

Islamic Law

Myths and Realities

by Denis J. Wiechman, Jerry D. Kendall, and Mohammad K. Azarian

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The general public and many academics have several preconceived notions about Islamic Law. One such notion is that Islamic judges are bound by ancient and outdated rules of fixed punishments for all crimes. This paper explores that idea and looks at other myths in an attempt to present Islamic Law from a non-biased view of *Shar'iah* Law.

Some contemporary scholars fail to recognize Islamic Law as an equal to English Common Law, European Civil Law and Socialist Law. A few academics have even attempted to place Islamic Law into the Civil Law tradition. Other writers have simply added a footnote to their works on comparative justice on the religious law categories of Islamic Law, Hindu Law, which is still used in some parts of India, and the Law of Moses from the Old Testament which still guides the current thought of the Israeli Knesset (Parliament) today. This survey will attempt to alter some of these inaccurate perceptions and treatments in both the contemporary literature and academic writings.

Mohammed Salam Madkoar explains the theoretical assumptions of Islamic Law:

In order to protect the five important indispensables in Islam (religion, life, intellect, offspring and property), Islamic Law has provided a worldly punishment in addition to that in the hereafter. Islam has, in fact, adopted two courses for the preservation of these five indispensables: the first is through cultivating religious consciousness in the human soul and the awakening of human awareness through moral education; the second is by inflicting deterrent punishment, which is the basis of the Islamic criminal system. Therefore "*Hudud*," Retaliation (*Kisas*) and Discretionary (*Tazir*) punishments have been prescribed according to

the type of the crime committed.

Islamic Law and Jurisprudence is not always understood by the western press. Although it is the responsibility of the mass media to bring to the world's attention violations of human rights and acts of terror, many believe that media stereotyping of all Muslims is a major problem. The recent bombing at the World Trade Centre in New York City is a prime example. The media often used the term "Islamic Fundamentalists" when referring to the accused in the case. It also referred to the Egyptian connections in that case as "Islamic Fundamentalists." The media has used the label of "Islamic Fundamentalist" to imply all kinds of possible negative connotations: terrorists, kidnappers and hostage takers. Since the media does not use the term "Fundamentalist Christian" each time a Christian does something wrong, the use of such labels is wrong for any group, Christians, Muslims, or Orthodox Jews.

A Muslim who is trying to live his religion is indeed a true believer in God. This person tries to live all of the tenets of his religion in a fundamental way. **Thus, a true Muslim is a fundamentalist in the practice of that religion, but a true Muslim is not radical, because the Qur'an teaches tolerance and moderation in all things.** When the popular media generalizes from the fundamentalist believer to the "radical fundamentalist" label they do a disservice to all Muslims and others.

No Separation of Church and State

To understand Islamic Law one must first understand the assumptions of Islam and the basic tenets of the religion. The meaning of the word 'Islam' is "submission or surrender to Allah's (God's) will." Therefore, Muslims must first and foremost obey and submit to Allah's will. Mohammad the Prophet was called by God to translate verses from the Angel

Gabriel to form the most important book in Islam, the Qur'an, Muslims believe.

There are over 1.2 billion Muslims today world-wide, over 20% of the world's population. "By the year 2000, one out of every four persons on the planet will be a Muslim," Rittat Hassan estimated in 1990. There are 35 nations with population over 50% Muslim, and there are another 21 nations that have significant Muslim populations. There are 19 nations which have declared Islam in their respective constitutions. The Muslim religion is a global one and is rapidly expanding. The sheer number of Muslims living today makes the idea of putting Islamic Law into a footnote in contemporary writings inappropriate.

The most difficult part of Islamic Law for most westerners to grasp is that there is no separation of church and state. The religion of Islam and the government are one. Islamic Law is controlled, ruled and regulated by the Islamic religion. Theocracy controls all public and private matters. Government, law and religion are one. There are varying degrees of this concept in many nations, but all law, government and civil authority rests upon it and it is a part of Islamic religion. There are civil laws in Muslim nations for Muslim and non-Muslim people. *Shar'iah is only applicable to Muslims. Most Americans and others schooled in Common Law have great difficulty with that concept.* The U.S. Constitution (Bill of Rights) prohibits the government from "establishing a religion."

The U.S. Supreme Court has concluded in numerous cases that the U.S. Government can't favour one religion over another. That concept is implicit for most U.S. legal scholars and many U.S. academicians believe that any mixture of "church and state" is inherently evil and filled with many problems. They reject all notions of a mixture of religion and government.

To start with such preconceived notions limits the knowledge base and information available to try and solve many social and criminal problems. To use an analogy from Christianity may be helpful. To ignore what all Christian religions except your own say about God would limit your knowledge base and you would not be informed or have the ability to appreciate your own religion. The same is true for Islamic Law and Islamic religion. You must open your mind to further expand your knowledge base. *Islamic Law has many ideas, concepts, and information that can solve contemporary crime problems in many areas of the world.* To do this you must first put on hold the

preconceived notion of "separation of church and state."

Judge (Qazi)

Another myth concerning Islamic Law is that there are no judges. Historically the Islamic Judge (Qazi) was a legal secretary appointed by the provincial governors. Each Islamic nation may differ slightly in how the judges are selected. Some nations will use a formal process of legal education and internship in a lower court. For example, in Saudi Arabia there are two levels of courts. The formal *Shar'iah* Courts which were established in 1928 hear traditional cases. The Saudi government established a ministry of justice in 1970, and they added administrative tribunals for traffic laws, business and commerce. *"All judges are accountable to God in their decisions and practices"* (Lippman, p.66-68).

One common myth associated with Islamic Law is that judges must always impose a fixed and predetermined punishment for each crime. Western writers often point to the inflexible nature of Islamic Law. Judges under Islamic Law are bound to administer several punishments for a few very serious crimes found in the Qur'an, but they possess much greater freedom in punishment for less serious (non-Hadd) crimes. Common law is filled with precedents, rules, and limitations which inhibit creative justice. Judges under Islamic Law are free to create new options and ideas to solve new problems associated with crime.

Elements of *Shar'iah* Law

Islamic law is known as *Shar'iah* Law, and *Shar'iah* means the path to follow God's Law. *Shar'iah* Law is holistic or eclectic in its approach to guide the individual in most daily matters. *Shar'iah* Law controls, rules and regulates all public and private behaviour. It has regulations for personal hygiene, diet, sexual conduct, and elements of child rearing. It also prescribes specific rules for prayers, fasting, giving to the poor, and many other religious matters. Civil Law and Common Law primarily focus on public behaviour, but both do regulate some private matters. *Shar'iah* Law can also be used in larger situations than guiding an individual's behaviour. It can be used as guide for how an individual acts in society and how one group interacts with another. The *Shar'iah* Law can be used to settle border disputes between nations or within nations. It can also be used to settle international disputes, conflicts and wars. This Law does not exclude any knowledge from other sources

and is viewed by the Muslim world as a vehicle to solve all problems civil, criminal and international.

Shar'iah Law has several sources from which to draw its guiding principles. It does not rely upon one source for its broad knowledge base. The first and primary element of *Shar'iah* Law is the Qur'an. It is the final arbitrator and there is no other appeal. The second element of *Shar'iah* Law is known as the Sunna, the teachings of the Prophet Mohammad not explicitly found in the Qur'an. The Sunna are a composite of the teachings of the Prophet and his works. The Sunna contain stories and anecdotes, called Hadith, to illustrate a concept. **The Qur'an may not have all the information about behaviour and human interaction in detail; the Sunna gives more detailed information than the Qur'an.**

The third element of *Shar'iah* Law is known as the *Ijma*. The Muslim religion uses the term *Ulama* as a label for its religious scholars. These *Ulama*'s are consulted on many matters both personal and political. When the *Ulama*'s reach a consensus on an issue, it is interpreted as *Ijma*. The concepts and ideas found in the *Ijma* are not found explicitly in the Qur'an or the teachings of the Prophet (Sunna). Islamic judges are able to examine the *Ijma* for many possible solutions which can be applied in a modern technical society. **They are free to create new and innovative methods to solve crime and social problems based upon the concepts found in the *Ijma*.** These judges have great discretion in applying the concepts to a specific problem.

The *Qiyas* are a fourth element of *Shar'iah* Law. The *Qiyas* are not explicitly found in the Qur'an, Sunna, or given in the *Ijma*. **The *Qiyas* are new cases or case law which may have already been decided by a higher judge.** The *Shar'iah* judge can use the legal precedent to decide new case law and its application to a specific problem. The judge can use a broad legal construct to resolve a very specific issue. For example, a computer crime or theft of computer time is not found in the Qur'an or Sunna. The act of theft as a generic term is prohibited so the judge must rely on logic and reason to create new case law or *Qiyas*.

The fifth element of *Shar'iah* Law is very broad and "all encompassing." This secondary body of knowledge may be ideas contained in the other written works. The New Testament is an example of this area of information, and legal discourses based upon Civil Law or Common Law may be another example. All information can be examined for logic and reason to

see if it applies to the current case. It also may be a local custom or norm that judge may find helpful in applying to the issue before him. The judge may also weigh the impact of his decision upon how it will effect a person's standing in the community.

Crimes in Islam

Crimes under Islamic Law can be broken down into three major categories. Each will be discussed in greater detail with some common law analogies. The three major crime categories in Islamic Law are:

1. *Hadd* [plural *Hudud*] Crimes (most serious).
2. *Tazir* Crimes (least serious).
3. *Qesas* Crimes (revenge crimes restitution).

Hadd crimes are the most serious under Islamic Law, and *Tazir* crimes are the least serious. Some Western writers use the felony analogy for *Hadd* crimes and misdemeanor label for *Tazir* crimes. The analogy is partially accurate, but not entirely true. Common Law has no comparable form of *Qesas* crimes.

Fairchild, in her excellent book on comparative justice, makes the following observation of Islamic Law and punishment (Fairchild, p.41).

Punishments are prescribed in the Qur'an and are often harsh with the emphasis on corporal and capital punishment. Theft is punished by imprisonment or amputation of hands or feet, depending on the number of times it is committed . . .

Hadd Crimes

Hadd crimes are those which are punishable by a pre-established punishment found in the Qur'an. These most serious of all crimes are found by an exact reference in the Qur'an to a specific act and a specific punishment for that act. **There is no plea-bargaining or reducing the punishment for a *Hadd* crime. *Hadd* crimes have no minimum or maximum punishments attached to them.** The punishment system is comparable to the determinate sentence imposed by some judges in the United States. If you commit a crime, you know what your punishment will be. There is no flexibility in the U.S. determinate model or in the punishment for *Hadd* crimes of Islamic Law. No judge can change or reduce the punishment for these serious crimes. The *Hadd* crimes are:

1. Murder;

2. Apostasy from Islam

1. (making war upon Allah and His messengers)
 1. Theft
 2. Adultery
 3. Defamation
2. (false accusation of adultery or fornication)
 1. Robbery
 2. Alcohol-drinking [any intoxicants]

The first four *Hadd* crimes have a specific punishment in the Qur'an. The last three crimes are mentioned but no specific punishment is found (Schmallegger, p.603).

Some more liberal Islamic judges do not consider apostasy from Islam or wine drinking as *Hadd* crimes. The more liberal Islamic nations treat these crimes as *Tazir* or a lesser crime.

Hadd crimes have fixed punishments because they are set by God and are found in the Qur'an. *Hadd* crimes are crimes against God's law and *Tazir* crimes are crimes against society. There are some safeguards for *Hadd* crimes that many in the media fail to mention. Some in the media only mention that if you steal, your hand is cut off. The Islamic judge must look at a higher level of proof and reasons why the person committed the crime. A judge can only impose the *Hadd* punishment when a person confesses to the crime or there are enough witnesses to the crime. The usual number of witnesses is two, but in the case of adultery four witnesses are required. The media often leaves the public with the impression that all are punished with flimsy evidence or limited proof. Islamic law has a very high level of proof for the most serious crimes and punishments. When there is doubt about the guilt of a *Hadd* crime, the judge must treat the crime as a lesser *Tazir* crime. If there is no confession to a crime or not enough witnesses to the crime, Islamic law requires the *Hadd* crime to be punished as a *Tazir* crime.

Tazir Crimes

Modern Islamic Society has changed greatly from the time of the Prophet. Contemporary *Shar'iah* Law is now in written form and is statutory in nature. Islamic concepts of justice argue that a person should know what the crime is and its possible punishment. For example, Egypt has a parliamentary process which has a formal penal code written and based upon the principles of Islamic Law, but Saudi Arabia allows the judge to set the *Tazir* crimes and punishments.

Modern Islamic Law recognizes many differences between these two nations. It also allows for much greater flexibility in how it punishes an offender. The major myth of many people is that judges in Islamic nations have fixed punishments for all crimes. In reality the judges have much greater flexibility than judges under common law.

Tazir crimes are less serious than the *Hadd* crimes found in the Qur'an. Some common law writers use the analogy of misdemeanors, which is the lesser of the two categories (felony and misdemeanor) of common law crimes. *Tazir* crimes can and do have comparable "minor felony equivalents." These "minor felonies" are not found in the Qur'an so the Islamic judges are free to punish the offender in almost any fashion. Mohammed Salam Madkoar, who was the head of Islamic Law at the University of Cairo, makes the following observation (Ministry of the Interior, 1976, p.104):

Tazir punishments vary according to the circumstances. They change from time to time and from place to place. They vary according to the gravity of the crime and the extent of the criminal disposition of the criminal himself

Tazir crimes are acts which are punished because the offender disobeys God's law and word. *Tazir* crimes can be punished if they harm the societal interest. *Shar'iah* Law places an emphasis on the societal or public interest. The assumption of the punishment is that a greater "evil" will be prevented in the future if you punish this offender now. Historically *Tazir* crimes were not written down or codified. This gave each ruler great flexibility in what punishments the judge was able to dispense. The judge under Islamic Law is not bound by precedents, rules, or prior decisions as in common law. Judges are totally free to choose from any number of punishments that they think will help an individual offender. The only guiding principle for judges under *Shar'iah* Law is that they must answer to Allah and to the greater community of Muslims. Some of the more common punishments for *Tazir* crimes are counselling, fines, public or private censure, family and clan pressure and support, seizure of property, confinement in the home or place of detention, and flogging.

In some Islamic nations, *Tazir* crimes are set by legislative parliament. Each nation is free to establish its own criminal code and there is a great disparity in

punishment of some of these crimes. Some of the more common *Tazir* crimes are: bribery, selling tainted or defective products, treason, usury, and selling obscene pictures. The consumption of alcohol in Egypt is punished much differently than in Iran or Saudi Arabia because they have far different civil laws. **Islamic law has much greater flexibility than the Western media portrays.** Each judge is free to punish based upon local norms, customs, and informal rules. Each judge is free to fix the punishment that will deter others from crime and will help to rehabilitate an offender.

Qesas Crimes and *Diya*

Islamic Law has an additional category of crimes that common law nations do not have. A *Qesas* crime is one of retaliation. If you commit a *Qesas* crime, the victim has a right to seek retribution and retaliation. The exact punishment for each *Qesas* crime is set forth in the Qur'an. If you are killed, then your family has a right to seek *Qesas* punishment from the murderer. Punishment can come in several forms and also may include "*Diya*." *Diya* is paid to the victim's family as part of punishment. *Diya* is an ancient form of restitution for the victim or his family. The family also may seek to have a public execution of the offender or the family may seek to pardon the offender. Traditional *Qesas* crimes include:

1. Murder (premeditated and non-premeditated).
2. Premeditated offences against human life, short of murder.
3. Murder by error.
4. Offences by error against humanity, short of murder.

Some reporters in the mass media have criticized the thought of "blood money" as barbaric. They labelled the practice as undemocratic and inhumane. *Qesas* crimes are based upon the criminological assumption of retribution. The concept of retribution was found in the first statutory "Code of Hammurabi" and **in the Law of Moses in the form of "an eye for an eye." Muslims add to that saying "but it is better to forgive."** Contemporary common law today still is filled with the assumptions of retribution. The United States federal code contains "mandatory minimum" sentences for drug dealing, and many states have fixed punishment for drugs and violence and using weapons. The United States justice system has adopted a retribution model which sets fixed punishments for each crime. **The idea of retribution is fixed in the U.S.**

system of justice. *Qesas* crime is simple retribution: if one commits a crime he knows what the punishment will be.

Diya has its roots in Islamic Law and dates to the time of the Prophet Mohammad when there were many local families, tribes and clans. They were nomadic and travelled extensively. The Prophet was able to convince several tribes to take a monetary payment for damage to the clan or tribe. This practice grew and now is an acceptable solution to some *Qesas* crimes. Today, the *Diya* is paid by the offender to the victim if he is alive. If the victim is dead, the money is paid to the victim's family or to the victim's tribe or clan. The assumption is that victims will be compensated for their loss. **Under common law, the victim or family must sue the offender in a civil tort action for damages. *Qesas* law combines the process of criminal and civil hearings into one,** just as the "civil law" is applied in many nations of the world. *Qesas* crimes are compensated as restitution under common law and civil law.

The *Qesas* crimes require compensation for each crime committed. Each nation sets the damage before the offence and the judge then fixes the proper *Diya* . If an offender is too poor to pay the *Diya* , the family of the offender is called upon first to make good the *Diya* for their kin. If the family is unable to pay, the community, clan or tribe may be required to pay. This concept is not found in common law or the civil law of most nations. **It acts as a great incentive for family and community to teach responsible behaviour.** What happens to the debt if the offender dies and has not paid it? Historically, it was passed on to the offender's heirs. Today, most nations terminate the debt if the offender left no inheritance.

One question that is often raised is "What happens if a victim takes the *Diya* without government approval?" The victim or family has committed a *Tazir* crime by accepting money which was not mandated by a judge: taking *Diya* must be carried out through proper governmental and judicial authority.

Another concept of *Qesas* crimes is the area of punishment. Each victim has the right to ask for retaliation and, historically, the person's family would carry out that punishment. **Modern Islamic law now requires the government to carry out the *Qesas* punishment.** Historically, some grieving family member may have tortured the offender in the process of punishment. Now the government is the independent party that administers the punishment,

because torture and extended pain is contrary to Islamic teachings and *Shar'iah* Law.

Conclusions

Contemporary treatment of Islamic Law and "Radical Muslims" is filled with stereotypical characterizations. Some in the Western media have used the "New York City bombings" as a way to increase hate and prejudice. They have taken the views of a few radicals and projected them onto all Muslims. This action has done a great disservice to the Muslim world. Some academic writings also have been distorted and not always completely accurate and some researchers have concluded that Islamic Law requires a fixed punishment for all crimes. These writers also have concluded that Islamic judges lack discretion in their sentences of defendants in the *Shar'iah* Court System. There are four *Hadd* crimes that do have fixed punishments set forth in the Qur'an, but not all the *Hadd* crimes are bound by mandatory punishment.

Islamic Law is very different from English Common Law or the European Civil Law traditions. Muslims are bound to the teachings of the Prophet Mohammad whose translation of Allah or God's will is found in the Qur'an. Muslims are held accountable to the *Shar'iah* Law, but non-Muslims are not bound by the same standard (apostasy from Allah). Muslims and non-Muslims are both required to live by laws enacted by the various forms of government such as tax laws, traffic laws, white collar crimes of business, and theft. These and many other crimes similar to Common Law crimes are tried in modern "*Mazalim* Courts." The *Mazalim* Courts can also hear civil law, family law and all other cases. **Islamic Law does have separate courts for Muslims for "religious crimes" and contemporary non-religious courts for other criminal and civil matters.**

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