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## **Codifying a Sharia-based Criminal Law in Developing Muslim Countries**

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Conference on Criminal Law Development in Muslim-Majority Countries  
University of Tehran  
March 2019

### **Conference Opening Remarks**

In my remarks today I would like to argue that there is value in codifying criminal law in a way that incorporates the principles of Shari'a, to the extent that the members of the society have internalized those principles. In an increasingly complex and legalistic modern world, the codification of the Shari'a principles touching criminal law may be the best way of assuring that those principles are carried forward.

There are good reasons for the present strong trend toward codifying a comprehensive statement of the elements of all offenses, defenses, and liability rules. First, codification provides fair notice of the criminal law's rules to the people who are bound by them. Second, codification increases uniformity in application, so similar cases are treated similarly. It is hardly justice when similar cases are treated differently simply because they are decided by different judges. Third, codification provides a platform for refinement and improvement of the criminal law in the future. It is difficult to have public discussion and debate if the rules and their application are unclear or subject to differing interpretations. Only a clear, unambiguous codified text can provide the clarity needed. Finally, codification of the criminal rules makes clear that the power to revise the rules is clearly within the hands of the national government rather than in the hands of an individual judge.

These virtues probably explain why the past several centuries have seen a persistent march toward greater and more comprehensive criminal law codification. The shift between uncodified or partially codified law and comprehensive codification moves in only one direction. There are almost no instances of a country, having shifted to a comprehensive criminal law codification, abandoning it to return to a system of uncodified or partially codified criminal law.

I have worked on criminal law codification projects in a number of countries, including two developing Muslim countries. I have also directed criminal law codification projects for states and the federal government in the United States. So I am sensitive to the challenge of codification both from the academic and the practical point of view.

For many developing countries, the task of codifying their criminal law can be a challenging project and we are lucky that there are international organizations willing to assist developing countries to undertake such ambitious projects by providing both funding and expertise. The United Nations Development Program (UNDP) and the International Development Law Organization (IDLO) are just two of such organizations, and they have done a fine job helping developing countries with criminal law codification projects around the globe.

As useful as these international organizations are, however, there is also a natural tension between the internationals and the locals. It is natural for the internationals to want to promote adoption of international norms in the new criminal codes. But I have reservations about the wisdom of their pressing for the incorporation of these norms if they conflicted with local community views. I think all parties, both the internationals and the locals, are better off if

a criminal code is based upon the shared judgments of justice of the ordinary people within the society, rather than based upon international or Western norms. Here's why.

One could certainly make some democratic arguments in favor of having criminal law enshrine the community's judgments of justice. Criminal law protects us from the most egregious harms and we allow it to impose the most serious sanctions. So it is particularly appropriate in a democracy that the members of the society decide what constitutes a crime and how much punishment will be imposed.

But that is a political and philosophical argument. I want to argue that having criminal law track ordinary people's judgments of justice has great practical value as well. Modern empirical studies by social scientists have shown that a criminal law that tracks the community's judgments of justice can build a reputation with the community as being a moral authority to which they should defer and acquiesce. A criminal justice system that can earn such "moral credibility" with the community can increase its power to gain compliance and, particularly importantly, to cause people to internalize the criminal law's norms. In other words, a criminal law that earns a reputation for being just can harness the powerful forces of social influence and internalized norms in order to benefit society by better controlling crime and by strengthening societal norms. In contrast, the empirical studies suggest that a criminal law that regularly conflicts with ordinary people's judgments of justice can lose moral credibility, inspire resistance and subversion, and undermine the system's crime-control effectiveness and socialization power.

This relationship between tracking community views and the criminal code's effectiveness is both sensitive and continuous. It is sensitive in the sense that we know from empirical research that every incremental reduction in moral credibility produces an incremental loss in the criminal law's ability to control crime and internalize norms. The relationship is continuous in the sense that it does not matter how good or how bad your current criminal justice system is at the moment. Whatever its current state, improving its moral credibility with the community will incrementally increase its effectiveness, and reducing its moral credibility with the community will incrementally decrease its effectiveness.

Thus, the message to the internationals who sponsor criminal law codification projects is that they ought not insist upon a criminal code that tracks international norms but rather one that tracks local norms. If they force upon the locals a criminal code of international norms that conflict with local norms, it will simply serve to undermine the code's legitimacy and moral credibility, which will undermine the value of the entire project. They can advance their own agenda better in the long term if they help establish an effective criminal code, which might then be a vehicle for future shifts of community views toward international norms.

The internationals can of course provide arguments to the locals for why the international norms ought to be adopted. And if at some point local norms shift to better align with international norms, then the criminal code ought to be amended accordingly. But demanding that the code adopt rules that conflict with local norms is a losing strategy from the beginning because it will tend to discredit the entire project in the eyes of the local community.

It should be pointed out that the same arguments for having criminal law track community views apply equally to the political elites in the country. They are likely to be in control of the criminal law codification process and no doubt would be tempted to draft the code to reflect their own views without regard to the views of the larger community. Such an approach may promote their political agenda but, to the extent that it conflicts with existing community views, it will damage the code's reputation and ultimately its effectiveness.

I have little doubt that some political elites or religious leaders will want to push back against this point. The clerics might understandably argue that “the criminal law must reflect God’s rules, whether the people have internalized those rules are not.” The strength of this claim is undeniable. However, what the clerics must understand is that there is a hidden cost to insisting upon a criminal law rule that the community sees as unjust, for it undermines the criminal law’s moral credibility and longer-term can undermine the legitimacy and support for Shari’a.

There is one important exception to the rule that criminal codes ought to reflect community views. One can imagine a situation where political, social, and religious leaders want to *change* community norms on one issue or another. Can they use criminal law reform to help them do that?

If the criminal code has in other respects tracked community views and has earned moral credibility with the community, social reformers can take the “moral credibility chips” that it has earned and “spend” them to help change community views. If citizens have come to see the criminal code as a reliable statement of what is and is not truly condemnable, then a criminal code change that criminalizes new conduct, for example, will be taken as a persuasive signal that this new conduct is indeed condemnable.

If the attempt to shift community views is successful, then the law-community conflict will soon disappear and the law’s moral credibility will be maintained. However, if community views do not promptly show movement toward adopting the criminal law’s new rule, then the reformers ought to back off, return the law to match existing community views, and perhaps try to use other mechanisms, such as religious or educational institutions, to change community norms before they have criminal law criminalize the new conduct.

To return to the issue of the common points of tension between the international organizations and the local community, while this problem exists to some extent in most criminal law codification projects, it is a particular challenge in developing Muslim countries. Many Westerners assume that a criminal code based upon Shari’a would in all respects look like the severe penalties that they see in the hudud offenses. Thus, the internationals may well oppose any reliance upon Shari’a in drafting a criminal code.

But this concern comes from a misunderstanding of Shari’a and the hudud offenses. In my experience, the principles underlying the treatment of criminal law cases under Shari’a are very similar to the standard principles underlying criminal law around the world. I am certainly no Shari’a expert but it seems clear, for example, that Shari’a holds central a principle of proportionality between blameworthiness and punishment, as do most criminal law systems in the world. Indeed, even in the definition of what constitutes a crime and in the factors that distinguish more serious and less serious offenses, there is an enormous amount of overlap around the world. The differences that do exist tend to be those that relate to the relatively few number of culturally dependent offenses such as those relating to family and religion. But the vast majority of the criminal code provisions in a Shari’a-based criminal code would be entirely compatible with the provisions of a Western criminal code. But this enormous level of agreement is hidden by Westerners’ mistaken assumption that the hudud offenses reflect the typical principles of justice contained in Shari’a.

The hudud offenses do present a special challenge for codifying criminal law in a developing Muslim country. It is common for the local community to be devout and to want to honor their religion and the teachings of the Koran as they draft their criminal code. On the other hand, it is also common that many aspects of the hudud offenses conflict with the local community’s existing norms. What is to be done?

In these situations, sometimes thoughtful analysis and creative drafting can help accommodate the points of tension. For example, if the local Muslim community does not in fact support use of the death penalty but, out of their devotion to Islam and the Koran, does not wish to formally abolish it, the criminal code can formally adopt the death penalty but, following Shari'a's principle of proportionality in punishment, specifically provide that this uniquely harsh punishment must be reserved for the uniquely most egregious case. Thus, if one can imagine a case worse than the case at hand, then the death penalty ought not be imposed in the case at hand but rather reserved under the proportionality principle for use only in the most egregious case.

Similarly, if the local community's modern judgments of justice do not support lashes as a punishment, the criminal code can preserve that formal punishment but convert it into a formal occasion of symbolic public condemnation where ceremonial lashes cause no pain or injury. A similar symbolic approach might be taken with regard to other traditional penalties, such as cutting, stoning, or physical retaliation.

In other instances, however, existing community norms may conflict with the hudud offenses in a way that leaves little room for a creative accommodation. For example, some Muslim communities may reject the propriety of serious penalties for apostasy, criticizing Islam, failure to fast, adultery, or false claim of adultery, among others. But even here, it is possible to seriously limit the application of the offense by adding a series of restrictions on its scope or by creating special proof requirements that typically cannot be satisfied.

I understand and to some extent support such attempts at accommodating the tension between the traditional offenses and the community's modern sensibilities. However, it is worth noting that these kind of accommodations are less attractive than the two approaches at accommodation described previously. Those previously-described approaches are entirely principled, while these are less so.

Given the proportionality principle, it really does make sense to limit the death penalty to the most egregious offense imaginable. And in the use of purely ceremonial lashing or other symbolic punishment, the law is being open and straightforward about what it seeks to do: the violation deserves public censure but not physical punishment.

In contrast, the latter approach – setting unattainable proof requirements, for example – seems more like cynical manipulation. If the conduct is truly sufficiently condemnable to deserve criminal liability, then it deserves some punishment, even if the punishment is simply formal public condemnation. But criminalizing the conduct then making its prosecution impossible would seem to be gameplaying, which will tend to undermine the criminal code's moral credibility. People may wonder: Is the conduct criminally condemnable or not?

To conclude my remarks, I very much understand the motivation of many groups to want to push hard for a new criminal code to reflect values important to them. The international organizations have a conception of human rights and freedoms that is dear to them. Political and religious authorities in a country want the criminal code to promote the values that they hold important. However, modern social science research has shown us the dangers and hidden costs of allowing these global or national political or religious preferences to shape a criminal code in ways that conflict with existing judgments of justice of the community to which it applies. In contrast, a criminal code that tracks community views can harness the powerful forces of social influence and internalized norms, and this power can be used to help shape community views in the future, to bring long-term change or to provide long-term stability.

## Conference Closing Remarks

The perspective I am offering is different from most of what you have heard during this conference. Most other speakers are genuine Shari'a experts. I am giving the perspective of somebody who does a lot of criminal law reform in many different kinds of countries, cultures around the world. I am a student of Shari'a, not an expert on it. Yes, I directed two Shari'a-based criminal code drafting projects, but it was not my Shari'a expertise that I was contributing but rather my criminal code drafting expertise. I can offer a scientific perspective on the issues because I do a lot of work with social psychologists. I do think that my perspective can be useful to the issues raised in this conference. I have two points to make in these closing remarks. One topic I talked about in my opening remarks; the other is new to the conference discussions. The first topic is about justice; the second is about fairness.

As to the first topic, you remember my discussion in my opening remarks about my friction with international organizations that have funded the criminal code reform projects in the developing Muslim countries. Some of the internationals wanted the criminal codes being drafted to incorporate international norms. And my advice to them was that it actually made more sense to not push that point. It was better to have those criminal codes incorporate local norms, which were typically Muslim norms.

My reason for arguing that position was that we know from empirical research that a criminal code that conflicts with local norms is one that will provoke resistance and subversion. And there is the likelihood that those conflicts, and the resulting bad reputation that the criminal code gets, are likely to undermine its effective operation to gain compliance in the future. The conflicts with local community norms undermine the new code's moral credibility and, as a result, the code loses the ability to get the citizens to internalize the norms expressed in the code. If people see the criminal code as setting rules that they believe are unjust, rules that, for example, criminalize conduct that in the community's view is not truly condemnable, then they will never come to see the code as a reliable moral authority. Thus, when the code criminalizes certain conduct for which the condemnability is unclear, people are more likely to simply ignore the code, and assume that is one more example of the criminal code getting it wrong.

On the other hand, if the conflicts between local norms and the criminal code are minimized, the code can earn moral authority with the community, which can give it a potentially enormous power to gain deference and to influence the shaping of local norms. If the code tracks community views faithfully, it can earn a reputation for being a reliable statement of what is truly condemnable, and thereby can gain the power to persuade people that when it criminalizes something it really does mean that the criminalized conduct is truly condemnable. Thus, people are more likely to accept this assessment, to conform their conduct accordingly, and eventually to internalize the norm as their own.

That internalization is enormously important. Having a norm internalized is much more powerful than having a policeman standing nearby who might (or might not) arrest the person. Once you internalize some value, that means that you will act upon that value because that's you. You do it for yourself, your own view of yourself. It doesn't matter whether there are other people around or not. That is the ultimate power of social influence; to be able to get people to internalize your norms. Where the criminal code conflicts with existing norms, it loses the ability to shape community norms in the future and to have people internalize its norms.

Does that dynamic, which I described in my opening remarks, have relevance in Iran? Over the course of the last two days I have had a significant education in Iranian criminal law

and how it operates. Many speakers have talked about the possibility, and sometimes the frequency with which the current criminal law can seriously conflict with community views. In some cases the law under-criminalizes and under-punishes, as in a panel we just heard discussing the failure to prevent the victimization of women.

In other cases the law over-criminalizes and over-punishes. This can be a serious problem for the common law's reputation even in cases where the offenses are minor, as with criminalizing failing to wear a hijab or failing to fast or sex before marriage. Apparently some significant portion of the population does not see such conduct as criminally condemnable; the criminal law's prohibition is not based upon a strong consensus among the community. This means, then, that every instance of prosecution, or even the daily scene of seeing others compelled to abide by these prohibitions, has the effect of undermining the criminal law's moral credibility with the community.

Citizens will say to themselves, if the criminal law can be wrong about these sorts of issues – ignoring violence against women, insisting on criminalizing conduct that is not seen as truly condemnable – then they are less likely to defer to the criminal law in the future and to see it as a moral authority that should have an influence in shaping and internalizing their own norms.

I was particularly struck by the fact that Iran's upper-level governing structure has the two parts: the Guardian Council and the Expediency Council. The existence of the Expediency Council offers an obvious mechanism for the government to take into account the social dynamic that I describe. That is, it may make sense to have a rule that is traditional – perhaps it represented community norms at some time in history – but continuing to follow the rule ought to be reevaluated if it conflicts with existing community norms. Indeed, one might worry that with the loss of moral credibility, the continuing law-community conflicts could undermine community support for reliance upon Shari'a generally. Thus, one might conclude that this is an instance in which the government ought to take into account the damaging effects and perhaps conclude that it is expedient to have criminal law better track community views.

Now, I don't imagine that the current Expediency Council is going to go look at the social psychological data and then revise the criminal law tomorrow, but it is an interesting idea to think about because the structure of the government – the existence of the Expediency Council – does formally recognize the possibility that although something may be consistent with historic Shari'a, it might nonetheless be better for society – and for the future of Shari'a – to step back and at least evaluate whether there could be some expediency in softening a rule.

The second point that I want to raise in these closing remarks relates to the first but is a new and different point that has not been touched upon during the conference. I want to describe some social psychological research that has been done over the last several decades, primarily by Professor Tom Tyler at New York University.

One of the things that Tyler has shown is that even if people are in litigation or are being prosecuted, they are much more likely to accept the results of the adjudication, even if goes against them, if they perceive the adjudication as having been fair. Even if they are going to be punished for their criminal conduct, they are more likely to support and acquiesce in the operation of the criminal justice system in the future.

You can see the parallels here to the empirical research I just discussed concerning community perceptions of the criminal law's substantive criminal liability and punishment rules. If the law produces results that track the community shared judgments of justice, it builds moral credibility with the community and thereby increases people's willingness to defer to it. Tom Tyler's research on perceived procedural fairness shows an analogous dynamic. If the community sees the adjudication process as being fair it builds the "legitimacy" of the system,

as Tyler calls it, which in turn makes people more inclined to defer to the system and to acquiesce in what it does.

Now, the power of the system's "moral credibility" in producing just results is much stronger than the power of the system's "legitimacy" in using a fair procedure. But still, procedural fairness is quite important.

Does this research have some relevance to the adjudication of criminal cases in Iran? I think it does. I think the major difficulty would be the fact that individual judges hold the ability to determine not just the facts of the case but also to determine the law that is being imposed and that they can draw upon not just the criminal statutes but also can draw upon Shari'a principles as they interpret them.

I think it's easy to see why reliance upon Shari'a is attractive, especially for a country that is devoutly Muslim. But the point is that here too there are hidden costs to relying upon Shari'a principles in this particular way – by allowing individual judges to decide for themselves how to interpret and apply those principles to a particular case.

First, one hidden cost is that under this sort of system there is unpredictability in the rules that will be applied. No one can be sure ahead of time what law will be applied in a particular case or how it will be applied.

Second, this is a system that will regularly produce inconsistency among judges. Once you give judges this kind of discretion, different judges will exercise it differently, and that will produce inconsistency in application. That inconsistency will hurt the perceived fairness of the adjudication system. The results in any given case will depend the defendant's good or bad luck of the judge assigned to the case rather than what the defendant has actually done or his or her blameworthiness for doing it.

Third, this kind of system of unbridled judicial discretion presents a transparency problem because ordinary citizens can't see where the result is coming from – the source of the particular legal rule applied in the case is a black box to them. To the individual judge, it may be quite clear. He looks to the Shari'a authorities and, in his mind, the law that he chooses to apply may make perfect sense. But because that system is one that cannot be understood from the outside, its lack of transparency leaves people wondering: what is it that is really influencing the decision in this case? They may imagine all sorts of sources of improper influence that they might worry about. They could be completely wrong about that, but without transparency they cannot know what is truly driving the adjudication decision.

Finally, I think a final problem is one of fair notice. If people don't know beforehand exactly what rule is going to be applied, they cannot confidently guide their conduct according to what the law demands.

The end result of all these difficulties is that the community is not likely to have much faith in the fairness of the adjudication process. What they see instead is unpredictability, inconsistency, a lack of transparency, and a lack of fair notice, and this serves to undermine the "legitimacy" of the legal system, which in turn then undermines people's willingness to defer to it.

On this issue, I think there is a solution. And some of the countries that I have worked with have used the solution. One can avoid the problems of unpredictability, inconsistency, lack of transparency, and lack of fair notice simply by reducing the Shari'a principles and rules to a codified form that will be clear to all persons beforehand and that will be applied in the same way to all defendants in the system.

This approach not only helps give legitimacy to the current criminal justice adjudication system but also helps with a long-term goal of keeping Shari'a principles relevant and influential even in the complex and changing circumstances of modernity.

I admit that there are many other important factors at issue in making decisions to structure a criminal law system. All I am suggesting here is that those people making these structural decisions ought to at least know about the practical implications, long-term and short-term, of the decisions they make, so they can include those implications in their calculations. They will want to take into account not only the obvious costs but also the hidden costs of the uncodified discretionary system traditionally used.

As a final word, let me thank not only the organizers but all of the speakers at this conference over the past two days. I think that I, probably more than any other person in this room, have learned an enormous amount and I am indebted to you all for that education. Thank you.