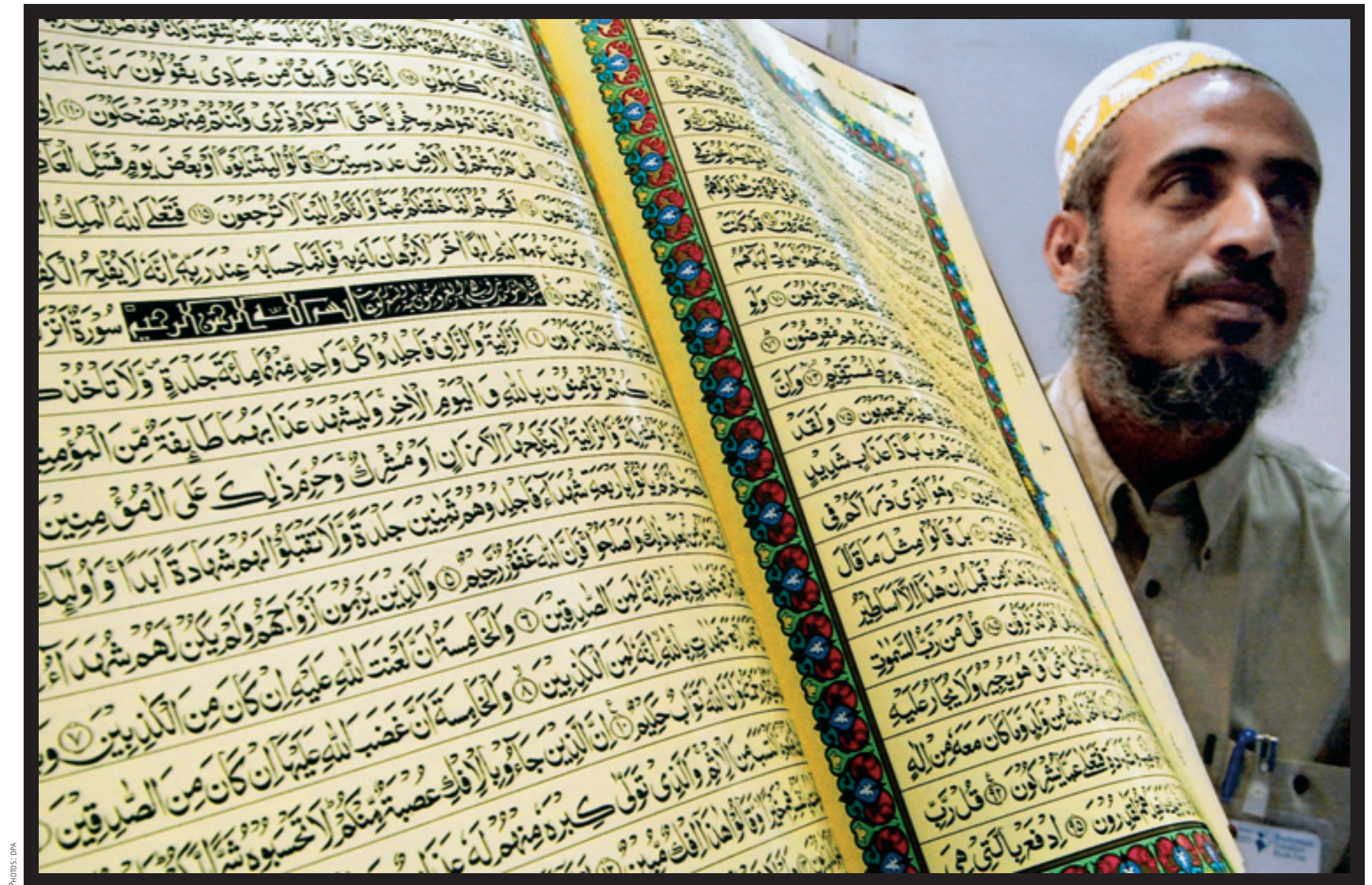


In Islam, Diversity of Legal Opinion is seen as a Divine Gift

The terrorist attack on the World Trade Center on the 11th of September led to war in Afghanistan, and made the Islamic intellectual world a subject of intense public interest. Bookshops report increasing sales of works dealing with the youngest of the widespread religions of the world. Many people are keen to learn more about the ethics and politics of Islam, where knowledge of these areas is generally limited to reports of offences for which dreadful punishments are threatened: the thief has his hand chopped off, the unfaithful spouse is stoned, and the person caught drinking alcohol is flogged. At the MAX PLANCK INSTITUTE FOR FOREIGN AND INTERNATIONAL CRIMINAL LAW in Freiburg, SILVIA TELLENBACH is studying the different legal systems in Islamic states. She is currently working on a monograph which should help to paint a picture of Islamic criminal law in the modern world and of its commonly-disputed capacity to develop in changing times. The book should provide a more rounded view than has been available to western readers until now.



PHOTOS: DPA

Workers with the foreign aid organization “Shelter Now” were arrested in Afghanistan in August, accused of proselytising, and criminal proceedings were initiated against them. It was weeks before they were allowed contact with legal council. There were contradictory reports circulating in the press about the punishments they might possibly have to be prepared for. Anything from the death penalty to deportation seemed possible. Many grey areas also remained as regards the court of law to deal with them, and the way in which the process would be conducted. Only one thing was heard repeated

over and over again: reference to Islamic law. The core of Islamic criminal law consists of the hadd offences (or in the plural hudud offences), which are defined in principle along with their punishments in the Koran. These include theft, highway robbery, illicit sexual intercourse, malicious gossip concerning illicit sexual intercourse, and alcohol consumption. Some people believe that the hadd offences also include the abandonment of faith (apostasy) and rebellion. In addition to the hadd offences there are the qisas offences, the offences of homicide and bodily harm which, even before Islam, were punished according

to the principle of “an eye for an eye, a tooth for a tooth”, and which in the Koran are restricted to deeds carried out with intent and to the person who actually carried out the deed - no longer to his or her relatives. All other criminal offences are known as ta'zir offences, and a punishment is handed down by the appropriate authority according to the requirements of time and place with the proviso that these requirements shall remain in line with general Islamic principles. Each of these groups has its own dogmatic rules. There is no general part of criminal law that is applicable to all offences.

History shows, however, that even in the early days of the Islamic world a criminal law was developing in paral-

Since the 1970s this has resulted in reforms in certain countries - most importantly Iran, Sudan, Pakistan, Yemen, Libya and Mauritania, and most recently also Afghanistan - where newly enacted criminal laws are based on Islam. However, no cases have yet emerged from Libya or Mauritania in which the harsh Islamic punishments were actually applied. There is also plenty of evidence to suggest that when Islamic criminal law was officially reintroduced - just as with proposals for Islamic criminal law in Egypt, which have ground to a halt in parliament - the states tended to prefer to integrate Islamic movements, but not to actually apply the principles of Islamic criminal law again.

Although the Koran is the primary source of Islamic law, its significance is limited in terms of volume. There are around 30 verses dealing with the subject of criminal law. In other words, most of Islamic law is formulated from other sources. Firstly there is the authentic tradition of the prophet Muhammad passed down through his actions, words, and suffering, the sunnah. Very soon after his death people began intensively compiling but also falsifying the wisdom he left behind, and checking the credibility of the transmission of the prophetic reports (hadith) through time founded an entire science. The fact is, though, that we know far more about the historical Muhammad than we do about the historical Jesus. The third source of law is the consensus of the jurists, although the way in which this

group is defined has remained a contentious issue. The fourth source of law is for Sunni Muslims analogy, while for Shi'ite Muslims it is reason. These primary sources of law are also supplemented by a number of legal principles and procedures. The very nature of the sources suggests that they can lead to very different interpretations.

Furthermore, Islam is divided not only into the Sunni (around 90 percent of Muslims) and Shi'ites, but within these two confessions there are still different persuasions - known as schools of law. The most important of these are the Shi'ite djafari school of law, and on the Sunni side there are the Hanafi, Shafi'i, Hanbali and Maliki schools of law. Even within the same school of law, opinions are not always the same. There is no such thing as an instance which could decide a question infallibly and therefore once and for all, even if the position adopted by Ayatollah Khomeini before his death appears from afar to suggest something different. However, unity exists

through a word from the Prophet which could be represented thus: “the diversity of opinions is seen as a divine gift”.

A jurist of Islamic law must spend many years studying the legal sources and ways of approaching them before earning the right to pass down an opinion on a question of Islamic law, a fatwa. Thus a fatwa is an expert opinion which a believing Muslim requests from a jurist on a question of Islamic law, and is not a judgement which can be enforced. If the opinion of one jurist is not to the liking of the believer, then the believer is free to seek out a jurist who will pass down an opinion more in line with the believer's way of thinking. And it is quite possible that the two jurists both produce their fatwa to the best of their knowledge and conscience, yet arrive at opposite results. Islamic law, even Islamic criminal law, can clearly be more dynamic than is commonly assumed.

It is certainly true that a sentence in the Koran is as such eternal and unalterable and may not be abolished by a law-maker if it no longer seems in keeping with the times. Thus verse 38 of the 5th surah states “A thief shall have his or her hands chopped off”. This pronouncement is immutable. But what constitutes theft in the sense of this hadd punishment in the Koran? Now the wide area of interpretation opens up which Islamic jurisprudence has used for centuries to manage to influence the understanding of texts. It has, for instance, narrowed the concept of theft ever further: of course a movable object belonging to somebody else must have been taken away secretly. But this object must also have a considerable minimum value - in this way petty thefts are taken out of the frame. The stolen object must furthermore have been secured by a container, indeed an appropriate container. Valuable goods displayed openly in a bazaar or shop do not satisfy this criterion. Jewellery belongs in a jewellery box and not in an easily-opened chest. Also, a person who later acquired the stolen object by buying it or as a gift is not treated as a thief. These are but a few of the limiting criteria. Overall it is true to say, however, that an act is only theft in the sense of the Koran if it requires a considerable amount of criminal energy. Those thefts which remain below this threshold are not condoned, but they are dealt with as ta'zir offences with less severe punishments such as imprisonment.

But even today various possibilities for further development of Islamic law have emerged. One example is provided by the “talfiq”, a concept which is perhaps best translated as “patchwork”. The jurist is not tied to a single school of law for a legal opinion, but can draw together the arguments from all the schools of law which he considers especially well-suited for the case in question.

Whilst the fundamentalists' calls to reintroduce Islamic criminal law usually limit themselves to a few simplistic

statements, those countries which have embodied it in their legal systems must actually apply it in everyday cases and also engage with the problems of modern life. Questions arise which imperiously demand an answer - indeed a practicable answer - within the framework of Islamic criminal law. That could be said to be illustrated by the homicide offences.

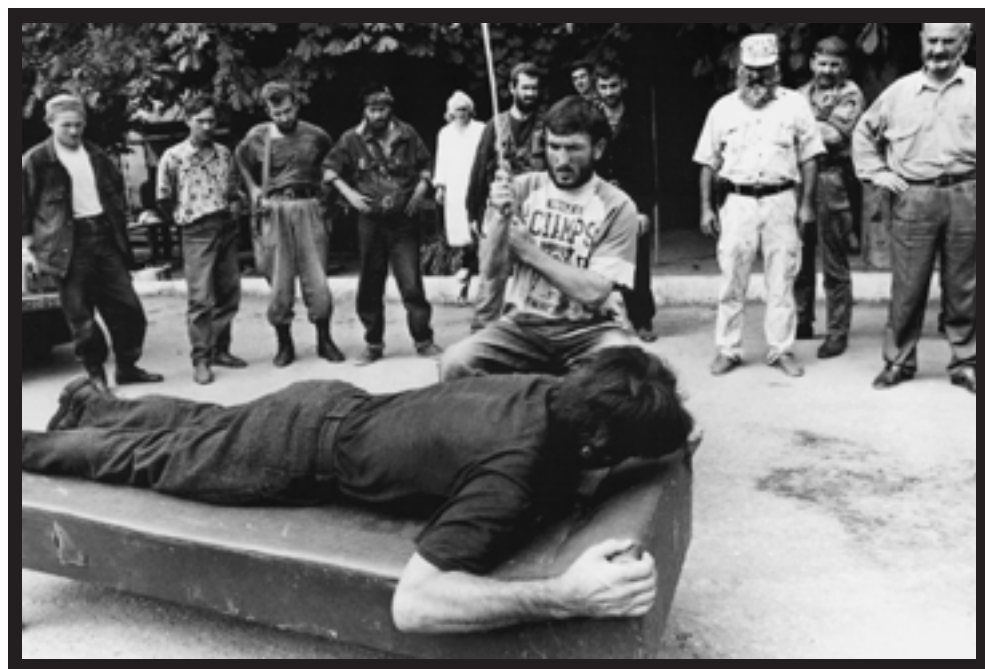
According to classical law, homicide offences should be treated differently, depending on whether they were carried out intentionally, quasi-intentionally or through negligence. Intentional acts are met with what is known as retaliation, which means that exactly the same is done to the person responsible for the crime as they did to their victim. This, however, only applies when the person responsible and the victim are of equal status, especially in terms of gender and religion. If this is not the case, then the only redress is the payment of blood money. In other circumstances, too, perpetrators and rightful claimants of retaliation are free to agree on a sum of blood money instead of retaliation, and claimants can also forgive the perpetrator. The principle of blood money also applies to

“There is no such thing as an instance which could decide a question infallibly and therefore once and for all.”

quasi-intentional killing and killing due to negligence, and in these cases, too, rightful claimants of retaliation can renounce part of or even all of the blood money.

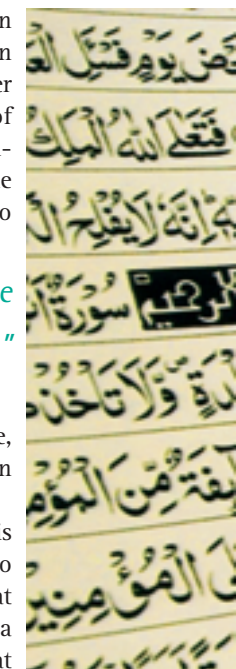
According to this model, punishment for a homicide is placed in private hands, and the state is involved only to the extent of confirming through a legal judgement that the rightful claimant of retaliation has the right to view a particular person as the perpetrator and to deal with that person accordingly. This is seen nowadays as no longer acceptable since in theory it is possible that a criminal act remains unpunished if the rightful claimants of retaliation forgive. Most of the countries with Islamic law have now added a subsidiary state claim for punishment which, in the event that the rightful claimants renounce their right to retaliation or even any punishment at all, leads to the perpetrator being sentenced to a long period of imprisonment (but not to the death penalty!).

The requirement that perpetrator and victim must have the same standing is also being carefully relaxed on certain occasions. Originally it meant that a man could not be killed for killing a woman, nor a Muslim for killing a non-Muslim, and that blood money in such cases only amounts to half of the full sum. Although Iranian criminal law has retained this principle, it nonetheless specifies expressly (although in an unexpected place) that blood money for a woman can be negotiated in excess of that specified in law. There is no upper limit defined, so it



lel to the core Islamic criminal law, and this developing criminal law increasingly overstepped the limits of the Islamic principles, basing itself rather on reasons of state as a guiding principle. Local laws and tribal laws also remained important. Many Muslim states fell under European influence from the 19th century onwards, and nearly all these states adopted European criminal justice systems. The region which is now Saudi Arabia remained one of the few areas in which Islamic criminal law remained in force, and in principle still remains in force now.

After the Arab-Israeli war of 1967 (the Six-Day War), the movement commonly referred to as re-Islamisation emerged. For the supporters of this movement the main issue was and still is the restoration of dominant status for Islam both in state and in society. A key requirement was therefore the re-introduction of Islamic law; particular symbolic value was attached to Islamic criminal law.



would be possible to negotiate a greater sum of blood money for a murdered woman than for a murdered man. Yemeni criminal law pronounces that retaliation or blood money is due when a protected (ma'sum) person is killed. Elsewhere a protected person is defined as a Yemeni national irrespective of his or her faith, and a Muslim irrespective of his or her nationality. It is therefore quite possible for a Muslim to be punished for murdering a Jewish, Yemeni silversmith.

In the case of a deed carried out with intent, the blood money is to be paid by the perpetrator, while in the case of a quasi-intentional deed and an act of negligence it is to be paid by the perpetrator's "aqila", a group of male relatives who are held liable. The 'aqila is sometimes extended beyond the families: thus, in the Sudan, the car insurer equally qualifies as a member of the 'aqila, because nowadays, in countries with Islamic criminal law as in non-Muslim countries, the typical case of negligent homicide is now the fatal road traffic accident. Even the employer is a member of the 'aqila in the case of accidents at work. The Iranian penal code states in more ab-

"A return to general principles such as justice or the common good is increasingly gaining in importance."

stract terms, but with similar effect, that anyone who has assumed relevant liability contractually is a member of the 'aqila.

Another contentious issue has come under scrutiny in recent years in Iran; this concerns bodily injury which, as with homicide offences, can be punished through retaliation or payment of blood money. Let us consider a situation where a person has been seriously injured in a road traffic accident, recovery from the injuries takes months and costs a fortune, and in the meantime the injured person's business collapses - in short the material damages far outweigh the blood money the victim is entitled to according to Islamic criminal law: can the victim then demand damages in addition to the blood money?

Blood money was originally intended to very likely form a definitive and pacifying ruling, and it has only ever happened recently that the highest court has recognised claims for damages despite blood money.

Changes are also becoming apparent in the way that the law deals with cases of illicit sexual intercourse. The basic offence is sexual intercourse between unmarried partners, for which the punishment is whipping. Adultery is an aggravated offence which is punishable by stoning. This applies equally to women and to men - the preferential treatment of men for offences of this nature originates from European law. However, the punishment of stoning can only be imposed if the act was proven with the prescribed forms of evidence. According to traditional

Islamic law, such evidence should take the form of four confessions at four court hearings or four witnesses who must be of unblemished character, Muslim and male. It is now argued especially in Sunni Muslim law that it is practically impossible to produce four witnesses who satisfy all the requirements. This is said to demonstrate that God never wanted this punishment to be imposed, but had only threatened it so to speak in a symbolic manner.

The Shi'ites, too, recognise confession and witnesses as forms of evidence. Some Shi'i jurists also recognise an additional form of evidence, which is denied by the Sunni, namely the knowledge of the judge which he has gained in "generally accepted ways". This type of evidence presents an enormous destructive force for the whole Islamic system of proof. The recognition - albeit still contested - of the judge's knowledge as a form of evidence has found its way into the Iranian criminal code - again tucked away in an unexpected place - and this will allow all the modern forms of evidence from forensic evidence to genetic fingerprinting to be considered in the future in Iran, because the judge can then draw his knowledge about the deed from these sources and present it in an open and comprehensible way. The importance of the conventional forms of evidence of confession or four witnesses would thereby hold considerably less importance. The Sunni argument that the adultery law is meaningless because the act cannot really be proven can no longer be applied.

But Iranian law has also looked for other ways of avoiding imposing the punishment of stoning, and thus to banish it. Based on the religious duty out of compassion not to reveal the sins of others and not to bear witness against a sinner, the new Iranian code of criminal procedure greatly restricts the admissibility of investigations in advance in cases of this nature.

The approach in cases of apostasy (the abandonment of Islamic faith) is also being rethought. Apostasy is forbidden. According to classical law, a man at least was to be punished by death if he failed to return to Islam after a period of reflection which was granted. What constitutes an abandonment of Islam is clear if the apostate converts openly to another religion, but is otherwise hard to pin down. Anyone who denies the binding effect of the most important principles of Islamic belief is an apostate. However, which principles of belief count as the most important is once more open to interpretation and can easily lead to political abuse. On the other hand, advocates of Islamic criminal law lay claim in the same breath to the freedom of conscience in Islam. Abandonment of Islam is not regarded as an expression of freedom of conscience, but rather as an assault on the Islamic state and social order that is on a par with high treason. But at the same time this interpretation offers the strongest argument

within the Islamic world for removing apostasy from the list of punishable offences: if the reason for punishment lies in the attack on the state and society of Islam, then the charge should only be upheld if the renunciation of faith really endangers these legally-protected interests. When the consequences of renouncing Islam are limited to the private life of the apostate, the charge should consequently not be upheld; in this way, the vast majority of cases of apostasy would no longer be punishable. The ban on missionary activity is also explained by the fact that renunciation of Islam is a punishable offence. Missionary activity thus constitutes incitement to commit a punishable offence. Since the legal definition of incitement is not developed in the area of hadd offences, it is covered only by an independent criminal offence, a ta'zir offence.

As mentioned above, the authorities have a great deal of freedom with ta'zir offences. Ideally it is the just and learned judge who, as the ruler's representative, knows which action is to be punished in which way. In practice, states with Islamic criminal law have codified the ta'zir offences. The nulla poena sine lege principle (in other words: no punishment without law) is often put forward as a fixed standard of Islamic law and has - in Iran for instance - constitutional status, although there is at the same time an ambiguous constitutional norm which can be interpreted as permitting judges to create laws. Until now there has been an unmistakably tense relationship between the ta'zir offences and the nulla-poena clause.

After the Islamic revolution in Iran there was a strong tide of opinion in favour of rejecting legal definition of ta'zir offences, leaving it instead in the hands of the judges. The opposing side argued that Iranian judges were not yet sufficiently well-versed in Islamic law just after the revolution to be able to judge in accordance with it; it was felt that they should therefore be provided with laws, the elements of criminal offences, and a sentencing framework. It was Khomeini who decided this conflict by ordering the enactment of a ta'zir law. The possibility of judges creating the elements of criminal offences and punishments has, however, been expressly retained at one point in Iran: in the law governing the special courts for spirituality.

The profusion of grey areas in the ta'zir laws explains why there was also so much uncertainty in the proceedings against the "Shelter Now" team. The religious leader

can enact and modify decrees. When considering the Taliban and its leadership it is important to realise that their interpretation of Islamic law cannot be compared to that of the great theological colleges in Iran, Egypt or Pakistan. The Afghan Taliban obtained their theological education mainly from Pakistani teaching establishments for village mullahs, where even Islamic law is taught only in an extremely insufficient and crude form. The Pashtunwali, the code of honour of the Pashtuns, still has a far more important influence on the thinking of the Taliban than does their knowledge of the highly-developed Islamic law.

Efforts to further develop the Islamic criminal law and to create a largely new Islamic code of criminal procedure



are taking place elsewhere, primarily in Iran. The return to general principles such as justice or the common interest, and the working out of a precept concerning what is and what is not immutable in Islamic law while taking into consideration completely new points of view are increasing in importance. Ayatollah Khomeini, who was far more restrained and pragmatic than often perceived in the West, enacted a directive shortly before his death to the effect that certain norms of Islamic law could be disregarded if necessary for the continued existence of the Islamic state. To this day, the consequences of this directive have not been fully unravelled. But they do seem to smooth the way to a code of criminal law which strives to interpret Islamic principles, preserving their essential core in such a way as to allow a useful framework for modern-day life. It will continue to be exciting to watch the way in which Islamic criminal law develops in the future.

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