Effective Legal Representation in “Shari’ah” Courts as a Means of addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States

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1 INTRODUCTION

Islamic law remains one of the recognised legal systems of the world today. The foundations of the law were, however, laid in seventh century Arabia. By the standards of those times, Islamic law was very comprehensive and ahead of its time.

The two main sources of the law are the Qur’an and Sunnah, which to Muslims are divine and quasi-divine sources respectively and thus literally immutable. To enable the efficient application of these two sources and the evolution of the law, the classical Islamic jurists formulated well-defined and sophisticated legal methods, principles and doctrines that have propelled Islamic law forward since the seventh century. The interpretation and application of the sources by the classical Islamic jurists developed into a rich

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2 The Qur’an is the holy book of Islam, revealed by God to Prophet Mohammad between 610-633CE. The Sunnah means the Traditions of Prophet Mohammad consisting of his sayings, deeds and tacit approvals. These two constitute the Shari’ah and source of Islamic law. See Baderin, M.A., International Human Rights and Islamic Law (Oxford: Oxford University Press, 2003), pp. 32ff for an analysis of the distinction between “Shari’ah” as the source and “Fiqh” as the method of Islamic law.
Islamic legal jurisprudence, which Islamic courts continue to rely upon in their application of Islamic law in many parts of the Muslim world.

Today there are four main Sunni Schools of Islamic jurisprudence, namely the Maliki, Hanafi, Hanbali, and Shafi‘i Schools, as well as Shi‘ah Schools of Islamic jurisprudence, the most famous of which is the Imamiyyah or Ithna Ashariyyah School. Unlike the two main sources, the interpretations and jurisprudence of the different Schools are neither divine nor quasi-divine and thus open to review by competent jurists from time to time based on circumstances of place and time. The Qur’an and Sunnah often only provide general substantive law, while relevant details and issues of procedure are provided by the jurisprudential works of the jurists. Thus, while the substantive provisions in the Qur’an and Sunnah may not be directly alterable, their application and effect are modifiable through a review of the procedural laws and principles instituted by the early Islamic jurists.

The Islamic criminal justice system forms part of the heritage of Islamic law. It has been observed that: “Crimes of all sorts, including homicide, molestation, robbery, etc., were rampant in the then [Arabian] society; [which] the prevailing customary law of punishment had utterly failed to contain.” After the creation of the nascent Islamic State in Medina and formal introduction of Islamic law, the Islamic criminal justice system successfully stemmed the high tide and deplorable crime situation in the Arabian society then. Today however, there is a lot of controversy regarding suitability of the Islamic criminal justice system for contemporary times. Islamic criminal justice is often criticised today as being behind the times for the 21st century and that its prescribed punishments are inconsistent with international human rights norms.

There are three main views regarding the application of the Islamic criminal justice system in contemporary Muslim societies. The first view is that of those who see the system as archaic and barbaric and that it must therefore be discarded, the second view is that of those who see it as part of the law of God which must continue to be obeyed and applied by Muslim States, and the third view is that of those who argue that, even though it is part of the law of God, the ideal Islamic society in which the system is meant to be implemented does not exist anywhere in the world today, thus there should be a moratorium.

3 This jurisprudence is known as “Fiqh”, meaning “Understanding” of the sources by the jurists. For e.g., see Nyazee, I.A.K., (Trans.), The Distinguished Jurist’s Primer: Ibn Rushd’s Bidayat al-Mujtahid wa Nihayat al-Muqtasid (Reading: Garnet Publishing Ltd., 2000[a]), 2 Vols. Its principles are known as “Usul al-Fiqh” which lay down the classical rules of Islamic jurisprudence. For English sources on the principles of Islamic jurisprudence, see e.g. Kamali, M.H., Principles of Islamic Jurisprudence, 3rd Edn., (Cambridge: The Islamic Texts Society, 2003); Hasan, A., Principles of Islamic Jurisprudence, (Islamabad: Islamic Research Institute, 1993) 4 Volumes; Nyazee, I.A.K, Theories of Islamic Law (Islamabad: Islamic Research Institute, n.d); Nyazee, I.A.K, Outlines of Islamic Jurisprudence (Advanced Legal Studies Institute, 2000[b]). Free electronic copy available for download at: http://www.nyazee.com/islaw/theory/theory.html (27/1/06).

4 See Baderin, M.A., supra note 2 above, pp. 37-39 for a brief discussion of the development of these jurisprudential schools.

5 Ibid.