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IN SEARCH OF A SUITABLE MODEL OF PENAL CODE FOR AFGHANISTAN[i]

By
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Caveat

Let me begin with a caveat. I am not a Shariah scholar. I am not giving any Shariah opinion on any issue that I discuss here. I am a common law lawyer and a common law Judge who, during my forty years' working experience, had served in various capacities in the Malaysian Legal and Judicial Service including as Chief Prosecutor, as Judge in all the Courts in the country, from the lowest to the highest, including the Shariah Court of Appeal of a State. I have been involved in the drafting of laws for application in the Shariah Courts since 1980's and until now head the Central Bank of Malaysia Law Harmonization Committee for Islamic Banking, Islamic Finance and Takaful as well as the Advisor to the Law Harmonization Committee of Brunei Darussalam. The views I express here are my personal views formed after all my years of experience. I do not say that they are right but I do say that they are my honest views at this point of time unless subsequently better reasons and stronger arguments make me change my mind. I hope they are of some relevance in the search for a suitable model of Penal Code for Afghanistan.

Historical background

During the Moghul rule of what now constitutes India, Pakistan, Bangladesh and Afghanistan, the courts there administered the Shariah to the exclusion of Hindu law. Islamic law gave way to English criminal law with the increase of British influence in the Indian sub-continent. Before 1860, The English criminal law, as modified to suit local circumstances, was administered in the Presidency-Towns of Bombay, Calcutta and Madras. The draft of the Indian Penal Code was prepared by the First Law Commission, chaired by Thomas Babington Macaulay. Its basis is the law of England. Elements were also derived from the Napoleonic Code and from Edward Livingston's Louisiana Civil Code of 1825. Finally, the Indian Penal Code was passed into law on 6 October 1860. The Code came into operation on 1 January 1862. (I shall refer to it generally as "Macaulay's Penal Code.")

(Let me pause here for a while. It is interesting to note that elements of Napoleonic Code were also absorbed. I say so because, if you read the introduction written by David Moussa Pidcock to the book titled "Napoleon and Islam", the English translation from French of *Napoleon et l'Islam* by Christian Cherfils, published in 1914, you will find that David Moussa Pidcock said that 96% of Code Napoleon came from the rulings of Imam Malik. If there are some merits in the claim, which I really do not know, it must have something to do with Napoleon's Egyptian campaign.)

After independence, the Indian Penal Code was inherited by Pakistan (now called Pakistan Penal Code) and (now) Bangladesh, formerly part of British India. It was also adopted wholesale by the British colonial authorities in Burma, Sri Lanka, Malaysia, Singapore and Brunei, and remains the basis of the criminal codes in those countries.

(Note that the adoption of the Penal Code transcends religion: Pakistan, Bangladesh, Brunei and Malaysia are not only Muslim-majority countries but also "Islamic countries". Sri Lanka and Myanmar (formerly Burma) have Buddhism as their State religion, while Singapore is a modern cosmopolitan city-State.)

Afghanistan defeated the British in the First Anglo-Afghan War (1839-1842). Even after the Second and the Third Anglo-Afghan Wars (1878-1880 and 1919, respectively) the British did not or did not succeed in colonizing Afghanistan. Thus Afghanistan escaped the likely introduction of Macaulay's Penal Code for over a century!

Amongst the "Islamic countries" that inherited Macaulay's Penal Code from the British rule, Malaysia, known as "the most-advanced Islamic country" in the world and leader in Islamic banking and Islamic finance, is happy to keep it as it was introduced except for the unavoidable amendments necessitated by time and place. Bangladesh too seems to have made little changes to it. Brunei, in her quest to be Shariah-compliant, had been struggling for the past thirty years to "Islamize " the Penal Code with the help of a Pakistani former Professor but has yet to see the light at the end of the tunnel. On the other hand, Pakistan, where politics play a more powerful role than in Brunei, has gone further. It has "Islamized" the Penal Code.

Clearly, the aim was to replace the existing "un-Islamic law" or "law of the unbelievers"[ii] with "the Shariah". One would have thought that the Penal Code would have been chucked out and replaced with a totally new "Islamic criminal law". That is the impression you get if you listen to the politicians and the preachers. But, the technocrats, the people who have to do the job, have other practical problems. What did they do?

Look at the Pakistan Penal Code now. Without going into details, we note that Macaulay's Penal Code remains intact. The name, the language, the structure and the style remain the same while a large portion of the contents remains unchanged. What does it mean? It means that they are retained because they are not contrary to Shariah.

New sections were added to provide for the introduction of the Shariah punishments like *Qisas, Diyat, Arsh, Daman and Ta'zir (*Section 53). There are major amendments in Chapter XVI "Of Offences Affecting The Human Body." And very lengthy provisions on causing hurt and numerous types of punishments provided, each for a different type.

It is not my intention to comment on the Shariah provisions or to compare them with the original Macaulay draft. I am only looking for a model which could be used as the basis to be introduced to Afghanistan.

Pakistan Penal Code could be used as a model

In my opinion, the Pakistan Penal Code could be used as a model.

My reasons are as follows:

1. Had the British succeeded in colonizing Afghanistan as it did over the Indian Sub-continent, Burma, Malaysia, Singapore and Brunei, most likely Macaulay's Penal Code would have been introduced into Afghanistan more than a century ago.
2. The Code has survived the test of time, more significantly in the Indian sub-continent which, in many ways, resemble Afghanistan. What was British India had split into India, Pakistan, Bangladesh and Sri Lanka yet the Code is still the law in those countries.
3. If it is said that Afghanistan is a predominantly Muslim country, so are Pakistan, Bangladesh, Brunei and Malaysia.
4. If it is said that the majority of the people of Afghanistan now aspire to have the Shariah as their criminal law, Pakistan had done it within the Code itself while retaining the vast majority of the original provisions which certainly must be "not contrary" to Shariah, otherwise they would have been repealed. Similar modifications may be made to suit the circumstance in Afghanistan.
5. Afghanistan is closest to Pakistan, geographically, historically, demographically and culturally. Majority of the people of the two countries share not only the same religion but are also the followers of the Hanafi school. A large number of the population of the two countries also share the same language.

So, I think, there are sufficient reasons to use the Pakistan Code as the basis to work on. Find out what the Afghanistan people want, what the Afghanistan Government thinks it requires to effectively govern the country, what lawyers think regarding the kind of provisions the Code should contain and to incorporate them into the Code. Provisions to cover modern developments and technology could easily be incorporated. If the Code could still serve all the countries mentioned above, why not Afghanistan?

Points to be taken into account

However, the following points should be taken into account.

First, the single most important factor to remember in making or adopting whatever law is the attainment of justice. Everything else is secondary. Law without justice is bad law and justice is universal. A law which turns a victim of rape into a criminal and punished for adultery while the rapist goes free, is un unjust law by any standard, whatever the source it is claimed to be. Indeed it is unjust even by the standard of the source that it is claimed to be.

Secondly, law is universal. Whatever the source it is claimed to be, the net effect is mainly the same. Take for example Macaulay's Penal Code. It is said to be based on English law and partly from the Napoleonic Code and Edward Livingston's Louisiana Civil Code of 1825. Someone claims that Napoleonic Code

is influenced by the rulings of Imam Malik, i.e. Shariah based. I do not say the claim is true but if it is, it only proves the universality of law. I am not surprised that you may find some elements of Roman Law, the Old Testament and even Hammurabi Law in it!

Thirdly, any law, human or divine, so long as it is administered by men may be abused and lead to injustice. There is a tendency amongst Muslims to assume that if they do something which they believe to be "Islamic" and in the name of Islam, everything will turn out fine: Allah s.a.w. will take care of everything. They forget that *"sunnatullah"* applies to all: you have to do the right thing to get the right result. They forget that even the Prophet and his troops lost the Battle of Uhud, not because of lack of piety or wavering faith, but because the archers deserted their positions and prematurely rushed for the spoils of war. It was a question of not following orders and lack of discipline. So, there has to be safeguards, wherever possible.

Possible resistence

I believe that there will be groups who might resist on the ground that the Code comes from "un-Islamic" source. Ask them to produce the "Islamic Code". They would not be able to do so. We had a similar experience in Malaysia in 1980s when we were drafting the criminal and civil procedure codes. In the end, we took the Criminal Procedure Code which was used in the civil court as the basis to work on, (Again the Criminal Procedure Code came from India and I believe the same countries that adopted Macaulay's Penal Code also adopted the Criminal Procedure Code because the Criminal Procedure Code makes specific references to the Penal Code.) Now the same Code with modifications, where necessary, is known as the Shariah Criminal Procedure Act or Enactment, as the case may be. The same "un-Islamic" provisions have now become "Shariah". It was the same with the Civil Procedure law. We adopted the Subordinate Courts Rules used in the Subordinate Courts, made the necessary modifications and now it is known as "Shariah" Civil Procedure Act or Enactment, as the case may be!

Even now, as Chairman of the Law Harmonization Committee, I am doing the same thing: identify the provisions which are not Shariah-compliant, ascertain the Shariah position and make the necessary amendment. The latest example is the provision regarding "interest after judgment" in the Rules of Court. We have added another provision which is Shariah-compliant and applicable to cases arising from transactions in accordance with Shariah, e.g. Islamic Banking transactions. The old provision continues to apply to all other cases.[iii]

Approach

That is the reason why when, more than a decade ago, I was asked "What is your definition of Islamic law?" my reply was, "Any law that is not un-Islamic." I believe that here too, that is the approach that should be taken. Pakistan has done the same when Islamizing her Penal Code. Why not extend the methodology to Afghanistan? I believe most of what need to be done has been done by Pakistan.

I also believe that a law may be completely new yet Islamic, a law may be different from that at the time of the Prophet yet MORE Islamic. In my Abd Razzaq Al-Sanhouri Lecture at Harvard University, for the first proposition I gave the example of Road Traffic Law and for the second, law regarding slavery.[iv]

In adopting the Shariah, we should look for the principles, not the minute details and sub-divisions that the earlier jurists had done. I am referring to the provisions regarding the offence of "hurt" starting from section 332 until the end of Chapter XVI, in the Pakistan Penal Code, as an example. While the Macaulay Penal Code divides "hurt" into two main categories, i.e. "hurt" and "grievous hurt", the Shariah provisions contain numerous divisions and sub-divisions, each with a specific name and punishment. I pity the Magistrate or the Judge, who, having made a finding of facts before him, tries to slot it in into one of the many pigeon holes to arrive at the sentence. I do not think anyone would say that it is God's injunction that it should be that way. Check the Qur'an. How many versus can you find on it?

It was the work of traditional jurists. To me, two factors have influenced them. First, their love for dividing and sub-dividing something into different categories and sub-categories and giving each one of them a specific name. I remember vaguely reading many years ago that Arabic has something like five hundred names for sword (I stand corrected). One can imagine the number of names for camels! Secondly, the Shariah punishment combines the criminal punishment and the civil liability. On the other hand, Macaulay Penal Code confines itself to criminal punishment only. Civil liability is a separate matter.

I think it is worthwhile to consider whether it is possible to reduce the categories and sub-categories of the offences of hurt and their respective sentence if it is intended to introduce the Shariah alternative of the offence of hurt.

The other point is that the people who commit hurt or death are criminals. They are not people with money to pay the compensation, by whatever name. Of course, they will have to suffer additional alternative punishment for it. That is the same as in the case of fine and imprisonment. But what troubles me is that I have heard suggestions that the Government or the *Baitul Mal* should step in to pay for them. I do not agree with that suggestion. First, a country with violent people, culture and history, will go bankrupt in no time. Secondly, I think it is contrary to public policy for a country to make tax payers and donors to pay for the crime of others. It is alright to help the victim but it should not, in any way, lessen the sentence on the criminal. Crimes should not be encouraged, financed or compensated by the State.

Diyat originated in the Arab tribal society and had worked in such a society. Will it work in a modern society where tribalism is unknown and even kinship is deteriorating? But, is Afghanistan still a tribal society?

Hudud

Hudud is to me the most tricky one. I would not argue whether it should or should not be introduced. That is a matter of policy for a country to decide. However, I would like to make a few points that should be considered in making the decision.

First, I do not subscribe to the view that *hudud* is central to Islam: you must implement *hudud* to be Islamic. Within two decades from the death of Prophet Muhammad (p.b.u.h.), the Second Caliph of Islam, Umar Ibn Khattab suspended the implementation of hudud when there was famine. I have not heard any Ulama (I mean in Malaysia) criticizing him, but instead they accept it as an authority. That decision was clearly based on his *ijtihad*. Has "the door of *ijtihad*" closed since then?[v]

Secondly, I tend to believe that the type of punishment is not the objective (*maqasid)* of a law. The objective of the law is the attainment of justice and the maintenance of law and order. Types of punishments are methods which may change according to circumstances. That has happened throughout human history.

Thirdly, the experience in Pakistan regarding rape should serve as a lesson. When the law led to unjust results against the female victims of rape and "after daily demonstrations"[vi], the law was re-amended: prosecution for rape was again brought under the ordinary criminal law and not under Shariah. If the opinion of traditional scholars regarding Shariah could be changed by demonstrations, why not through reasons?

Fourthly, the *hudud* offence of theft, for example, may not be the most serious of offences relating to property now. There is no way in which a thief could steal a bank together with all its branches and assets. But, the whole bank could be bankrupted by criminal breach of trust which is not a *hudud* offence. In such a case, is criminal breach of trust less serious than theft and the amputation of hand as punishment less serious than imprisonment?

Fifthly, I believe it is a myth to say, as we often hear, that if you introduce *hudud*, the crime rate will immediately fall due to the fear of the punishment and the country becomes a safer place to live in. Why, even in the 21st century, a country that introduces *hudud* still does not allow woman to drive or leave the home without being accompanied by a man and without covering herself from head to toe? Has that nothing to do with safety? Do you think it is safer for a young woman dressed casually to walk in any town in Pakistan, Sudan or Saudi Arabia than in Sweden or Japan? In those countries that have introduced *hudud*, what are the chances of a rape victim lodging a report: she could even be killed by her own relatives for what is known as "honour killing" (to me it is "merciless killing")!

Sixthly, there is the issue about witnesses, particularly the disparity between the evidence of male and female witnesses. In Malaysia and in Brunei, at one time, both the Attorney General and the Solicitor General were ladies. Are we saying that the evidence of the Attorney General and the Solicitor General put together is only equal to the evidence of their Office Boy alone?

Seventhly, it is almost impossible to produce four male witnesses to prove rape or adultery. In the end, it is the woman who gets punished because she gets pregnant.

Conclusion

To conclude, I think, we can take the Macaulay Penal Code as the basis to work on. For that purpose we can use Pakistan Penal Code.

First, remove those provisions which are peculiar to Pakistan and are not relevant to Afghanistan.

Secondly, I am quite sure, Shariah-compliance will be an issue. Convince them that the bulk of the provisions are already Shariah-compliant even though they do not use Arabic words: any law that is not un-Islamic is Islamic.

Thirdly, if Shariah provisions as in the Pakistan Penal Code and even *hudud* were to be included, in adopting them, the points that I have mentioned above should be considered and taken into account.

Thank you.

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NOTES

[i] This is not a research paper. It is written in my hospital room living on milk poured through the nose. The respective Penal Codes that I refer too are what I found on the internet. They may not be the most up-to-date versions. However, as I am not relying on them to discuss their detail provisions but only to have an over-view, I believe they serve the purpose.

[ii] Such terms are popular amongst Islamist politicians and preachers even in Malaysia. I believe we can find such people in any country with a significant Muslim population.

[iii] See: "Late payment charge on judgment debts in financial transactions in Accordance with Shariah." – www.tunabdulhamid.my . See also "Harmonization of Common law and Shariah in Malaysia: a practical approach" – www.tunabdulhamid.my

[iv] See: "Harmonization of Common law and Shariah in Malaysia: a practical approach" – www.tunabdulhamid.my

[v] The difficulty in forwarding this kind of argument is that someone will say that the premise is not authentic. There is no way in which anyone could prove or disprove it. In the end it becomes a matter of opinion, whether to accept it as authentic or not. I am putting forward the argument only on the assumption that the premise is authentic. All these show that there had been differences of opinion throughout history and, therefore, we too could form our own opinion over an issue.

[vi] Per Dr. Anwarullah.