

The Disunity of Islamic Criminal Law and the Modern Role of *Ijtihād*

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Abstract

Islamic law, and criminal law in particular, have been closed since its heyday of legal scholarship to external influences and new theoretical arguments and constructs. This, it is argued, is due to the lack of enlightened and revered scholarship that will enhance Islamic law and which is currently unavailable. This situation is unlike early and classical Islam where legal argumentation flourished and Islamic scholarship was generally open to external currents and philosophical ideas. Despite these limitations Islamic criminal law has not coalesced to shield itself from foreign elements, but instead lacks a single voice not only in practice but also in its theoretical bases among Muslim nations. We cannot therefore speak of 'an' Islamic criminal law nor can Muslims continue to ignore the beneficial role of *ijtihād* that should be utilised at least as a forum for discussion about bridging classic Islamic criminal law with contemporary Muslim needs. Many contemporary issues in Islamic criminal law are evidently based on prejudice, culture and less on a coherent understanding of Islamic theology itself. Islam possesses a plethora of outstanding legal scholars that should be allowed to contribute to an *ijtihādī* scholarly 'revolution'.

Keywords

ijtihād; Islamic criminal law; auto-poiesis; disunity; social systems

1. Introduction

The title of this article may from the outset seem natural to some readers but wholly irrational to others. The aim is to demonstrate the disunity in the formulation and application of criminal law in the Muslim world, even where it is expressly premised on the Shari'ah and its fundamental sources. Thus, we are not here concerned with the possible disunity of Islamic law as a whole, to which this author offers no views at all. In order to address the issue of a system's disunity one has to find its underlying causes. In the present case we attempt to refute the argument that Islamic law is generally a closed system that is not influenced by its

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external environment. In fact, the openness of Islamic law is confirmed even with regard to its classical period, as well as through historical data about more contemporary times, particularly as a result of developments during the nineteenth century in which Egypt was its epicentre.¹ This has created a divergence in the criminal justice systems of Muslim nations that is readily evident.

Although subject to external influences, the institutional mechanisms of Islamic law are necessarily rigid because of express injunctions in the Qur'ān and the Sunnah, which are hard to defy or in respect of which one may offer a compellingly different interpretation. Moreover, the presumption in much of the last millennium was that no authoritative juridical reasoning was possible because of the lack of enlightened scholars. This culminated in the breeding of a significant degree of stagnation, which severely affected the interpretation and application of Islamic criminal law. However, in the course of the nineteenth century these barriers were broken by two schools of scholars: those representing revivalism and those standing for modernism.² They both employed *ijtihād* as a means of juridical reasoning in order to address fundamental questions of their generations, many times going beyond the letter of a verse,³ each of course guided by their own particular needs and agendas. The result of this type of *ijtihād* is apparent today through the extremities in the application of Islamic criminal law in the Muslim world: from the Taliban in Afghanistan to the moderate criminal justice system in Tunisia.

2. Islamic Law as an Open System

At one point, two schools of thought existed as to the origins of non-Islamic legal thought (particularly Talmudic law, Byzantine–Roman law, canon law and Persian–Sassanian law), into Ancient Islam. *Joseph Schacht* was originally of the opinion that foreign elements entered ancient Islamic law through non-Arab converts to Islam, who in turn brought with them their own juristic traditions.⁴ Schacht does not claim that said foreign elements dominated Islamic legal thought, but he does admit that they did to some degree inform particular legal principles

¹ See *J.N.D. Anderson*, “Law Reform in Egypt: 1850–1950, in *P.M. Holt* (Ed.), *Political and Social Change in Modern Egypt* (Oxford University Press, 1968), p. 209.

² For a thorough account of modernist views, see *M. Kerr*, *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida* (Berkeley University Press, 1966).

³ See *F. Vogel*, “Closing of the Door of *Ijtihād* and the Application of the Law”, *American Journal of Islamic Social Sciences*, 10 (1993) 399; *R. Peters*, *Ijtihād and Taqlid in 18th and 19th Century Islam*, *Die Welt des Islams*, 20 (1980) 131.

⁴ *J. Schacht*, “Foreign Elements in Ancient Islamic Law”, *Journal of Comparative Legislation & International Law*, 32 (1950) 9.

and rituals of this new religion.⁵ *Motzki*, on the other hand, in a much later article conducted a comprehensive study of the early Islamic scholars and came to the conclusion that only a minority originated from non-Arab converts and, as a result, their contribution to the emerging Muslim jurisprudence must have been in fact negligible.⁶ The truth is that in a system that is dominated by an irrefutable imperative, which in turn postulates particular rules on the basis of divine revelation, any foreign elements incorporated therein, whether as mere suggestions or as norms that are supplementary to the divine revelations themselves, must be wholly consistent with the dictates of the Qur'ān.⁷ Moreover, given that the Sunnah, which encompasses all accepted Ḥadīth, is *ab initio* presumed to conform with the Qur'ān, any foreign elements must at least conform to the Sunnah.

At yet another level, Ancient Islam can lay claim to a self-contained system that, although aware of its external environment (i.e., societies, countries or groups dominated by other religions or politico-social systems), is not affected by such an environment in its institutional relations.⁸ Certainly, during this early time Islam, and its criminal law by implication, was influenced by factors external to Islam, but only to the extent that these were deemed compatible with Islamic tenets. By way of example, the Prophet Mohammed recognised the inviolability of the person of the envoy and ruled in favour of granting such persons safe passage up to the outer boundaries of the territory of the host State (i.e., the principle of *amān*).⁹ The principle of *amān* pre-existed Islam and was in fact sacrosanct to the international relations of the Ancient world well before the advent of Christ.¹⁰ Its acceptance in Islamic jurisprudence and the contribution of the latter to the shaping of the concept in general international law is well recognised,¹¹ but

⁵ By way of illustration, *Schacht*, id., p. 14, mentions the interpretative tool of *qiyās* that is tantamount to an analogy. *Qiyās*, Schacht argues, as a form of systematic reasoning, “must for linguistic reasons have been borrowed from Rabbinic *heqesh*, itself presumably a translation of the Greek term *συμβάλλειν*”.

⁶ *H. Motzki*, “The Role of Non-Arab Converts in the Development of Early Islamic Law”, *Islamic Law & Society*, 6 (1999) 293.

⁷ The Qur'ān itself is not oblivious to its influences from other religions. See particularly Q4:26 (known as *Sūrah an-Nisāa*), which reads as follows: “Allah desires to make clear to you, the laws of your religion and what is in your best interests, and to guide you in the ways, the paths, of those, prophets, before you, in the way of what is lawful and what is unlawful, so that you might follow them.”

⁸ See generally, *N. Luhmann*, *Law as a Social System* (trans. by K.A. Ziegert, Oxford University Press, 2004), Ch. 1.

⁹ See *I. Bantekas*, “Religion as a Source of International Law”, in: *J. Rehman et al. (Eds.), Religion and Human Rights: A Critical Examination of Islamic Practices* (Leiden: Brill, 2007) 143, pp. 150–151.

¹⁰ *K. Zaat*, “The Protection of Forced Migrants in Islamic Law”, *UNHCR Research Paper* No. 146 (Dec. 2007), pp. 22–23.

¹¹ See *Case concerning United States Diplomatic and Consular Staff in Tehran (USA v Iran)*, Judgment of 24 May 1980, *International Commission of Jurists Reports* (1980) para. 86.

its incorporation into Muslim law would have been impossible if a normative imperative to the contrary was found to have existed. But as regards the unity and autopoietic character of Islamic law, and Islamic criminal law in particular, this has not come about from values located outside it and its borders have been clearly drawn by internal institutional processes and not by the doctrines of other religions, cultures or practices. These may have had an influence in Islam's formative years, but only so long as they were compliant with the Qur'an's fundamental precepts. Its development into a social system has meant that Islamic criminal law has evolved into a self-producing mechanism that produces all the distinctions and norms that it itself employs and uses. This has in turn led it to so-called operational closure through which it has become closed to its external environment, producing thereto only a limited range of responses.¹² It necessarily acts in this manner because it is self-sufficient. However, consistent with our aforementioned comments on the influences on classic Islam by external influences, the translation and transcription movement of Islam (750–850 AD) concedes that during this early time of its development, Islam both took and received from its early adherents in all fields of science, learning and social organisation.¹³ Greek and Roman philosophy were particularly prominent and this is particularly true also of Roman law whose codification was a major event in the century prior to the advent of Islam.

It is one thing for a legal system to produce distinctions and norms internally and communicate these to its members in an authoritative manner, but it is a wholly different proposition for that legal system to interact with other legal regimes. A legal system may lay claim to full and absolute operational closure, albeit it is a reality of life that the inter-connectedness of international society (even if to conclude an armistice or to agree that one's merchants can transit or sell in other States) makes interaction inevitable sooner or later. By way of example, during the first era of expansion and interaction of Islam, war against unbelievers was justified merely by the fact of disbelief, thus bringing about the dichotomy of "*dār al-Islām/dār al-ḥarb*" (territory of Islam and territory of war, respectively). The *dār al-Islām* was subject to a particular set of rules common to the Muslim brethren living therein, whereas the *dār al-ḥarb* was not. By the thirteenth century, at a time when both the Christian and Muslim nations realised that one could not fully subjugate the other, the aforementioned dichotomy was expanded to include a third category, the "*dār al-ṣulḥ*", which means the territory of peace. This status corresponds also with the modern state of affairs, comprising relations with non-Muslim States that were not hostile to Muslim nations and

¹²) Luhmann, *supra* note 8, Ch. 2.

¹³) See I.M.N. Al-Jubouri, *History of Islamic Philosophy with a View of Greek Philosophy and Early History of Islam* (Authors on Line, 2004), pp. 186ff.

which moreover entered into treaty relations with them.¹⁴ Islamic law was certainly open to external influences without necessarily being overwhelmed, although to what degree is anyone's guess.

Moreover, given the indeterminate and rather vague nature of classical Islamic law as a legal system that is insusceptible of delivering accurate results in the context of a non-Muslim judicial setting, it should not surprise the reader that the Sharia has sometimes been viewed as not constituting a legal system.¹⁵ Such affirmations are certainly context-specific, but are not wholly unjustified as Islam does not speak with one voice globally and so the existence of Islamic law as a legal system under the terms identified above is not easy to substantiate. Islamic law and Islamic criminal law, in particular, are undergoing a process of fragmentation that varies from country to country. This result is also attested by Islamic scholars who argue that the Qur'an and the Hadith are insufficient to deal with the exigencies of daily life and much prominence is given to the jurisprudence of local courts and their exposition of legal principles.¹⁶ Classical Islamic law, particularly its criminal component, does not therefore fit the mould of a legal system that is institutionally autonomous and self-producing, which in turn would clad it with operational closure. The communications of the Islamic Sharia are both dependent and derived from the domestic laws of Muslim countries, as well as from religious institutions that are able to yield authority over relevant issues. These domestic criminal justice systems in turn are influenced to one degree or another by European codifications or common law principles as is usual with all functioning legal systems. This process will have removed the unity of classical Islamic criminal law in the practice of Muslim nations. As a result, we cannot speak of a single Islamic criminal law, but of discrete criminal justice systems informed and fashioned around the Sharia. Taken as a whole they can only provide a basis for ascertaining general principles of Islamic criminal law. Not unnaturally criminal law differs to a larger or small degree from country to country in the Muslim world and, in some cases, this body of law is closer to secular criminal justice systems, as is the position in Turkey and Tunisia.

¹⁴ M. Khadouri, *War and Peace in the Law of Islam* (Johns Hopkins Press, 1955), pp. 202–222.

¹⁵ See *Beximco Pharmaceuticals v Shamil Bank of Bahrain EC*, [2004] 1 W L R 1784. This case involved a choice of law clause according to which the contract was to be construed in accordance with English law "subject to the principles of Shari'ah". The Court of Appeals held that under the 1980 Rome Convention on the Law Applicable to Contractual Obligations only national legal systems can be designated as laws governing a contract, a requirement which the Shari'ah does not satisfy.

¹⁶ See C. Mallat, *Introduction to Middle Eastern Law* (Oxford: Oxford University Press, 2007), who argues that as a result of this lack of accuracy of classical Islamic law a small revolution has taken place among Muslim lawyers. They are turning to the law as applied and practiced by countries with sizeable Muslim populations, which he terms Middle Eastern Law.

3. Legal Interpretation, *Ijtihād* and Militant Islam

The commentators of all legal systems will naturally argue that any aberrations in behaviour within the confines of the legal system that would otherwise be classified as criminal are not and cannot be validated by reference to the procedural rules of the system itself. By way of illustration, a murderer cannot argue that normative processes in the common law give him the power to decide on a case-by-case basis if it is reasonable to kill other people. This is so because the law does not give such power to anyone. The law does not grant us power to make law, save in very exceptional circumstances, such as in contractual relationships. There are only limited situations in which non-State agents can make a legitimate claim to promulgate binding rules of behalf of others; in cases of lawlessness and in those situations where law is indeterminate, uncertain and so fragmented that no one is quite sure how his personal and inter-personal relationships are regulated.

From the rise of Islam as a social and legal system its law-making processes ultimately crystallised into four strictly hierarchical types, as is well known; these are the Qur'ān, the Ḥadīth (representing the sayings and actions of the Prophet and that of his immediate community of followers), *qiyās* (human reasoning by analogy, but only if adopted by a large enough majority of Muslim scholars) and *ijmā'*, which represents the actual consensus of the Muslim scholarly community. If an analogy is indeed possible, *qiyās* and *ijmā'* play the role of the common law in the English legal tradition that sets out to satisfy the application of law without gaps. However, just like all social and religious systems, the validation of their internal processes by their stakeholders usually faces one very significant problem. They generally accept and in fact revere the foundations of the system itself to such a degree that they are later unable to concede that subsequent human intervention can substitute for any minor or major gaps or deficiencies in the system. Every attempt is made to rely on existing sources even if it is evident that they are wholly inadequate to deal with the 'new' situation at hand. This is in fact one of the major questions in the philosophy of religions: i.e., whether a particular religion can actually progress from its original form. The question could be framed in alternative terms as follows: is truth immutable? I will not attempt to respond to this question, but I will use it as my basis for analysing some of the procedural problems faced by Islamic scholars to respond to social and legal issues of their generations.

The deficiencies of the early system of Islam and its four primary sources in dealing comprehensively with all legal and social issues was taken up illumined Muslim scholars, or not, through the process of *ijtihād*. The word is derived from *jihād* and means to struggle; in fact, these early scholars struggled immensely to come to terms with and keep the system coherent. *Ijtihād*, therefore, represented independent legal reasoning that was not, however, binding on the petitioner or other jurists. By natural implication, if an *ijtihād* ruling did not meet with general

scholarly agreement (*ijmā'*) it was of no lasting value. Yet, there was a danger as to the cohesion of Islamic law in the unregulated business of *ijtihād* and eventually when the various Islamic legal schools coalesced as such into *madhhabs* the 'power' of *ijtihād* was removed from simply anyone and granted exclusively to muftis. By the fourteenth century they in turn claimed that only the most knowledgeable among Islamic scholars could authoritatively postulate *ijtihād*, but alas it was proclaimed that there existed no such scholars since the demise of the founders of the four main *madhhabs*.¹⁷ This prohibition on *ijtihād* did not, however, stop all scholars from continuing to practice it, but certainly curtailed it almost to vanishing point.¹⁸ From the point of view of a Western academic, like myself, the intentional closing of the gates of *ijtihād* entailed the introduction of the equivalent of Europe's Dark Ages in which no new knowledge was accepted. This was devastating for what was by that time a free-thinking, scientific-led and thriving Islamic culture and civilisation that had made a significant influence on Europe. It is evident that to a very large degree the closure of the gates of *ijtihād* was related to the controlling mechanism of making *fatwās*.

For the purposes of the subject matter of this article this is where our particular interest commences. In the course of the middle to the end of the nineteenth century with the crumbling of the Ottoman Empire and the spread of Western imperialism throughout North Africa and the Middle East, including the Arabian Peninsula, a significant transformation took place in the legal systems of those territories. This related to the imposition of civil codes that were directly imported from France on Egypt and North Africa. This threatened not only to bring about a secularisation of Muslim societies, but it had profound implications for the survival of Islamic law and its use in the regulation of Muslim life generally. The situation gave rise to two distinct socio-legal phenomena. On the one hand, revivalist movements gained much prominence, such as that of Al-Wahhab in Arabia and of Shah Walli Allah (forerunner of the Taliban), all of which employed *ijtihād* to solidify their popular bases and concretize their respective message.¹⁹ It was not unnatural, therefore, that the more powerful and well-embedded Islamic institutions, particularly those in Egypt, would seek to discredit those movements and proclaim that the gates of *ijtihād* had closed.²⁰ As a result of this particular attitude to *ijtihād*, it should be noted, contemporary legal scholars wrongly

¹⁷ See M. Fadel, "The Social Logic of *Taqīd* and the Rise of the Mukhatasar", *Islamic Law & Society*, 3 (1996) 193.

¹⁸ W.B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Uṣūl al-Fiqh* (Cambridge University Press, 1997), pp. 153–156.

¹⁹ See A. Dallal, "Origins and Objectives of Islamic Revivalist Thought: 1750–1850", *Journal of the American Oriental Society*, 113 (1993) 341.

²⁰ I. Falk-Gesink, "Chaos on the Earth: Subjective Truths versus Communal Unity in Islamic Law and the Rise of Militant Islam", *American Historical Review* (2003) 710.

claimed this to be a rule of universal application.²¹ Besides the revivalists that were to later radicalise and polarise the Islamic agenda, a new breed of intellectuals entered the scene: Islamic modernists. They contended that Muslim societies were for some time undergoing a social and moral decline that was in large part predicated on the “invented history of [Islam’s] immutable legal tradition” which was the cause for moral and social stagnation.²² The core of their revival ideas rested on an epistemological shift away from received knowledge and toward individual judgment, a reinvigorated *ijtihad*.²³ This was a vision of Islam in tune with the rationale of the European Enlightenment and which accorded with scientific discoveries. This was also anathema to the conservative schools of thought, but it did not prevent revivalist, modernist and radical groups from making extensive use of *ijtihad* particularly by controlling several newspapers and gaining a strong footing in the public debates.²⁴

Currently, there is a new trend of thinking about the procedures for instituting *ijtihad*, as well as for ways in which it can secure legitimacy. This is known as *ijtihad jamā’i*, or ‘group *ijtihad*’. This is characterised in its substance on a collective decision by a group of Muslim scholars, as opposed to a contemporary individual opinion that may lack legitimacy, and which is opposed or conflicts with a ruling by a scholar of the classic period of Islam. Obviously, a collective decision by respected scholars is easier to accept, although it may appear *prima facie* that collective *ijtihad* is nothing more than a disguised version of *ijmā’*. The difference between the two, however, is obvious; whereas *ijmā’* requires the agreement of most of the scholars of its time, group *ijtihad* only needs the agreement of a group of scholars. The difference, therefore, is principally of a quantitative nature, but this flexibility is also the measure of its success, if any.²⁵ Group *ijtihad* is still at a state of infancy, but, in the opinion of this author, it is the key to scientific dialogue, at least in the field of law and society.

There are good and bad news arising from these processes of social fermentation. On the one hand, Islamic law and socio-political thinking removed itself from a stagnant rigidity that generally halted development and which was unable to generate or invite new ideas to new problems. On the other hand, however, it helped bring about and nurture radical ideas about the relations of Islam with the non-Muslim world, as well as the shaping of radical attitudes on law, particularly criminal law. The latter is certainly not a welcome development, but it is part and parcel of the process of openness. The fact that *ijtihad* is generally open to all

²¹ W.B. Hallaq, “Was the Gate of *Ijtihad* Closed?”, *International Journal of Middle East Studies*, 16 (1984) 3.

²² I. Falk-Gesink, *supra* note 20, p. 712.

²³ Id.

²⁴ Id., pp. 727–729.

²⁵ See B. Schäßler, L. Stenberg, R. Mottahedeh, *Globalisation and the Muslim World* (Syracuse University Press, 2004) p. 100.

persons and all groups has necessarily served to increase the incoherency of Islam's legal procedures and its substantive law. Thus, attitudes within Sunni Islam about criminal law and criminal procedure vary from place to place. The variety of attitudes is not only confined to the official juridical systems among Muslim nations, but more significantly among those religious institutions that are deemed to possess an authoritative status as to the interpretation of religious matters. In some countries these institutions are incorporated in the official apparatus of the State, but in others they are not. In Western societies, official church authorities will make pronouncements on various matters of social and religious concern, but these will in no way trump the legislature, nor will they have the potency to effectively override formal laws.²⁶ In the Muslim world the position is quite the opposite. The criminal law in Islamic States is preconditioned by religious considerations, which themselves are predicated on the four sources of Islamic law. However, with the emergence of radicalised or nationalist Islamist groups since the formation of the Muslim Brotherhood in 1928 the proliferation of *ijtihad* to serve their particular agendas has culminated in increasing their popular bases and radicalisation of criminal law.²⁷ Typical examples that have suffered as a result has been the deterioration of the status of women and their place in the criminal justice system (e.g., in respect to rape or adultery), the position on apostasy, the perpetration and incitement of so-called Islamic *jihād*, including the indiscriminate killing of civilian unbelievers, under the pretext that it is mandated by the Qur'an and the Prophet. *Fatwās* and rulings are issued without coherency and system from all corners of the Islamic world on matters of criminal interest. This has led to the disunity of the Islamic criminal justice system, at least as this may be discerned under the flagship of its four fundamental sources. Unfortunately, for many Muslims around the globe their perception about criminal law is derived from informal actors that preach a militant Islam on the basis of their own self-interested *ijtihad*. In the primitive societies of Afghanistan, or the ultra-conservative Muslim societies of Britain, the contents of such *ijtihad* are much more potent than any type of formal criminal legislation. As a result, it is not surprising that the relevant stakeholders engage in terrorist activities or execute female family members for having friendly relations with non-Muslim males, to name a few. This is perceived as being consistent with their notions of crime and punishment. It is fair to say, therefore, that Islamic criminal law is as diverse as its range of *ijtihadīs*.

²⁶) Exceptionally, the Greek Orthodox Church protested the deletion of one's religion from national identity cards and called for the faithful to resist, but besides a string of well-attended rallies and popular dissent the law was not effectively overruled. Equally, the Catholic Church has criticised the use of condoms as a strategy against HIV/AIDS, calling for abstinence instead.

²⁷) For a compelling account of the Muslim Brotherhood movement, see R.P. Mitchell, *The Society of the Muslim Brothers* (Oxford University Press, 1993).

4. Disunity is not Necessarily Negative

The application of criminal law in the Muslim world during the last 150 years has undergone two stages of transformation. The first was brought about in the mid to late nineteenth century by the codes introduced by imperialist forces, the influence of which continued well after decolonisation in most countries, with the exception perhaps of Saudi Arabia and the Gulf States. At present there is a resurgence of classic Islamic criminal law in some parts of the Muslim world, particularly Pakistan, Sudan, Libya and northern Nigeria.²⁸ Thus, at the first level of disunity is the bifurcation of systems adherent to classic Islamic criminal law and those that are certainly influenced by it in certain areas but are predominately codified around Western models. Unlike the position in the law of personal affairs, it is wholly unlikely that the latter model of criminal justice systems will borrow elements from the former. This is not to exaggerate the differences between them, however. Much is based on misconceptions. For example, the strict penalties associated with the more serious *ḥudūd* offences are imposed only very rarely in the practice of States adherent to the classical tradition. Even in respect of *ta'zīr* offences that are punished by flogging, the authorities in countries where these are enforceable generally demonstrate extreme discretion, taking into account the seriousness of the crime and the status of the offender. The Western audience is fascinated by the brutality of some forms of punishment, but their imposition is mostly conditioned by local politics.

The disunity among Muslim criminal justice systems is more evident in respect of the interpretation of particular offences, such as that of apostasy, or procedural rules, such as *diyya* (compensation, but essentially so-called blood money) and *qiṣāṣ* (a claim for retaliation),²⁹ as well as the weight to be given to a female testimony. The offence of apostasy is a good starting point for this discussion because of its historical dimension in Muslim legal and religious history and the controversies it has given rise to.³⁰ Despite the often cited verse in the Qur'an whereby

²⁸ See R. Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press, 2006).

²⁹ The general concept of blood money predates Islam and was practiced extensively in the Arabian Peninsula well before the advent of Prophet Mohammed. In most Muslim criminal justice systems the legislation in *diyya* and *qiṣāṣ* is preceded by a detailed annex specifying the worth of each human organ or limb in terms of retaliation. See Oman Royal Decree No 118/2008 (7 Nov 2008), which provides for such an annex. It should be noted that *diyya* is not a criminal punishment, but merely civil compensation and belongs in the realm of private law, since in many cases it may be exacted from the perpetrator's male relatives. See R. Peters, *id.*, pp. 7–8.

³⁰ The Baha'is in Iran have been persecuted since their split from Islam in 1863, and this has continued to the present day. See Report of the Special Rapporteur of the Human Rights Commission, UN Doc E/CN.4/1987/20 (28 Jan. 1987); in 1985 the Nimeiri regime in Sudan ordered the public hanging of a Sudanese intellectual, Mohammed Mahmud Taha, on the grounds of apostasy for his personal interpretation of the Qur'an. See A.A. An-Na'im, "The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan", *Religion*, 16 (1986) 197.

it is proclaimed that there is no compulsion in matters of religious belief,³¹ further supported by the contention as to the lack of worldly sanctions against disbelievers and apostates, save for those imposed by God in the afterlife,³² scholarly commentaries that claim their veracity from Ḥadīth are of a different opinion. It is not the purpose of this short piece to examine these commentaries, but in their majority the authors of these scholarly commentaries call for the penalty of death.³³ The reason associated with this type of punishment in classical Islam had nothing to do with one's belief or the act of apostasy itself; rather, it was justified by reference to the political and military threat engendered by a male abandoning Islam. As a result, there was no such punishment for women.³⁴ The contemporary application of the crime of apostasy varies considerably, but its main premise is the degree of political pressure on governments by resurgent Islamist forces. This is certainly the case in Sudan, north Nigeria and Iran³⁵ and has traditionally been the case in Saudi Arabia, albeit the matter has never warranted any serious discussion there. In Egypt, apostasy is not and was not a criminal offence and the string of cases decided since the 1990s focused on the implications arising from personal statute laws, particularly divorce, inheritance and the like.³⁶ Apostasy has the same legal effect in all other secular legal systems in the Muslim world, albeit the application of personal family statutes is less severe and intrusive as compared to Egypt.

Another issue of contention among criminal justice systems in the Muslim world concerns the status of women in the criminal trial.³⁷ This, much like its

³¹ Qur'ān 2:256.

³² Particularly Q95:54; Q47:25; Q2:217; Q16:108–109.

³³ See R. Peters, G.J.J. de Vries, "Apostasy in Islam", *Die Welt des Islams*, 17 (1976–1977) 1.

³⁴ B. Johansen, "Apostasy as Objective and Depersonalised Fact: Two Egyptian Court Judgments", (2003) 70 *Social Research* 687, p. 694.

³⁵ See J. Griboskie, "Iran Moves Towards Death for Apostasy", *Spero* (22 Sept. 2008), available at: <<http://www.speroforum.com/site/print.asp?idarticle=16195>>, where it is reported that the discretion to a judge once available to Iranian judges in cases of apostasy was amended through Art. 225(7) of its Penal Code to a mandatory death sentence.

³⁶ B. Johansen, *supra* note 33, pp. 697ff.

³⁷ In fact, the relatively poor legal status of women in most Muslim legal systems is reflected in recent rulings of European courts the effect of which is to deny recognition in respect of particular judgments. See *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, in which the House of Lords held that a woman was justified in seeking asylum in the UK as a result of discriminatory family laws in Lebanon based on the Shari'ah. The relevant passage as *per* Lord Hope of Craighead, para 6, is instructive: "The fact is however that Shari'ah law as it is applied in Lebanon was created by and for men in a male dominated society. The place of the mother in the life of a child under that system is quite different under that law from that which is guaranteed in the Contracting States by Article 8 of the [European Convention on Human Rights] read in conjunction with Article 14. There is no place in it for equal rights between men and women. It is, as Lord Bingham points out, the product of a religious and cultural tradition that is respected and observed throughout much of the world. But by our standards the system is arbitrary because the law permits of no exceptions to its application, however strong the objections may be on the facts of any given case."

equivalent of apostasy, is coloured by the clear Qur'ānic injunction, as well as subsequently accepted Hadith and commentary, according to which: "And let two men from among you bear witness to all such documents. But if two men be not available, there should be one man and two women to bear witness so that if one of the two women forgets [anything], the other may remind her."³⁸

The verse is hardly ambiguous as to its meaning and scope and is confirmed without any toning down by a number of the top commentators, including Buhkārī and Maududī. This could not be otherwise given similar injunctions through the body of the Qur'ān.³⁹ The effect of these verses in the criminal law of contemporary revivalist Muslim nations is reflected in the status meted out to women in the process of evidence, although their stance is not altogether clear and precise.⁴⁰ Article 79 of the Iranian Islamic Penal Code stipulates that the sole testimony of a woman, or as against that of a male, is insufficient to substantiate the charge of adultery. Moreover, in accordance with Article 248 only male relatives of the alleged perpetrator may take an oath as to that person's guilt; a female admission is only possible as a matter of last resort where no male relative is found. Further discrimination cases of this nature are abound in the Code and this is true also in respect of blood money evidence.⁴¹ This position is certainly different in North Africa and other parts of the Middle East, Central Asia, as well as Turkey.

There are two ways of addressing this divergence in the application of Islamic law between Muslim nations where the meaning of a verse in the Qur'ān and Hadith is unambiguous. The first is to consider that the countries in question dismiss the application of Islamic criminal law altogether in their legal systems as unsuitable to their legal traditions and social needs – without necessarily dismissing the application of Islamic law in other facets of the legal system. Turkey, and to a lesser degree Tunisia, are apologists of this particular model. The second strand of Muslim nations seeks to strike a delicate balance between modernism

³⁸) Qur'ān 2:282.

³⁹) Particularly Q2:228, which states that "wives have the same rights as the husbands have on them in accordance with the generally known principles. Of course, men are a degree above them in status". See also Q4:34 and Q4:11.

⁴⁰) Surprisingly, the Saudi Law of Criminal Procedure, Royal Decree No M/39 (16 Oct 2001), does not expressly incorporate this injunction. It is, however, implicit because in accordance with Art. 1 of the Law the courts are to uphold the Qur'ān and the Sunnah. This is consistent with other Saudi statutes, such as Art. 3 of the Arbitration Implementing Rules, Royal Decree No. M/7/2021, of 08/09/1405 H (1985), which stipulates that only male Muslims can act as arbitrators. The same situation is also evident in respect of the Saudi Law of Procedure Before Sharia Courts, Royal Decree No. M/21 (19 August 2000), which similarly is silent about this Qur'ānic injunction, despite the fact that this Law is the natural place for it. Naturally, Art. 1 of the Shari'ah Courts Procedural Law, which refers to the Qur'ān and the Sunnah as its grundnorms, will just like its other counterparts produce the result of verse Q2:282, but understandably the absence in a statute of such an important provision is prejudicial to the rights of the accused.

⁴¹) Art. 495, Iranian Islamic Penal Code.

and tradition. While tradition is maintained, it is counter-balanced through moderation in the application and enforcement of Shari'ah. This involves an application of the traditional rule, but subject to non-discrimination, equality, consent and others principles akin to human rights. Although this process may sound plausible to a Western audience, it naturally lacks legitimacy in Islamic law, which no Muslim government wants to be seen forsaking. A justification based on Islamic law is therefore required. In the preamble to the 2004 Moroccan Family Code,⁴² which is of this persuasion, the term *ijtihad* is specifically mentioned four times in order to clearly demonstrate that the privileges granted to women are premised on enlightened juridical reasoning, which is itself based on "Islam's tolerant rules and exemplary purposes". In this manner, the departure from the strictness of the explicit Qur'anic verses is to a very large degree legitimised.

This discussion is not directed towards criticising substantive criminal law as this is concentrated in the Qur'an or the Sunnah; rather, it is meant to denote a divergence in the interpretation and application of classic Islamic criminal law in contemporary Muslim nations. This is particularly striking given the fact that an interpretation (even through application) that is contrary to the express meaning of the Qur'an is generally invalid. This apparent disunity in the application and enforcement of Islamic criminal law throughout the world is certainly not indifferent to the influences received from civil law and common law criminal lawyers and theoretical developments therein. The decrease in unity is also evident in the support for claims over cultural relativity in the Muslim world in respect of criminal matters.⁴³

5. Conclusion

The era of a single and unified Islamic criminal law has passed. There are many reasons for the decline of the unity of this system of law. This said, its influence on the criminal justice systems of countries that do not adhere to the strict precepts of classic Islamic criminal law is undiminished, particularly those in North Africa many other countries in the Muslim world. The introduction of European and Ottoman codifications, particularly in the nineteenth century, were themselves

⁴² Royal Edict No. 1.04.22, Implementing Law No. 70.30 (3 February 2004).

⁴³ It should be noted, however, that in a poll conducted by the University of Maryland in 2007 involving urban populations in Egypt, Morocco, Indonesia and Pakistan, more than 60 percent of those questioned responded that although democracy would be welcomed, 71 percent agreed on the strict application of Shari'ah in all Muslim nations. See Muslim Public Opinion on US Policy, Attacks on Civilians and Al-Qaeda (24 April 2000), available at: http://www.worldpublicopinion.org/pipa/pdf/apr07/START_Apr07_rpt.pdf.

very influential in the shaping of criminal legal cultures in certain nations, but it was the liberal employment of *ijtihād* in many other respects that was responsible for a revival of new commentaries and adaptations meeting contemporary exigencies. Thus, the processes for the creation of substantive and procedural rules did not re-commence on an altogether common footing, despite being grounded in the same primary sources.

In my opinion, the disunity of Islamic criminal law is beneficial at this historic juncture and wholly temporary. Muslim nations are the ideal testing grounds for secular, moderate and radical revivalist criminal law and it is only through a long process of adaptation and informed consensus that Muslim societies can come up with the type of criminal law that suits their needs, particularly if this is going to be based on an Islamic model. At the end of this process they will naturally come together through a mutual process of approximation or harmonisation because of their fundamental social and religious commonalities, especially if the social commonalities continue to persist through time. This is no different from the currently high degree of harmonisation of the criminal laws of European nations, in which the EC Commission has found fertile ground for further approximation.⁴⁴ This is hardly an artificial experiment, but the natural result of harmonisation of similar cultures, societies and ideologies. If Muslim societies do not in the future achieve the same degree of unity in the field of criminal law, this can only be explained on two grounds: (a) although sharing the same religious values, the respective societies are in fact socially and culturally distinct, or (b) despite converging fully at all socio-cultural levels, their distinctiveness in the application and enforcement of criminal laws is artificially maintained by elite leaderships.

As an endnote, I am of the opinion that the gates of *ijtihād*, even if in its group format, should be deemed open by reason of necessity. Islamic criminal law strives to legitimise in many countries an archaic law at the same time when Muslim societies worldwide are adapting to new social mores, without necessarily abandoning the fundamental tenets of Islam. Positive laws and social customs are not consistent and are conflicting in many situations and this in itself is not healthy or sustainable in the long run without the persistence of social tensions. Muslim communities should trust the process of *ijtihād* because otherwise one is presuming that God has stopped communicating with his people forever and that, moreover, we should longer search for knowledge because it is immutable and unsurpassed. Both presumptions seem unreasonable to me. For one thing, we are talking about a living and caring God who by implication actively engages with

⁴⁴) Approximation has been defined in the case of EC criminal laws as a process whereby diverse legal elements retain their individuality but adapt in order to form a coherent whole so as to accommodate a particular objective. See A. Weyembergh, *Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme*, *Common Market Law Report*, 42 (2005) 1567.

each and every one of us and thus communicates with us at all times; communication, however, does not always imply understanding on the part of the recipient. Secondly, if knowledge was immutable, and this also follows the previous observation, then human civilisation would never have progressed since the beginning of time.⁴⁵

⁴⁵ It is reported that when Prophet Mohamed asked Mu'adh ibn Jabal upon his appointment to Yemen as a *qāḍi* (judge) what he would do if he could not derive a solution from the Qur'an and the Sunnah, the latter responded by saying that he would exercise his own legal reasoning. The Prophet was well pleased with this response. See *Sunan Abū-Dawūd*, Book 14, *Kitāb al-Jihād*, No. 3585.