

A Comparative Study of Muslim and English
Criminal law in the areas of Theft, Murder
and Rape.

by

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PREFACE

In this paper the writer has attempted to compare two of the widely used systems of law i.e the English law and Islamic law.

This paper is however limited to certain crimes considered to be grave under both schools of law. For instance this paper covers specifically the offences of theft, murder and rape. The substantive laws relating to these are laid down and compared.

Because of the scarcity of legal materials on Islamic penal law, the writer is forced to rely on certain texts and as such could not give a more comprehensive view presented by the four great Imams of Islam. While the English position is abundantly clear for all one has to do is to delve into the numerous books available to locate the law but Islamic penal law suffers from lack of written materials on it. Most western writers either ignore it or is ignorant of it or give a prejudiced picture of it. Muslim writers too are equally guilty, materials on the subject of theft and rape are virtually non existent. Most of the law stated here were gleaned ^{from} various seminar papers and lectures presented by various members of the Islamic teaching profession.

This project paper rests on the assumption that the reader posses some basic knowledge of Islam as a way of life and not merely as a religion.

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ABSTRACT

This paper attempts to deal with three major areas of criminal law that occur extensively in our world today. By specifically confining this paper to the offences of Theft, Murder and Rape it is hoped that the similarities and differences could be drawn from them in order to establish which system affords better deterrence and punishments.

By way of general introduction, chapter one attempts to familiarise the reader with the Islamic penal law concepts which may be different from the others. In chapter two, where the sources of Islamic law are laid down in order that those unfamiliar with it will realise the diversity of its roots. In the subsequent chapters the writer has taken care in stating the law as the nature of this paper invites strict scrutiny.

The writer has attempted to show how Islam attempts to ensure justice amongst its adherents. The very foundation of society depends on law and order and it is hoped that this paper will stimulate the mind into considering the Islamic penal system.

CHAPTER ONE

Islamic criminal law is mostly to be found in the verses of the Holy Quran. The Holy Quran lays down the various criminal offences. However the verses contain generalities in statements of principles only. The minute details of the various offences had been left to the various learned jurists to fill in.

Unlike the English common law and statutory system where every detail of a crime is laid down and explained, Islamic criminal law does not do so. As such it is left to the learned Muslim jurists, i.e. the Mujtahids, of Islam to expound and develop the law.

In this area the traditions of the Holy Prophet Muhammad (peace be upon him) help a great deal. And through the centuries Islamic criminal law has gained shape and a definite form.

Schacht¹ contends that there exists no general concept of penal law in Islam. It is hoped that the following pages will prove his hypothesis not only inaccurate but totally wrong.

During the Ottoman Empire in Turkey there had existed a complete Code of Muslim Criminal Law which in modern times is the equivalent of the Criminal Procedure Code and the Penal Code. All matters and forms of criminal liability were coded and effectively enforced. This was the result of exclusive thought and work of various Muslim jurists before and during the Ottoman period.

However the Code is now unavailable.²

Islamic criminal law tries to achieve a situation where the would-be-offender is deterred from committing a crime and that the offender would be sufficiently punished. Unlike other religious systems, a crime in the eyes of Islam is a sin against God and humans. Therefore its punishment is directed towards appeasement or seeking of forgiveness from God and from man. Under the English system, the offender is punished against himself and his brother man. There is no attempt to punish him on behalf of God. This may be due to the complete separation of religion

1. SCHACHT, An Introduction to Islamic Law, Clarendon Press, p. 187

2 The writer's attempts at securing a copy has been unsuccessful.

and state. A crime in English terms has been defined as a wrong against the State and the State only can avenge that wrong. In Islamic terms a crime is, first and foremost, an act of defiance to the words of God and then only against the Islamic State. Punishment therefore is effected accordingly.

AIMS OF ISLAMIC PENAL LAW:

Islamic law strives to create a world that is crime-free; where all actions and conduct are regulated by the words of God; where no evil exists; where the saying "think no evil, see no evil hear no evil and say no evil" exists. Although this state cannot be achieved the crime rate can be kept low. This can be seen happening in the Prophet's time where very few reports of crime surfaced.

Punishments.

In the English legal system the most extreme punishment meted out is death. This is effected by either the gas chambers, lethal overdose of drugs, the electric chair, shooting or hanging³. For lesser offences the punishments are imprisonment and / or whipping.

In Islamic law, punishments range from death (by stoning), loss of limb (amputation), banishment, whipping and importantly the aggrieved party is sometimes given a choice as to whether to claim his pound of flesh or blood-money. Blood-money (diya') is a term used to denote compensation. In cases of murder the English system treats it as an offence against the state as such only the state can punish. But the Islamic system treats it as a crime against the state AND the individual. Loss of life cannot be replaced but its impact can be lessened.

Most probably⁴ the compensation awarded would be something like the compensation awarded to accident victims.

Islamic penal law has combined the principles of personality and territoriality of the law, and as a result it applies to all

3. English here means the Anglo-American. Otherwise it refers to the law practised in the British Isles.

4. The writer has yet to come across a method of calculating it.