

Reconsidering the Human Rights Framework for Applying Islamic Criminal Law

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In the few Muslim countries where Islamic criminal law in some form is already in force, charges have been made that human rights are thereby being violated. As demands rise in some other countries for reinstating Islamic criminal law, objections are raised that this will lead to conflicts with international law. As a review of the contemporary discussions of Islamic criminal law and international human rights law can confirm, many of those expressing opinions on the merits of applying and/or reviving Islamic criminal law neglect to consider how criminal justice systems actually function in contemporary Muslim countries and the need to reform them in the interests of achieving justice. The characteristics of these systems, which constitute the framework in which any criminal laws – whether secular or religious -- will be applied is what is most relevant for human rights assessments. One should not focus solely on issues of substantive laws, which are mostly theoretical, such as whether or not certain hadd penalties conflict with international human rights rules barring torture and/or cruel, inhuman, or degrading punishments. It is more important to devote time to evaluating critically where criminal justice systems fall short of meeting the standards of international human rights law. Such assessments of the frameworks are needed whether one's primary concern is respect for human rights law or is ensuring the welfare of Muslims and protecting them from harm.

Study of international human rights instruments shows that they emphasize rules designed to preserve the fairness and integrity of the criminal justice process. The rules regarding how criminal justice systems function are extensive, because the concern has been to ensure that the enormous power of the state, the police, the security forces, and the courts is balanced by a set of procedural protections designed to ensure that criminal defendants are not mistreated and that they are given an adequate chance to defend themselves in fair trials. It is hard to imagine that there could be any reasonable assessment of the Islamic sources that would lead to the conclusion that Islam is against human rights principles that have such concerns. Thus, one could say that by and large, in the area of criminal justice, international human rights law and Islamic principles are congruent.

Focusing on substantive criminal law – such as hadd penalties -- in the abstract can distract people from considering how the application of criminal laws is affected by shortcomings in the criminal justice systems typical of today's Muslim countries, where effective protections for the human rights of the criminal accused are woefully lacking. One cannot expect any exemplary application of penal sanctions where ills may prevail such as biased and poorly-trained judges, politicized justice, selective prosecutions, corruption, inadequate access to competent counsel, disregard for the presumption of innocence, targeting disfavored and vulnerable groups for arrest and prosecution, severe abuses – including torture -- of detainees held incommunicado, extortion and other

pressures exerted on family members of accused persons, routine reliance on coerced confessions, and general disregard for due process.

Reputable human rights organizations, both international human rights NGOs and groups inside Muslim countries, have provided guidelines for the reforms that would be needed to bring criminal justice systems in Muslim countries up to the standards of international human rights law. Significantly, even where elements of Islamic criminal law are theoretically in force, their criticisms of the existing systems rarely treat the local versions of Islamic law as a major problem. (An exception would be a case like Afghanistan under the Taliban, where a harsh and idiosyncratic version of Islamic criminal law assumed central importance.) Instead, their critiques tend to focus on framework problems. Thus, secular Turkey is among the countries cited for serious human rights violations in its criminal justice system, as are countries like Egypt, Libya, Syria, Tunisia, and Uzbekistan, whose legal systems are essentially secular.

Libya is an interesting case. The dictatorial government reinstated elements of Islamic criminal law back in the 1970s, without showing much subsequent inclination to carry out the penalties. However, it did show a consistent determination to use the criminal justice apparatus to eliminate dissent and to terrorize Libyan society into meekly acquiescing in Qadhafi's ambitious and self-aggrandizing projects. Harsh penalties in the criminal code of a country like Libya cannot possibly produce healthy results. The current chorus of denunciations of Libya for human rights violations perpetrated in the course of the convictions of the five Bulgarian nurses and a Palestinian doctor on charges of having deliberately infected Libyan children with AIDS, which has resulted in their being condemned to death, show how the human rights community focuses on systemic flaws. These six were convenient scapegoats for a regime eager to avoid taking responsibility for allowing sloppy practices in Libyan hospitals, which had led to the tragic outcome of HIV spreading to children. An official decision was made to charge a group of vulnerable expatriate health care professionals. Imprisoned in terrible conditions since 1999, held in isolation, severely tortured to produce "confessions," convicted in trials in which scientific proof of their innocence was ignored, and now held hostage as the regime bargains for a huge ransom from Western countries and the release of the Libyan convicted in the Lockerbie case, the six health care professionals are the victims of a system where politics rather than the rule of law determines outcomes. A criminal justice apparatus as egregiously defective as that in Libya should not be entrusted with the momentous task of carrying out any draconian penalties, whether Islamic or secular in character. Unfortunately, the kinds of defects that characterize the Libyan administration of criminal justice are by no means unique. Cases can easily be found in other Muslim countries that similar egregious deviations from international human rights law. Islamic law when inserted in the frameworks of such defective systems will predictably produce the same deplorable outcomes as the application of secular criminal laws will.

If more attention were paid to how unprepared contemporary Muslim countries are to implement Islamic law in a creditable fashion, thoughtful observers would, I surmise, be disposed to say that projects for reinstating Islamic criminal laws should be deferred

indefinitely, shelved until a time when their application would not mean that Islamic law would become associated with failings characteristic of ill-developed criminal justice systems. If one takes justice as being the goal of Islamic criminal law, one could argue that evaluating these systems based on Islamic principles and values would lead to identifying many of the same flaws that one spotlights by using international human rights law. However, given the common failure to examine critically how poorly the criminal justice systems in contemporary Muslim countries carry out their responsibilities, people can casually – and incorrectly -- draw the conclusion that the revival of Islamic criminal law will automatically realize a divine mandate or that criticisms of the human rights violations in countries that have enforced Islamic penal sanctions are to be equated with attacks on Islam per se.

As an American, I realize that my expressions of concern regarding the human rights violations that can result from applying Islamic criminal law in current circumstances are inevitably associated with hypocritical U.S. government stances regarding human rights and the gross double standards applied by the United States in judging human rights issues involving Muslims and Muslim countries. It is admittedly awkward to be talking about the deficiencies of the criminal justice systems of other countries at a time when under U.S. auspices so many Muslims have been casually and/or arbitrarily accused of involvement in terrorism, incarcerated in horrendous conditions in which they must endure severe indignities, and denied the basic elements of due process -- even being subjected to appalling abuses like the ones exposed at Abu Ghraib and reported by detainees held at Guantanamo.

However, I would raise the question: By what standard do we pass negative judgments on the outrages that have resulted from recent U.S. policies regarding Muslims suspected of terrorism if not the standards of international human rights law? Human rights organizations around the world have quite properly critiqued U.S. treatment of Muslim suspects using the standards of international law, and they have found extensive, egregious violations. To the chagrin of U.S. officials who have wanted to deploy international human rights law exclusively to attack other countries for their violations without ever having the United States be subjected to critical scrutiny, human rights law has proved to be a double-edged sword, one that provides the basis for condemnations of U.S. human rights violations that are as severe as any condemnations directed at Muslim countries for their violations. Since the victims in both cases are Muslims, Muslims concerned about the protecting the dignity and rights of Muslims should therefore be wary of challenging the universal applicability of international human rights law. By proposing theories of Islamic exceptionalism in the domain of criminal law, by arguing that international human rights law does not govern the treatment of Muslim defendants or restrict the penalties to which they can be subjected in Muslim countries, they are effectively weakening the case for condemning the U.S. handling of Muslims suspected of being connected to terrorist activities.

Even without the particular deviations from international human rights law brought about by fighting the so-called “War on Terror,” the U.S. criminal justice system has been judged deficient in many respects by critics who rely on international human rights

standards. Among other things, critical assessments have been made of the merits of applying harsh penalties within the framework of the U.S. legal systems as it currently functions. Many Americans originally supportive of the death penalty have undertaken as the fairness of the U.S. death penalty has been challenged in the wake of recent revelations. In the United States, there has traditionally been strong popular support for the death penalty, often on the grounds that it serves both retributive and deterrent functions. Some crimes are so heinous, so the theory goes, that the penalty needs to be proportionately strong. It is also widely assumed that imposing the death penalty for particularly atrocious crimes would in turn deter other potential criminals from committing similar offenses.

These arguments resemble some articulated by Muslims demanding application of Islamic criminal law. In justifying their calls for harsh sanctions, especially for persons convicted of hadd crimes, which -- depending on interpretations -- may entail stonings, floggings, and amputations, they say that the crimes involved constitute affronts to Islamic morality and call for the severest punishment. They may assert that the lesson needs to be conveyed that people must avoid committing these offenses at all costs. But, as I have noticed, they tend to turn away from appraising the practical outcomes of adding harsh penalties to the criminal justice systems as they currently exist in Muslim countries, systems that hardly embody models of justice to be celebrated or designed to instruct people in morality.

U.S. supporters of the death penalty have recently been disturbed by new information documenting the serious deficiencies in the way that the death penalty is applied in the U.S. legal system. Among other things, more and more statistics have accumulated proving that the application of the death penalty is racially biased; African Americans are sentenced to capital punishments for crimes for which prison sentences would be given to White Americans. With all its investment in courts and after the development of elaborate protections for the due process rights of the criminal accused and despite having an independent judiciary and a professional bar, the U.S. criminal justice system turns out to have repeatedly convicted defendants of capital offenses of which they were entirely innocent. Eager to "solve" crimes and to punish supposed perpetrators, criminal justice officials have often railroaded innocent defendants, trying to evade rules designed to protect the accused and seeking to secure convictions regardless of the soundness of the evidentiary basis. Over the last decade, the endeavors of groups like the Justice Project and the availability of DNA testing have conclusively established that many prisoners awaiting execution were wrongly convicted and that their protestations of innocence were entirely well-founded, making it increasingly hard for people to deny that the U.S. criminal justice system functions in ways that clash with international human rights law.

The sobering news of the egregious malfunctioning of the U.S. criminal justice system has altered the opinions of many former supporters of the death penalty. While still opining that, in a more perfect criminal justice system, the application of the death penalty would be warranted for the most serious offenses, they have concluded after realizing the scope of the deficiencies that permeate the existing system that suspending the death penalty is warranted. That is, they have come to realize that, in order to avoid

being implicated in appalling miscarriages of justice, they have to move beyond considering the merits of criminal laws – in this case capital punishment – in the abstract and shift to examining the actual consequences of draconian penalties in the context of the U.S. legal system with its various human rights shortcomings. When they have done so, they have tended to doubt whether recourse to the death penalty serves the end of justice or has the chance of reinforcing moral values. In consequence, many former supporters of capital punishment have reversed their positions after making painful reassessments, deciding that capital punishment should not be applied in a system where the framework could not guarantee respect for human rights. They realized that systemic deficiencies were crucial and deserved a central place in an consideration of the merits of certain substantive laws.

It is time to pay attention to the actual human rights context in which Islamic criminal law might be applied in today's Muslim societies. When one appraises problematic features of contemporary criminal justice systems, one finds a context in which there are pervasive violations of international human rights law. These same systemic deficiencies are ones that Islamic law hardly condones. Regardless of which of the two sets of laws one refers to, one is drawn to conclude that systemic reforms are urgently needed. If Muslims decide to accord priority to the task of reforming these inadequate criminal justice systems, they can embark on a project where they will not encounter conflicts between international human rights law and Islamic values, both of which stress the need for fairness and justice.