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The Need To Have A Uniform And Codified Law In Saudi Arabia

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Abstract

This paper tackles the lack of uniformity in the applications of criminal law in Saudi Arabia (SA) which results in inconsistencies in decisions and further results in criticisms from the international community. The main argument presented is that the criminal justice system (CJS) could be improved through codification and adopting the use of precedents. The paper first discusses the consistency of crime and punishment in the country, touching on the CJS, the differing interpretations of the law, and the human rights issues attributed to SA. The discussion then shifts to the uniformity of criminal law, focusing on the need to have a generally applicable law and equality in the eyes of the law with an emphasis on the principles of case law and judicial precedents. Finally, the paper discusses the feasibility of attaining a uniform criminal law, considering the challenges, the government actions towards codification, and the impact on international relations.

Keywords: Islamic law, criminal justice system, precedents, case law, human rights, women's rights, codification.

1 Introduction

Shariah law (Islamic law) is a kind of religious law in force in Saudi Arabia (SA) and other Muslim countries. It is the kind of law that many people from non-Muslim countries do not know about, and people in Saudi Arabia do not want to talk about. This essay focuses on the criminal justice system of Saudi Arabia and, although the system is based on religious law, this paper tries to stay away from purely religious issues. It is necessary to note that most countries in the world observe either the civil law tradition, common law tradition, or a mix of these legal traditions. Most international laws, including those cognizable by the International Criminal Court (ICC), are based mainly on these legal systems. Clearly, the Islamic legal system of SA is a minority when it comes to international law. Thus, there are many procedures and concepts of international law that conflict with Islamic law. To address these differences, both international law and Islamic law must exert a greater degree of acceptance and tolerance to avoid conflict, and the ICC must acknowledge the existence of the Islamic law in the Rules of the ICC.¹ The conflicts need to be lessened, if total eradication is not possible, for the nations observing the Islamic law to have fair representation in international law.

Modern Islamic law developed over a long period starting from the time that the holy *Quran* was written in the seventh century. Like the other legal systems, Islamic law developed through the works of scholars. The *Quran*, and later with the *Sunna*,² was the basis of the Islamic law but its meaning needed to be interpreted for easier understanding and application. The earliest texts dealing with Islamic law were written in the late 8th to early 9th centuries which explain the law, establish social norms, justifying the norms in relation to the scriptures, and give their understanding of the law.³ Four *Sunni*⁴ traditional schools of law emerged; the *Hanafi*, the *Maliki*, the *Shafi'i*, and the *Hanbali* – the official school of law in SA.⁵ With these schools of law came different interpretations of the Islamic law, and the coming up of differing legal doctrines and principles. Developing a criminal law with a uniform application is advantageous to the country as it would improve the criminal justice system, promote the general welfare, and improve the country's international relations.

2 The Consistency of Crime and Punishment

The consistency in providing punishment for a particular crime is tantamount to fairness. Similarly, an inconsistent application of the law is unjust, with either the victim or the perpetrator of the criminal act receiving undue advantage or disadvantage. Ideally, like cases must be treated alike and the penalties to be imposed need to be proportionate to the severity of the crime committed. Since the criminal law of SA is not codified, it is subject to different interpretations that could result in different punishments. Another concern with the SA criminal justice system is the imposable penalties, which non-Muslim countries strongly criticized for alleged cruelty and human rights violations.

2.1 The Criminal Justice System

The criminal justice system (CJS) of SA is based wholly on its state religion – Islam. There are four sources of law in SA; the Holy *Qur'an* is the main source, the *Sunna* is the secondary source, *Jima* or the consensus of opinions of Muslim scholars as the tertiary source, and *Qias* or analogy

¹ Steven C. Roach, "Azrab States and the Role of Islam in the International Criminal Court," *Political Studies* 53, no.

1 (March 2005): 143, <https://doi.org/10.1111/j.1467-9248.2005.00521.x>.

² Sunnah refers to the traditions and practices directly observed or taught by the Prophet Muhammad.

³ Eirinin Kakoulidou, "The Background and Formation of the Four Schools of Islamic Law," *Academia.edu*, 2018,

1, https://www.academia.edu/download/30356244/The_background_and_formation_of_the_Four_Schools_of_Islamic_Law.pdf.

⁴ Sunni is the largest denomination of Islam, its name is derived with reference to Sunnah.

⁵ *Ibid*, 6-12.

is the last source.⁶ While the provisions of the *Qur'an* and the *Sunna* are quite straightforward and could easily be referenced to, the *Jima* and *Qias* are subject to a more liberal interpretation by judges. There is a lack of uniformity in the criminal justice system since judges, in rendering decisions, are not confined to the teachings of the *Hanbali* school of law and may use doctrines from other schools of law whenever he sees fit.⁷

There are different classifications of crimes and punishment in SA, i.e., *hudud*, *qisas*, and *ta'azir*. *Hudud* crimes are those which are mentioned in the Holy *Qur'an* which punishment is either also in it or the *Sunna*. There are seven *hudud* crimes: *ridda* (apostasy), *baghi* (transgression), *sariqa* (theft), *haraba* (highway robbery), *zena* (adultery), *qudhf* (slander), and *shorb al-khamr* (drinking alcohol).⁸ *Qisas* offenses are punished based on the concept of retribution, or the infliction of the same or relatively equal harm to the offender.⁹ It is the literal eye for an eye way of punishment. *Ta'azir* deeds are those which the scriptures do not provide a punishment, but the government punishes based on the concept of correction.¹⁰ Belonging to this classification of crimes are those which would otherwise have been considered *hudud* or *qisas* but are lacking some elements to be considered as such, e.g., attempted robbery.

2.2 Different Interpretations of Law

Unlike in civil law and common law jurisdictions, SA's CJS is not bound by case law, thus giving judges a wide range of discretion in meting out punishments. It is not mandatory for judges to decide based on the previous decisions of other judges on similar cases, and may even depart from his previous decision.¹⁰ This makes the interpretation of the law unpredictable and subject to misuse, wittingly or unwittingly, by judges. In the absence of a fixed set of precedents, each case is treated unique, except for *hudud* crimes that have fixed penalties, and all the participants in the proceedings (i.e. the judge, the lawyers, and the opposing parties) are clueless of the probable outcome of the case. With no adherence to precedents, the law becomes uncertain and gives rise to inconsistent and unfair decisions.

It is also probable that certain crimes get punished more heavily, or more lightly, in a certain province than in the others. It could be due to the influence that the society may have on the judge which societal consideration may be different from the judge working in another province. This scenario becomes possible due to the lack of a uniform and codified criminal law that defines crimes and provides for their punishment. Even in the execution of the penalty, a death sentence, for instance, varies. While most executions are by beheading, some are subjected to firing squads. Also, the executions are usually done in public, but there are instances that these are done inside the confines of prisons. Furthermore, some are displayed in public after the execution while others are not. And some executed persons are not being returned to their families.¹¹ These scenarios show that even in death there are still confusions.

⁶ Embassy of the Kingdom of Saudi Arabia in Washington DC, "Legal and Judicial Structure | the Embassy of the Kingdom of Saudi Arabia," [www.saudiembassy.net](https://www.saudiembassy.net/legal-and-judicial-structure-0#:~:text=Since%20Saudi%20Arabia%20is%20an), 2021, https://www.saudiembassy.net/legal-and-judicial-structure-0#:~:text=Since%20Saudi%20Arabia%20is%20an.

⁷ Liv Tonnessen, "Women's Activism in Saudi Arabia: Male Guardianship and Sexual Violence," *CMI Report R 2016:1* (2016), 3-4.

⁸ M. Cherif Bassiouni, "Crimes and the Criminal Process," *Arab Law Quarterly* 12, no. 3 (1997): 269-86, <https://www.jstor.org/stable/3381843?seq=1>.

⁹ Arafa MA, "Islamic Criminal Law: The Divine Criminal Justice System between Lacuna and Possible Routes," *Journal of Forensic and Crime Studies* 2, no. 1 (March 2018), 4, <https://doi.org/10.18875/2638-3578.2.104>. ¹⁰ *Ibid*, 5.

¹⁰ Tonnessen (n 7), 3.

¹¹ Amnesty International, "Urgent Action: Executed Body Not Returned to Family,"

www.amnesty.org, November

26, 2014, https://www.amnesty.org/en/documents/mde23/034/2014/en/.

2.3 Human Rights Issues

SA is not a signatory to the United Nations (UN) Universal Declaration of Human Rights (UDHR) but is a signatory to other international human rights conventions such as the Convention on the Rights of the Child, and the Convention Against Torture. The UN is particularly critical of SA over its imposition of the death penalty, particularly beheading. In 2019, the UN High Commissioner for Human Rights strongly condemned SA after it executed 37 prisoners – alleging torture was used to obtain a confession and that some of those executed were minors.¹² There are numerous other criticisms about SA's carrying out the death penalty which is well within the ambit of Islamic law but is considered inhumane by people from non-Islamic countries. Aside from the type of punishment, there are also accusations of torture to obtain confessions. Confession is necessary before a finding of guilt could be had in some hudud crimes.¹³ Torture is illegal in SA law as confessions must necessarily be voluntary. Upholding the rights of women is one of the biggest human rights issues in SA. Discrimination against women was the normal thing in SA, but a significant improvement was introduced in 2017 with the abolishment of the male guardianship rule, albeit on a limited scale. With that, women started getting freedom of movement; they could now travel abroad alone and drive on their own, things that they were not legally allowed to do. But the male guardianship is not off altogether. For instance, women who have served their term in prison facilities cannot be released unless in the custody of a male guardian.¹⁵ Also, women could be sent to jail-like shelters indefinitely even for unclear reasons or minor acts of delinquency, e.g., disobeying parents.^{14, 15} The crime of rape is far from being clear in SA due to the lack of a codified law defining it. Since it involves sexual intercourse with a woman who is not his wife, it may be likened to adultery; at the same time, based on jurists' legal opinion, rape may also be considered as highway robbery if rape resulted from the act.¹⁶ And since the burden of proof required for a *hudud* crime is high – even higher than the proof beyond reasonable doubt of the western laws – rape at times is prosecuted as *ta'azir* just to have a better chance of conviction. The lack of a clear definition of the crime of rape often results in injustice, particularly on women-victims.

3 Uniformity of Criminal Law

The concept of a uniform criminal law means a law that generally applies equally to all people living in the country. The criminal law protects not only citizens but also foreigners who are in the country, and for which reason, all are bound by the same criminal law. However, for the people to be properly apprised of what the law is, the crimes must be defined with its

¹² UN News, "UN Rights Chief 'Strongly' Condemns 'Shocking' Mass Executions in Saudi Arabia," UN News, April 24, 2019, https://news.un.org/en/story/2019/04/1037191.

¹³ Elizabeth Peiffer, "The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria," *Journal of Race, Gender, and Social Justice* 11, no. 3 (2005): 507–39, 509–16, <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1132&context=wmjowl>. ¹⁵ Equality Now, "Ending Male Guardianship in Saudi Arabia," Equality Now, 2020, https://www.equalitynow.org/ending_male_guardianship_in_saudi_arabia#:~:text=In%20April%202017%2C%20King%20Salman.

¹⁴ Bill Bostock, "Saudi Arabia Runs Squalid, Abusive Jails for Women Disowned by Their Male Guardians – a Forgotten Chapter in Its Rush to Champion Women's Rights," *Insider*, 2020, https://www.insider.com/daralreaya-brutal-saudi-women-jails-for-disowned-progress-2019-10.

¹⁵ Aljazeera, "Loopholes Riddle Saudi Reforms on 'Guardianship' of Women: Report," [www.aljazeera.com](https://www.aljazeera.com/news/2019/10/23/loopholes-riddle-saudi-reforms-onguardianship-of-women-report), October 23, 2019, https://www.aljazeera.com/news/2019/10/23/loopholes-riddle-saudi-reforms-onguardianship-of-women-report.

¹⁶ Tonnessen (n 7), 10-12.

corresponding penalty. And with a fixed set of laws, the courts could not deviate from such laws particularly guided by the previous decisions rendered on similar cases, provided that the previous decisions align with the law, particularly the scriptures. With a uniform criminal law, no one could make an excuse for not knowing the law. As a well-known principle in the western legal systems says, "ignorance of the law is no excuse."

3.1 General Applicability

The first step to having a criminal law of general application is by having the penal laws codified. A codified law tells the people what are the prohibited acts and what the penalties for committing those acts are. In most countries in the world, they have their penal code where all the crimes are clearly defined with the corresponding penalties. Aside from the penal code, other penal statutes are enacted by the legislative branch of the government, particularly acts that have not been declared criminal acts before. The enactment of laws is important since, like in western legal systems, Islamic law does not punish an act unless it is expressly prohibited at the time of its commission.¹⁷ With a clear set of laws, the judges could properly be guided in their decisions and all the parties would know beforehand what are the consequences and most probable result of the case.

3.2 Equality in Law

To be of general application, the laws must not be discriminating against anyone by reason of his or her personal circumstances. It means equality in the eyes of the law, not extending privilege or discriminating against a certain people or group. One relevant issue about equality in law is women's rights. As previously discussed, women still tend to be subjected to male guardianship and unequal treatment (e.g., confinement to shelters, permission to leave prison) despite the initial step of abolishing the rule in 2017. Aside from women's rights issues, there are also allegations of religious and political persecution as well as the disparity in treatment among migrant workers from poor countries compared with those from western countries. These are some of the challenges that the country faces and which could be solved by having a codified criminal law that applies equally to all.

3.2.1 Case Law

Interestingly, even without a codified law, a country could still have a uniform application of the law by observing the case law. The case law is a collection of previously decided cases that the judges are bound to follow. Those previously decided cases are called precedents and the system is strictly observed in countries with common law traditions. Under this scheme, cases with similar facts necessarily get the same results. A novel case, with a question of law that has not been previously decided by any court, could be decided by the judge based on the letters of the law and his own reasoning. Such a case is called a leading case and the decision on which becomes a precedent and starts the development of case law. Under this system, since judges must respect case law and decide similarly with the precedents, the application of law becomes uniform to all courts within the country. But, SA does not observe case law or any rule on precedent.¹⁸

¹⁷ King Fahd Bin Abdulaziz Al-Saud, "Basic Law of Governance" (1992), art 38, https://www.saudiembassy.net/basic-lawgovernance#:~:text=No%20conviction%20or%20penalty%20shall,be%20imposed%20ex%20post%20facto.&text=Residents%20in%20the%20Kingdom%20of,respect%20Saudi%20traditions%20and%20feeling s..

¹⁸ Nancy B. Turck, "Resolution of Disputes in Saudi Arabia," *Arab Law Quarterly* 6, no. 1 (1991): 415-43, 420, <https://doi.org/10.1163/157302591x00142>.

3.2.2 The Concept of Precedents

Good record keeping is the key to developing case law, such as by having them recorded in official law reports. But not all cases need to be included in the law reports as there could be too many of them. Besides, only cases where a question of law has been raised and subsequently resolved may be considered precedents.¹⁹ A case which only disputes on matters of facts are not part of case law. In common law traditions, following the precedents is mandatory and is called

stare decisis. Precedents are only influential but not mandatory to follow in countries under civil law tradition under the principle of *jurisprudence constante*. In a way, particularly in common law jurisdictions, precedents form part of the law as it explains what the law is and how it should be implemented.

3.2.3 Advantages of Precedents

Through the observance of precedents, courts could deal with similar cases in the same way, the people could establish their expectations about the case, the previous decisions could easily be replicated, and unreasonable precedents may be overturned by creating a new and more rational one.²⁰ Treating similar cases differently is a sign of inequality and, therefore, injustice. It betrays the belief of the parties that the outcome of the succeeding similar cases must be the same as the previous cases. For the judges, following precedents would minimize mistakes in the interpretation of the law, and could also avoid possible abuse of discretion. And since precedents could be set, even long-standing case law may be subjected to review or change with arriving at a novel but more judicious decision that begins a new precedent. The concept of adherence to precedence makes sense in Islamic law since it considers the opinion of jurists as one of the sources of law. What then is left to be done for SA is to come up with legislation mandating judges to adhere to judicial precedents.

4 Feasibility of Attaining a Uniform Criminal Law

Creating a uniform criminal law in SA requires a strong political will and readiness to embrace changes for the betterment of the country. Some people or sectors of society may likely show opposition to the proposal. But judging from government actions that lead to the current developments, realizing a codified and uniform criminal law may come sooner than expected. Besides, there are numerous advantages to be gained from it.

4.1 Challenges

The religious conservatives are the usual opposition to changes relating to Islamic law. These religious leaders usually have a strong influence in government policymaking, but their influence dwindled particularly through the reforms being instituted by SA crown prince Mohammed bin Salman. Mohammed's dedication to reforms has him going even against the highly influential conservative group *Salafists* (or more precisely revivalist for their insistence to view the Islamic law as it were in the 7th century) by having some of their leaders jailed.²¹ Since the *Salafists* are proposing the return of the Islamic law to its form back in the first three generations of Muslims,

¹⁹ Grant Lamond, "Precedent and Analogy in Legal Reasoning," ed. Edward N. Zalta, Stanford Encyclopedia of Philosophy (Metaphysics Research Lab, Stanford University, 2016), https://plato.stanford.edu/entries/legal-reasprec/#:~:text=Most%20cases%20do%20not%20create.

²⁰ 22 Ibid.

²¹ Kareem Fahim, "Saudi Arabia's Once-Powerful Conservatives Silenced by Reforms and Repression,"

Washington Post, June 5, 2018, https://www.washingtonpost.com/world/saudi-arabias-once-powerful-conservatives-silenced-by-reforms-and-repression/2018/06/04/5332bdec-3dad-11e8-955b-7d2e19b79966_story.html.

creating further change to the Islamic law through codification would most certainly incite them into airing their criticisms. Moreover, some national, or international, issues could arise if a conflict with the *Salafists* arises as their ideologies are advocating *jihad*.²²

Another apprehension with changing SA CJS is its potential effect on criminality. It must be noted that SA currently has a significantly lower crime rate compared with the United States, with crimes mostly drug-related.²⁵ But since turning the criminal law into having uniform application relatively retains the imposable penalties, there could be no significant correlation

between the change and criminality. Even the possible assumption that knowing the law could give the people the knowledge on how to avoid it is too far-fetched to be considered. Quite to the contrary, knowing what actually results from committing crimes could serve as a deterrent. The important thing that must be ensured is the certainty and consistency of punishment.

4.2 Government Actions towards Codification

The SA government has started instituting policies that could be preparatory to having a codified criminal law of general application. A series of laws replacing three-decades-old rules in the judiciary have been enacted, starting with the Law of Criminal Procedure in 2001, followed by a Royal Order in 2005 instituting amendments to the judicial system including dividing courts based on areas of specialization, and another Royal Order in 2007 regulating the judiciary.²³ The abolition of the male guardianship rule, albeit only partial, now allows women to drive, travel abroad, do some government transactions, and even join the armed forces. These developments in women's rights are geared towards gender equality which had long been stunted. Surely there were objections prior to the implementation of the new laws and rules, but they prevailed anyway. With these changes already in place, the country is now prepared for more dramatic changes particularly in the field of criminal law.

In a more recent development, in February of 2021, the SA government announced judicial reforms, including the enactment of the Penal Code for Discretionary Sanctions, which are believed to be en route to the codification of laws in the country.²⁴ The codified criminal law

is the first big step into having a uniform application of the law. Continuing legal education may also be required to ensure that all judges are well-equipped with the knowledge about the new regulations. Also, the adoption of a judicial precedent system could significantly contribute to making the law clearer to everyone. In the absence of expressed provisions in the scriptures, SA could adopt legal principles which enjoy customary international law status. Aside from having better order within the country, a well-established judicial system would also promote international interactions.

²² Seth G. Jones, "A Persistent Threat: The Evolution of al Qa'ida and Other Salafi Jihadists," 2014, 12-15, https://www.rand.org/content/dam/rand/pubs/research_reports/RR600/RR637/RAND_RR637.pdf.

²⁵ OSAC, "Saudi Arabia 2020 Crime & Safety Report: Riyadh," www.osac.gov, April 8, 2020, https://www.osac.gov/Country/SaudiArabia/Content/Detail/Report/f6af335c-d5b7-4087-9086186575bdfb0f.

²³ Abdullah F. Ansary, "A Brief Overview of the Saudi Arabian Legal System - GlobaLex," Nyulawglobal.org, 2019, 3.5, https://www.nyulawglobal.org/globalex/Saudi_Arabia.html.

²⁴ Natasha Turak, "Saudi Arabia Announces Major Legal Reforms, Paving the Way for Codified Law," CNBC, February 9, 2021, https://www.cnbc.com/2021/02/09/saudi-arabia-announces-legal-reforms-paving-theway-for-codified-law.html.

4.3 Improvement of International Relations

Having a defined CJS could help improve the country's international relations. That is assuming that the judicial reforms would consider the criticisms that the international community has been raising, particularly on allegations of human rights violations and on the rights of women. In April 2020, the SA Supreme Court made back-to-back decisions; first abolishing flogging as a form of penalty, and then declaring the non-imposition of the death penalty to offenders who were minors at the time of the commission of the offense.²⁵ These new rules are viewed by the rest of the world as an indication of SA's commitment to upholding human rights. On the side of women empowerment, the world would soon see female judges in SA, an improvement from the recent appointment of notaries to provide legal services for women.²⁶ If the way SA addresses the international criticisms continues, the country would have a lot better relations with other countries.

The judicial reforms could also be the way for SA to harmonize its laws with international law. While some areas of the law may not be reconcilable with the international standards, like the penalties for *hudud* crime, finding a common ground on other areas could result in better standing of the country in international law. International relations is not alien to Islamic communities like SA. Even in the early years of the Islamic faith, back in the times of the Prophet Muhammad and his early successors, the Muslims have shown flexibility in making accord and alliances with other countries despite the differing religious beliefs.²⁷ With some give and take, the conflict between Islamic law and international law, particularly concerning human rights issues, could be minimized.

5 Conclusion

Having a uniform criminal law would bring positive changes to the criminal justice system, it would be for the greater good of the parties in a case, and the benefit of the country in general. The need to have a consistent application of the law is based on the concept that cases attended by similar facts must arrive at the same finding in law. Failure to be consistent with promulgated decisions results in confusion even among law practitioners. Moreover, the differing decisions become prone to criticism. Related, the law must also be uniform in application, i.e., to all the people within the territory. One way of ensuring uniformity is by having the law written down for everyone to see and examine. The law must also be applied without discrimination. And, hopefully, the CJS would establish case law and judicial precedents to aid in ensuring consistency and uniformity in the application of the law, and to eliminate mistakes or abuses of discretion by judges.

The government reforms of the judiciary that seemingly gear towards the codification of criminal law are very encouraging. Although opposition from religious conservatives and revivalists is expected, the political will of the government is likely to prevail. Other apprehensions against the changes are only worthy of scant consideration as the change is not only for the good of the different stakeholders of the CJS but of the country in general. There is still a long way to travel, particularly the road to gender equality. But through the internal reforms, the country is – slowly but surely – developing a better image in the eyes of the international community.

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²⁵ Arab News, "Saudi Arabia's Abolition of Death Penalty for Minors Welcomed," Arab News, April 28, 2020, <<https://www.arabnews.com/node/1666091/saudi-arabia>><https://www.arabnews.com/node/1666091/saudi-arabia>.

²⁶ Saudi Gazette, "Saudi Arabia to Appoint Female Judges Soon," *Saudigazette*, January 15, 2021, <<https://saudigazette.com.sa/article/602536>><https://saudigazette.com.sa/article/602536>.

²⁷ Maurits Berger, "Islamic International Law," OBO, 2018, <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-97801997969530170.xml>><https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-97801997969530170.xml>.

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