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Peters, R.

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Sharī‘a and ‘Natural Justice’: The Implementation of Islamic Criminal Law in British India and Colonial Nigeria

Rudolph Peters

Abstract

Whenever colonial powers took over Muslim territory, sharī‘a criminal law was abolished and replaced by Western style penal codes, modified to fit the colonial situation. There are, however, two exceptions: British India (until 1861) and colonial Nigeria until independence. Here sharī‘a criminal law was left in force with some adaptations and under the control of the colonial authorities. This article analyses why this was done and how sharī‘a was applied in practice.

Introduction

Maintaining law and order is a central concern for any state. In colonies, however, where the danger of rebellion was always lurking and where drastic social and economic changes often resulted in higher crime rates, this was one of the foremost concerns of the administration. Criminal law was an essential tool for imposing and protecting colonial power relations and keeping the peace. Since colonial powers, as a rule, did not regard native penal laws as effective tools to meet these goals, they almost always introduced penal codes from the metropolis adapted to the colonial situation. There are, however, two notable exceptions: India and Northern Nigeria where the British continued to enforce Islamic criminal law. In this paper I will try to explain why this was the case and describe how the colonial situation affected the application of Islamic criminal law.

Colonial law is an excellent window for studying the structures of colonialism. It gives an insight into the major concerns of the colonial powers in administering their activities.


2 Mann and Roberts, Law in Colonial Africa, 4.
territories and the cultural assumptions that shaped colonial rule. Colonial administrators wanted to create new states with new power structures and new legal systems, directly subordinated to the state. This, of course, was a gradual process: the colonial state was not established the moment a colonial power, by conquest or otherwise, assumed control over certain territories. Essential for these colonial states was establishing bureaucratic forms of government and placing the law and its enforcement under state control. For the enforcement of criminal law this meant that prosecution was increasingly made the responsibility of state organs and that the scope for private prosecution and private settlements was restricted. Colonial administrators assumed that indigenous forms of government and law enforcement were despotic, arbitrary and chaotic. In fact, colonial rule was often justified by the claim that it had brought justice and peace where previously these had been absent. Western civilization, it was argued, was of a higher order and, therefore, it was the ‘white man’s burden’ to spread his civilization to the rest of the world. These concerns and notions resulted in four distinctive traits of colonial legal systems.

The first one is that colonialism imposed new legal orders that were centralized, hierarchical and firmly anchored in the state apparatus. They replaced the pre-colonial local laws that were usually unwritten, based on informal means of settling conflicts and not integrated into the power structure of the state. This does not mean that the colonial regimes introduced one unified substantive law - in fact legal pluralism was more often the rule than the exception - but rather that a strict hierarchy of legal authority was introduced, that the jurisdictions of the various courts and laws were clearly delimited and that court procedures were formalized. Indigenous law, to the extent it was preserved, was usually reformed, if only by new, more prescribed means of enforcement. Colonial authorities or high courts usually had the right to quash decisions of native courts if they regarded these as being repugnant to essential principles of civilization. In British colonies the terms ‘natural justice’ or ‘justice, equity and good conscience’ were used to refer to these principles of civilization.

Pre-colonial law was usually unwritten customary law or, in the case of shari‘a, jurists’ law to be found in scholarly works discussing a great variety of often contradictory legal opinions. If local laws and customs were allowed to be part of the new colonial legal order, the colonial powers needed to know them in order to have control over them. Therefore, the second characteristic of colonial legal systems is that local laws and customs were often put into writing and fixed. In many colonies projects were initiated to document and sometimes codify these local laws and to
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over, recording and codifying native indigenous laws and recording decisions as
ecedents often changed these laws beyond recognition.
An assumption underlying all colonial rule was that the Europeans were more
civilized than the indigenous population and that they should not mix. There was a
sharp social divide between the small elite hailing from the metropolis and the
igenous population. This divide was given a legal basis and a third trait of colonial
egal systems was that they conferred a separate legal status on the colonizers and a
few privileged local notables and established special courts for them. This meant that
laws from the metropolis were introduced — usually based on equality before the
— they had to be amended in order to reflect this divide. Often Europeans fell
under the jurisdiction of a separate court system applying special laws.
Colonial law reform was, as a rule, a tool for the establishment of new forms of
government, the protection of colonial economic interests and the maintenance of law
and order. However, it was sometimes also used as an end in itself, to impose
‘civilization’. Although law reform to achieve this was in itself not instrumental in
consolidating colonial power relations, there was an indirect relationship. One of the
justifications of colonization, as I have mentioned before, was the spread of Western
civilization, or more specifically the imposition of justice and peace and the
mination of ‘barbaric’ practices. If such practices were tolerated, the colonial
enterprise would lose its credibility in public opinion in the homeland as well as, in
the colonies themselves, among the Westernized local elites, missionaries and the
lower ranks of colonial administrators. Especially the latter groups, who were directly
fronted with such practices, played an important role in attempts to abolish these
customs and practices.3
After taking over power in the newly acquired territories the colonial
administration had to decide in what domains Western law should be introduced and
where indigenous law could be preserved. The outcome was usually contingent on
practical, rather than on ideological considerations. Western law had the advantage
that it was clear, familiar to the colonial administrators who had to enforce it and
could easily be adapted to serve colonial interests. However, at the same time it was
less suitable because it was alien to the local populations and based, essentially, on

3 See Jörg Fisch, ‘Law as a Means and as an End: Some Remarks on the Function of European and Non-
European Law in the colonies’, in Mommsen and de Moot, European Expansion and Law, 15–38.
equality before the law, a notion that did not fit the colonial situation. In order to be practicable it had to be adapted, especially, to the existence of categories of persons with different legal statuses and distinct rights and obligations. Preserving indigenous law, on the other hand, was easier in the sense that the local population was accustomed to it and that local laws usually recognized differences in legal status. However, it had to be transformed to fit the colonial situation by redistributing and demarcating judicial authority, subordinating it to the all-embracing authority of the colonial state and by making its contents easily accessible by recording or codifying it. The choices made differed from colony to colony. In general, however, Western law was introduced in those domains where the law had to protect interests that were crucial to the colonizing powers. Commercial law — important for trade — and criminal law — essential for law and order — were westernized in almost all colonies. Land law was usually Westernized only in those colonies where there were large groups of colonial settlers.

The ways colonizers dealt with sharī‘a illustrate these observations. In general, the application of sharī‘a was restricted to those parts of the law that regulated relations in the private domain and did not have an impact on colonial interests: the law of persons, family law and the law of succession. However, the colonial authorities kept some control over the law in these domains by creating a new hierarchical court system, sometimes with the possibility of appeal to Western type courts, and by regulating the training of judges. Where colonial interests were at stake such as, for instance, in the domain of trade and land ownership (in settler colonies) sharī‘a was usually replaced by Western laws. Since, as mentioned before, criminal law is central to the maintenance of law and order and the protection of colonial power relations, most colonial powers preferred to impose their own criminal laws on the colonies. That the British preserved the application of Islamic criminal law in two colonies is exceptional and requires explanation.

**Islamic Criminal Law**

Islamic criminal law⁴ is treated by the jurists under three headings:

1. ḥamīṣ, or offences against the person (i.e. homicide and wounding)
2. ḥaddi crimes, i.e. offences mentioned in the Qur’ān and entailing fixed penalties

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3. **Ta’zír and siyâha**: discretionary punishment by the court or executive officials for sinful acts or acts endangering state security or public order.

The first group consists of homicide and bodily harm. These crimes can only be prosecuted by the victim or his heirs (in the case of manslaughter) who may pardon the defendant at any time. For intentional murder, the heirs may demand retaliation, i.e. the death penalty, whereas the penalty for intentional injury causing a loss of limbs or senses, is the infliction of the same injury on the perpetrator. If the death or injury are not caused intentionally or if the victim or his heirs are willing to waive their right to retaliation, it is then replaced by the payment of the blood price, the amount of which depends on gender and religion. The Mālikīs (but not the Ḥanafis) also require that the killer’s value (i.e. his blood price) not be higher than that of the victim’s, except in the case of a man killing a woman.

The second category of offences consists of the crimes for which fixed penalties are provided in shari’a. They are the following:

1. Theft, to be punished with amputation of the right hand.
2. Robbery or disturbance of the peace. This is a complex crime and its punishment varies with the circumstances. For disturbance of the peace (defined as frightening travellers in order to prevent them from continuing their journey), the punishment is exile, or, according to some, imprisonment; if the perpetrator has stolen property, he is to be punished by amputation of opposite limbs, i.e., amputation of the right hand and the left foot; if a person has been killed, then the killer is to be put to death and finally, if the perpetrator has both plundered and killed, the punishment is crucifixion or death by other means. Crucifixion entails that his body be exposed to the public after his execution. If the culprit repents before he is caught, and reports himself to the authorities, the hadd punishment lapses.
3. Illegal sexual intercourse (zina‘), i.e. all sexual relations out of wedlock or outside the relationship between master and female slave. This crime is punishable by death by stoning if the culprit, male or female, is a muḥyaa‘a, i.e. if he or she has previously enjoyed legitimate sexual relations, otherwise with one hundred lashes.
4. Unfounded accusation of fornication (qadîf‘), to be punished with eighty lashes.
5. Drinking alcoholic beverages, to be punished with forty, or according to others, eighty lashes.

Sentencing to death on the basis of the severe hadd penalties was difficult since the doctrine set high standards for convictions. In the first place, there is the rule that uncertainty, shubha, prevents punishment. This means that a person who is mistaken or uncertain as to the unlawfulness of his behaviour, resulting either from an error of fact or from an error of law, will not be punished with retaliation or a hadd penalty. Not much is required to demonstrate shubha in the sense of an error of law.
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According to the Hanafites, the defendant's declaration that he believed that the act was allowed suffices, even if this statement is made after the crime has been proven during the trial. In a number of cases there is a legal presumption that such an error exists regardless of the culprit's actual awareness of the rules. A person who kills a son or steals his property is assumed to act in the belief that he is entitled to do so.

Secondly, the use of retaliation and hadd punishments is complicated by rules of evidence that are stricter than in other domains of the law. In Islamic law, proof can be furnished by witnesses, admission, and oath. Witness evidence must be substantiated by two Muslim adult men, or by one Muslim adult man and two Muslim adult women, of good reputation, who give identical testimony in the presence of the qāḍī. Hearsay evidence is admitted. However, for a sentence of hadd punishment or retaliation, the evidence of two Muslim male eyewitnesses of good reputation is required and female witnesses are not accepted. In order to prove fornication, four male eyewitnesses are necessary, who must have seen the act in intimate detail. Moreover, if the defendant pleads guilty to a hadd crime, he can withdraw his statement at any moment, even after a sentence has been passed, and thus prevent the execution of the punishment.

Thirdly, the application of hadd punishment is restricted by very precise definitions of the crimes and, sometimes, by procedural formalities. Theft, again, offers a clear illustration. According to the classical doctrine, theft in the legal sense exists if a person who can speak and see, intentionally and surreptitiously takes away an object which is not liable to decay, with a certain minimal value, which is in another person's rightful possession, and which the thief takes out of a safe place suitable for the object in question. The snatching of a purse in the street falls outside this definition, since such an act is not surreptitious. Neither can a person be punished with amputation if he takes and sells another person's jewellery if the latter has left it on the table in his house, since it was not kept in a safe place suitable for jewellery.

The last category of offences (ta'zir or siyāsa) is a residual one. Persons whose guilt is established but who cannot be sentenced to retaliation or a hadd penalty for procedural reasons may be punished under this heading. The same applies for habitual offenders, who, under this heading, may be sentenced to penalties that are more severe than the ones prescribed for their crimes.
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5 The use of the words ‘equity and the natural laws’ is interesting. It is the forerunner of the formula ‘justice, equity and good conscience’, which played an important role in British colonies as a guideline for formulating the law in situations where indigenous law is silent and for abolishing indigenous law if it was deemed to be repugnant to these principles. Derrett discusses the historical background and the legal uses of the formula but confines himself to its use as a guideline for formulating the law and does not discuss its role in criminal law where it was used for abolishing local laws. J. Duncan and M. Derrett, ‘Justice, Equity and Good Conscience’, in James N.D. Anderson (ed.), Changing Law in Developing Countries (London 1963), 113–53.

6 Niharkana Majumdar, Justice and Police in Bengal, 1765–1793: A Study of the Nizamat in Decline (Calcutta 1960), 72f (italics added).
prevailing in India as the best for the local population, whereas officials of the EIC fell under special British jurisdiction. The imposition of English criminal law upon the local population would have been impractical as it was not codified, and consisted of common law and a great number of separate statutes. Since the British judges of the EIC lacked the intimate knowledge of Bengali society, culture and languages, it was deemed more convenient to leave the first stages of adjudication to local experts on the basis of shari’a or Hindu laws. However, the case illustrates that from the very beginning there were frictions between the local shari’a practices in criminal affairs and what the British regarded as just and effective for the maintenance of law and order.

As of 1790 the shari’a courts were subordinated to British judges. The qādis and muftees attached to the courts were relegated to the position of ‘law officers’, i.e. scholars of Islamic law and Hindu law (the latter for civil cases between Hindus), who assisted the British judges in expounding the law in each case. The courts were to pass sentence in the terms of the Futwa [fatwā], if it appears consonant to justice and conformable to the Muhammadan law. The courts of first instance heard both criminal and civil cases. For purposes of appeal in criminal cases, the court of the Mughal governor of Calcutta was transformed into a high court (Nizāmat-i ‘Adālat, or, according to the then current British orthography, Nizamut Adaulat). The criminal courts applied Hanafi law, which the British judges enforced on the basis of fatāwā issued by law officers. In order to have some control over the pronouncements of the law officers, Hanafi works of Islamic law, such as the Hidāya8 were translated into English. The theoretical primacy of shari’a in criminal cases lasted until 1861 when the Indian Penal Code and the Code of Criminal Procedure were introduced. This was made possible by the demise of the Mughal Empire in 1858 and the transfer of India’s sovereignty to the British Crown.

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The way the British approached shari‘a has been dubbed ‘defective deference to Islamic norms’, i.e. legal reform along English (or Western) lines behind a façade of respect for shari‘a. This is especially true with regard to criminal law, for after the EIC had acquired the right to administer criminal justice it began to reform Islamic criminal law. They did so by legislation, without, however, formally replacing or modifying shari‘a. In general, the enacted regulations gave instructions to the law officers of the courts to issue their fatāwā on the basis of legal fictions. For instance, in cases of homicide, the law officers were instructed to give their fatāwā on the assumption that all the victim’s heirs had demanded the death penalty, regardless of whether or not this was true. This possibly reflects the influence of English jurisprudence; in common law, legal fictions were frequently used in order to adapt the limited number of available writs to new circumstances. By allowing fictitious details to be added to the facts of the case, the operation of a writ could be expanded, without formally changing the law. British lawyers working in India at that time apparently compared shari‘a to common law, and used legal fictions in order to introduce reform. For Muslim jurists this was not at all problematic; muftis, according to Islamic legal theory, expound the law on the basis of the facts that are presented to them without examining their truth. Therefore, their fatāwā are not binding. The British, however, erroneously thought they had the force of law and regarded them as justifications for the harsher sentences they desired.

The reforms of shari‘a criminal law had three aims: first, to make its enforcement the exclusive duty of the state and impersonal, without regard for individual characteristics; second, to forge it into an, in British eyes, effective instrument for keeping the peace and third, to divest it of its ‘barbaric and cruel’ elements. This was done through the following types of reforms:

1. Reforms to assert the right of the state to prosecute and to abolish the influence of victims (or their heirs);
2. Reforms to introduce the notion of equality before the (criminal) law by eliminating personal circumstances unrelated to the offence that could influence the sentence, such as the shari‘a rule that a father could not be sentenced to death for killing his child;
3. Reforms to eliminate ‘irrational’ obstacles for sentencing such as the strict shari‘a rules of evidence;

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12 Although the EIC was a chartered trading company, I refer to it as a ‘state’ in view of the fact that it governed parts of India.
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Reforms to abolish amputation of limbs and death by stoning as penalties, and
Reforms to eliminate arbitrariness by defining ta'zir punishments and abolishing siyāsa justice.

Between 1790 and 1817, the British totally and unrecognizably transformed Islamic criminal law. Although the law officers continued to function until 1832, the criminal law applied in the Indian courts by that time had entirely lost its Islamic character except in name. However, the criminal law thus created was only formally abolished by the introduction of the 1861 Indian Penal Code.

British Interference
Establishing the Exclusive Right of the State to Prosecute Crime

For the British, criminal law enforcement was essentially a matter for the state. It was part of public law, and not of private law. Therefore it was difficult for them to accept that under sharīʿa the prosecution of homicide cases, as well as some other offences, was a private affair and depended on the wish of the victim or his heirs.¹³ They could pardon the accused at any stage of the proceedings and make it conditional on a financial consideration. One of the first criminal regulations issued by the British instructed the law officers to give their fatūwa in homicide cases on the assumption that the heirs demanded retaliation.¹⁴ The British also wanted to put an end to the possibility of private settlements in criminal cases between victims and perpetrators. In order to underline the public interest in prosecuting and punishing crime, the British introduced the principle that criminal offences would be investigated and prosecuted by state organs, regardless of the wishes of the victim or his heirs.

Another aspect of the law of homicide that offended the British notion of public justice was the rule that unintentional homicide (i.e. culpable homicide or death by accident) was regarded as a tort entailing the payment of financial compensation to the victim’s heirs. The British were appalled by the fact that the heirs were the recipients of the ‘fine’, as they called the blood price (diya). They interpreted this as a kind of monetary expiation could be bought for monetary

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Removing ‘Irrational’ Elements
Because the British
were loath to pro

¹³ In England the prosecution of crime was, until the first part of the nineteenth century, also the responsibility of private individuals. The difference, however, was that once they had brought a charge against an offender, they could no longer influence the proceedings. During the first half of the nineteenth century, prosecution became a matter for the police until the office of the Director of Public Prosecution was created in 1879. A.H. Manchester, Modern Legal History of England and Wales, 1750-1950 (London 1980), 226.
¹⁴ Tapas Kumar Banerjee, Background to Indian Criminal Law (Calcutta 1990) (reprint of an earlier edition printed in Bombay in 1963), 72f. The instruction was repeated in a more detailed form in Regulation 1793/9, §§5, 76 and Regulation 1797/4, §3, 4. See Colebrooke, Digest, vol. 1, 526.
kind of monetary expiation and thus as an expression of the idea that human lives could be bought for money. In 1797 the British declared that

[in]o sentence of pecuniary compensation or damages, adjudged to or recoverable by individuals, shall be given on any criminal prosecution, nor any sentence of fine except to the use of Government.\(^5\)

If the law officers awarded diya in their fatwā, this should be commuted to imprisonment.\(^6\) In 1801 the rule was formulated more precisely. Henceforth, the commutation of blood price into imprisonment was not applicable in cases of wilful homicide\(^7\) (because then capital punishment would be in order), nor in cases of 'homicides by real misadventure, in the prosecution of a lawful act, and without any malignant intention',\(^8\) even if the fatwā of the law officers awarded a blood price. Under Islamic law, causing a person's death suffices for financial liability for the blood price and fault is not required. This is consistent with the shari'a rules of tort according to which the liability for damages is predicated on mere causation and not on fault. However, when the British brought this part of the law of homicide under the criminal law, where guilt is the determining principle for awarding punishment, a distinction had to be made between involuntary manslaughter entailing punishment and purely accidental killing. There are several decisions of the Nizāmat-i 'Adālat acquitting defendants who had accidentally killed persons while aiming at animals, although the fatwā of the law officers held them liable for blood price.\(^9\)

Removing 'Irrational' Obstacles for Awarding Punishment

Because the British felt bound to the provisions of strict shari'a criminal law and were loath to pronounce sentences on the strength of sīvāsa,\(^{20}\) which offended their

\(^{15}\) Regulation 1797/14 §14, Colebrooke, Digest, vol. 2, 881.

\(^{16}\) Regulation 1797/14, §3, Colebrooke, Digest, vol. 2, 881.

\(^{17}\) Under shari'a wilful killing entails capital punishment. However, this depends on the wish of the victim's heirs, who may also demand financial compensation. Moreover, certain circumstances (e.g. the fact that the victim was the child of the perpetrator) prevent the imposition of the death penalty. In such cases a shari'a court would award the blood price to the heirs. See Peters, Crime and Punishment, 38: 53.

\(^{18}\) Regulation 1801/8, §6, Colebrooke, Digest, vol. 2, 882.


\(^{20}\) Sīvāsa means administering discretionary punishment for acts threatening public security on the basis of summary trials. See Peters, Crime and Punishment, 676.
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sense of the rule of law, the possibilities for inflicting capital punishment and other severe punishments were limited by the many loopholes offered under shari‘a. Therefore they relaxed the standards of evidence set by the shari‘a and abolished the pleas based on ‘uncertainty’ (shubha) and personal circumstances not related to the crime.

As we saw in the report of the trial of the abortionist, the Islamic law of evidence offended British notions of justice. Under the strict rule of shari‘a, only testimonies given by Muslim eyewitnesses of good reputation could be admitted. In a country where the majority of the population were Hindu, the British regarded this rule as ‘an odious distinction, the absurdity and injustice of which are too glaring to require comment’. This ‘absurdity’ was remedied in 1793 when a regulation was enacted that stipulated that the law officers had to prepare their opinions assuming that the witnesses were Muslims of good reputation (‘adl). In 1803 more restrictions on the Islamic law of evidence were removed; legal deficiencies in the evidence were no longer to be taken into account:

If no penalty shall be provided by a Regulation, but the legal penalty for the crime, by Muhammadan Law, would, on complete conviction have been Hund [hadd] or Kissas [qisâs, or retaliation] and the Futwa shall adjudge discretionary punishment on the ground of some legal deficiency in the evidence, the law officer shall be required to state, in a second Futwa, what would have been the specific penalty, under the Muhammadan law, in case of legal conviction, and the Court shall sentence the prisoner accordingly.

The same regulation stipulated that convictions should be based on solid evidence, measured according to British standards, and not necessarily by the criteria of strict Islamic criminal law.

Proving criminal intent has always been problematic for Muslim jurists. Since, under Islamic law, witnesses cannot testify to a person’s mental state, the jurists held that criminal intent in cases of homicide could only be established by reference to the weapon or instrument of killing. Abū Ḥanīfa’s opinion, prevailing in the Ḥanafite school, was that only the use of sharp weapons or objects (capable of severing limbs) or fire would be indicative of intent. According to this opinion, killing with a stick or by administering poison, obviously, an irrational method, was charged (ṣuḥūf) and the victim was the perpetrator’s slave. Moreover, the law ordered the retaliation would proceed against a charge of voluntary bar for capital punishment.

With regard to the pleas, such as uncertainty were charged (ṣuḥūf) and the second instance stipulated that if, in the crime be liable for capital punishment, and the evidence was sufficient, it was general justice’ unless the conviction of the prisoner’s guilt, and shall sentence...

The same wording was charged (ṣuḥūf) and in the second instance...

22 ‘[...] the law officer shall declare what would have been the Futwa if the witnesses had been Muhammadans [...]’. Regulation 1793/9 §56, Colebrooke, Digest, vol. 1, 529.
24 Regulation 1803/53, §7.
25 Banerjee, Boc
26 Regulation 1
27 Regulation 1
28 Regulation 1
by administering poison could not be punished with death. For the British, this was, obviously, an irrational doctrine that stood in the way of adequately punishing murderers. As early as 1790 a regulation was passed instructing the courts to follow a less authoritative Hanafite opinion to the effect that the use of any weapon, instrument or method, which is fatal, is proof of criminal intent. Three years later, in 1793, these restrictions for proving criminal intent were also removed and the courts were directed to ‘regulate the punishment by the intention of the criminal, not by the manner or instrument of perpetration, except as evidence of the intent’.

Under Islamic law there are many pleas that would prevent capital punishment even if the defendant had been convicted of wilful homicide. These include circumstances not related to the seriousness of the crime, such as the fact that the victim was the perpetrator’s descendant, one of the perpetrator’s heirs, or the victim’s slave. Moreover, the fact that one of the accomplices in the killing is not liable for retaliation would prevent the others being sentenced to death. In 1799 most defences against a charge of voluntary manslaughter were eliminated. Henceforth, there was no bar for capital punishment on ‘any ground of personal distinction’.

With regard to the hadd crimes, a regulation issued in 1803 eliminated all special pleas, such as uncertainty as to the unlawfulness of the act with which the defendant was charged (shubha), and the strict rules of evidence. The pertinent section stipulated that if, in the absence of legislative provisions,

the crime be liable to a specific penalty [i.e. hadd penalty] by the Muhammadan law on full conviction, and the Futwa should award discretionary punishment in consequence of the conviction not being complete according to the Muhammadan law, the Court, if satisfied of the prisoner’s guilt, shall require a second Futwa specifying the specific penalty on full conviction, and shall sentence the prisoner according to such second Futwa.

The same would apply ‘if the specific penalty of the Muhammadan law be barred by some special exception not affecting the criminality of the offence and repugnant to general justice’. This meant that if someone was accused of theft, for which there was evidence, but not sufficient for a sentence to a fixed penalty, or if the evidence was sufficient, but the accused had stolen from his child, he would nevertheless, in the second instance, be sentenced to the fixed punishment for theft, which the British

25 Banetjee, Background, 72f.
26 Regulation 1793/9, §75, Colbrooke, Digest, vol. 1, 533.
27 Regulation 1799/8, §2-5, Colbrooke, Digest, vol. 1, 534.
would commute to a long term of imprisonment. The same regulation specified this principle in detail with regard to armed robbery.

Defining ta’zīr Offences in Order to Render Criminal Justice Less Arbitrary

With regard to offences punishable with ta’zīr, the law officers would state in their fatāwā the grounds for discretionary punishment but leave the measure of it to the court. The upper limit of discretionary punishment was thirty-nine lashes ('stripes') or seven years imprisonment in the Courts of Circuit and in the Nizāmat-i 'Adālat any punishment but death. The latter court was instructed ‘to provide for the case in the future’, i.e. to enact legislation covering the offence. The British were not comfortable with the notion of discretionary punishment. It offended their idea of the rule of law and they regarded it as arbitrary. Increasingly, legislation was issued to regulate this field and to restrict the discretion of the courts. One of the first examples of such legislation can be found in the regulation of 1797, which made the offence of perjury punishable by ta’zīr. The accused could be punished by public exposure, tashhīr, or by corporal punishment, or by both. In particular cases, the culprit’s forehead could be marked (branded). Ta’zīr made it possible to punish defendants for hadd crimes if the evidence was not sufficient for a conviction or if a conviction was impossible because of a plea not related to the seriousness of the offence. Most jurists, however, were of the opinion that in such a case the punishment should be less severe than the hadd penalty. In the aforementioned regulation of 1803 the distinction between ta’zīr and hadd penalties for the same offence was removed. In such cases the law officers were requested to give a second fatwā specifying the hadd penalty on full conviction and the court would then pass sentence accordingly. After 1803 the British issued more penal regulations specifying offences and their punishments in order to limit the powers of the courts to mete out punishment on the strength of ta’zīr.

Cruel Punishments

In the eighteenth and nineteenth centuries the English penal system was quite harsh. There were about two hundred capital offences and many others punishable by lifelong deportation or long terms of incarceration. Flogging was a common penalty.

However, mutilation as in the British notion of amputation was not normal, whereas taking away the hands or feet like amputation and the like and the like already existing punishment for treachery or imprisonment and had been also commuted into a

Introduction

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31 Regulation 1797/17, §2, Colborne, Digest, vol. 2, 882.
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The plural state in their assurance of it to the ashes ('stripes') or mat-i 'Adâlat any for the case in the British were not their idea of the station was issued to the first examples made the offence of y public exposure, cases, the culprit's punish defendants n or if a conviction f of the offence. Most punishment should be less 1803 the distinction removed. In such cases the hadd penalty on severely. After 1803 the punishments in the strength of the hadd penalty on severely. After 1803 the punishments in the strength of

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Introduction

Around 1900, when the British occupied Northern Nigeria, they intended to control the area through indirect rule. The main reason was financial; making use of the existing structures of authority and native government officials was much cheaper than setting up a special colonial administration, staffed with personnel from the motherland, as the British had done in large parts of India. They left the local emirs in their positions of power and exerted control through the existing administrative and judicial structures. The Native Courts Proclamation of 1900 was based on this principle. The British Resident (i.e. the provincial governor) could establish, with the consent of the emir (the local ruler), native courts with full jurisdiction in civil and criminal matters over the native population. The British used this power to confer official status to the courts of the emirs and the alkalis (Islamic judge, from the Arabic al-qâdî). The judges, who were to apply Mâlikî Islamic law, were appointed by the emirs, with the approval of the Residents. When in 1904 a Criminal Code based on English law was introduced in Northern Nigeria, shari'a criminal law was not abolished. Section 4 of this code stipulated:

No person shall be liable to be tried or punished in any court in Nigeria, other than a native tribunal, for an offence except under the express provisions of the Code or some other Ordinance or some law...

However, mutilation as a punishment was not accepted. There was a strange paradox in the British notion of penal law: punishing by taking a life was considered to be normal, whereas taking a limb was regarded as cruel and barbaric. In his study of early British-Indian criminal law, Fisch refers to these sentiments in the title Cheap Lives and Dear Limbs, and argues that the difference between English (and European) law and Islamic law in this respect is not related to ideas about penal law, but is rather the result of different cultural norms. The British did not want to enforce punishments like amputation and the first substantive criminal regulation of 1793 confirmed the already existing practice of commuting sentences awarding mutilation into imprisonment and hard labour 'of seven years for each limb'.

Death by stoning was also commuted into a prison sentence, and not into another form of death penalty.
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This section exempted the native courts from the principle that criminal sentences had to be founded on statute law and allowed them to try acts under Islamic law (qua native law), regardless of whether or not they were punishable under the Criminal Code. Therefore, they could sentence persons for illegal sexual intercourse (zina'), which is an offence under Islamic law, but not under the 1904 Criminal Code.

British Interference

British interference in Northern Nigeria differed from the way the British dealt with Islamic criminal law in India. In Nigeria the colonial administration kept its distance from native criminal justice and did not attempt to change it except with regard to the application of cruel punishments. Only in the 1940s did the British begin interfering with the sharī'a law of homicide.

From the beginning the native courts had full jurisdiction in criminal cases. However, certain categories of penal sentences (among them capital sentences) had to be approved by the Governor-General after review by the Resident. The British Resident had extensive powers to supervise and control the courts: he could enter and inspect the courts, suspend, reduce and modify sentences or order a rehearing of the trial before another native court or transfer it to a provincial court (i.e. a court applying English common law). The courts of the emirs and alkalis could award any type of punishment. However, sentences awarding amputation or death by stoning or other punishments that were deemed repugnant to humanity and natural justice (later reformulated as natural justice, equity and good conscience) would not be carried out. In an address given in the Northern town of Sokoto in 1902, the British governor-general Lord Lugard described his policy as follows:

"The alkalis and emirs will hold the Law Courts as of old, but bribes are forbidden, and mutilation and confinement of men in inhuman prisons are not lawful. Sentences of death will not be carried out without the consent of the Resident. Every person has the right to appeal to the Resident who will, however, endeavour to uphold the power of the Native Courts to deal with native cases according to the law and the custom of the country."

The application of Islamic law by the native courts in the North extended to the courts’ practice and procedure. The British authorities gave these courts much latitude. In a 1930 decision the West African Court of Appeal, the highest appeal court for the British colonies in West Africa, recognized the Mālikī qasāma procedure, on the stipulation that it was, however, an offense the victim’s male next of kin had found a certain confession, eyewitness, or a diitated the offense committed the offense and before the conviction. The presented the case back to the native court, and a qasāma was sworn who explained its possible meanings.

There is no doubt that the principle has been accepted in the judicial systems of the Islamic world, obviously incompatible with the practice of English law.

I have found that in the trial of an accused it is not permitted to use testimonies against the accused while attempting to force him to confess. The Supreme Court allowed to do so, ‘he can do so, evidence of conscience.’

The main reason for the abolition of the

34 Abdulai, History of Defunct
35 Guri vs. 'The In

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33 A.G. Karibi-Whyte, History and Sources of Nigerian Criminal Law (Ibadan 1993), 177.
procedure, on the strength of which a suspect against whom there is some evidence, which is, however, not sufficient for a conviction, can be sentenced to death if the victim's male next of kin swears fifty oaths against him. The Emir of Katsina's court had found a certain 'Abdallāh Kogi guilty of wilful homicide, although there was no confession, eyewitnesses, nor other legal evidence that could show that he had committed the offence. There was however circumstantial evidence (lawت) to support the conviction. The West African Court of Appeal did not uphold the sentence, but sent the case back and instructed the emir's court to look for the victim's relatives to swear a qasama oath, in order to make the sentence lawful. The Court of Appeal explained its position as follows:

There is no desire to interfere with decisions which are in accordance with native law, the principle has been that the verdict and sentence of a Native Court which is an integral part of our judicial system carried out in accordance with procedure enjoined by native law and not obviously inequitable will be accepted even though the procedure is widely different from the practice of English Criminal Courts.34

I have found only one decision in the field of criminal procedure in which a shar'a provision was declared to be in conflict with natural justice. This was the rule that in the trial of hadd crimes, if the plaintiff produces full evidence, the defendant is not permitted to put forward a defence (except producing evidence to impugn the testimonies against him). In this case a native court found a man guilty of homicide while attempting to rob and therefore sentenced him to death. On appeal, the Federal Supreme Court annulled the judgment on the ground that the appellant was not allowed to defend himself. This is because according to the Islamic law of evidence, an accused is not allowed to give evidence on his behalf, while under English law, he can do so, but in a witness box. The court held that this rule of procedure and evidence of Islamic law was repugnant to natural justice, equity and good conscience.35

The main impact of British interference with Islamic criminal justice was the abolition of mutilating corporal punishments. Caning and flogging remained lawful

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34 Abdullahi Kogi and others vs Katsina Native Authority (1930) 1-1 NLR 49 as quoted in Karibi-Whyte, History and Sources, 162-4. See also Abdulmalik Bappa Mahmud, A Brief History of Shari'ah in the Defunct Northern Nigeria (Jos 1988), 18.

punishments except for women, but sentences imposing these penalties had to be confirmed by the emir or the District Officer. Other forms of corporal punishment such as amputation were outlawed. The same applied to death by stoning. If a native court sentenced a person under Islamic law to amputation or death by stoning, or imposed the penalty of flogging on a woman, the British officials charged with the execution of sentences would routinely commute such sentences into imprisonment or a fine. As a result, the distinction between hadd offences and the corresponding non-hadd crimes to be punished by ta'zir became obliterated since now they all entailed imprisonment as a punishment. With regard to illicit sexual relations, there was not much difference in punishment for those who were muban and those who were not. The former would now be given a prison sentence (instead of death by stoning), whereas the latter would be sentenced to one hundred lashes and imprisonment if the accused was a man, and to imprisonment or a fine (in the place of the lashing) in the case of a woman.

The second area of interference was the law of homicide. It would seem that the British colonial judiciary wanted to impose the rules of English law with regard to the awarding of punishment in homicide cases. It is plausible that this was partly motivated by the symbolic value of capital punishment as a sign of sovereignty. The interference had its origins in an amendment to the Criminal Code. In 1933 the words ‘other than a native tribunal’ were deleted from article 4. These words were understood as giving the native courts the jurisdiction to prosecute under native law offences that were not included in the Criminal Code. Initially judicial practice did not change. The common interpretation of the phrase ‘some other Ordinance’ was that it referred to the Native Courts Ordinance, which expressly permitted the Native Courts to impose punishment under native law and custom, and thus under Islamic law. However, in 1947 the West African Court of Appeal gave a different interpretation of the new wording of article 4. The court of the emir of Gwandu had sentenced a man to death for having killed his wife’s lover. The accused had pleaded that the homicide had been justified because of the affair between his wife and the victim. The court of the emir could not apply Islamic law such a death sentence under the sentence provisions of the Criminal Code, that this could not be qualified as a capital of death by stoning in Islamic law.

This decision had the effect that the Native Courts Ordinance did not allow for specific provisions to impose the death penalty. In response, the colonial government passed article 4 of the Criminal Code, stipulated that no person should be tried or punished in any court in Nigeria, other than a native tribunal, for an offence except under the express provisions of the Code or some other Ordinance or some law...

36 'No person shall be liable to be tried or punished in any court in Nigeria, other than a native tribunal, for an offence except under the express provisions of the Code or some other Ordinance or some law...

37 Section 10 (2) of the Native Courts Ordinance of 1933 reads: ‘Native courts...may impose a fine or imprisonment...or may inflict any punishment authorized by native law or custom provided it does not involve mutilation or torture, and is not repugnant to natural justice and humanity.’

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39 Tsofo Gunna v. Gwandu Native Authority (1947) 12 WACA 141, discussed in Mahmud, A Brief

History of Shari'ah, 17f, and Muhammad Tabi’u, ‘Constraints in the Application of Islamic Law in

igeria’, in S. Khalid Rashid (ed.), Islamic Law in Nigeria: Application and Teaching (Lagos 1986),

5-85.
text of the *Native Courts' Ordinance*, punishment would be awarded according to English law, after an Islamic court had established the facts of the case and the accused's guilt. This meant that in such cases death sentences could be pronounced.

The application of Islamic criminal law by Islamic courts came to an end in 1960 when the new *Penal Code for the Northern Region 1959* came into force. Based on the 1861 Indian and the 1899 Sudanese Penal Code, this code was essentially an English code.

Conclusions

In the Introduction I said, referring to Mann and Roberts, that colonial law is an excellent window for studying the structures of colonialism. Comparing the implementation and development of criminal law in India and Northern Nigeria in the colonial period is a case in point. It reveals not only the influence of local factors on colonial structures, but also the evolution in British colonialism between the turn of the nineteenth and the turn of the twentieth centuries.

British India and Northern Nigeria were, to the best of my knowledge, the only colonies where Islamic criminal law continued to be applied. The main reason that this was done in India was the constitutional position of the EIC, which, until 1858, ruled not as a sovereign but in the name of the Mughal emperor. This meant that the British could not replace the legal system and had to maintain law and order through the enforcement of Islamic criminal law. It is, however, doubtful whether the British were prepared to introduce English penal law. By the end of the eighteenth century British colonialism was still in its infancy. Colonial administrators had no models that they could follow and tried to solve the problems with which they were confronted in pragmatic ways. As with regards to criminal law, they thought that Islamic law was most suited for the local population (officials of the EIC fell under a different jurisdiction). In addition, transplanting English penal law to India — had they wanted to — was complicated since there was no English penal code; English criminal law was a mixture of common law and a great number of statutes. The difficulties were compounded by the fact that criminal law usually was enforced by colonial administrators without proper legal training.40

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40 This was an important reason for the drafting and introduction of penal codes in other British colonies. See H.F. Morris, 'A History of The Adoption Of Codes Of Criminal Law And Procedure In British Colonial Africa, 1876–1935', *Journal of African Law* 3 (1973), 3.
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Shari'a and 'Natural Justice'

When, at the turn of the twentieth century, the British conquered Northern Nigeria, the situation was different. By that time British colonialism had developed and there were definite notions about how colonial rule ought to be exercised. One of these notions was that colonial domination could be based on existing pre-colonial power structures, by leaving local leaders in their positions of authority, under British supervision. This model, it was argued, was cost effective since only a handful of colonial administrators were needed to control an entire population. One of the advocates of this model, Lord Lugard (1858–1945), became the first High Commissioner of Northern Nigeria and could put his ideas into practice. Since the authority of the local leaders was partly founded on their judicial powers, these were preserved, but placed under British control. This meant that Islamic law, including Islamic criminal law, continued to be applied.

The way Islamic criminal law was applied was related to the different modes of domination. In India a semblance of Islamic legitimacy was upheld by the presence of the Muslim law officers in the courts, whose task it was to issue fatāwā in each case in order to expound the law to the British judges. The latter would pass judgement accordingly, unless they regarded the applicable rule of Islamic law as repugnant to natural justice. Through statutes and the introduction of European legal principles, Islamic criminal law was gradually modified. In a period of forty-five years, from 1772 until 1817, Indian criminal law lost its Islamic character, in the sense that most specific shari‘a traits were removed and it became very similar to European criminal law. In Nigeria, in accordance with the model of indirect rule, Islamic, indigenous courts would hear criminal cases and pronounce sentence. The colonial authorities remained aloof, but exercised a certain amount of control because they had to approve certain sentences before these could be carried out. If they found such sentences repugnant to natural justice, they would commute them. Moreover, the sentences of the native courts could be appealed to colonial courts of appeal. Although there was a marked difference between British India and Nigeria in the degree of interference with Islamic criminal law, there were also similarities. The most important one here is the fact that Islamic courts were incorporated into a hierarchical court system with clearly defined jurisdictions and procedures and that the law was standardized by publishing the decisions of the higher courts and, in India but not in Nigeria, by statute law and translations of authoritative works of Islamic law.

In an official report published in India in 1813 Islamic criminal law was characterized not only as barbaric, cruel and savage, but also as inadequate, defective
and absurd. These judgements clearly illustrate British concerns and assumptions and explain the development of British colonial legal policies in the field of criminal law.

The perceived inadequacy, defectiveness and absurdity of Islamic criminal law motivated most reforms of Indian criminal law during the first decades of colonial domination. The British were baffled by the inconsistencies in Islamic criminal law. On the one hand there were the strict rules regarding retaliation for homicide and wounding and the hadd crimes, according to which many defendants could not be adequately punished for reasons not related to the seriousness of the offences they had committed. But on the other hand there was ta'zir and sivâsa, the extensive discretionary powers of the courts and executive officials to mete out severe punishment, including death, on the basis of summary proceedings.

The British found this absurd. Since sivâsa and ta'zir offended their notion of law, they did not want to impose punishment on the strength of sivâsa and set out to define ta'zir offences and their punishment in order to close the door on arbitrary justice. However, left with the strict rules of retaliation and the hadd offences, they found that these were not adequate for maintaining law and order. It was difficult to get convictions because there were too many loopholes in the law. Moreover, in cases of homicide and bodily harm the government had no control over the prosecution of the perpetrator. Criminal law reform introduced in India during the first decades of colonial rule was aimed at transforming strict shari`a criminal law (i.e. the law of retaliation and hadd) into a type of European criminal law, based on public justice and equal treatment and eliminating the effect of accidental circumstances not related to the offence itself. In the process shari`a criminal law became much harsher as it became easier for the courts to pronounce death sentences. At the same time, statute law was introduced to define specific ta'zir offences and specify their penalties. This, of course, enhanced the control of the state over the implementation of criminal law and curbed the arbitrariness of the courts, thus satisfying British ideas about the rule of law.

In Nigeria, no such legal policy was pursued. In conformity with the notion of indirect rule, keeping the peace through the implementation of criminal law was first and foremost the responsibility of the indigenous authorities and the colonial administration only interfered where Islamic criminal justice was regarded as violating ‘natural justice’. Beyond the field of punishment itself, such interference...
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hardly occurred. However, during the last decades of colonial rule, there were
attempts, partly successful, to restrict or modify the Islamic law of homicide. As a
result of new legislation and its interpretation by the colonial court of appeal, the role
of Islamic law with regard to offences defined in the 1904 Criminal Code for
Northern Nigeria was relegated to establishing the defendant’s guilt, whereas the
punishment was to be awarded according to the Criminal Code. In practice this had
consequences only for the law of homicide and, more specifically, the pronouncing of
capital sentences. It would seem that the colonial administration wanted to assert its
sovereignty and capital punishment is one of the most powerful symbols for doing so.
The result was a juristic monster that caused a great deal of confusion lasting until the
new Penal Code for Northern Nigeria came into force in 1960 and put an end to the
implementation of Islamic criminal law.

It was a common and widespread assumption that Islamic criminal law was
barbaric and cruel. Many of the reforms in India and Nigeria were intended to
'civilize' Islamic criminal law by abolishing cruel penalties. As we have seen, cruel
penalties were outlawed both in India and in Nigeria in the earliest stages of colonial
rule. As I explained in the Introduction, this was not directly necessary for the
preservation of colonial power relations. Nevertheless such reforms were of
importance for colonial domination because they created acceptance of colonial rule
amongst the assimilated elites of the colonized peoples. In addition, since one of the
justifications of colonialism was its civilizing mission, tolerating practices that were
widely condemned as barbaric would have had an adverse impact on its support
amongst the British themselves, both at home and in the colonies.