sup>234</sup> Said, *Human Rights in Islamic Perspectives*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 86, 90 (1980).

<sup>235</sup> Coulson, *The State and the Individual in Islamic Law*, 6 INT'L & COMP. L.Q. 49, 51 (1957).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Piscatori, *Human Rights in Islamic Political Culture*, in THE MORAL IMPERATIVES OF HUMAN RIGHTS: A WORLD SURVEY 139, 143 (K. Thompson ed. 1980).

private claims for *Qesas* and *Ta'azir* and some expectation of reward for obedience on the Day of Judgment.<sup>239</sup> These "are hardly equivalent to modern human rights."<sup>240</sup>

Islamic countries' incorporation of the panoply of international human rights norms and principles into their domestic legal systems is theoretically limited by the fact that their domestic codes are derived from immutable religious rather than philosophical sources. In many cases these natural law rights either are contrary to or not required by the *Shari'a*.<sup>241</sup> Of particular concern are the limitations on individual freedom and the treatment of non-Muslims and women.

#### A. Due Process

Although recognizing individual privacy, Islam penalizes wine drinking, fornication, apostasy, and defamation, all of which arguably pose little social danger and are subject to minor or no criminal sanction in most western jurisdictions.<sup>242</sup> These acts usually are considered to fall within individuals' "zone of privacy" and are outside the scope of legitimate state criminal regulation.<sup>243</sup>

Amnesty International has criticized the *Shari'a* punishments inflicted for violation of the above offenses—flogging, stoning, and amputation—as cruel, inhuman, and degrading punishment in violation of human rights treaties.<sup>244</sup> The strictness of Islamic criminal procedure, which requires a certainty of guilt, both limits and legitimizes the severe punishment of these crimes against the rights of God. The question remains, however, whether the infliction of such penalties can be justified despite fair and stringent procedures.

International human rights instruments prohibit torture or cruel, inhuman, or degrading treatment or punishment.<sup>245</sup> Whether *Hudud* or *Qesas* penalties constitute such forms of prohibited punishment, international human rights instruments arguably prohibit the infliction of *Hudud* punishments for offenses such as apostasy, wine drinking, and fornication.

Article 17 of the International Covenant on Civil and Political Rights, *inter alia*, protects individuals against "arbitrary or unlawful interference" with their

<sup>239</sup> *Id.* at 142.

<sup>240</sup> *Id.*

<sup>241</sup> *But see* Malik, *The Concept of Human Rights in Islamic Jurisprudence*, 3 HUM. RTS. Q. 56 (1981); Nawaz, *The Concept of Human Rights in Islamic Law*, 11 HOW. L.J. 325 (1965).

<sup>242</sup> The crime of apostasy, for instance, arguably would violate the free exercise and establishment clauses of the United States Constitution.

<sup>243</sup> *See generally* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>244</sup> AMNESTY INTERNATIONAL, *TORTURE IN THE EIGHTIES* 241 (1984).

<sup>245</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (111), U.N. Doc. A/810, U.N. Doc. A/910 at 71 (1948), at art. 5 [hereinafter Universal Declaration]; International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), at art. 7 [hereinafter ICCPR].

privacy.<sup>246</sup> This right to privacy, for example, clearly encompasses individual freedom of thought, conscience, and religion, and the right to change one's religion.<sup>247</sup> Thus, article 17 prohibits making apostasy a crime. Article 18 of the International Covenant on Civil and Political Rights guarantees an individual the "freedom to have or to adopt a religion or belief of his choice."<sup>248</sup> An individual also may not "be subject to coercion which would impair his freedom to have or to adopt a religion."<sup>249</sup> These rights were reaffirmed in 1981 in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>250</sup> A similar, but perhaps less convincing analysis may be undertaken as to wine drinking and fornication.<sup>251</sup>

The process by which criminal liability is established under the *Shari'a* also is subject to attack on human rights grounds. The *Shari'a* procedure fails to provide for cross-examination of witnesses or rebuttal testimony by the accused and narrowly limits admissible evidence.<sup>252</sup> It excludes all males who lack good character and are not considered upright in society (non-*adl*). In addition, all females and non-Muslims are excluded from testifying.<sup>253</sup> It does not provide jury trials or appeals.<sup>254</sup> The oath requirement appears to violate the prohibition on self-incrimination.<sup>255</sup> Women and non-Muslims receive less compensation for injuries than do Muslim males.<sup>256</sup> Coulson argues that *Ta'azir* offenses and punishments are completely within the ruler's discretion, are subject to few limits, and may even be applied in an *ex post facto* fashion.<sup>257</sup>

## B. Equal Protection

The Islamic legal code is part of a larger religious system. As a result, those of secondary religious importance (e.g., women) and non-Muslims are considered legally inferior. This legal stratification arguably is contrary to the prevailing international norms of equal treatment for all individuals. The Universal

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<sup>246</sup> ICCPR, *supra* note 245, at art. 17.

<sup>247</sup> *Id.* at art. 18.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at art. 18(2).

<sup>250</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/Res/36/55 (1981).

<sup>251</sup> Defamation may be "subject to certain restrictions" under civil law, but arguably may not be subject to severe criminal penalties. *See generally* ICCPR, *supra* note 245, at art. 19(3)(a). Nevertheless, it may arguably be justifiable to inflict *Hudud* for defamation.

<sup>252</sup> *See id.* at art. 14(3)(e).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at art. 14(5).

<sup>255</sup> *Id.* at art. 14(3)(g).

<sup>256</sup> *Id.* at art. 2(1). This article prohibits discrimination on grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.*

<sup>257</sup> CONFLICTS AND TENSIONS, *supra* note 28, at 53-56.

Declaration of Human Rights states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>258</sup> Article 7 provides that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law."<sup>259</sup> Both the International Covenant on Civil and Political Rights<sup>260</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>261</sup> affirm the non-discrimination principle.

The Convention on the Elimination of All Forms of Discrimination Against Women states that signatory nations, particularly in the political, social, economic, and cultural fields, should take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."<sup>262</sup>

Women, however, have an inferior position within Islam. The Koran states that "[m]en are the managers of the affairs of women for that God has preferred in bounty one of them over another . . . . Righteous women are therefore obedient . . . . And those you fear may be rebellious admonish; banish them to their couches, and beat them."<sup>263</sup> While recognizing that the socioeconomic position of Muslim women has improved, Raphael Patai writes that "the typical condition of women in the Arab world in the early 1980's still comprised most of the features that had characterized it in past centuries . . . ."<sup>264</sup> In addition to females' lack of testimonial privilege, there are other legal disadvantages for women. A male in most Islamic countries may legally have up to four wives;<sup>265</sup> a female can be married without her consent.<sup>266</sup> A wife is not able to divorce her husband, but he is able to obtain a divorce by simple oral repudiation (*talaq*).<sup>267</sup> Custody of children generally rests with the father (although some schools permit women to have custody of a young child).<sup>268</sup> A woman may work or travel only with the permission of her father or husband;<sup>269</sup> young females

<sup>258</sup> Universal Declaration, *supra* note 245, at art. 2.

<sup>259</sup> *Id.* at art. 7.

<sup>260</sup> ICCPR, *supra* note 245, at art. 2(1).

<sup>261</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), at art. 2(2).

<sup>262</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. —) at art. 3, U.N. Doc. A/0000 (1979).

<sup>263</sup> KORAN IV: 38.

<sup>264</sup> R. PATAI, *THE ARAB MIND* 331 (1983). *See generally* WOMEN IN THE MUSLIM WORLD (L. Beck & N. Keddie eds. 1978).

<sup>265</sup> R. PATAI, *supra* note 264, at 331.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 331–32.

are subject to clitoridectomy for the purpose of reducing or eliminating their libido, making it probable that they will preserve their virginity prior to marriage.<sup>270</sup>

*Dhimmis* (non-Moslems) also face discrimination within the Arab world based on their religious status.<sup>271</sup> This of course violates the previously mentioned equality principle embodied in human rights instruments.<sup>272</sup> The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states that no individual "shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief."<sup>273</sup> The Declaration concludes that such discrimination "constitutes an affront to human dignity . . . and shall be condemned as a violation of . . . human rights and fundamental freedoms . . ."<sup>274</sup> These principles are affirmed in the International Covenant on Civil and Political Rights. Article 18 of the Covenant protects an individual against coercion that would impair his or her freedom of religion;<sup>275</sup> article 27 protects the rights of religious minorities "to profess and practise their own religion."<sup>276</sup>

Non-Muslims are divided into believers (*Kitaby*) and nonbelievers (non-*Kitaby*).<sup>277</sup> Believers are non-Muslims who adhere to one of the heavenly scriptures (mainly Christians and Jews)<sup>278</sup> while nonbelievers do not believe in any of the heavenly revealed scriptures.<sup>279</sup> Unless granted temporary safe conduct (*aman*), nonbelievers are to be killed on sight.<sup>280</sup> Once the safe conduct of nonbelievers has lapsed or been revoked, they enter a state of war (*harbi*) with Muslims and "have no permanent and general sanctity of life or property."<sup>281</sup> The Koran advises "slay the idolaters wherever you find them . . . and lie in wait for them at every place of ambush."<sup>282</sup>

Believers are entitled to remain within the Islamic state as protected communities (under a so-called compact of *dhimmi*).<sup>283</sup> They are guaranteed security

<sup>270</sup> *Id.* at 332.

<sup>271</sup> See An-Na'im, *Religious Minorities Under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1 (1987).

<sup>272</sup> See *supra* notes 258-61 and accompanying text.

<sup>273</sup> The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *supra* note 250, at art. 2(1).

<sup>274</sup> *Id.* at art. 3.

<sup>275</sup> ICCPR, *supra* note 245, at art. 18(2).

<sup>276</sup> *Id.* at art. 27.

<sup>277</sup> An-Na'im, *supra* note 271, at 11.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 12.

<sup>282</sup> KORAN IX: 5.

<sup>283</sup> An-Na'im, *supra* note 271, at 11.



of person and property and freedom to practice their religion in private.<sup>284</sup> In return, they are required to pay a poll tax (*jizyah*) as a tribute and symbol of submission to Muslim rule.<sup>285</sup> They also are disqualified from holding judicial or political office and from testifying against Muslims and may not join the military.<sup>286</sup>

Traditionally, the limits on believers are even more severe. Schacht notes that they were required to wear distinctive clothing<sup>287</sup> and to mark their houses, which were not to be built higher than those of Muslims.<sup>288</sup> They could not ride horses;<sup>289</sup> were to yield the way to Muslims;<sup>290</sup> were not to build new churches or synagogues;<sup>291</sup> and could not be the guardian of a Muslim child, own a Muslim slave, or serve as the executor of a Muslim's estate.<sup>292</sup> The treatment of *dhimmis* as second-class citizens continues and has caused "[increased] tensions and clashes between Muslim and non-Muslim communities . . . ."<sup>293</sup>

#### IV. CONCLUSION

The Islamic world is experiencing a revivalist trend and a return to religious fundamentalism. Regimes find it increasingly difficult to avoid responding to these popular pressures for Islamicization. The incorporation of *Shari'a* crimes and procedure has become the touchstone of a regime's Islamic character.<sup>294</sup> Yet, aspects of *Shari'a* arguably are contrary to the international consensus on human rights.

As suggested, the notion of an independent and autonomous individual possessing rights against the state is alien to Islamic religion and culture. It is claimed by some that international human rights standards should be interpreted, applied, and qualified by domestic cultural and religious norms and practices.<sup>295</sup> Others are willing to concede that *certain* rights are not fundamental and may be abrogated on the grounds of cultural relativism.<sup>296</sup> Another group of commentators views such claims as permitting the abuse and subordination

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<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> J. SCHACHT, *supra* note 4, at 131.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 132.

<sup>293</sup> J. ESPOSITO, *supra* note 25, at 229.

<sup>294</sup> See generally G. JANSEN, *supra* note 2.

<sup>295</sup> See Renteln, *The Unanswered Challenge of Relativism and the Consequences for Human Rights*, 7 HUM. RTS. Q. 514 (1985).

<sup>296</sup> See generally Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984).

of individuals by regimes which often cynically wrap themselves in the mantle of traditionalism.<sup>297</sup>

International human rights instruments, although permitting the abrogation or qualification of their provisions in times of public threat and emergency,<sup>298</sup> affirm the "inherent dignity" and the "equal and inalienable rights" of all individuals.<sup>299</sup> There is no provision for rights to be abrogated or limited based upon cultural or religious relativism. Article 5 of the International Covenant on Civil and Political Rights establishes that no state, group, or person has "any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."<sup>300</sup>

Ironically, at a time when individual entitlement to human rights is accepted in theory and the democratic impulse has asserted itself on a global scale, Islamic societies are looking for salvation in a utopian past and abandoning the modern western intellectual tradition.<sup>301</sup> From a western secular perspective, the limitation and abrogation of human rights on the grounds of ideology or religion appears to be an inordinate price to pay for possible salvation in the world to come.<sup>302</sup>

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<sup>297</sup> See generally Newman, *Khomeini And Criminal Justice: Notes on Crime and Culture*, 73 J. CRIM. L. & CRIMINOLOGY 561 (1982); Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence From Sub-Saharan Africa*, 5 HUM. RTS. Q. 467 (1983).

<sup>298</sup> See ICCPR, *supra* note 245, at arts. 4, 18(3), 19(3)(a)(b), 22(2).

<sup>299</sup> Universal Declaration, *supra* note 245, at preamble.

<sup>300</sup> ICCPR, *supra* note 245, at art. 5(1).

<sup>301</sup> *Id.*

<sup>302</sup> See generally R. WRIGHT, *SACRED RAGE: THE WRATH OF MILITANT ISLAM* (1986).