

Basic features of Islamic criminal law

Prof. Dr. Christine Schirrmacher

Islamic theology regards Sharia law as perfect, God-given legislation not of human origin and therefore beyond question. Muslim apologists claim the world-wide application of the Sharia would result in universal freedom and justice. God's commands were communicated to the Prophet Muhammad through the archangel Gabriel and recorded in the Koran and traditional Islamic texts. The relevant legal texts have been interpreted by renowned theologians, among whom the lawyers of the early centuries of Islam are regarded as particularly authoritative.

The Sharia covers the whole spectrum of Islamic jurisprudence: laws regulating religious practice (the daily ritual prayers, fasting in Ramadan, pilgrimage to Mecca, the ceremonies at religious feast days, and more), marriage, family and inheritance law, property laws, the criminal code and laws covering religious foundations. The Sharia thus determines a person's relationships to God, to his family and to society.

An important part of the Sharia is undoubtedly that dealing with family and inheritance law. Sharia law forms the main if not sole basis of family law and therefore of civil jurisprudence not only in all Muslim countries (with a few exceptions), but also in parts of Africa and Southeast Asia. One outstanding exception is Turkey. When the Ottoman empire gave way to the Turkish Republic under Kemal Atatürk in 1926, laws pertaining to marriage and the family were modelled on the Swiss Civil Code and the Sharia was completely abolished as a basis of law. A kind of shadow jurisprudence nevertheless remains in that, for instance, polygamy, forbidden under Turkish law, continues to be practised in rural areas, and the issue of such "clerical marriages" is regularly declared legitimate and the marriages themselves are retroactively granted State recognition.

The Sharia has remained an ideal law which has never actually been completely and consistently applied. The "return to Sharia" proclaimed by some countries today in fact means little more than that marriage and family law are being more closely modelled on Koranic precedent. Modern jurisprudence in Muslim countries tends to be a composite of Koranic commandments, elements of Islamic traditions, customary law, vestiges of pre-Islamic Persian or Roman codes and elements of European legal provisions let over from the colonial period. The rapid expansion of the Islamic empire in the centuries following Muhammad's death saw the need to expand the relatively few decisions he made in the early Islamic community and recorded in the Koran and traditional texts, into a workable legal corpus based on Islamic principles. As a result various schools of jurisprudence emerged, four of which, the Shafi'i, Hanbali, Hanafi und Maliki schools, achieved permanent status. These four schools agree on the basic features of Islamic criminal law, which is binding for contemporary orthodox Sunni Islam.

Three classes of crimes are usually distinguished, differing substantially as to rules of evidence and the penalties inflicted.: capital crimes, crimes of retaliation and discretionary crimes.

The most serious cases, denoted capital (Arabic *hadd*) crimes, comprise those classed by the Koran or tradition as capital offences and for which they prescribe a fixed penalty. Since Islam regards such crimes as committed against God and not man, a charge may no longer be dropped once has been brought, nor is an amicable out of court settlement permitted until punishment has been inflicted on the guilty. Hadd-crimes comprise:

(1) *Adultery and immorality*: Surah 24:2-3 prescribes 100 lashes for both man and woman. In Islamic law the idea has come to prevail that whereas unmarried women should be whipped, married women deserve death by stoning in accordance with Islamic tradition. The Koran warns explicitly against pity for offenders. However the testimony of four (usually male) witnesses or a confession is required as evidence of guilt. It is not customary to admit circumstantial evidence,

which is regarded as furnishing insufficient grounds for a conviction, unlike the pregnancies cited as evidence against unmarried women recently accused in Nigeria and the Sudan of offences punishable by stoning.

The requirement of four male witnesses makes it virtually impossible for women in countries like Pakistan to establish a case of rape, since such witnesses will never be forthcoming. Not a few women, mainly from the underprivileged Christian minority who are virtually deprived of recourse to due process, have tried to bring cases of rape and have subsequently been themselves charged with bringing a slanderous accusation of adultery (cf. 2) against the man involved and punished by lashes.

(2) *Slanderous accusation of adultery*: Surah 24:4 prescribes 80 lashes for those found guilty.

(3) *Serious theft*: According to Surah 5:33-38 this is punishable by amputation of the right hand and, for a second offence, of the left foot. Islamic lawyers have specified certain conditions to be fulfilled before a case of theft can be included in this category, such as a minimum value, safe custody and an undisputed title of the stolen goods, but amputation still affords the victim no compensation whatsoever and turns the offender into a cripple, who, generally unable to find employment, ends up as a burden to the community.

(4) *Armed or highway robbery* is punished, depending on the severity of offence, by a prison term, amputation, execution or crucifixion.

(5) *Use of alcohol*: the Koran does not mention a specific penalty but the tradition lays down 40 to 80 lashes for anyone found partaking of intoxicating liquor. The second category, crimes of retaliation (Arabic *qisas*) are those in which the offender or his family are required to make reparation. The most important crimes in this category are doubtless grievous bodily harm and manslaughter. The victim's family can insist on a comparable injury (an eye for an eye, a tooth for a tooth) or the death of a equivalent member, where possible, of the offender's family (a man for a man, a slave for a slave). In lieu of the offender's death, the victim's family may accept financial compensation and the performance of a religious penance such as a supplementary fast. By far the most numerous offences fall into the third discretionary (Arabic *ta'zir*) category, where the penalty is imposed at the judge's discretion and which include cases of embezzlement, blackmail, forgery etc.

Islamic law originated in the legal precedents of Muhamad's early Muslim community on the Arabian peninsula in the 7th Century AD, a jurisprudence shaped by specific circumstances and therefore limited to individual cases. Not only is it scarcely compatible with the requirements of a modern, technological society, although still regarded by many theologians as divinely given and therefore beyond question, but a consistent application of its drastic forms of corporal punishment (amputation, lashing, execution, crucifixion, retribution) results in torture, crippling or inhuman forms of execution. The application of the Sharia is particularly nefarious where inbuilt curbs such as the requirement of four witnesses or due process are set aside and influential potentates employ it as a means of repression against impotent, often Christian, minorities.