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Islamic Law and Crime in Contemporary Courts

Mark Cammack*

INTRODUCTION

This article and the article that follows, Russell Powell's *Forgiveness in Islamic Ethics and Jurisprudence*, were presented at the 2011 meeting of the Association of American Law Schools. This introduction provides a rudimentary overview of Islamic criminal law and addresses related misconceptions.

“Criminal law,” as that term is currently understood, does not exist in the classical Islamic legal tradition. There are, to be sure, legal doctrines within the classical corpus that prescribe punishments for actions that today are called “crimes.” These punishments, moreover, are often understood to serve the same purposes that underlie our criminal law, and the state is responsible for enforcing at least some of these punishments.¹ But the collection of classical era doctrines that are today discussed under the label “Islamic criminal law” were not understood as comprising a unified area of law in the pre-modern era,² and not all of those classical era rules fit the modern definition of crime.

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1. RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY* 7 (2005).

2. WAEL HALLAQ, *SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS* 309 (2009). Works of classical Islamic jurisprudence typically divided the subject matter into “four quarters”—rituals, sales, marriage, and injuries. *Id.* at 551-55 (2009). The topics that comprise what is today regarded as Islamic criminal law are included in three or four “books” (kitab) of the quarter on injuries. But other topics are also treated in quarter four; in one Shafi'i text widely studied in Indonesia, for example, the topic immediately following discretionary punishments is circumcision.

HADD

What today is called “Islamic criminal law” is actually drawn from three categories of rules—*hadd*, *qisas* and *tazir*—within the classical legal literature.³ The first category of rules, *hadd* (pl. *hudud*), means “the limits prescribed by God.” *Hadd* offenses, of which there are between five and seven,⁴ are characterized by the fact that they carry a fixed punishment.⁵ Before discussing the specific offenses that are considered *hadd*, it will be helpful to explain why it is that the number of such offenses cannot be stated with certainty.

The explanation for the uncertainty as to the number of *hadd* offenses lies in the basic character of Islamic law. Islamic law is regarded as God’s will for humankind. God has not, however, seen fit to make the divine law known in detail. He has provided indications of the law in the Qur’an and the recorded example of the life of Muhammad, but left the task of extracting meaning from these sources to human interpreters.

In the pre-modern era Islamic law was generally identified with *fiqh*. The word “*fiqh*,” which means “understanding, comprehension, or knowledge,” refers to the conclusions, opinions, or understanding of legal scholars with respect to particular points of law. Legal scholars who authored books of *fiqh* (addressing a more or less standard set of issues) published such books under their own names. In general it was to this *fiqh* literature that the classical legal tradition looked to find answers to concrete legal issues.

Islamic legal theory developed elaborate rules of interpretation to ensure that the conclusions of the legal scholars did not stray from the revealed sources. For various reasons, however, agreement as to the correct interpretation of the sources proved impossible, and diversity of opinion is the norm rather than the exception in the *fiqh* literature. That diversity of opinion is manifest most clearly in the existence of a number of different schools of thought or doctrine. There are four such schools or “*madhhab*” within the majority *Sunni* branch of Islam, each of which is recognized as fully orthodox by the other schools. The *Sunni madhhab*, named after the supposed founder of the school, differ from each other on both points of doctrine and matters of method.

3. PETERS, *supra* note 1, at 7.

4. For further information about the law relating to *hadd* offenses, see generally *id.* at 53-65.

5. HALLAQ, *supra* note 2, at 310.

The four *Sunni madhhab* differ with respect to the offenses that are punished with *hadd* penalties,⁶ but there are five *hadd* offenses that are recognized by all four *madhhab*.⁷ These include (1) illicit sexual relations (*zina*), (2) false accusation of illicit relations (*qadhif*), (3) drinking alcohol (*shurb al-khamr*), (4) theft (*sariqa*), and (5) highway robbery (*qat' al-tariq*).⁸ One of the schools—the *Shafi'i's*—also consider homicide and bodily harm as *hadd*, while the *Maliki* school considers insurrection (*baghy*) and apostasy (*ridda*) as *hadd*.⁹

The punishments for *hadd* are extremely harsh by today's standards. Illicit sexual relations are punished by either stoning or one hundred lashes,¹⁰ for example, and theft is punished by amputating the right hand.¹¹ The *hadd* crimes are also narrowly defined, and the proof requirements for imposing punishment are rigid and strict. The *hadd* offense of theft is committed by taking the property of another by stealth from a place of custody. A thief who enters through an unlocked door is not punished with the *hadd* penalty because the unlocked door means the property was not in a place of custody.¹² The property must be of a minimum value, and theft of property that is forbidden for a Muslim to own does not qualify.¹³ Nor is a poor person who steals food out of need punishable with the *hadd* penalty,¹⁴ and the *hadd* penalty does not apply if there is any doubt as to whether the thief had any ownership interest in the property.¹⁵

Hadd offenses are also subject to stringent and highly technical proof requirements. For the most part, the commission of the offense may be established only with the confession of the accused or direct

6. HALLAQ, *supra* note 2, at 310-311.

7. *Id.*

8. *Id.*

9. *Id.*

10. PETERS, *supra* note 1, at 60-61. The punishment of stoning applies only to offenders who have had lawful sexual relations within marriage, while never married persons are subject to punishment by lashing. A further distinction is made between never married offenders who are free persons, who receive 100 lashes, and slaves who are punished with 50 lashes.

11. *Id.* at 56. The punishment of amputation is based on Quran 5:38 which states, "As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from God."

12. *Id.*

13. *Id.*

14. HALLAQ, *supra* note 2, at 317.

15. PETERS, *supra* note 1, at 56.

eyewitness testimony¹⁶ from persons who satisfy the law's standards of religion and probity.¹⁷ Circumstantial evidence is not permitted to establish the commission of *hadd* offenses,¹⁸ and the law provides various means by which apparently guilty persons can nevertheless escape punishment.¹⁹

QISAS

The second body of doctrine commonly included as Islamic criminal law, *qisas*, means "just retaliation" and deals with homicide and the infliction of bodily harm short of death.²⁰ The principle of "lex talionis" governs the *qisas* offenses, and the punishment for homicide or wounding is either retaliation or compensation.²¹ The principle of equivalence limits the law of retaliation and the guilty party suffers the same harm that he inflicted on the victim.²² This means that, in the case of homicide, the murderer is executed in the same manner that he killed

16. The requirement of direct testimony to the commission of the act presents the greatest obstacle in the prosecution of *zina* where the witness must have observed the actual act of penetration "like a pencil into the kohl container... or a bucket into a well." *Id.* at 15.

17. *Id.* at 12. The general requirement is that the facts must be proven by the testimony of two Muslim males who are both sane and upright. *Id.* In some circumstances the testimony of women is accepted, but the testimony of two women is equivalent to the testimony of one man. *Id.* The testimony of four witnesses is required to prove *zina*. *Id.* at 15.

18. Professor Peters illustrates the law's attitude to the use of circumstantial evidence with a fatwa from the sixteenth century:

Question: [What happens] if a wine jar is found in Zeyd's possession?

Answer: It is related that Abu Hanifa (may God have mercy on him) went on a Pilgrimage and that he, upon entering Medina saw people gather around a man. They said, "We found him with a wine-skin, and we wish to inflict the fixed punishment on him." Abu Hanifa replied, "He's got the instrument of fornication with him, too. So stone him." And they left the man and scattered. *Id.* at 15.

19. One significant limitation on the imposition of the *hadd* punishments is the doctrine of uncertainty which prohibits punishment when uncertainty exists as to the facts or the law. PETERS, *supra* note 1, at 21-23. This doctrine is based on a Prophetic report stating, "Ward off the fixed punishments from the Muslims on the strength of Shubha as much as you can." *Id.* at 22.

20. *See generally id.* at 38-53.

21. Whether retaliation is available depends on the mental state of the perpetrator at the time of the killing and the relative social status of the perpetrator and the victim as measured by blood price. *Id.* at 39, 47.

22. *Id.* at 39.

the victim,²³ and in cases of wounding the perpetrator receives the same wound that he inflicted.²⁴ Compensation is sometimes an alternative to retaliation at the election of the victim²⁵ and, in some cases, is the only authorized punishment.²⁶ The amount of compensation owed for wounding is measured against the full blood price for the killing of a free Muslim man.²⁷ In cases of homicide the perpetrator pays compensation to the victim's relatives,²⁸ and for wounding pays it to the victim.²⁹

Unlike the *hadd* offenses, which the state enforces, homicide and bodily injury are private actions prosecuted by the victim or the victim's relatives.³⁰ The state is responsible for ensuring the proper implementation of retaliation by requiring a formal determination of guilt based on established standards of proof.³¹ But homicide and wounding are regarded as injuries to the victim or the victim's family rather than society, and the affected parties choose whether and, in some cases, how the injury is to be redressed.³² Since they act on and enforce the decisions of private individuals, the courts' role in these cases is essentially civil rather than criminal.³³

TAZIR

The third classical era rubric that is included under the heading of Islamic criminal law is *tazir*.³⁴ *Tazir* is a residual category in the sense that it serves as the basis for punishing actions which are considered sinful or destructive of public order but are not punishable as *hadd* or *qisas*.³⁵ The types of actions punishable under this heading are not

23. *Id.* at 30. According to the opinion of some jurists, the execution of the punishment may be carried out by the relatives of the victim. *Id.*

24. *Id.* at 40. If an injury similar to that suffered by the victim cannot be inflicted without an undue risk of death the victim is entitled to compensation only. *Id.*

25. *Id.* at 39.

26. *Id.* at 49.

27. *Id.* at 50-51.

28. *Id.* at 49.

29. *Id.* at 52-53.

30. *Id.* at 39.

31. *Id.*

32. *Id.*

33. BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 152-53 (1998).

34. For further information on the *tazir* punishments, see generally PETERS, *supra* note 1, at 65-67.

35. *Id.* at 7.

delineated.³⁶ *Tazir* punishments may be imposed on those who commit *hadd* or *qisas* offenses when *hadd* or *qisas* penalties cannot be imposed because of their strict procedural requirements.³⁷ Additionally, *tazir* includes acts which, though similar to offenses punishable as *hadd* or homicide, do not meet all of their requirements.³⁸ This would include, for example, the theft of property that does not meet the minimum value necessary to impose the *hadd* punishment.

Hadd and *qisas* are the subject of detailed regulation in the *fiqh* literature.³⁹ *Tazir*, by contrast, is essentially a discretionary power of the ruler, and the legal restrictions on the exercise of that power are more in the form of standards than rules. In keeping with the general understanding of *tazir* as the means of achieving practical objectives of maintaining public order and morals, the strict proof rules that encumber the implementation of other forms of punishment do not apply. The ruler also enjoys considerable leeway in deciding an appropriate form of punishment,⁴⁰ but in fixing punishment the ruler is to be guided by the

36. The prominent *Hanbali* jurist Ibn Taimiyya lists the following as among the “forms of disobedience for which there is no legal penalty or *kaffara* (expiation in the form of alms)” and are therefore punishable as *tazir*:

“(a) the case of the man who kisses a boy or a woman unrelated to him (by marriage or a very near kinship); (b) the (case of the) man who flirts without fornication; (c) eats a forbidden thing like blood or dead animal (which suffers natural death or is slaughtered in an unlawful manner); (d) who defames people with an accusation other than adultery; (e) who steals a thing, not in an enclosure or of value; (f) who misappropriates things entrusted to him... (g) who cheats in his dealings (with others) like (the merchants); (h) who debase the commodities such as foodstuffs and clothes; (i) who gives short measure (of capacity or weight); (j) who bears false witness or encourages others to bear false witness; (k) who accepts bribes to pass favorable judgments or who judges contrary to what Allah has enjoined; (l) who exercises aggression on his subjects; (m) who challenges (others) as was done in the pre-Islamic (and pagan) period or answers the challenge, etc.”

IBN TAIMIYYA ON PUBLIC AND PRIVATE LAW IN ISLAM OR PUBLIC POLICY IN ISLAMIC JURISPRUDENCE 127 (Omar A. Farrukh, trans.).

37. PETERS, *supra* note 1, at 66.

38. *Id.*

39. *Id.* at 7.

40. Ibn Taimiyya explains that “*tazir* is not a definite punishment; it is generally an infliction of some pain on a man by word or action or by avoiding saying a good word to him or doing a good deed for him. It may be by harsh admonition or reproach; it may be by forsaking him and neglecting to salute him until he repents...*Tazir* may be by imprisonment, by beating, by daubing the face black or making the guilty ride, backwards on a donkey.” TAIMIYYA, *supra* note 36, at 128-29.

culpability of the offender, the heinousness of the act, and the needs of public welfare.⁴¹ Some jurists regard the *hadd* punishments as establishing absolute limits on *tazir* punishments, though there is a difference of opinion as to how this limitation is interpreted. For some jurists the punishment for *tazir* may not exceed the least severe punishment authorized for any *hadd* offense.⁴² Other jurists are of the opinion that the *tazir* punishment for a particular type of offense—*theft*, for example—may not be greater than the *hadd* punishment for that type of offense.⁴³

The assortment of rules that are today grouped together as Islamic criminal law did not comprise a unitary body of doctrine in the pre-modern period, and the classical era classificatory scheme seems arbitrary and illogical from a modern perspective. Because classical era jurists regarded *hadd*, *qisas* and *tazir* as fundamentally different, they grouped three doctrines that, from our perspective, belong together as “criminal law.” Part of the explanation for the classical categorization of offenses relates to the nature of legal rights generally within Islamic law.

CLAIMS OF GOD AND CLAIMS OF MEN

As Baber Johansen has shown, classical legal thought distinguished between two categories of legal rights and obligations—the rights or claims of men (which also includes women) and the rights or claims of God.⁴⁴ The claims of men are the claims of private legal persons against each other,⁴⁵ and include the law governing civil transactions, family law and inheritance, and private wrongs.⁴⁶ These claims are conceptualized as property, and legal actors are proprietors who control the disposition of that property. The principle that underlies the claims of men is the principle of just exchange.⁴⁷ The state adjudicates the claims of private individuals, but only if individuals holding such claims invoke the state’s jurisdiction.⁴⁸

41. Frank E. Vogel, *The Trial of Terrorists under Classical Islamic Law* 43 HARV. INT. L.J. 53, 60 (2002).

42. TAIMIYYA, *supra* note 36, at 129.

43. *Id.* at 129.

44. BABER JOHANSEN, CONTINGENCY IN A SACRED LAW 200-216 (1999).

45. *Id.* at 200.

46. *Id.* at 201-06.

47. *Id.* at 200-01.

48. *Id.* at 210.

The claims of God are the rights and obligations that belong to God.⁴⁹ Because the state represents God, the claims of God are claims of the state and religion against private persons.⁵⁰ The claims of God consist primarily of acts of worship such as prayer, fasting, and pilgrimage, as well as some types of religious taxes.⁵¹

The categorization of Islamic punishments is based in part on the distinction between claims of God and claims of men. The *hadd* punishments are claims of God,⁵² while *qisas* rights to retribution or compensation for homicide or wounding are claims of men.⁵³ The distinction is of more than simply theoretical significance. The enforcement of claims of God differs from the enforcement of claims of men, and that difference is reflected in the law with respect to *hadd* and *qisas*. Individuals have needs, and the principle of just exchange (the foundation of the claims of men) serves the purpose of fulfilling human needs.⁵⁴ God, however, is above deficiency and has no needs.⁵⁵ For that reason God suffers no loss or damage when his claims are not fulfilled.⁵⁶ But because they are claims of God and not of private persons, the vindication of those claims is not a matter of human choice.

The distinction between claims of God and claims of men lies behind the differential treatment of homicide and *hadd* punishments. The classical era jurists emphasized the fact that cases relating to *hadd* “should be judged by the rulers without the need of a suit being brought by anyone. Similarly, a witness is accepted, although there is no plaintiff.”⁵⁷ And while injuries involving the claims of men could be forgiven by the holders of those claims, the *hadd* penalties “should not be neglected, neither by intercession nor by bribe nor by any other

49. *Id.* at 200.

50. *Id.* at 210.

51. *Id.* at 213.

52. PETERS, *supra* note 1, at 54; JOHANSEN, *supra* note 45, at 213

53. PETERS, *supra* note 1, at 39; JOHANSEN, *supra* note 45, 206-09. The symbolic and expressive character of the *hadd* punishments indicates that their significance extends beyond the injuries suffered by the individual parties. Ibn Taimiyya says with respect to the punishment for theft that “the thief’s hand should be cut off on great occasions (when multitudes of people assemble), since the execution is a form of punishment,” TAIMIYYA, *supra* note 36, at 112, and “[i]t is recommended that the cut off portion be tied to his neck (to be seen by everybody).” *Id.* at 114.

54. JOHANSEN, *supra* note 44, at 214.

55. *Id.* at 214.

56. *Id.* at 214.

57. TAIMIYYA, *supra* note 36, at 74.

intervention.”⁵⁸ Perhaps the clearest indication of the fundamentally different character of *hadd* punishments and the penalties for homicide and wounding is in the role played by repentance. In some cases the imposition of *hadd* punishment lapses if the person repents.⁵⁹ But repentance does not expunge the claims of men. In the case of banditry, for example, repentance may enable the offender to avoid the *hadd* punishment, but if the act also involved a homicide or wounding the claim for retaliation or compensation is not affected.⁶⁰

The distinction between the claims of God and the claims of men explains the differential treatment of *hadd* offenses on the one hand and homicide and wounding on the other. That distinction does not, however, explain why the category of *hadd* includes certain actions and not others, or why homicide and wounding give rise to claims of men rather than claims of God. Delineating entirely satisfactory answers to these questions may not be possible, although Bernard Weiss has helped clarify the thinking that gives prominence to actions punishable as *hadd* by relating those actions to broader values that are believed to underlie the law more generally.⁶¹

Legal reasoning within classical Islamic law generally avoids articulating general rules applicable to a broad category of factual situations.⁶² Rather than reasoning inductively to delineate a general rule from a set of known cases, the law developed in a casuistic fashion, using a known case to decide another case at the same level of particularity. The Qur’an, for example, prohibits drinking wine.⁶³ In seeking to capture the legitimate implications of this prohibition, one approach is to identify the purpose or reason for the prohibition and then generate a rule that covers cases that implicate such purpose or reason. This approach might lead to the conclusion that ingesting intoxicants is forbidden. Classical Islamic jurists declined to follow this approach.⁶⁴ The prohibition against drinking wine justifies prohibiting intoxicants

58. *Id.*

59. PETERS, *supra* note 1, at 27.

60. *Id.*

61. WEISS, *supra* note 33, at ch. 7.

62. *Id.* at 67.

63. THE QUR’AN 5:91.

64. The Arabic term for the legal rule that governs a particular case—*hukm*—is often translated as “ruling” rather than rule to reflect the understanding that it reflects a statement of law applicable to one particular case rather than to cases of a certain type. WEISS, *supra* note 33, at 70.

made from dates, but the jurists believed formulating a categorical rule for all intoxicating substances entailed too great a risk of subjective interpretation.

FIVE CARDINAL VALUES

Although the classical jurists did not develop general rules of law, they did make an effort to identify the values and purposes behind the divine law. Through a process of inductive reflection on the entire body of revealed legal rulings, the scholars identified a list of five cardinal values that underlie the law—religion, life, progeny, property, and human rationality.⁶⁵ For some jurists these five values played a role in the analogical method that is the principal means for deriving implications from the revealed texts.⁶⁶ While the use of these values as a tool of interpretation never won general acceptance, the scholars agreed that these five values represented a faithful characterization of the vision of social life underlying Islamic law.⁶⁷

As Professor Weiss has shown, understanding the doctrines regarding the punishment of offenses in the context of the five cardinal values helps explain the logic that gives coherence to the law and underlies the selection of particular actions for punishment. By contemporary standards, the varied group of offenses punishable as *hadd* seems illogical or haphazard. When viewed in light of the five cardinal values, however, the category of *hadd* offenses seems less strange. The harsh treatment accorded to sexual relations outside marriage—stoning in the case of those who are or have been married and flogging for those who have not—serves as a potent symbolic affirmation of the significance attached to the ideals embodied in the notion of progeny.⁶⁸ The punishments prescribed for *zina*, which functioned within a broader matrix of doctrines relating to family and sexual morality, reflects the high value placed on the preservation of the patrilineal family as the foundation of a social order conducive to the achievement of God's

65. *Id.* at 146.

66. Specifically, the five cardinal values were used as a means of identifying the cause (*illa*) of a ruling that is known through having been stated in the revealed sources in order to apply that rule by analogy to another case in which the same cause is present. Thus, in searching for the cause of a ruling jurists sought to identify features of the case that could be associated with the general purposes of the law. *Id.* at 77.

67. *Id.* at 146.

68. *Id.* at 156.

purposes for humankind.⁶⁹ Similarly, the grim mimetic punishment of amputation for theft bespeaks the importance attached to property both in its practical function in the conduct of social life and as a basic category for organizing and understanding the social-legal world.⁷⁰ Classical legal thought regarded the protection of property and the facilitation of exchange transactions as indispensable to providing the material necessities on which the social order depends.⁷¹ The concept of property also served as the conceptual category for thinking about abstract legal phenomena.⁷²

The inclusion of drinking wine within the category of *hadd* offenses reflects the core value of human rationality.⁷³ The capacity for rational understanding and choice is emphasized throughout the law from the performance of religious duties to the execution of valid civil transactions. Because drinking wine compromises rational thought, its punishment is demanded as a claim of God. Finally, the relationship between apostasy and the core value of religion, and by extension the reason *Maliki* jurists considered the punishment of apostasy as a claim of God, is self evident.

At first blush the treatment of homicide within Islamic law would appear to present a puzzle. The fact that life is included among the law's cardinal values would seem to call for punishing homicide as a claim of God. And yet only one of the four *madhhabs*—the *Shafi'is*—regard homicide as a *hadd* offense.⁷⁴ Bernard Weiss' analysis shows, however, that treating the punishment of homicide as among the claims of men is not inconsistent with the view that the categorization of offenses in Islamic law is explicable in terms of the law's promotion of the value of life. Muslim jurists thought of individuals as members of families, and understood the preservation of life to be inextricably bound up with the protection of family life.⁷⁵ The detailed treatment given to family life in Islamic law reflects this understanding of the role of the patriarchal family, and the treatment of homicide reflects this understanding as well.

69. *Id.* at 151-58.

70. *Id.* at 162-63. In addition to the punishment applied to theft, this importance is also reflected in the attention given to the law relating to commercial transactions in the classical literature. *Id.* 160-62.

71. *Id.* at 158-60.

72. *Id.* at 159.

73. *Id.* at 163-64.

74. HALLAQ, *supra* note 2, at 310-311.

75. WEISS, *supra* note 33, at 151-52.

Destruction of human life is treated as an offense against the family, and for that reason the family decides how the matter is to be resolved—by retaliating, accepting compensation, or granting forgiveness. Similarly, the perpetrator who takes another life does not act alone but as a representative of his family. This is manifest in the fact that responsibility for taking another person’s life is borne by the perpetrator’s family rather than the individual. Thus, treating homicide as among the claims of men protects life by reinforcing the importance of the family in a way that treating it as a claim of God and subjecting the murderer to a fixed punishment does not.

THEORY OF THE MODERN STATE

Classical Islamic law developed within a particular political, legal, and epistemological context, and the structure and content of the law only becomes understandable when viewed within that context. “Criminal law” as the term is now commonly understood is the product of a markedly different outlook, and to describe the doctrines discussed in this introduction as “criminal law” would implicitly impute a logic that is foreign and potentially misleading.⁷⁶ Across most of the world criminal law connotes a system of thought and an associated practice with a more or less definite scope and purpose. That common understanding has its source in the theory of the modern state.

The punishment of crime is a particularly naked application of state power. For that reason, the criminal law will inevitably reflect the society’s understanding of the proper scope and function of state power.⁷⁷ In the pre-modern world, the state asserted authority over a fairly narrow range of matters. States lacked the means to regulate social life generally,⁷⁸ and states actually governed only with respect to certain narrow segments of the population.⁷⁹ The routine political activities of

76. HALLAQ, *supra* note 2, at 308 (stating that “the modern conceptualization of crime and penal law was not shared, in any marked way, by the Muslim jurists of the pre-modern era, for their notions served epistemic imperatives that fundamentally differed from those enshrined in the modern state and its systems”).

77. James Q. Whitman, *Between Self Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 TULSA L. REV. 901 (2004).

78. ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE* 57 (1985) (arguing that social power in the pre-modern world was exercised principally through the actual or threatened use of military violence).

79. *Id.*

pre-modern states were exclusively military and fiscal.⁸⁰ The principal connection of the state to its subjects was the state's requirement for taxation,⁸¹ and the pre-modern state could not and did not seek to "order social life with the purposefulness and intensity that modern states do."⁸²

The emergence of the modern state with its vastly expanded powers was the result of the development of new technologies of rule that enabled state administrators to influence even the most intimate activities of daily life.⁸³ The acquisition of these new technologies accompanied the emergence of a new conception of the role and function of the state and a new understanding of the proper scope of state power. The modern state is commonly defined in terms that have a direct bearing on the criminal law. That is, the fact that the state lays claim to a monopoly on the use of violence within its borders characterizes the modern state.⁸⁴

The field of criminal law is a modern construction, and the modern vision of the state defines and implements it. While the state structure that informs the contemporary understanding of criminal law did not exist before the modern era, by the end of the twentieth century that structure had become the all-but-universal form for the exercise of political power. The measure of whether a political entity has been able to successfully establish itself as a "state" is whether it can plausibly lay claim to control over the exercise of violence within its territory.

THE MODERN STATE IN THE MUSLIM WORLD

The spread of the modern state across the Muslim world has had a profound effect on Islamic law. Indeed, as Wael Hallaq has argued, "the conceptual, structural and institutional discord" that exists between the

80. GIANFRANCO POGGI, *THE STATE: ITS NATURE, DEVELOPMENT AND PROSPECTS* 19 (1990).

81. GIDDENS, *supra* note 78, at 58.

82. POGGI, *supra* note 80, at 19.

83. GIDDENS, *supra* note 78, at [●].

84. This definition of the modern state was first articulated by Max Weber. MAX WEBER, *ECONOMY AND SOCIETY* 54 (Guenther Roth & Claus Wittich eds., 1968). While the theory of the state's monopoly over legitimate violence is never fully realized, the force of the theory is demonstrated by the way in which deviations from the theoretical ideal are rationalized. Self defense and other doctrines that treat homicide or other crimes of violence as legally justified are inconsistent with the principle that violence is only justified when carried out by the state. Notably, however, the principle forbidding private violence is preserved by treating the killer who acts in self defense as having acted on behalf of the state under circumstances that make it impossible for the state to act for itself.

received tradition of Islamic law and the nation-state is at the root of virtually every problem and issue in the modern history of Islamic law.⁸⁵ The sources of this discord are complex and multi-faceted, but the full dimensions of the problem need not be discussed here. It is sufficient for present purposes to point out that classical Islam and the modern state share a common emphasis on law as the medium for the exercise of social power, and that both systems embrace a jurisprudential theory based on the principle of an exclusive and undivided legal sovereignty.⁸⁶ The two systems differ, however, on the source of legal sovereignty. While God is the sole source of law in Islam, modern law derives its validity from identification with the state.⁸⁷

Criminal law is a modern phenomenon that did not exist in the classical Islamic tradition. At the same time, as a result of the spread of the nation-state, classical Islamic law has virtually vanished from the contemporary world. Saudi Arabia is the only contemporary polity in which the classical *fiqh* remains the governing law in its own right.⁸⁸ Many states have enacted legislation based on *fiqh*, and some states have declared that *fiqh* itself has the force of law. But it is only in Saudi Arabia that *fiqh* is law by virtue of its character as *fiqh*.

The imposition of Islamic punishments has long been regarded as significant as indicating the existence of legitimate Islamic government.⁸⁹ The administration of *hadd* punishments commonly ranks

85. HALLAQ, *supra* note 2, at 359-60.

86. *Id.* at 361-62.

87. Prior to the modern era the state was not regarded as the sole or even primary source of law, and identification with the state was not necessarily a criterion for legal validity. Although the ruler claimed certain powers applicable throughout the realm, legal jurisdiction was defined chiefly in terms of personal status, rather than territory. ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 53 (1992); WEBER, *supra* note 84, at 696. For the most part, law was identified with and enforced by various non-state corporate entities; the law that mattered in people's lives "was neither state law nor territorial law but 'special law,' valid for a particular group of persons, not for a particular stretch of territory, and held as a matter of right by that group of persons, not on the discretionary sufferance of the state." *Id.* at 55; *see also* GIANFRANCO POGGI, *THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION* 72 (1978) (describing law in the estates system as "essentially the distinctive packages of rights and privileges traditionally claimed by the estates and component bodies as well as by the ruler; it existed in the form of differentiated legal entitlements, generally of ancient origin, and it was in principle within the corporate powers of the beneficiaries of those entitlements to uphold them").

88. For further information on the Saudi legal system, *see generally* FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA* (2000).

89. BRINKLEY MESSICK, *THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND*

first among the responsibilities of the ruler in fiqh texts on the subject. As Brinkley Messick has written, “[i]f implementation of a single part of the shari’a could stand for that of the whole, *hudud* application frequently served this discursive purpose.”⁹⁰

Contemporary Islamization efforts often set their sights on the implementation of Islamic crimes or punishments as providing unimpeachable evidence of the existence of a bona fide Islamic order.⁹¹ These efforts typically purport to represent the restoration of an authentic and immutable essence. Inevitably, however, contemporary courts and legislators do not simply enforce or apply Islamic law. They invent it. Only time will tell whether this process will eventuate in the development of a modern system of Islamic criminal law.

HISTORY IN A MUSLIM SOCIETY 51 (1993) (stating that enforcement of hadd penalties serves as “a key summarizing symbol, shari’a shorthand for the existence of legitimate government”).

90. *Id.*

91. See PETERS, *supra* note 1, at 153 (observing that between 1972 and 2005 seven countries had enacted legislation on Islamic criminal law).