

FORENSIC PSYCHIATRY
in Islamic Jurisprudence

KUTAIBA S. CHALEBY

THE INTERNATIONAL INSTITUTE OF ISLAMIC THOUGHT

Forensic Psychiatry in Islamic Jurisprudence

KUTAIBA S. CHALEBY



THE INTERNATIONAL INSTITUTE OF ISLAMIC THOUGHT

© The International Institute of Islamic Thought, 1422AH/2001CE

THE INTERNATIONAL INSTITUTE OF ISLAMIC THOUGHT

P.O. BOX 669, HERNDON, VA 22070, USA

LONDON OFFICE

P.O. BOX 126, RICHMOND, SURREY TW9 2UD, UK

*This book is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of the publishers.*

ISBN 1-56564-276-7 paperback

ISBN 1-56564-277-5 hardback

Typesetting by Sohail Nakhoda

Cover Design by Shiraz Khan

Printed in the United Kingdom

by Biddles Limited, Guildford and King's Lynn

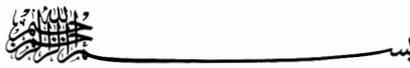
CONTENTS

	<i>page</i>
FOREWORD	ix
AUTHOR'S INTRODUCTION	xi
About this book	xi
About the Shari'ah or Islamic law	xv
The principles or sources of <i>fiqh</i>	xix
Balancing benefit and harm	xxii
Judicial System in Islamic Law	xxiv
The System of Courts	xxvi
I. PRIVILEGES AND CONFIDENTIALITY	1
The doctor-patient relationship	1
Doctor-patient relationship in Islamic law	4
Diagnoses and psychiatric evaluation	6
Privileges and confidentiality in Islamic Law	8
The subpoena in secular and Islamic Law	11
2. INSANITY DEFENSE AND CRIMINAL RESPONSIBILITY	13
In secular law (the Anglo-American tradition)	13
The insanity defense	14
In Islamic law	19
The concept of insanity in Islamic law	20
Classification of insanity in Islamic law	21
The insanity defense in the two traditions	23
Conclusion	25
3. INVOLUNTARY HOSPITALIZATION AND TREATMENT	26
Criteria	26
What is mental illness?	27
The concept of patient consent in Islamic law	30
Classification of patient consent in Islamic law	32
Right to treatment vs. duty to protect in Islamic law	34
Questionable commitment	35

4. MENTAL COMPETENCIES	37
What is mental competence	37
Competence of entitlement	37
Competence of performance	38
Civil responsibility and liability	38
Age and mental competence	39
Adulthood in Islamic law	40
Competence to marry and divorce	41
Competence to make a contract	42
Competence to sign into a hospital or institution	44
Competence to make a will	44
Undue influence	46
Competence to deal with one's wealth	47
Criteria of financial competence	49
Special interdiction or <i>ḥajr</i>	49
The guardian	51
Can the guardian carry out commercial transactions?	52
Competence to be executed	53
5. ISLAMIC FAMILY LAWS IN FORENSIC PSYCHIATRY	54
Marriage	54
Divorce	55
The <i>safīh</i> or 'financially incompetent'	60
Undoing the marriage, or <i>khul'</i>	60
Competence to undo the marriage	61
6. CHILD CUSTODY IN ISLAMIC LAW	63
Definitions	63
Child custody vs. guardianship	63
The mother's right to custody	64
Can the mother refuse custody?	65
Parental rights for custody	66
General criteria of fitness for custody	67
The concept of period of custody in Islamic law	72
The best interest of the child in Islamic law	74
7. CHILD ABUSE AND CHILD WITNESS	77
Child protection in the Qur'an and Sunnah	77
Parental assault against children in Islamic jurisprudence	79
Schools for averting the <i>ḥadd</i> punishments from parents	79

	CONTENTS	vii
	Scholars against averting the <i>ḥadd</i> from a parent	81
	Physical chastisement in disciplining	82
	Legal implications of child abuse reporting	84
	Child witness	87
8.	PSYCHIATRIC MALPRACTICE AND LIABILITY	91
	Malpractice	91
	Duty	91
	Negligence	92
	Intentional harm	93
	Unintentional harm	94
	Violation of professional standards	97
	Ignorance	98
	Patient consent	100
	Deception	100
	Refusal of treatment	101
	Breach of confidentiality	101
	Consented termination of life	101
	<i>Diyyah</i> : the bloodwit for an organ or a life	103
	Problematic issues on <i>diyyah</i> facing contemporary jurists	105
	AFTERWORD	107
APPENDIX	<i>Questions and Answers with</i> Shaykh Ṣāliḥ ibn Saʿd al-Leḥaidān	113
NOTES		157
BIBLIOGRAPHY		169
INDEX		179

FOREWORD



Of knowledge, we have none, save what
You have taught us. (The Qur'an 2:32)

The International Institute of Islamic Thought (IIIT) is pleased to present this pioneering work which explores new ideas and thoughts in the field of forensic psychiatry from an Islamic perspective. The author, Dr. Kutaiba S. Chaleby, specialises in forensic psychiatry and has a wide and extensive knowledge of the subject-area which he combines with accessibility to the Shari'ah. His long experience at psychiatric centres (especially fourteen years as head of the section of Psychiatry at King Faisal Hospital), together with the various teaching posts he has held in both Muslim and non-Muslim countries including Louisiana University in the States and his work at a number of centers and hospitals in the West, has provided him with the necessary tools to demonstrate how contemporary forensic psychiatry relates to Shari'ah. He successfully shows that some of the major issues and concerns of forensic psychiatry have already been tackled with a great deal of sophistication and precision by Muslim scholars in the past.

Indeed this is the first book in the field of forensic psychiatry which seeks to focus on the application of psychiatry to legal issues connected with Islamic Jurisprudence. Holding a unique position amongst the world's religions in its containment of every aspect of human existence, it is openly natural for Islam to govern both the spiritual and legislative aspects of life. It is therefore not surprising that one of the most important conclusions drawn by the study is the ability of Islamic jurisprudence to cover almost every issue raised in the field of forensic psychiatry. The range of interpretations encompassing these issues is

so wide that a match for many aspects of different secular laws can be found in at least one of the four schools of thought. This gives contemporary psychiatry in any Islamic country a broad spectrum of tools to work with, enabling the utilisation of options specific to particular societal and cultural norms. This book will appeal to both the general as well as the academic reader drawing important and wide-ranging conclusions relevant for many individuals and societies in the Islamic world.

Forensic Psychiatry, like other pioneering works published by the IIIT, will not only make an important contribution to the field of the Islamization of the behavioral sciences, but will hopefully generate much interest among specialists to analyze and further develop the ideas and theories presented and discussed.

The IIIT, established in 1981, has served as a major center to facilitate sincere and serious scholarly efforts based on Islamic vision, values and principles. Its programs of research, seminars and conferences during the last twenty years have resulted in the publication of more than two hundred and sixty titles in English and Arabic, many of which have been translated into several other languages.

We would like to express our thanks and gratitude to Dr. Chaleby, who, throughout the various stages of the book's production, cooperated closely with the editorial group at the IIIT London Office. He was very helpful in responding to our various queries, suggestions and amendments.

We would also like to thank the editorial and production team at the London Office and those who were directly or indirectly involved in the completion of this book: Dr. Jamil Qureishi, Sohail Nakhoda, Shiraz Khan, Ataiya Pathan and Dr. Maryam Mahmood. May God reward them and the author for all their efforts.

Rabi^c al-Awwal 1422
July 2001

ANAS AL-SHAIKH-ALI
Academic Advisor
IIIT London Office, UK

AUTHOR'S INTRODUCTION

ABOUT THIS BOOK

The history of forensic psychiatry as a sub-discipline of psychiatry (itself a speciality within medicine) is a subject that needs separate attention which cannot be attempted here. For our purposes it suffices to accept the current definition as adopted by the American Board of Forensic Psychiatry and by the American Academy of Psychiatry and Law:

Forensic psychiatry is a sub-specialty of psychiatry in which scientific and clinical expertise is applied to legal issues in legal contexts embracing civil, criminal, correctional or legislative matters; forensic psychiatry should be practiced in accordance with guidelines and ethical principles enunciated by the profession of psychiatry.¹

That definition has replaced and expanded on the older, more popular perception which limited forensic psychiatry to psychiatric evaluations for legal purposes.

The importance of forensic psychiatry does not end in the fact that it encompasses the overlap between law and medicine, two major fields of knowledge in human life. In fact, it touches on issues that affect both the individual and society as a whole through its direct involvement in criminal, civil and, most important, family law. The number of individual psychiatric-legal issues is therefore vast and, moreover, for each such issue, there is a variety of legal contexts in which it may arise. 'Legal context' is itself variable with the multiplicity of jurisdictions and legal traditions and criteria. Our aim, in this book, is to present a preliminary study of issues that fall within the domain of forensic psychiatry in one particular legal context, namely Islamic law. But what is 'Islamic law'?

The practical answer to this question should be: “the law as it is in one or other Islamic country.” But the matter is not so straightforward. The present legal system in many Islamic countries has in part been derived, as a direct result of the rule of foreign colonial powers, from the French or English or other European legal traditions, themselves evolved from the ancient Roman law. However, in matters of personal status, family relationships and inheritance, almost all Islamic countries retained the Shari‘ah or Islamic law proper. In recent decades particularly, the aspiration to cultural as well as political independence, and among Muslims, a renewed interest in Islam, has induced a strong and popular demand to adopt the Islamic Shari‘ah as the main, and even, in some countries, the only, source of legislation.

My interest in the subject derives from fifteen years of service as chairman of the Psychiatric Consulting Committee of the Ministry of Health in Saudi Arabia. The Committee encountered many legal issues related to the actions of people who were mentally ill, or who were alleged or claimed to be mentally ill. Also, we have had to meet the challenges of shaping mental health policy to regulate (among other things) involuntary hospitalization and the legal rights of the mentally ill. It was our duty to advise on legal decisions so as to comply with the religious and cultural traditions of the country, which means the religion and traditions of Islam. The need to evolve what we may call an ‘Islamic forensic psychiatry’ was a practical one. I was encouraged to develop basic guidelines for psychiatrists to help them treat patients or make decisions on forensic issues in ways that are Islamically oriented and Islamically acceptable. A draft of the work proposed was presented in 1986 to Shaykh Ibn Bāz, Head of the Fatwa Assembly in Saudi Arabia, who reviewed it and urged me to continue with it. It took several years of study to produce a general text on forensic psychiatry that included some of the Islamic legal views on the subject. That text was completed with the help of Shaykh Ṣāliḥ al-Leḥaidān, consultant and chief judge in the Ministry of Justice, and published in Arabic in Cairo in 1996.

The next step was to write a text devoted directly to the relevance

of Islamic Shari'ah to the work of forensic psychiatrists. It began with a presentation in 1993, at the annual meeting of the American Academy of Psychiatry and Law, on the Islamic view of legal issues in psychiatry. So many prominent figures in the field were kind enough to express interest in the paper that I was encouraged to publish it, after further research, in the *Bulletin of the Academy of Psychiatry and the Law* under the title 'Forensic Psychiatry in Islamic Law' (1996). Following its publication, I received many communications from psychiatrists in Islamic and non-Islamic countries stressing the need for a longer study that could guide them in their practice, and contribute to the drafting of mental health legislation rooted in the spirit and the purposes of Islamic Shari'ah.

That there is a need for mental health legislation, and for guidance for the practice of forensic psychiatry, in Islamic contexts is, I am sure, widely recognized. 'In Islamic contexts' does not have to mean 'within Islamic jurisdictions': there are Muslims living in large numbers under non-Islamic jurisdiction who nevertheless share the same need. I hope that this book will demonstrate that the need can be met from within the resources of the Shari'ah itself. Those who come to the subject for the first time will be amazed by the sheer depth of those resources: the great scholars of *fiqh* (jurisprudence) to whose work we shall be referring were extraordinarily far-sighted, profoundly humane, compassionate and flexible in their understanding of how to apply the law of Islam. There is much that we can learn from them to inspire and guide our practice in the present day. While I have no interest in seeking to vindicate the Islamic tradition over against any other, it would be a kind of intellectual dishonesty not to acknowledge the fact that Islamic scholars were able to make subtle and sophisticated distinctions between kinds and degrees of mental illness, and their consequences for the definition of legal competence and responsibility, that do not appear in the Western secular tradition until the modern period.

This work, it bears repeating, is oriented to the practical needs of practitioners in the field. Therefore, as the chapter titles indicate, the work is arranged around particular practical issues. The book is not a 'historical study' such as would aim to narrate the development

of ideas, epoch by epoch and school by school, in a chronological sequence. Our aim, in this first book-length study of the subject, is to show how the resources available in the tradition of Islamic *fiqh* can help us to resolve the difficulties we encounter, on a daily basis, as we deal with individual legal–psychiatric issues. To serve that purpose the authorities to which we refer – for examples of legal reasoning or legal rulings (precedents) – needed to be the most widely respected figures, scholars of recognized juristic stature, in the history of Islamic law. (In a different context it might be of interest to reflect upon the exceptional or wayward thinkers of the past, but not here.) We have added, in the Appendix, a series of case-examples that were presented to a practising judge of established authority for his counsel and opinion. The aim was to give concrete, practical form to some of the matters discussed at a (necessarily) more theoretical level in the main part of the book, and to bring out more clearly some of the nuances in that discussion.

Readers will note that, on certain matters of Islamic law, we judged it appropriate and worthwhile to elaborate more fully than the specialized focus of forensic psychiatry itself would appear to justify. We believe that, for these matters, forensic psychiatrists need to understand the Islamic legal context well enough to be able to relate their expertise to it effectively. For example, a psychiatrist must understand the restricted legal power of an individual's will to undo a natural heir's right of inheritance – especially if the intent in making the will was precisely to disinherit the heir – before he or she can determine the mental competence of the individual at the time of making the will or his intentions in so doing.

As we could not assume that all readers of this book will be equally or sufficiently familiar with the special characteristics of Islamic law, we have devoted the remainder of this introduction to a brief overview. This overview does not, to our knowledge, make any controversial or otherwise remarkable statement; it merely puts down as concisely as possible generally uncontested facts. Readers who need no introduction to Islamic law may turn directly to the next chapter.

ABOUT THE SHARI'AH OR ISLAMIC LAW

The way the Shari'ah operates in practice is not very different from the way that (for example) Anglo-American law operates in practice. There is a body of texts (the 'written law') which are subject to interpretation by lawyers and judges; the interpretation is not arbitrary – it must proceed according to the rules and standards of the legal profession; there are various levels of courts and judges dealing with different kinds of matters according to their gravity or complexity; and there are established procedures of referral (appeal) from one level to a higher one. However, Islamic law is unique in that its body of texts (called *naṣṣ*) are of divine rather than human origin. Laws made by man (whether decreed by a monarch or a tribal chief, or by a body of priests or by a legislature of elected representatives of the 'sovereign will of the people') are subject to the influences of time and place, the pressure of individuals or interest-groups, public mood, and other factors. Therefore, such laws can change over time: what one generation regards as a heinous immoral act and so designates a crime may, in the next generation, become morally acceptable and is then neither regarded nor punished as a crime. Some parts of the law in man-made legal systems may change very slowly compared to others – constitutional law, for example, in politically stable countries, hardly changes at all over the generations – but, in principle, all parts of the law are subject to modification.

That is not the case with Islamic law. Important and substantial parts of the Shari'ah are fixed in the *naṣṣ* and can never be modified. Exceptions or exemptions are only countenanced to the degree that they are expressly sanctioned in the *naṣṣ*. For example, among the dietary laws of Islam, the consumption of pork is *ḥarām* (forbidden) by the Qur'an; the exemption for that is also in the Qur'an: in extreme situations of dire necessity, in order to preserve human life, provided no other food is available and provided the person is not desirous of breaking the law, pork becomes *ḥalāl* (lawful) for the duration of the necessity. Further interpretation of this exemption is the task and responsibility of qualified scholars. Some scholars may rule that this exemption allows (again, only in order to save human life, and again,

no substitute being available) that some part or other of a pig may be used, for example, in a life-saving drug or other medical treatment. Such an interpretation would be subject to further amendment or contradiction by another qualified scholar, or by a change in circumstance (for example the availability of a substitute): but the particular prohibition and the particular exemption as these stand in the Qur'an stand for all time.

The *naṣṣ* upon which the Shari'ah is founded comprise, first and foremost, the *aḥkām* of the Qur'an (those verses, about 500 in all, that are explicit commands), and, secondarily, the rulings, precepts and practice of the Prophet (ṢAAS)¹ as recorded in the Hadith. The authority of the Hadith (the record of what the Prophet said and did) is conferred by the Qur'an (4:59): it commands believers to obey the Prophet and those among the society of Muslims who have authority over them, and to refer any matters of dispute to the judgment of the Prophet (and, self-evidently, that of the persons he appointed to positions of authority). In the formative period of Islam, those in authority among the Muslims were appointed on account of their learning and piety so that there was no formal distinction between legal and political authority. Over time, there was a measure of specialization, and the duty of understanding and interpreting the law was discharged by learned scholars whose authority in Islamic society (always very considerable, virtually until the colonial period) was distinct from the authority of those who wielded executive power.

The commands of the Qur'an have always been beyond dispute. Some of the *aḥkām* are particular and some are general commands, but they do not cover every circumstance nor every eventuality. To be able to do that, Islamic scholars had to exercise conscience and reason (*ijtihād*): to infer the general principles behind the particular commands so as to apply them appropriately in different or new circumstances; and to understand the intent of the general commands so as to apply them appropriately as laws rather than ethical principles. In the same way, the texts in the Hadith required interpretive effort. The great Ḥanbalī jurist, Ibn Qayyim al-Jawziyyah, gives a particularly clear example.² For the duration of a fast, as well as eating and drinking, sexual intercourse is forbidden. The Prophet instructed a young

man not to indulge in any physical intimacy with his wife during the period of the fast, but permitted the same to an old man. The reasoning behind this was that the old man was more likely to be able to restrain himself from going on to do that which is forbidden during the fast. Another example: one year the Prophet ordered the people to distribute all the meat of their sacrifices by the third day without allowing it to be stored; in another year, he asked them to store whatever they could.³ The reason for the latter ruling was that, in that year, there was great scarcity of food. This kind of flexibility in the judgments of the Prophet showed that it is necessary, in order to effect the purposes of the law in different circumstances, to devise appropriate rulings which hold until the circumstances change.

The effort to understand the Qur'an and Hadith as law is called *fiqh* or jurisprudence. The *ahkām* of the Qur'an, as we have noted, were always beyond dispute. The texts of the Hadith, by contrast, were not all as uniform or as stable as the Qur'an. Dedicated scholars anxious to serve the cause of Islam travelled great distances between centers of learning in order to acquire and exchange knowledge of Hadith. Nevertheless, some Hadith texts became well-known in one region but did not gain the same recognition or currency in another. Also, scholars could not always agree on the legal weight of certain texts compared to others. Some of the texts were based upon a large number of reports conveyed through many lines of transmission by narrators of impeccable trustworthiness and excellent memory. Such texts clearly reflected the normative practice of the Prophet or 'Sunnah'. However, other texts were reported only by a single narrator and referred to a single remembered incident, and their wording and their intent could not be so easily or reliably cross-checked against other texts received through different lines of transmission.

Over time, patterns of interpretive effort or *fiqh* developed and settled as 'schools' of Islamic law. It would be a grave misconception to suppose that there was serious division on any important matter between the 'schools'. Differences were over relatively minor detail, and generally derived not from any disagreement of principle, but from the fact that the *fiqh* (the legal reasoning) was done using different Hadith texts, or giving a different legal weight to the same texts.

The great jurists regularly made reference to the reasoning and dicta of schools other than the one in which they had been trained, and used the same to evolve the *fiqh* of their own school. Naturally, both for the purposes of training lawyers and judges, and to achieve administrative uniformity within jurisdictions, the *fiqh* of one school rather than another came to predominate in a particular region. But the variety of judgments available was valued as a blessing for the Muslims as a whole, and to hold (what people nowadays would call) ‘a minority view’ was never considered a transgression. For several hundred years now, the overwhelming majority of Muslims have accepted the authority of four schools of Islamic law: the Mālikī, the Shāfi‘ī, the Ḥanbalī, and the Ḥanafī.

It is most important to appreciate that Islamic law evolved as an autonomous institution, independent of the state or political power. Laws or regulations issued by the state did not have the moral or legal authority of the Shari‘ah. Such law codes were called *qānūn* (related to the English ‘canon’) and could be promulgated to regulate narrowly defined domains of activity or transaction (for example, the administration of traffic or hospitals or agrarian practice, or the regime of standards for particular professions) provided there was no contradiction with the Shari‘ah. In principle, the Shari‘ah is comprehensive of all departments of collective life: the rites of worship; family relationships (marriage, divorce, custody of children, inheritance); civil and commercial transactions; crime and punishment; certain taxes and expenditure therefrom; charitable endowments; inter-communal relations between Muslims and non-Muslims; government and administration; international treaties and obligations; and so on. The Shari‘ah is not a religious law in the limited Western sense of a law that regulates the properties or bureaucracy of the church or its powers to define rites and services or discipline its officers. When we affirm that no state regulation may contradict the Shari‘ah, we affirm the potential of the Shari‘ah to function as a strong, positive restraint on the power of the state, as indeed it did function in varying degrees throughout the pre-modern period of Islamic history; we do not merely express a wish that it ought to or might be so.

THE PRINCIPLES OR SOURCES OF *FIQH*

The exercise of *ijtihād*, which we defined as the exercise of conscience and reason by qualified scholars to understand the *naṣṣ* as law, was not arbitrary. It was guided by the general maxim – to encourage and promote the good and to discourage and prevent the harmful. Under that general maxim, which we will describe separately, *ijtihād* followed clearly defined and understood principles or *uṣūl al-fiqh* which functioned, after the *naṣṣ*, as sources of law.

1. *Juristic Consensus (ijmāʿ)*

When all Islamic scholars agree on a particular issue, that agreement is accepted as Islamic law. The consensus of the scholars may take either of two forms. One is the explicit consensus such as when the scholars actually meet and discuss the matter and agree on a particular ruling, or when a particular decision is made by a scholar with which other scholars in different parts of the world at that time are in agreement. The second is an implicit consensus, as when one scholar gives a ruling on an issue and no objection to it is raised or announced.

2. *Analogy (qiyās)*

On matters for which there is no explicit ruling in the Qur'an and Hadith sources, laws could be made by analogy, where one particular ruling is based on another that has some circumstantial similarities. For example, Islamic law expressly forbids wine because it is an intoxicating drink. The rule was extended by analogy to include all intoxicating drugs. There are some problems in using analogy as it is usually based on the underlying attributes of the Qur'anic ruling. It is easy in the matter of prohibiting alcohol because it is clear that alcohol causes alteration of consciousness; therefore, other kinds of drugs that do the same can be defined as forbidden on the same principle. However, the underlying attributes of some of the *ahkām* are not made explicit in the Qur'an, and therefore it requires very wide knowledge and understanding of the Hadith, of the Sunnah of the Prophet and of the practice of his Companions and their successors, to be able to infer the rationale with sufficient reliability to permit analogous rulings to be made. Certainly, it is a most onerous task for which only the most learned scholars are qualified.

3. *Juristic Preference (istiḥsān)*

When a rule derived by *qiyās* is not well defined or if it has been decided upon the basis of a precedent that is contradicted by a *qiyās* which yielded a different ruling, the jurist is faced with a choice. *Istiḥsān* refers to the preference between two analogies.

4. *Public Interest (al-maṣāliḥ al-mursalah)*

Assuming always that there was no contradiction of the intent of the primary sources of the law (the *naṣṣ*), scholars could, on matters on which the *naṣṣ* were silent, issue rulings that served the well-being of the society. Well-being was never understood in the narrow sense of economic prosperity, though that was important and relevant, but embraced the Islamic ethos of society as a whole and such factors as would concern the Muslims' security, cohesion and solidarity.

5. *Local Social Norms and Customs (urf)*

This is a regular principle in almost all legal systems. Islamic *fiqh* recognizes the legal force of local customs and practice insofar as there is no contradiction between these and the two primary sources of Islamic law proper, the Qur'an and the normative practice of the Prophet, the Sunnah. Local customs and practice do not cover only habits of dress or language, but also ways of doing business, of celebrating important occasions, and so on. Over time certain norms come to function as expected standards for a particular service or profession without necessarily being explicitly stated in legal terms. Similarly, certain kinds of commercial transaction are done on the basis of mutual understanding of terms that are not necessarily written out. In this way, local customs and practice set up implied contracts which, provided there was no contradiction with Islamic law proper, were recognized in Islamic courts: if one party to such an implied contract had not fulfilled conditions affirmed by the relevant social norms for the particular transaction, the judge would rule accordingly. The basis for the acceptance of local customs and practice is Qur'an and Sunnah: some of the pre-Islamic practices of the Arabs were approved and some annulled by the Qur'an; similarly, the Prophet accepted some of the inherited ways of doing things, forbade or altered others.

6. *The 'Law Before Ours' (shara' ma qablana)*

Islamic jurisprudence recognized a decision based on what had been legislated for Jews and Christians in their Scriptures provided that such law was not abrogated or contradicted by a clear statement in the Qur'an or Hadith.

7. *Status Quo (istiṣḥāb)*

If a dispute was brought to court, the status quo would be upheld until evidence appeared to the contrary. For example, if one party claimed property in the possession of a second party, the property remained with the second party until the first provided sufficient evidence to support the claim. Similarly, in any kind of dispute, the status quo is generally upheld by the law until evidence is produced to the court to change it: for example, a person is deemed mentally competent unless the court can be satisfied that he is not; a child under seven remains in the care of the mother unless the court is provided with good reasons to remove the mother's right of care.

8. *Blocking avenues of temptation (ṣad al-dharā'i')*

The *naṣṣ* make very clear what is forbidden to believers. However, there are circumstances in which something not in itself forbidden leads so inevitably and predictably to that which is explicitly forbidden, that it too must be proscribed. The proscription is, naturally, expressed as narrowly as possible so as to avoid enlarging the domain of the forbidden. For example, a nightclub would not be allowed to operate if its operation was known to be encouraging Muslims to meet to drink alcohol or engage in some other forbidden activity such as gambling or prostitution. The danger of something leading to the forbidden does not by itself justify prohibiting it: the danger must be general and of a high degree. At the same time, the harm done by prohibiting something must be weighed against the good done by not doing so. If the possibility of harm is seen as slight compared to the benefit, the danger must simply be accepted and any wrongdoing corrected as it arises. Thus, it is permissible to cultivate grapes (which have many wholesome uses) in spite of the possibility that they can be made into wine; the making and selling of wine are nonetheless forbidden.

When the possibility of an action leading to a bad outcome is high, restriction is more likely. But in some situations, the decision on what is likely to be or become more harmful or more beneficial is difficult to make. It is mostly in situations of this kind that the Islamic jurists have disagreed with one another. For example, under Islamic law, once a husband (who is mentally competent to do so) has pronounced divorce for a third time, the divorce is final and the man, however much he may regret his action, cannot call his ex-wife back into the marriage unless she marries another man and is divorced by him. Now if both parties, ex-husband and ex-wife, regret the divorce, it is a hurt for them, which hurt the law will not permit the parties to undo unless the woman re-marries and is divorced. In such a situation, Imām Shāfi‘ī and Imām Abū Ḥanīfah allowed a marriage to be arranged by the ex-husband for his ex-wife so that she might then be re-divorced, enabling him to re-marry her and the formerly divorced couple to re-unite. However, any such arrangement was proscribed by Imām Mālik and Imām Aḥmad ibn Ḥanbal: perhaps they felt that the Islamic law is as it is in order to make people realize that divorce is a very grave matter, and allowing a divorce to be undone even by wholly consensual arrangements would be to diminish its gravity in law.

BALANCING BENEFIT AND HARM

As the last example has illustrated, it is never a straightforward task to determine, in any particular situation, the ruling that will best promote good or best prevent harm. However, the importance and generality of the principle cannot be over-stated. The Shari‘ah is intended to serve the best interest of mankind as a whole and for all time, not the interest of a particular racial or social group, or the tastes or moods of a particular epoch. The concept of ‘best interest’ encompasses the spiritual and mental well-being of all people in the present and the future. We have a strong and famous example in the decision of the second caliph, ‘Umar ibn al-Khaṭṭāb, to forbid the distribution of conquered territories in Iraq and Persia among the conquering troops, on the ground that if he did so, future generations would be deprived of land and the wealth it might generate.

As well as seeking the best interests of mankind as a whole, Islamic legislation is directed towards avoidance of harm. One of the cardinal maxims among Islamic jurists is derived from the Prophet's saying, "No hurt, no damage in Islam."⁴ Any harmful procedure or transaction, any individual or collective behavior, that can cause hurt or damage can be prohibited in Islamic law. There should be: (1) no harm to oneself; (2) no harm to fellow human beings; and (3) no harm to the interests of society in general. The application of this maxim in situations where an individual may do hurt to himself or to persons in his care or to property which he controls (in which, through inheritance, others have a direct interest), whether wilfully or through incompetence, is of particular relevance to the subject-matter of this study.

When the interests of one party are associated with harm to another, the Shari'ah seeks ways by which to achieve a compromise. One of the ways to effect a compromise is the acceptance of minor harm to achieve a major interest. For example, preservation of a person's life is more important than preservation of his wealth. If a situation arises where, in order to preserve life or health, wealth must be dispensed to a degree that for any other purpose might be construed as squandering or waste, then such expenditure would be deemed justifiable in law. In some situations a harm has to be tolerated by the court in order to achieve a good purpose. For example, it is always undesirable to withdraw from any person his rights under the law, but in the case of a father known to pose a danger to the well-being of his children, the undesirable would have to be accepted and the father's right of custody would be removed in favour of another relative more likely to promote the welfare of the children. Analogously, the interests and rights of a group or of society as a whole would, in the event of conflict between the two, be preferred to the interests and rights of an individual.

In sum, we may affirm the remarkable power of the Shari'ah to adjust to different situations in order to serve its overall purpose of promoting the good and preventing the harmful. Between good and bad, the preference must be for good; between two harms or dangers, the lesser must be chosen; for the sake of the greater good, a minor harm can be tolerated; where the harm or benefit from a course of

action are expected to be the same, or if the outcome cannot be calculated, then it is the harm that must be prevented.

This power of adjustment in the law is not something contrived by the scholars; its authority derives, as we noted earlier, from the explicit exemptions in the primary sources of the law (the *naṣṣ*) to the prescriptions that are found in the same sources. Therefore, in making these adjustments the great scholars of Islamic law were not seeking to subvert the law by clever devices, but rather to work, through the most meticulous attention to its letter, in harmony with its spirit and purpose.

JUDICIAL SYSTEM IN ISLAMIC LAW⁵

Under Islamic law, the caliph is the primary guardian of the religious and political life of the society, responsible for the proper functioning of the law, and he may, if he chooses, take on judicial duties himself or delegate a portion of them to others. The Prophet himself both acted as judge and appointed others as judges. The *khulafā' al-rāshidūn* (the rightly-guided caliphs) followed this example. In particular, they supervised or took personal charge of administrative judicial duties within the *diwān al-maẓālim* (literally, 'office of complaints'). Civil and criminal jurisdiction were left to appointed judges who would, on occasion, also run the administrative courts.

Courts of Ordinary Jurisdiction

The 'ordinary courts' handle the daily business of the law, essentially any matters that the head of state decides not to have under his own control. Judges have authority to deliver their own judgments on matters not legislated by the Qur'an and Sunnah. As well as deciding on civil and commercial matters, family and personal law, the judges tried criminal cases and decreed the Shari'ah punishments (*ḥudūd*) and sometimes the discretionary punishments (*ta'zīr*). The judges also supervised such matters as marrying girls who have no legal guardian, executing wills to safeguard the interests of orphans, and appointing guardians to their estates. Such functions had been carried out by the Prophet himself for a time. In the earliest period of Islamic history, judges appointed by the head of state sometimes also held

responsibilities for political and administrative affairs. Later, as the Islamic state system evolved, politics and administration were separated from judicial affairs and a specialized body of judges was established.

The Administrative Judicial System

The 'office of complaints' was so called because it looked into complaints against government officials, high and low, and against judges, including the head of state. This office was set up to protect people from abuses of power. The person in charge of it had to be an authoritative judge of the highest calibre, with personal charisma, who commanded respect and obedience and who was known for fairmindedness, humility, piety and incorruptibility. He was charged not only to follow up complaints when presented, but also to look into matters on his own initiative if he had reason to suspect wrongdoing.

The 'office of complaints' had a remit that make its functioning very similar to what is practiced as administrative law in contemporary systems in different parts of the world. The administrative court under Islamic law in practice enjoyed a higher authority than the 'ordinary courts'. It had powers to conduct investigations and to use any appropriate strategies to obtain information about wrongdoing. It had responsibility to reach decisions and to issue verdicts on the matters (or persons) investigated and, where appropriate, to call witnesses, and to offer compromises that would resolve disputes between the contending parties. The complaints dealt with did not only come from the general public, the grievances of officials against their superiors were also judged within the *diwān al-maẓālim*. This kind of administrative court was not an Islamic innovation. It was practiced by the kings of Persia, and also practiced in Arabia before Islam through what were known as 'treaties' between rival tribes. The Prophet investigated complaints against officials himself, and his caliphs did so likewise. The Umayyad caliph ʿUmar ibn ʿAbd al-ʿAzīz was the first to set aside a particular day of the week for dealing with such matters.

The Concept of a 'Court'

Most of the classical works deal with the conditions under which the judge can function, detailing his responsibilities and the limits of his authority. They do not dwell upon the concept of a 'court' as such, nor use a term for it. They do, however, speak of a 'place of judgment', meaning by it the specialization in a particular area of the law, geographical locale to which the authority of the judge was limited, and the place where (and where only) cases could be heard. It is clearly stated in the works of the early scholars that an official judgment could only be handed out in the place designated for hearings. Also, judges with jurisdiction in a particular location could not hear cases in any other. Judges whose jurisdiction was restricted to certain areas of the law were given special titles to reflect the specialization. Besides such specializations as family law, commercial law, or criminal law, a judge could be specialized for a certain class of people or function, for example, the army, the police, or farmers, and so on. If there were two or more judges in one area, each with his own specialty, it was acceptable to have more than one judge in one geographic location. A judge who had authority to look into all matters of the law was called the 'judge of general inspection'.

Court Levels

Just as Islamic law recognized that courts and jurisdictions could be specialized, it also recognized that the courts could be classified into different levels. This has been established practice since at least the reign of the second caliph, 'Umar ibn al-Khaṭṭāb. At that time, a judge was appointed to look into simpler cases, with more senior judges, and the caliph himself, looking into more serious matters. Similarly, there were judges who specialized in deciding financial disputes not exceeding a certain amount of money and others whose jurisdiction covered the higher amounts.

The concept of referral or appeal from a lower to a higher court had been known before then, since the time of the Prophet himself. In a case that became a famous precedent, 'Alī ibn Abī Ṭālib, the Prophet's cousin, made this statement: "Since the Prophet is not here

at this time, my decision will stand. However, if he comes back, and either the plaintiff or the defendant is unwilling to accept the decision, they can appeal to the Prophet himself." 'Ali's decision was in fact appealed, and the Prophet upheld it. Subsequently, as well as recognizing that the decision of a court can be referred to a higher authority (usually the governor), Islamic law also recognized the concept of appealing the appeal itself, that is, of reviewing the whole trial process.

Judicial Proceedings in Contemporary Islamic Courts

Courts proceedings in many Islamic countries now follow a secular system usually derived, with some modifications, mainly from the French legal system. Family law is probably the only exception, since all Islamic countries follow the Shari'ah in matters related to marriage, divorce and child custody. A very few Islamic countries do not have a codified written law and use strictly Islamic jurisprudence as their only system in both civil and criminal proceedings. Increasingly, however, Islamic countries are now trying to use traditional Islamic law as the main or, whenever possible, the only, source of law practiced in their courts. They usually have to review past legal precedents, beginning in the earliest period in the time of Prophet Muhammad, and ending in the time of the Ottoman empire in the nineteenth century.

Islamic Countries Today

Saudi Arabia, since its birth some 70 years ago, is the prime example of an Islamic country that has not been influenced by any Western type of legal system. In this section, by way of illustrating contemporary Islamic practice, we will review briefly the organization of judicial proceedings in Saudi Arabia.

Courts in Saudi Arabia are headed by judges, typically by a single judge and rarely by a panel of judges. Courts of general jurisdiction see all cases, criminal and civil, including cases related to family matters. Criminal matters are now usually referred by an equivalent of a District Attorney who makes preliminary inquiries about the case from the police and the accused, and who decides whether or not the case will go to court. The post of 'District Attorney' has only been implemented in Saudi Arabia since the last decade. I participated in

the first course given to train Law School graduates as 'District Attorneys.' Before that, criminal cases had been referred by the police directly. Civil cases can be initiated by the people involved directly, and/or through their lawyers.

In Egypt, Iraq, Syria, and most other Islamic countries, the courts run on two levels, a court of common pleas, and a higher court of appeals. The latter reviews all cases that are appealed for any reason, whether a matter of law or a matter of fact is the cause of review. Also, it may, unlike the courts of appeal in the American or British systems, retry the whole case rather than look at matters of law only. A third level of court, somewhat equivalent to the appeal court in the Anglo-American system, looks at cases which are appealed after the review from the second level court, and it restricts the review to matters of law only, excluding matters of fact.

According to Dr. Muḥammad M. Hāshim's book, *'Al-Qaḍā' wa Niẓām al-Ithbāt*,⁶ there do not exist two levels of courts at present in Saudi Arabia. That is to say, all courts are considered as on the same level. There are, however, courts for 'Urgent Cases', the 'General Courts' are also called 'Superior Court' and 'Court of Appeals.' The last functions as the only avenue for review and only looks at an earlier court decision for fouls or mistakes in matters of law, it does not review the facts in the case. In other words, the appeal court will only criticize an earlier decision if there had been a violation of a rule in the Qur'an or Sunnah. In the event of a violation of Shari'ah, the case is remanded for retrial to the same court that made the earlier decision. Not all cases can be appealed. Minor cases where a fine to five hundred riyals (approximately 133 US dollars) or less is at issue cannot be appealed, nor if the decision had been reviewed already by a chief justice, nor if the case was not appealed within fifteen days from the announcement of the decision.

Cases referred to the Court of Appeals in Saudi Arabia are decided by a panel of three judges. However, decisions involving execution, amputation of a body part or death by stoning are decided by a panel of five judges.

The Saudi Arabian system does allow for review of matters of fact and retrials in certain cases. For example, where a court decision was

made in the absence of the accused who then turned up. A retrial can also be announced if substantial new facts have appeared that require a revision of an earlier court decision.

It is important to note that cases related to administrative laws, like the Labor Law, do not come under the jurisdiction of the court system in Saudi Arabia. There are special committees set up to look into administrative matters, and these follow a different system.

A psychiatrist, or any expert witness for that matter, can be called to testify by the judge. The judge might initiate this testimony on his own or upon the request of the litigating parties, if he agrees to the request. Lawyers are not routinely involved in all cases, but their participation is acceptable if the parties involved wish it. In legal practice to date, it is quite rare for a psychiatrist to be asked to testify in person. Judges are usually content to receive a medical report and base their decision on that. In my experience, judges in Saudi Arabia have rarely made a decision that disagreed with an expert medical or psychiatric recommendation.

“In this groundbreaking book for western readers, Dr. Chaleby gives a revealing insight into the rigorous mechanisms of Qur’an-based jurisprudence and the fascinating forensic psychiatric issues, cases and principles involved therein. The author’s skill lies in his ability to present the subtle nuances of the Islamic system, unfamiliar to the western reader, in a clear and logical form.”

PROFESSOR THOMAS G. GUTHEIL, MD
Chief of Forensic Psychiatry, Harvard University Medical School, USA

“This pioneering work is undoubtedly a product of hard and serious labor. An extensive number of references have been used to propound the central arguments of the book. Most of the rules and deductive reasoning in the text are the results of the Islamic Jurists’ personal opinions influenced by the circumstances of space and time.”

SHAYKH SALIH AL-HUSSAEIN
Legal Consultant, King Faisal Foundation, Saudi Arabia

THIS IS THE FIRST book in Forensic Psychiatry that focuses on the application of psychiatry to legal issues connected with Islamic jurisprudence. Holding a unique position amongst the world’s religions in its containment of every aspect of human existence, it is openly natural for Islam to govern both the spiritual and legislative aspects of life. It is therefore not surprising that one of the most important conclusions drawn by the study is the ability of Islamic jurisprudence to cover almost every issue raised in the field of forensic psychiatry. The range of interpretations encompassing these issues is so wide that a match for many aspects of different secular laws can be found in at least one of the four schools of thought. This gives contemporary psychiatry in any Islamic country a broad spectrum of tools to work with, enabling the utilisation of options specific to particular societal and cultural norms. This book will appeal to both the general as well as the academic reader drawing important and wide-ranging conclusions relevant for many individuals and societies in the Islamic world.

KUTAIBA S. CHALEBY, MD, FAPA is a board certified Forensic Psychiatrist and a member of the American Academy of Psychiatry and Law. He has published extensively in international and Arabic psychiatric journals. In 1990 he was honored as a Distinguished Fellow of the American Psychiatric Association. He has presented many papers on Islamic legal views in Middle Eastern and American psychiatric conferences.

THE INTERNATIONAL INSTITUTE
OF ISLAMIC THOUGHT

ISBN 1-56564-276-7



9 781565 642768 >