

**The Sharī‘a and Islamic Criminal Justice
in Time of War and Peace**

M. Cherif Bassiouni

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Mahmoud Cherif Bassiouni is a distinguished human rights advocate with an astounding career and publication record that exceeds seventy books (authored and edited) and 260 articles. *The Sharī‘a and Islamic Criminal Justice* is yet another rigorous contribution that should enrich and broaden the scope of the criminal law debate in the Islamic legal system and its relevance to international humanitarian law. The significance of this work lies especially in the

author's sincere endeavor to derive appropriate tools from Islamic law to address contemporary issues of post-conflict and transitional justice.

The first chapter, an introductory review of key conceptual constructs and historical developments, examines various topics from the evolution of Islamic legal theory and the Sunni and Shi'i schools of law to the resurgence of Islamic thought during the nineteenth and twentieth centuries. In regard to Islamic law's historical pertinence to issues related to war and peace, the author elaborates especially on two categories: *dār al-ḥarb* (the house of war) and *dār al-silm* (the house of peace). Finally, he illustrates four types of treaties: those of peace (*salām*), truce (*hudnah*), protection (*dhimmah*), and safe conduct (*amān*).

The second chapter marks the beginning of Bassiouni's serious investigation of the subject of this study, particularly with his discussion of Islam's protection of life and support of human dignity. Drawing on the Qur'an and Sunnah, he discloses substantial facts about Islam's response to the act of killing, among them that the Qur'an prohibits all forms of killing, except in the context of self-defense or executing the death penalty after a fair trial. In this respect, the Qur'an also prohibits the killing of non-combatants, the sick and the injured, the aged, women and children as well as attacking mosques and, by extension, all places of worship not used for military purposes. These laws are applicable to both Muslims and non-Muslims during times of war and peace.

The author stresses that Islam views the sanctity of human life in terms of the Muslims' obligation, both as individuals and as a community, to pursue and fulfill justice. According to him the Shari'ah's holistic view, which situates justice within the paradigm of life and judgment in the afterlife, is the primary factor that sustains this approach. The Shari'ah presents human beings as God's viceroys on Earth and hence commands them to protect all forms of life and objects created for their use. Such a view also defines the relationship between the state and the individual in ways that hold the latter accountable for protecting life and freedom as well as for fulfilling justice.

In the third chapter, Bassiouni presents a comprehensive account of Islam's justice system. He elucidates four constituents that Islamic criminal law shares with other systems, namely, normative provisions, procedural rules, evidentiary requirements, and applicable sanctions. After this, he marks out its distinguishing traits and expatiates on its major three categories of crimes and penalties. The first category, *ḥudūd*, represents those crimes for which the Qur'an mandates specific penalties (e.g., armed robbery, adultery, and questioning a woman's chastity). The second category, *qiṣās* (e.g., homicides and bodily harm), is also indicated in the Qur'an and its penalties are carried out in the

form of retaliation. In practice, however, the ultimate goal here is to compensate the victim, not to inflict equal harm on the wrongdoer. The third category, *ta'zīr*, and its penalties are intended, as the term literally denotes, to “chastise” and reform the offender. As these crimes are not found in the Qur'an or Sunnah, the judge is allowed great flexibility while determining a suitable punishment via *qiyās* (legal analogy) and *ijmā'* (consensus of the legal community).

The fourth chapter takes on the significant topics of Islamic international law and international humanitarian law. The author first presents a historical study of a treaty's binding nature in Islam and therefore concludes that all Islamic countries who are members of the United Nations and signed the 1949 Geneva Convention are bound by the Shari'ah to comply with all international law obligations and those under the UN Charter. On the question of Islamic law's compatibility with international humanitarian law, he demonstrates that the Shari'ah is one of the earliest legal systems to develop what is known today as armed conflict laws. He draws out and expounds upon several humanitarian-oriented legal proscriptions, including brutal forms of killing, the disproportionate and unnecessary use of force, the killing of envoys and prisoners of war, sexual abuse, and the destruction of crops, trees, and other natural resources.

One of Bassiouni's crucial interventions in this book is his critical analysis of the discourse about today's militant actions carried out in the name of Islam. He identifies four shortcomings of this narrative: (1) its failure to recognize the combatants' affiliations (he mentions three groups: regular military personnel, irregular combatants, and unorganized combatants); (2) the arduous focus on the West as the major victim, whereas the factual data that he presents shows that Muslims have suffered to a greater degree from such movements; (3) the inability to impose equal measures on all parties, as with coining terminology that legitimates the disproportionate use of power for one party and criminalizes it for the other. Here, Bassiouni particularly looks into the term *collateral damage* and reflects on the United States' intervention in Afghanistan and the Israeli-Palestinian conflict; and (4) the discrepancy in the mechanisms used to hold all parties accountable in different conflicts. He relates several incidents of the US Marines' disproportionate use of force, for which a military official is hardly ever charged.

The fifth chapter focuses on post-conflict and transitional justice and deliberates their executability in Muslim states today. Bassiouni maintains that Islamic law has made no significant contribution to inhibiting and regulating armed violence, conflicts, and rebellion since the twelfth century. However, he expresses some hope due to the many criminal investigations and prose-

cutions that took place in the aftermath of the Arab Spring. In this regard he refers to the Egyptian and Tunisian revolutions; however, and incomprehensibly, he ignores a more significant example: the 2004 Moroccan Truth and Reconciliation Commission.

For the author, one of the main reasons why Muslim states failed to develop their judicial system in the area of post-conflict law is related to a “deficit in human development,” especially the high illiteracy rates and the superficial level of legal knowledge in Muslim societies (p. 257). On several occasions, he connects their current inferior state with education. He largely blames the jurists for this, but in such ways that makes them appear to have operated outside of their societies’ history. For example, not once does he refer to the direct and indirect methods used by European colonization to cripple Muslim societies and to interfere with their efforts to reform their legal, educational, military, and/or economic institutions. Reading the legal in light of the political would have added a quite interesting side to the story, particularly since this story is being told by a scholar of such high caliber and expertise.

Certain binary oppositions and generalities that are repeatedly emphasized but not explained may also trouble some readers. By the end of the book, it becomes clear that Bassiouni not only ranks Muslim legal scholars living in Muslim countries much lower than their counterparts in the West, but also describes them as “the few trained judicial or other legal experts who apply the Shari‘a and Islamic public law mostly as tribal law” (p. 257). Following his account, whether he had the intention to present it as such or not, democracy (another *ideal* that he takes for granted), highly developed post-conflict laws, and progressive legal thinking are found in what he calls “the West” (presumably Europe and North America). On the other hand, he associates Muslim societies with “primitive” laws (p. 257) and “traditionalism” and declares that “it is time to reclaim the progressive tradition of Islam” (p. 287). Although the Muslim world’s current underdeveloped state cannot be questioned, what has led to it is surely not just the deficient training of imams and legal scholars.

Notwithstanding the above observations, Bassiouni’s endeavor to reconstruct the Islamic criminal justice system can only be praised. His critique of legal authorities may have stemmed from his concern for uncovering the Shari‘ah’s true potential, for he believes that the problem is not in the Shari‘ah per se but with those who communicate it to Muslims and the rest of world.

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