THE ISLAMIZATION OF CRIMINAL LAW:
A COMPARATIVE ANALYSIS

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With the exception of a few states on the Arabian Peninsula, the legal systems prevailing in the Islamic world are almost entirely based on Western law. Western codes were adopted during the second half of the nineteenth and the twentieth centuries. Only the law concerning personal status, succession and religious foundations (awqāf) is rooted in Islamic law, the Shari'a. This situation is a thorn in the flesh of Islamic opposition movements, whose political influence has recently been waxing. They regard the Western character of the law applied in their countries as an undesirable remnant of Western colonialism and strive for the establishment of an Islamic state, i.e., a state that enforces only Islamic law. When these movements come to power and are in a position to realize their political aims, they promulgate Islamic legislation. Such legislation predominantly concerns criminal law and the ban on interest.

This article analyses these criminal laws that have been promulgated during the last two decades, by comparing them with the provisions of the classical doctrine and by examining the extent to which these laws are or were actually applied. I have limited myself to those countries where Islamic criminal law has been introduced by legislation and shall not discuss countries such as Saudi Arabia, where Islamic law is the law of the land and Islamic punishments have always been enforced.

1. Criminal Law in the Fiqh

But first a few introductory remarks on the nature of Islamic criminal law. The Shari'a consists of two sets of rules. The first set of rules has a religious character and consists of a classification of
human behaviour into five categories: obligatory, recommended, indifferent, reprehensible, and forbidden. These categories are related to reward and punishment in the Hereafter. The other set of rules governs the relations between human beings and consists of rules dealing with the legal effects of juridical acts and transactions, i.e., the rights and duties of people with regard to one another. Both sets are interrelated. Complying with a legal obligation, e.g., the obligation of a buyer to pay the price of the commodities he purchased, is also the performance of a religious duty, to be rewarded in the Hereafter. Or, to take another example, pigs are impure animals which may not be consumed. As a consequence, they are not regarded to constitute legal property. Their possession is not protection by the law and contracts concerning pigs are null and void.

Forbidden, and therefore sinful behaviour does not only result in punishment in the Hereafter, but may also be punished in this world. The Shari'ah gives the caliph and judges the discretionary power to inflict punishment on those who have committed sinful acts. The penalties they may impose vary, according to the gravity of the act and the social status of the defendant, from reprimand to death. This discretionary power is called ta'zīr. Besides this general power of the authorities to mete out punishment, the Shari'ah knows a number of more precisely defined offences that can be regarded as Islamic criminal law stricto sensu. They fall under two headings: djināyāt, or offences against another's person, and crimes with fixed penalties (hadd, plural hudūd), called hadd crimes.

The first group consists of homicide and injury. This is essentially the domain of private prosecution, in the sense that the culprit can only be sentenced and punished if the victim or his heirs demand punishment. For intentional murder, the culprit may be punished with death, whereas the penalty for intentional injury causing a loss of limbs or senses, is the infliction of the same injury on the perpetrator. If the death or injury are not caused intentionally or if the victim or his heirs are willing to waive their right to retribution, it is then replaced by the payment of bloodmoney. For the loss of life of a free Muslim man this is fixed at one hundred camels of a certain specification or one thousand dinars in gold or ten thousand dirhams in silver. For injuries the classical books on law contain a tariff, according to which the amount of bloodmoney for a specific injury is given as