

AGNIESZKA MINDA, JOANNA NOWAK

SHARIA CRIMINAL LAW – STRUCTURE AND INFLUENCE THROUGHOUT HISTORY

I. OUTLINE OF MUSLIM LAW

Islam was created between VI and VII century AD on Arabic Peninsula, founded by Muhammad, who stood against tribal polytheism and declared himself as the prophet of the only God – Allah. Muslim law (Sharia) is an integral part of Islam, however it is not consistent for all Muslims. According to Sharia conception, it controls the whole human life. It involves parts concerning worship, called *ibadat*, and also relationships between people, called *mu`amalat*. It is not religious law, as for instance Christian canonical law.

Before Islam was created, migrating groups of poor people, containing in the majority Arabs as falling primeval community, which was clearly visible in Mecca. There Muhammad was a judge, peacemaker in disputes between tribesmen and he was proclaiming, that Allah's messenger had appeared to him and had shown him the path of rightful life. Unfortunately his followers were suffering from victimization in Mecca and had to escape, initially to Ethiopia, later to Medina¹.

Further history of creating country and Sharia was connected with military expeditions of orthodox (believers of the only God Allah), especially with conquering Mecca. Muhammad signed an agreement with Bedouin migrating tribes and formed a great, as at that time, army. After taking control over Mecca with agreement and support of influential townspeople, Muhammad was acclaimed as Allah's emissary and the ruler of the Arabic Peninsula. As a result it finished sustained, began long before creating orthodox community, process of creating statehood of Arabs from central and east Araby. The process finally effected in establishing first Muslim country – Caliphate².

1 M. al.-Hudari Bek, *Podstawy prawa muzułmańskiego*, Kair 1938, p. 45-50.

2 *Prawo muzułmańskie: struktura i podstawowe instytucje*, red. L. R. Sùkiájnen, V. E. Čirkin, Ū. A. Ūdin, Warsaw 1990, p. 8-10.

In Caliphate creator and the only interpreter of new religion was Muhammad. Records telling about prophet's actions made *sunna*, which is the second most important source of Muslim law. Speeches and deeds made during twenty-three years long activity of Muhammad became the basic of Sharia. Therefore important for evolution and growth of Muslim's law were archives of thirty-years long rules of first four "rightful" Caliphs, who were successors of Muhammad after his death.

Until X century AD Sharia developed based on translation of Coran and *sunna* made by Muslim theologists (*Mudjathids*, *Mufti*). Moreover Sharia contented old tribal-ancestral habits, which were oppose to existed law. That is how stride of traditional Sharia ended³. Unlike in other religious systems, Sharia is a result of divine revelation. Allah's will is main and the only source of law. Via Muhammad the prophet people were discovering norms created by the only god. In case of looking for source of law, the rule of law, which was appropriate for solving each problem, there had to be found Allah's warrant in saint books related to the problem. This is being done by Muslim theologists-lawyers⁴.

In the Islam doctrine, people do not create law, but they are only executors of Allah's will. Theoretically there is only one kind of source being respected – saint books of Koran and Sunna, based on which there were created rules of law telling about appropriate treatment⁵. According to lawyers other important source of Muslim law is *fikh* – tomes written by Sharia followers in medieval. Unfortunately there has not survived anyone of them.

What is more, *kijas* is deemed as another source of Sharia. It means creating law as a result of rational actions based on rules of Koran and Sunna. It is a kind of concluding based on an analogy. The last source of law is the Allah itself, so a human being cannot change this law. As we can see, it is in opposition to European's, which is relied on Roman law constituted by people⁶.

II. SHARIA AS A UNIVERSAL SYSTEM OF LAW CONNECTED WITH RELIGION FROM THE NORMATIVE AND DOGMATIC PERSPECTIVE

Pursuant to lawyer's opinions Sharia control behavior of Muslims in each aspect of their lives and also their feelings and thoughts. Sharia involves elements such as religious dogmatism of Islam, Muslim morality and ethics, order of ful-

3 J. Bielawski, *Islam, religia państwa i prawa*, Warsaw 1973, p. 32-49.

4 M.J. Musa, *Historia prawa muzułmańskiego*, Kair 1958, p. 156-160.

5 J. Bury, J. Kasprzak, *Prawo karne islamu*, Warsaw 2007, p. 11-23.

6 A.K. Zejdan, *Wprowadzenie do nauki prawa muzułmańskiego*, Baghdad 1966, p. 112-115.

filling religious duties and rules of behavior in their relations with each other and with people who are not adhering to Islam (*mu'amalat*)⁷. Structure of Muslim law was evolving during radical rebuilding law systems of Muslim countries in second part of XIX century AD. Codification acts of administrative law, criminal law, procedural law, civil law, became the basis of law system of some Islam countries. Significant impact on structure of law have had creation of *Medželi*. It was a code of civil law of Ottoman Empire released in 1869–1876⁸. Muslim lawyers ringfenced two groups of norms from Islam system. The first group includes orders of Koran and Sunna, moreover the second group included norms built upon other “rational references”⁹. According to some analysis from over 6000 lines of Koran only 200–500 include rules of behaviors, which Muslims should keep in their relationships with each other. What is more, in 140 lines is given the way fulfilling basic religious duties like prayer, pilgrimage, observance of fasting¹⁰.

Koran (in Arabian *Al-Kuran*), which means recitation, reading, consist of 114 *surs*. For Muslims it is the last of revealed book containing full of revelation, because previous books (revealed too), like Tora or Gospels, contains from different reasons it incomplete or faked. For Muslims Koran is God's speech. In their beliefs it's content is in heaven. Theologists have different opinions about the fact, if Koran was made by Allah or if it is as eternal as him and it derives from his nature. Text of Koran is the main source of law and rules of Islam, furthermore it contains the history of revelation, vision of heaven, hell, the final judgment and also legends and stories derived from the Old and the New Testament, but in original form. It is the base of organization of family and social life, it affects Muslims attitude to themselves and other people. It is interleaved with incantations and conveys. Some of Koran thesis may look like being in conflict with each other, but believing Muslims says, that Koran should be interpreted as the whole, because only then it is possible to be seen the right picture of the whole¹¹.

Whereas Sunna is a collection of stories (*hadis*) about deeds and speeches of prophet Muhammad. The collection is a part of Muslim religious tradition. It is also a set of prompts telling about dogma of Islam, opinions about social dealings and practices, good manners and behaviors¹².

7 *Ibidem*, p. 120.

8 *Ibidem*, p. 132-138.

9 M. al-Hudari Bek, *op.cit.*, p. 202.

10 M. J. Musa, *op.cit.*, p. 10-11.

11 J. Nosowski, *Przepisy prawne Koranu. Wykład systematyczny*, Warsaw 1971, p. 54-62.

12 K. Kościelniak, *Sunna, hadis i tradycjonałści. Wstęp do tradycji muzułmańskiej*, Cracow 2006, p.53.

Splitting up the degree of definiteness we can divide all norms of Koran and summa on two categories. First of them contains accurate and impossible to interpret provisions, mainly religious and some behavioral rules. This category of norms may not be translated by lawyers themselves, neither may be made different decisions based on them. Mentioned norms are understandable and clear rules of behavior, which may be directly used in practice. The second category of norms are not clear at all warrants, which may be interpreted in many ways, but which also demand substantiation in numerous rules¹³.

III. MUSLIM CRIMINAL LAW

Muslim law, especially criminal law, is for law systems of western countries completely alien and incomprehensible. It is a kind of opposition to civil law, is a type of natural law. Whilst creating forbidden acts theory Muslim lawyers took as starting point two fundamental philosophical-theological rules: they were assuming that all human actions and thoughts are driven by Allah's will. However according to opinions of majority of Muslim lawyers schools bounding given by Allah is flexible enough to allow people do independent choice in many situations¹⁴.

Consequently each serious crime is treated as punishable defiance of Muslim warrants, which sense is represented in general orienting Islam, especially it's law rules and norms, on protection of five of main variables: religious, life, mind, procreation and keeping property.

The second rule talks about violation of rights as disobedience against Allah's will. In Muslim lawyers opinion each illegal, in juridical sense, action is not just a simple derogation from the provisions of the law, punished by correct fine, but is also religious sin bringing further punishment¹⁵.

Muslim jurisprudents from Middle Ages created the most known classification of torts, on the grounds of which torts are divided on three categories. The first one includes crimes, which create the biggest imperil, due to what are attack on Allah's law and are punished sanction *hadd*. The second group includes crimes called *kisas*, violating law of specified people and are punished by fines. In the last group are crimes *tazir* category, which do not have specified punishment.

Moreover, people's behavior may be divided, by classic Muslim law, on two categories: behavior in relation to God (*ibadat*) and behavior in relation to oth-

13 *Ibidem*, p. 61-72.

14 A. Habib Hourani, J. Danecki, *Historia Arabów*, Gdańsk 2002, p. 24-29.

15 *Prawo muzułmańskie...*, *op.cit.*, p.176-178.

er people (*adat*). In both categories acts are also divided on: compulsory (*wad-jib*), forbidden (*haram*), allowed (*halal*), recommended (*nadub*), allowed by law (*mubah*) and reprehensible (*makruh*)¹⁶.

Crimes of *hadd* category include responsibility for actions violating law of whole Muslim community and those, which are defined in Koran or Sunna or Caliphs Law. To this group belongs seven the most dangerous social actions: drinking alcohol, stealing, adultery, rebellion and also resignation from Islam. Each Muslim, to believe in Allah, must have clear mind what as result forbid drinking alcohol.

Koran does not provide any penalty for drinking alcohol. In contrast, Sunna does, according to it the prophet warrant corporal punishment for drinkers. Those, who does it the fourth time should be subjected to death penalty. Evidences of drinking may be: testimony of witnesses, admittance to it or signs of being drunk. However, if an alcohol was drunk not by drunk person's fault (being forced to do this) then this person is not punished.

Another crime from *hadd* category is theft. In this case Koran sets strict type of punishment: "The theft is getting his or her arm cut, as a payback for what he or she had done. This is a punishment from God (...)"¹⁷. As a theft is considered, according to Muslim's Saints Book, taking well stealing. What is more, caliph Umar gave an order to discard this rule in hunger time. This evolved into doctrine, that theft is not being considered, if a country where it has been committed do not provide enough health care and if there are bad social and economical conditions¹⁸. This forbidden act is, however, an attack on one of the most important pillar of Islamic economical and social system – provided by Koran institution of private property.

Moreover, in Sharia the most dangerous crime is an adultery. We can ask a question, why exactly does the adultery belong do the worst crimes. Well, it is an attempt on the most basic protected by law goods – prolonging family. In addition it endangers family and morality system. According to Sunna a person, who does an adultery while being in marriage should be punished by one hundred lashes and then is being stoned to death. People, who commit this crime while not being married are punished by one hundred punches too, but instead of death penalty, is being deported for one year. For proving an adultery are necessary statements of four witnesses, unless the suspected person admit himself¹⁹.

16 J. Nosowski, *op.cit.*, p 64-79.

17 Por. J. Bielawski, *Koran*, Warsaw 1986, p.134.

18 *Ibidem*, p. 142-144.

19 J. Bury, J. Kasprzak, *op.cit.*, p. 69-70.

Next *hadd* category crime is the accusation of an adultery, which was not supported by any statements from at least four witnesses. Koran provide the following punishment: "Those, who accuse women, but cannot provide four witnesses, are punished by eighty lashes (...)"²⁰. Interesting is that the most probably version of setting this law has historical background. Muhammad wife, Aisha, during a walk disappeared and came back to her husband guided by some young Muslim. This fact made her accused for an adultery. Being punished for this crime takes place only on order of the accuser, who however can forgive the violator and in turn make him or her avoid the amercement²¹. Standing against current ruler or coup attempt, so rebellion or riots are too entailing severe punishment. Koran rules do not specify chastisement for mutiny, but in *Sharia* is mentioned, that the ruler should first of all try persuade rioters to obey. If sovereign will not be able to do this, then he rightfully can pursuit and fine them, even by death. As another crime is viewed mugging, for which Koran has specified amercement, which is set dependently from it is ravages. In Koran it is written: "Punishment for those, who fight with a God, his emissary and are trying to spread evil on the Earth, will be their death or crucifixion, or they will have their leg and arm cut-off on opposite sides, or they will be expelled from the country"²².

Apostasy, paganism or idolatry are betrayals of Islam. Those betrayal endangers the religion, which is the most appreciated value for Islam, and as a result, according to Sharia law is an enormous social danger. Koran itself do not set the punishment for the apostasy, but only show contempt in relation to it. According to theologians, the Prophet demanded capital punishment. Next group of crimes, specified in Muslim crime law are *kisas*. Those are crimes definite in Koran. Penalties for them are called "alignments", "chargeback". It is a typical example of reflective punishment, but which can affect only when aggrieved or his/her family do not agree for suitable compensation. To this group of crimes belongs murder or damaging body²³. In compliance with Sharia, *kisas* penalty can be given only in a situation, when accused crime is proved and victim's family wants it. In case of refraining from imposing penalty, violator is supposed to pay compensation, which amount has been set by court. If there are any doubts about defendant fault, he or she can be punished only in *tazir* way, which is a group of another crimes²⁴.

20 J. Bielawski, *Koran, op.cit.*, p. 321-347.

21 *Ibidem*, p.425.

22 *Ibidem*, p.133.

23 M. al-Hudari Bek, *op.cit.*, p. 78-80.

24 J. Bielawski, *Koran, op.cit.*, p. 121-123.

Two Koran lines are not only a base for *kisas*, but they also allows to pay *dija* and *arsh* payback, which is called the “price of blood”. It is determined by sides or via other people. In many cases it is possible to receive compensation from rich man on behalf of a murderer, when he or she cannot afford it. To qualify *kisas* as one of Sharia rules in case of murder, the crime must meet the following conditions: First of all, victim must have been an adult protected by Sharia. Secondly, victim cannot be descendant of murderer nor any of his/her beneficiary.

Further, accused for doing this cannot be juvenile and must be fully mental health in a moment of taking forbidden action. Execution of judged *kisas* should be made by aggrieved person. In situation of damaging body, fulfillment may be made only when attacker did the damage willful and illegal (it excludes wounds made during self-defense)²⁵.

This kind of remedy consists in making the same damage on a body of guilty person, as victim did suffered: “Life for life, an eye for eye, nose for a nose, teeth for teeth”²⁶. Of course victim can resign from doing punishment in exchange for “price of blood” (*arsh*). The “price of blood” can be paid alternatively in two cases: murder and willful body damage. For those two conditions it has different names – *dija* for murder and *arsz* for damage. There are also two kinds of *dija*: an optional form takes place, when victim has right for bloody revenge, in any other cases it has an obligatory form. The last, third category of crimes are action not described *expressis verbis* in Koran and Sunna, which directly affects in businesses of Muslim society. Word *tazir* literally means widely understood “punishing” and in legal sense means legitimized punishment. Main group of those crimes are situations, when because of circumstances could not have been punished in within two previous categories²⁷.

To illustrate this kind of crimes, a good example is theft of worthless item. In contrast, hijacking of valuable things is punished by *hadd*. *Tazir* are also used when Muslim law do not describe specified punishment in two previous situations²⁸. According to *Tazir* are punished trials of *hadd* and *kisas* such as preparing murder or complicity in it²⁹.

25 M. al-Hudari Bek, *op.cit.*, p. 82.

26 J. Bielawski, *Koran, op.cit.*, p.135.

27 J. Danecki, *Podstawowe wiadomości o islamie*, Warsaw 2007, p. 64-66.

28 J. Bury, J. Kasprzak, *op.cit.*, p. 113-117.

29 S. Skalski, *Podstawowe założenia muzułmańskiego prawa karnego*, „Palestra” 5-6/2007, p. 32-35.

IV. AFFECTION OF MUSLIM LAW ON CHOSEN COUNTRIES

Muslim law was doctrine of kind of a source including system of punishments for violating law and regulating way of using them. Since creation of The Ottoman Empire, it means from 1299 year, significant influence on a crime law has been having law made by the rulers. Released my Ottoman rulers legislative acts concerned all types of penalties. Releasing normative deeds in the field of administration and finance was taking place during reigns of all Ottoman sultans³⁰.

However only Mehmed Faith, ruling in 1451-1488, systematized released before deeds and implemented them as two welded acts called *kanun-name*. One of the most known legislative actions are legislations of Selim I, ruled between 1512 and 1520, and also Suleiman Lawmaker, who ruled 1520-1566. Similar situation took place in XVI and XVII century, but sultan Mustafa II (1695-1703) released decree which said that every court should use only punishments mentioned by Sharia law. Next significant event was, releasing in 1840 penal code based on French legislation³¹.

What is more, in Saudi Arabia are applied acts based on Sharia, which tells about responsibility for using an alcohol, falsification of financial documents and even sexual deviations. In 1934 was established a decree about ransom of the blood. Also there is possible cutting of a hand for theft³². In Egypt in the seventies of XX century was called for penalties of cutting-off a hand for takeover of state property. In 1975 and 1977 to Egypt Parliament were proposed the motions for return of traditional penalties according to Muslim criminal law, which means for example for theft, mugging, adultery, and even for revolution or apostasy. However those projects have not been accepted. In the end of seventies in Egypt was created counsel for the codification of Muslim law, which on behalf of the National Assembly elaborated project of criminal law, forwarded for consideration for the highest legislative authority³³. Muslim law influenced in Libya. In 1971 Revolutionary Command Council of Libya adopted a resolution about islamization of country's law system, which ordered that every single newly released act should be familiar to Sharia law. Existing ones have been considered in compare to Sharia. To execute that resolution there were implemented acts returning many of Muslim criminal law rules³⁴.

30 J. Hauziński, *Islam w feudalnych państwach arabskich i krajach ościennych VII-XV w.*, Poznań 1976, p.78-79.

31 J. Danecki, *op.cit.*, p. 87-92.

32 *Ibidem*, s. 110-117.

33 *Prawo muzułmańskie...*, *op.cit.*, p. 209-222.

34 *Ibidem*, s. 218.

V. ASSESMENT OF INFLUENT OF ISLAM RELIGION ON WORLDWIDE LAW

While describing Islam criminal law we cannot omit the fact, that Sharia represents an extreme case of “jurists law” which means that it was created and developed by private specialists. In case of Sharia Koran, Sunna and formed doctrine, not legislator, were lawmakers. It was possible only because Muslim law was based on religious-law theory of Islam. The Muslim law has a social form because in first place it places business and good of Muslim society. Personal deals are on the background. Muhammad the prophet has been claiming that “The best from humanity is this one, who serves other people”.

According to shown above problems it is noticeable the complexity and uniqueness of law regulations in Muslim law. Undoubtedly for “west” point of view, main problems are corporal punishment, capital punishment and procedures themselves, depart from known standards. It is worth to emphasize, that many regulations mentioned earlier can be found in reformed currently penal codes, which are often based on French solutions. Islam Religion is surely connected with Muslim countries law system, it significantly affects both country functioning and it’s society.

SHARIA CRIMINAL LAW – STRUCTURE AND INFLUENCE THROUGHOUT HISTORY

The main subject of consideration in this article is the structure of the Sharia criminal law, its characteristics and influence on Islamic law based on selected countries. Discussed questions concerned on concept Islamic law, sources of law like Koran, Sunna, Kijas and Idźma.

Moreover, in the article, it will be shown the characteristic of Muslim penal law, including crimes like “Hadd”, “Kisas” and characteristic an illicit acts “Tazir”. In the article is also described influence Sharia law on different countries like Saudi Arabia, Egypt and Libya. Structure of Sharia penal law concerns showing its as an universal, normative and dogmatic legal religious system, which regulate Muslims behavior in all areas of life.

In the conclusion, it is estimated the essence of the religion of Islam and its impact on the functioning of society and the state, as well as its relationship with the legal system of Muslim countries.