

## ROLE OF RELIGIOUS SOURCES IN FORMING THE MUSLIM CRIMINAL LAW UNDER MODERN CONDITIONS

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### ABSTRACT

The topicality of the problem under study is conditioned by the need to determine the role and position of the religious sources which participated in forming and developing of the modern Islamic criminal law. The objective of the research is to disclose the significance of the religious sources in the development of Muslim criminal law under modern conditions, basing on the Russian and foreign literature and on the analysis of the sources. The leading approach to research is comparative-legal method, which enables to comprehensively study the features of the source of the modern Muslim law. The research revealed such features of the Muslim law as close interconnection of the legal and religious norms determining the institutions of crime and punishment on the modern Muslim countries.

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The Quran and Sunnah are important sources, having both juridical and religious character, which influenced the development of criminal law in many countries of the Muslim world. Democracy is recognized in many Islamic states, where the ancient religious sources coexist with modern constitutions and criminal codes modeled by the European legislation patterns. The research materials will be useful for the further studies of the Islamic criminal law, as well as for the educational process at law universities.

**Key words:** Islamic law, Muslim countries, the Qur'an, Sunnah, religion.

## INTRODUCTION

The fundamental religious sources of the Islamic criminal law are the Quran, Sunnah, ijma and kiyas; however, the criminal law of some Islamic states was also greatly influenced by such sources as religious tradition and doctrine. The Quran used to be, and is, the primary and paramount source of law, combining the religious dogmas, juridical regulations, moral and ethical norms. For a God-fearing Muslim, the slightest deviation from the Quran injunctions is a terrible sin, as it is not the "Earthly" punishment but a divine retribution awaiting one after death that the true Muslim fears. Because of the serious attitude of the most Muslims to the content of the Quran, the Muslim jurists for a long time had no need to create a systematized criminal law, as acting against Allah's will is a crime per se. However, in the course of time, sunnah, kiyas and ijma acquired the significance of the sources of law. Besides, in the 20<sup>th</sup> – 21<sup>st</sup> centuries, the countries of Muslim law started to adopt codified legal acts which regulated the criminal-legal relations.

## METHODS

The methodological basis of the article is a set of methods and technique of scientific cognition, inherent in legal studies. In particular, we used comparative-legal, dialectic, structural-functional, and formal-logic methods.

## RESULTS

The analysis of the religious sources confirmed the idea that the Muslim law is a significant phenomenon of the modern world. However, like other legal systems of the world, the Muslim law was not recognized immediately. For quite a long time, there was a lack of the necessary research devoted to the sphere of crime and punishment in the criminal law of the Muslim countries. The religious sources of the Muslim criminal law confirm that in the

Islamic countries the legal and the religious principles are so closely intertwined that it is impossible to separate them from each other.

## DISCUSSION

A source of law is a means of establishing and full-fledged expression of legal norms in order to attribute significance to them. The sources of law can be viewed from various standpoints. Thus, in material sense, a source of law is a result of developing of social relations. In ideal sense, a source of law is an embodiment of legal consciousness. In juridical sense, speaking of sources of law we imply various forms of legal norms expression.

The main sources of criminal law in foreign countries are Constitutions, codified legal acts, special criminal laws and bylaws, judicial practice, doctrine, judicial precedent, and legal tradition<sup>1</sup>. Actually, there are multiple sources of criminal law; however, each state gives priority to specific sources. This is, first of all, because each state formed and developed under different external and internal circumstances and factors. In the modern world, the states belonging to different legal systems, prioritize different sources, thus affirming their allegiance to the historical past. From the legal point of view, the Islamic law is characterized by a large variety of the source base. The leading researchers of this sphere highlight two arrays of norms within the Muslim law<sup>2</sup>. The first array is represented by injunctions of the Quran and Sunnah which have legal meaning, including the narrations (Hadith) about the sayings, deeds and silence of the Prophet Muhammad.

The second array of the interconnected provisions is comprised of the norms elaborated and formulated by the Muslim legal doctrine on the basis of peculiar sources, which, nevertheless, are considered to be rational, – the unanimous opinion of the authoritative legal scholars (ijma), and deductions made by analogy (kiyas)<sup>3</sup>.

Terminologically, the expression “source of law” has been known since long. One can say that a source is a force which creates law. Most often, this force is the power of the state, which is obliged to react to the needs of every person and the society as a whole. Within the frameworks of the forming social relations, the necessary legal decisions are made.

The Muslim law is a specific integrity, a complex of legal norms united by both moral-ethical, religious and doctrinal principles<sup>4</sup>. In the modern world, a number of countries belong to the

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<sup>1</sup>Criminal law of foreign countries. Ed. by N.E.Krylova. In 3 vol., Moscow, Yurayt, 2016

<sup>2</sup>Syukiyaynen L.R. Muslim law: issues of theory and practice. Moscow: Nauka, 1986. P. 66.

<sup>3</sup>Artemov V.Yu. Sources and doctrinal schools of the Muslim law // Journal of Russian Law, 2007, No. 3, p. 32

<sup>4</sup>Rasskazov L.P., Kangezov M.R. Muslim law as a variety of religious law // Society and law, 2010, No. 1, pp. 24-26

Islamic legal system where the religious, legal, and moral norms are closely interconnected, which attaches special status to them and requires specific approach to the study of the established legal system<sup>5</sup>. These close interrelations in the Islamic law have long been attracting the attention of researchers. L.R. Syukiyaynen aptly remarked about the divine nature and close interconnection between juridical injunctions and the Muslim dogmas<sup>6</sup>. Muhammad Yusuf Musa and Subkhi Makhmasani notify that for the faithful Muslims law is equipotent to the divine revelation<sup>7</sup>, that is why it is not at all surprising that one cannot distinguish between religious norms, legal norms, and cult regulations.

In the Islamic law, the role of such religious source as the Quran is indisputable great. The Quran (Arabic *الْقُرْآن* – al-Quran, translated as “edification”, “reading aloud”) is the sacred book for all Muslims. Substantially, it represents parables, prophecies, and prayers left to the Muslims by the Prophet Muhammad. The Quran is the basis of Islam; it comprises moral injunctions, customs, traditions, legal conceptions, instructions about the rules of conduct and the moral features of a Muslim faithful to Allah. Probably, in the whole cultural heritage one can find no other such voluminous and, at the same time, multifaceted source. It should be noted that the value of the Quran as a source of law, culture, literature, and art is not accidentally continuing to arise interest in modern researchers<sup>8</sup>. The Quran is recognized as the first and the most ancient monument of the Arabic prose, which reflects the stages of Muhammad’s personality formation, his establishing as a teacher and a person of a new epoch. The Quran promoted the gradual development of a common literature language in the Arabic peoples. One of the most prominent researchers of the content and meaning features of the Quran, Jalāl al-Dīn al-Suyūfī asserts what the Quran is for the Muslims:

– a divine instruction not only for the Muslims but for the whole humanity, as is read in the Quran: “We sent thee not, but as a Mercy for all creatures”(surah 21, ayah 107)<sup>9</sup>;

– the eternal word of the God, which is an evidence of the prophecy, as it confirmed the ultimate and the perfect divine law (the Quran says that Muhammad is the last prophet, which adds value to his revelations);

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<sup>5</sup>Bykova E.V. Islam, Muslim law and universal values // International public and private law. 2010, No. 4, pp. 21-25

<sup>6</sup>Syukiyaynen L.R. Muslim law: issues of theory and practice. Moscow: Nauka, 1986. p. 15.

<sup>7</sup>Muhammad Yusuf Musa. Al-Islam wakhajat al-insanilayhi. Cairo, 1961. p. 192; Subkhi Makhmasani. Philosophy of law in Islam. Beirut, 1952. p. 15

<sup>8</sup>Petrovskiy A.V. Muslim criminal law and features of criminal legislation of Muslim states. Krasnodar, 2013. p. 8; Elayan G.F. Bases of the Muslim criminal law. Makhachkala, 2002, p. 9

<sup>9</sup>Abū al-Faḍl ‘Abd al-Rahmān ibn Abī Bakr ibn Muḥammad Jalāl al-Dīn al-Khuḍayrī al-Suyūfī. *The Perfect Guide to the Sciences of the Qur’an*. In 2 parts. Moscow: Muravey, 2000. p. 15. Translated by Abdullah Yusuf Ali. <https://carm.org/quran-21>

– the Quran injunctions, alongside with the established Muslim tradition and a number of other sources, in the Islamic countries serve as a source of law, notwithstanding the religious principles, mainly contained in the Quran.

M.E. Turgumbaev states that, despite the indisputability of referring the Quran to the primary sources of the Muslim law, including criminal law, the legal provision contained in it are, by their content, insufficient for the full-fledged regulation of all relations between the Muslims<sup>10</sup>.

Criminal liability is stipulated in the Quran, but only for certain crimes. For example, in the Quranic surahs and ayahs one can see the norms specifying punishment for committing theft (surah 5 “The Table”, ayah 38), adultery (surah 24 “The Light”, ayah 2). The Quran allows the use of the talion law for encroachment to life and health of a person (surah 24 “The Light”, surah 2 “The Cow”, ayah 178; surah 5 “The Table”, ayah 45)<sup>11</sup>.

Special attention should be paid to the Sunnah, which in the Muslim world serves as the second important source of religion and law. Translated from Arabic, Sunnah is an example, practice, custom, tradition; that is why conceptually Sunnah is filled with the statements by the Prophet Muhammad, descriptions of his deeds and unpronounced approvals. The legal norms of the Sunnah are of casual origin; however, unlike in the Quran, they are more specific and more practically applicable. The Sunnah acquired its authoritative status because it is filled with the statements and descriptions of the deeds of the Prophet Muhammad, who, according to Islam, was the bearer of Allah’s will, the selected prophet, through whom the Almighty send the Quran to the Muslims.

Special attention was paid, first of all, to the peculiar form of the hadith. A true hadith consisted of two parts – the text containing a narration about a deed, an approval or a statement, and a base enumerating the narrators of the hadith up to the Prophet Muhammad<sup>12</sup>. Below is the example of a hadith containing a criminal-legal norm:

“... a woman ...stole a blanket from the house of Allah’s envoy and people started to say that the Allah’s envoy was going to cut off her hand; ...and we came to the prophet to speak about it and said:

‘We will buy her out for 40 ounces’. He answered: ‘To be cleansed of her sins would

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<sup>10</sup> Turgumbaev M.E. Institution of crime and punishment in the Muslim law: PhD thesis. Kazakhstan, Almaty, 2014. p. 28.

<sup>11</sup>The Quran (interpretation of meanings and commentaries by Iman Valeriya Porokhova), Moscow, 2002, pp. 139, 375

<sup>12</sup>Khalikov A.G. Hadith as a source of the Muslim criminal law: abstract of PhD (Law) thesis. Dushanbe, 1995, p. 10

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be better for her”<sup>13</sup>.

The constant need to study and research the hadith gave birth to a separate religious-legal doctrine in Muslim life. Within the frameworks of this doctrine, the muhaddis (persons who researched hadith) elaborated a mechanism to distinguish a true hadith from a false one. That is, the muhaddis, first of all, estimated the reliability and decency of the hadith transmitters, critically analyzed and thoroughly examined their statements. A reliable hadith transmitter is a faithful Muslim with good reputation. In time, special reference books appeared, containing biographical data of the Muhammad’s co-workers, followers and disciples, as well as several generations of hadith transmitters. Such reference books enabled to determine the reliability and reputation of a person, hence, to check the authenticity of the hadith. As a rule, the muhaddis estimated the revealed facts themselves, and made appropriate conclusions.

Today, the Sunnah provisions complement the Quran, or explain its instructions. Correlation between the Quran and Sunnah can be traced in three aspects:

1) The Quran and Sunnah provisions may coincide, then they confirm each other. In this context, the problem may be solved easily – there is a clear instruction in the Quran and confirming evidence in Sunnah.

2) The Sunnah instructions may specify the Quran provisions, i.e., clarify, detail, or interpret their meaning.

3) The Sunnah may contain new provisions lacking in the Quran, which, nevertheless, does not make the Sunnah hadith doubtful or invalid.

While the Muslim law is flexible and elastic by its nature, especially as refers to a doctrine, it is far from being such in relation to the legal tradition. In Islam, tradition is fundamental; deviations from it may violate the sacred commandments of the Quran, especially in those countries where shariah is recognized as the main source of law. In some Eastern countries tradition exists as a moral base, which is prioritized in some cases only. For example, the legal system in Turkey, though it is Muslim country, was essentially modernized under the influence of Western legal systems<sup>14</sup>. That is why, tradition in Turkey is used for reconciliation of the parties within the pre-court dispute settlement; it has a priority over state laws if the conflict can be solved amicably. However, other Muslim countries still cannot rid themselves of the influence of the existing customs. For example, the majority of the Eastern countries, despite the cruel and fundamental character of the Quran, have declared the value

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<sup>13</sup>Cited by: Artemov V.Yu. Basic institutions of the Muslim criminal law: PhD (Law) thesis. Moscow, 2008. p. 42.

<sup>14</sup>Leger Raymond. Great legal systems of the modernity: comparative-legal approach. 3<sup>rd</sup> ed., Transl. from French. Moscow, 2010, p. 158

of human rights in their Constitutions<sup>15</sup>. For instance, Art.8 of the Constitution of the Republic of Lebanon<sup>16</sup> stipulates that no one can be punished without appropriate evidence and grounds, nor arrested or imprisoned. Despite that, the mediaeval traditions and customs of the Muslim countries made it possible to amputate a hand of a caught thief, immediately according to the actual fact of the committed crime. Execution of this punishment did not imply any investigation – the community instead of a court passed a sentence and instantaneously executed it. Partly, such cases still occur even in those countries which declared themselves as democratic. In them, the legal equity of all citizens is only formal<sup>17</sup>.

At the same time, in Jordan, committing a criminal offence implies imposing the following punishments upon the criminal – capital punishment, hard labor, imprisonment. Committing law breaches incurs the following kinds of punishment – arrest, fine or bail, while infringements may entail a short-term arrest or a small fine. Such approach shows that the Islamic countries which borrowed the French legal system have a three-dimensional system of punishment, grouped not by the types of crimes but by the types of the committed deeds. Accordingly, different penalty measures are imposed on criminals and offenders.

The criminal legislation of Lebanon and Syria take into account two main criteria when imposing punishment:

- a) gravity of the committed law breach;
- b) character of the deed.

Thus, according to Art. 37-40 of the Criminal Code of the Republic of Lebanon, the gravity of punishment depends on the category of crimes, which are divided into general criminal and political crimes, law breaches and offences. A similar system of punishment is stipulated in the Criminal Code of Syria of 1949.

Besides, the Syrian and Lebanese criminal legislations contain an indication on the possibility to impose additional punishments, among them: degradation, publishing the sentence, deprivation of the civil rights. Additional punishments belong to the category of secondary punishments, which are mandatory or permissible<sup>18</sup>.

The Criminal Code of Egypt also stipulates the accessory and additional punishments. Implementation of accessory punishments is mandatory; they are not included into the

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<sup>15</sup>Sapronova M.A. Political system and constitutions of Arabic countries. Moscow, 2003

<sup>16</sup>Constitution of the Republic of Lebanon of 23 May 1926, with amendments of 21 September 1990. Access mode: <http://worldconstitutions.ru/?p=90>

<sup>17</sup>Kibalnik A.G. Crime and punishment in the doctrine of the Muslim criminal law // Criminal law: scientific-popular Journal / “Business school ‘Intel-servis’ Close Corporation. Moscow, 2007, No. 1, pp. 28-29

<sup>18</sup>Muhammed-al-Fadel. General principles of criminal law. Damask, 1978. p. 377.

sentence but aimed at ensuring the execution of the main punishment and enhancing its efficiency<sup>19</sup>. In the Criminal Code of Oman (Art. 39), the main punishments are divided into educative, defamatory and offensive. The offensive punishments are capital punishment, temporary imprisonment or imprisonment for life. Defamatory punishments are short-term arrest or fine<sup>20</sup>.

In some Islamic states – Morocco, Algeria, Jordan – there are categories of safety measures which can be established and imposed instead of the main punishments. Personal safety measures are hospitalization into a mental institution, hospitalization of alcoholics and drug addicts into specialized clinics, temporary suspension of the activity of a juridical person. Real safety measures are confiscation of property, temporary or ultimate termination of activity of an organization, bail.

Some Islamic scholars mark the fact that the Muslim law consists of two parts – general principles and specific decision on certain cases (a kind of a basis and a superstructure). That is why it is not the rules of conduct that serve as the foundation, but the principles which belong to the most stable part of the Muslim law, being closely connected with social relations and public life<sup>21</sup>.

The most widely spread and significant are such principles as “everything which is allowed can be legally limited”, “the existing norm follows the destiny of its foundation”, “norms may change with time, location and conditions”. That is why, many Muslim countries managed to reject polygamy, to solve the problems of property limitation, and to eliminate Muslim courts. Law making in these countries is evaluated from the viewpoint of the general norms – principles of the Muslim law. We face the gradual but irreversible narrowing of the domain of the Muslim law and rupture of actual relations with the specific shariah laws. That is why, special attention is paid not to the legally consolidated norms but to the practical applicability of the general concepts. Actually, the principles declared by the Muslim law are relevant not only for the Eastern countries but for all countries of the world, as they have abstract character. Their practical implementation depends on multiple factors; in the Eastern countries these factors are religious ideology, traditions, the prevalent foundations of public life, psychological climate among the Muslims.

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<sup>19</sup>Egypt: PenalCode 1937 <http://www.refworld.org/docid/3f827fc44.html> (access date 10.09.17).

<sup>20</sup>Nisam Taufik al-Majali. Criminal law of Jordan – general part. Amman, 2005. p. 462.

<sup>21</sup>Burhān al-Dīn Abu'l-Ḥasan ‘Alī bin Abī Bakr bin ‘Abd al-Jalīl al-Farghānī al-Marghīnānī. The Hedaya: Commentary on the Islamic Laws: In 2 parts, 4 vol. / Transl. from English ed. N.I. Grodekov. Moscow: Wolters Kluwer, 2008. Part 1. Vol. 1–2. p. 80.



## CONCLUSION

Thus, Islamic law is a specific integrity, a complex of legal norms united by both moral-ethical, religious and doctrinal principles. In the modern world, a number of countries belong to the Islamic legal system where the religious, legal, and moral norms are closely interconnected, which attaches special status to them and requires specific approach to the study of the formed legal system. These close interrelations in the Islamic law have long been attracting the attention of researchers. However, when forming their criminal legislation and punishment system, the Muslim countries not only have been taking the Shariah injunctions into account, but also actively employed the foreign practice of criminal laws adoption and elaboration.

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