

# Fair Trial Guarantees in Criminal Proceedings Under Islamic, Afghan Constitutional and International Law

*Silvia Tellenbach\**

## I. Introduction

Speaking about fair trial guarantees in criminal proceedings in Islamic law, Afghan Constitutional law and international law is an attempt to compare three very different topics: International law, consisting of a limited number of international conventions of a more or less precise wording, international custom as far as accepted as law, general principles of law recognized by civilized nations and the interpretation of these sources by court decisions and international scholarly discussion; the Afghan Constitution as a law that has been enacted recently; and Islamic law that has been developed in the course of centuries, based on the Quran, the *sunna* (the tradition about what the Prophet said or did or of his tacit approval of something said or done in his presence)<sup>1</sup>, *idjma'* (consensus of the jurists), and *qi-yas* (analogy with Quran and *sunna* drawn by jurists), or in the opinion of the Shi'is *'aql* (reason), as its chief sources complemented by further supplementary sources. According to a word of the prophet, the diversity of opinions is a divine mercy and we must never forget that Islamic scholars may take different views on the same issue – all based on Islamic law, a fact that can be helpful in the development of law, e.g. by following the opinion that seems to be most appropriate to solve a particular problem.

As to criminal law the Quran, the most important source of law does not contain more than about 30 verses concerning this topic and almost all of them refer to substantive criminal law, not to criminal procedure. Also in the *sunna*, there are only few traditions that could be regarded as statements about criminal proceedings.

As it is known, Islamic criminal law consists of three categories of crimes. Two of them, the *hadd* and *qisas* crimes<sup>2</sup> were regarded as prescribed by God whereas

---

\* Dr. phil., Head of the section Turkey/Iran/Arab States at the Max Planck Institute for Foreign and International Criminal Law in Freiburg. – This paper is the revised version of a lecture given at the International Conference on “The Shari’a in the Afghan Constitution and Its Implication for the Legal Order: Constitutional and Administrative Law, Governmental System, Administration of Justice” held in the Max Planck Institute for Comparative Public Law and International Law Heidelberg, 20-21 February 2004, and retains the lecture style of that presentation.

<sup>1</sup> EI (2), s.v. “hadith” (J. R o b s o n).

<sup>2</sup> *Hadd* crimes were regarded as crimes against God; they comprised adultery, launching a false charge against a chaste person to have committed adultery, drinking alcohol, theft highway robbery, and according to part of the jurists unjustified and violent disobedience to the Muslim ruler in the Is-

the crimes of the third group, the *ta'zir* crimes, were left to the discretion of the ruler who was, however, bound to the general principles of Islam. Whereas the provisions regarding crimes of *hadd* and *qisas* were discussed again and again by the scholars of Islamic law, *ta'zir* crimes as well as most parts of criminal procedure were regarded as a matter of administration that was left to the authorities and therefore relatively seldom discussed by the jurists. The authorities were obliged to act according to the general principles of Islamic law but the way this was done has always been different according to the exigencies of space and time. That means that Islamic law in the field of criminal proceedings has to fulfil the task of helping to implement the provisions of criminal law but it is very flexible in its means. Thus if we try to compare fair trial guarantees in the Afghan Constitution and international law, namely the International Covenant on Civil and Political Rights, with fair trial guarantees in Islamic law we have to proceed very carefully and to limit the comparison to some fundamental principles and of course, due to the limit of time, we can only deal with the topic in brevity. The question we have to ask is not so much whether a certain provision is required by Islamic law but whether it is contrary to Islam thus being in accordance with the wording of art. 3 of the Afghan constitution that runs: "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam."

## II. Elements of Fair Trial

### The Principle of Legality

To start with the principle of legality, the principle of "*nullum crimen nulla poena sine lege*" means that nobody can be punished without the existence of a criminal law in force at the time when the act was committed. This law must foresee an exact description of the act that is to be punished and of the punishments that can be applied. This principle protects against the abuse of power of judges and guarantees the security of the individuals giving an exact idea of what is permitted or forbidden. In Western continental law, it was fully developed in the Age of Enlightenment when the rights of the individual became the basis of Western law. It may be true that common law countries follow the English traditions in which statutory law is not as important as in continental law but also here the judge is bound to the judicial precedents from which follows that the citizen knows what is forbidden.<sup>3</sup> In the International Covenant on Civil and Political

---

lamic state and apostasy. *Qisas* crimes violated the right of men only and comprised manslaughter and bodily injury, cf. Gamil Muhammed Hussein, Basic Guarantees in the Islamic Criminal Justice System, in: Muhammed Abdel Haleem/Adel Omar Sherif/Kate Daniels (eds.), *Criminal Justice in Islam – Judicial Procedure in the Shari'a*, London 2003, 57-96, (37 et seq.)

<sup>3</sup> Cf. Taymour Kamel, The principle of Legality and its Application in Islamic Criminal Justice, in: Mahmoud Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, London/Rome/New York 1982, 149-169, (149 et seq.).

Rights the principle of legality is laid down in art. 15. In Islamic criminal law there is no word like “*nulla poena sine lege*”, that could be almost called a slogan, but there are many of the elements that are implied by the principle of legality. The Quran contains different verses that are regarded as a basis for the principle of legality and the principle of non-retroactivity that is closely connected or almost a component of it: “We never punish until we have sent a messenger” (Surat Bani Israil XVII, 15). “And never did thy lord destroy the townships. He had raised up in their mother(town) a messenger reciting unto them our revelations” (Surat Al-Qasas XXVIII, 59). “Allah forgiveth whatever ... may have happened in the past, but whoso relapseth, Allah will take retribution from him” (Surat al-Ma’ida V, 95). The central meaning of all these verses is that there is no punishment without a preexisting law criminalizing such conduct.<sup>4</sup>

In Islamic criminal law it is clear that the *hadd* crimes and the *qisas* crimes had been exactly described by the divine lawgiver. For the crimes of *hadd* there are also fixed legal penalties whereas the punishments for *qisas* crimes are on the one hand exactly provided for but on the other hand the victim and his family are free to negotiate a compensation instead of the retributive punishment. The third category of crimes, the group of *ta’zir* crimes, which comprises all the offenses for which the *Shari’a* does not prescribe a penalty, seems to be more problematic. Originally a *ta’zir* crime meant a behaviour that was regarded as a violation of Islamic principles in a way that the ruler (and his delegates) decided to punish it. So the judge had a very broad discretion in what he was going to punish and how. Muslim authors discussing the *ta’zir* crimes in relation to the principle of legality use a number of arguments drawn from the Quran. There is one verse that is quoted very often: “And let there be from you a nation who invite to goodness and enjoin right conduct and forbid indecency” (Surat Al Imran III, 104).<sup>5</sup> There are some authors who argue that this verse is already sufficient to prove the existence of the principle of legality for *ta’zir* crimes as well, but it seems to be doubtful whether this argument is sufficient. It is a general principle which confers on the Islamic community the task of watching over the life of its members and giving them a guideline for their own life. The Quran and the other sources, however, do not give a comprehensive list of what is good and what is blameworthy. There is no doubt that the Islamic judge does not have an unlimited discretion to create new crimes or to inflict new punishments. But this general limitation is much broader than the principle of legality which requires an exact definition of the acts that are to be punished under the circumstances of a certain time and a certain place.

<sup>4</sup> Muhammad Salim al-‘Awwa, The basis of Islamic Penal Legislation, in: Mahmoud Cherif Bassiouni (ed.), (note 3), 149-169, (134); Abdal-Madjid Mahmud al-Matlub, Al- asl bara’at al-muttaham, in: Al-Muttaham wa-huququhu fi ash-shari’a al-islamiya, Al-Markaz al-‘arabi lid-dirasat al-amniya wat-tadrib bi r-Riyadh (ed.), vol. I, 1986, 201-242; Kamel, *supra* note 3, 158 et seq.; Hussein, *supra* note 2, 36 et seq.; Mohammad Hashim Kamali, The Right to Personal Safety (Haqq al-Amn) and the Principle of Legality in Islamic Shari’a, in: Muhammad Abdel Haleem/Adel Omar Sherif/Kate Daniels (eds.), (note 2), 57-96, (69 et seq.).

<sup>5</sup> Kamel, *supra* note 3, 150.

On the other hand the category of *ta'zir* crimes does not prohibit a detailed description of the acts that are forbidden. After the Islamic revolution in Iran there was a great discussion about the question whether parliament should enact a special law containing all the crimes that are to be regarded as *ta'zir* crimes or whether the task of finding the right description of a crime and meting out an appropriate punishment should be left to the discretion of the judge. The discussion was brought to an end by Ayatollah Khomeiny himself who ordered the parliament to enact a special law, namely the *ta'zir* law of 1983.<sup>6</sup>

Today the possibility to lay down *ta'zir* crimes in a law that gives precise descriptions of the acts that are to be punished and of the penalty that can or must be imposed is accepted by most of the Islamic jurists as being in line with the principles of the *Shari'a* and such a code can be as detailed and exact as every law that is enacted in countries which recognize the principle of legality in the sense of continental law.

In Afghan law the *nulla poena sine lege* principle is contained in art. 27 para. 1 of the Constitution: "No act is considered a crime, unless determined by a law adopted prior to the date the offense is committed", and para. 3: "No person can be punished ... but in conformity with a law adopted before the date of the offence". In this connection, however, art. 130 para. 2 should be mentioned. It runs: "Where there is no provision in the constitution or other laws regarding ruling on an issue, the court's decisions shall be within the limits of this constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible way." This is a provision which is necessary for civil law cases but it is not made for criminal matters. A similar provision in the Iranian constitution (art. 167) led to the discussion of whether the judge could punish persons because of a behavior that was forbidden according to Islamic law but not according to Iranian statutory law. The wording of the Afghan Constitution is slightly more in favour of the general principles of the constitution and therefore there is hope that such a discussion will not arise in Afghanistan.

## The Principle of Guilt

The principle of guilt is one of the most important elements of the Islamic and the Western law systems and in both systems guilt is strictly personal. But it is remarkable that Islamic law, based on the Quranic verse: "No bearer of burdens can bear the burden of another" (Surat Bani Israil XVII, 15) and the Afghan constitution lay particular stress on this fact. Art. 26 of the Afghan constitution says that crime is a personal action and the prosecution, arrest and detention of an accused and the execution of penalty cannot affect another person. The reason for the stress laid on this principle by the Islamic law may also be found in the situation at the time of the Prophet, when retaliation was not only possible against the perpetrator

<sup>6</sup> Husain Mihrpur, Sarguzasht-i ta'zirat, Madjalla-yi kanun-i wukala 148/149 (1989), 13-66.

of the foregoing crime but against every member of his family. Prophet Muhammad brought a restriction of this barbaric way of acting by limiting the persons who could be held responsible on the persons who had themselves committed the former crime.<sup>7</sup> And also the wording of art. V *lit. e* of the Universal Islamic Declaration of Human Rights of 1981 may be revealing in this regard: “Every individual is responsible for his actions. Responsibility for a crime cannot be vicariously extended to other members of his family or group, who are not otherwise directly or indirectly involved in the commission of the crime in question.”<sup>8</sup>

### The Presumption of Innocence

The presumption of innocence is one of the fundamental principles in western and in Islamic criminal law. In art. 14 (2) ICCPR it is defined in the following words: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” In Islam man is regarded as originally innocent and pure. Therefore every person is presumed to act righteously and honestly until the contrary is proved.<sup>9</sup> This conception is based on the so-called *istishab* that means the presumption in the law of evidence that a state of affairs known to have existed in the past continues to exist until a change is proved. This conception may explain the wording of art. 25 of the Afghan Constitution para. 1 “innocence is the original state”, followed by the sentence “An accused is considered innocent until convicted by a final decision of an authorized court”. The presumption of innocence has a number of different aspects.

Firstly, it is the logical consequence of the presumption of innocence recognized in Western and in Islamic law that the burden of proof of the charge is on the prosecution, it is not the defendant who has to prove his innocence.<sup>10</sup> This principle is derived from the following word of the Prophet: “The burden of proof is on him who makes the claim, whereas the oath is on him who denies.”<sup>11</sup> In Islamic law, the system of proof applicable for *hadd* crimes and *qisas* crimes already shows that it is very difficult and sometimes almost impossible to prove a crime and if there remains any doubt as to whether the defendant had committed the crime it was not possible to punish him. The Prophet’s sayings encourage the judge to pay attention to cases of doubt: “Avert hudud punishments by suspicions or doubts and if the accused has a way out, release him. It is better for the imam to pardon

<sup>7</sup> Only in the case of negligent homicide and negligent bodily harm the *‘aqila*, the male relatives, have remained responsible for the payment of a compensation (*diyya*). This obligation, however, is not so much a punishment than a duty based on the solidarity of the family, cf. Kamali, *supra* note 4, 68.

<sup>8</sup> <<http://www.alhewar.com/ISLAMDECL.html>>.

<sup>9</sup> Hussein, *supra* note 2, 45.

<sup>10</sup> Osman Abd-el-Malek al-Saleh, The Right of the Individual to Personal Security in Islam, in: Mahmoud Cherif Bassiouni (ed.), (note 3), 55-90, (67); Kamali, *supra* note 4, 66.

<sup>11</sup> Kamali, *ibid.*, 66.

erroneously than to punish erroneously.”<sup>12</sup> And men are exhorted to be merciful and not to be witnesses against defendants. We can see the influence of this idea e.g. in the Iranian Code of Criminal Procedure. The Islamic Criminal Code of the Islamic Republic of Iran provides severe punishments such as stoning and whipping for the crime of adultery (*zina*) but the Code of Criminal Procedure provides that all crimes against public morals shall not be investigated (art. 43 CCP). There are only two exceptions to this rule: the first if the perpetrators are caught in the very act and the second if there is a private complainant. Thus it will be very rare that such cases come to trial.

In international law as commented upon in the general comments on art. 14 (7) ICCPR as also in Islamic law as regards *hadd* and *qisas* crimes, the accused has the benefit of the doubt. In Islamic law there is a concept that is still more in favour of the accused, the concept of “*shubha*” (resemblance). It means an illicit act which nevertheless resembles to a licit one<sup>13</sup> and may be regarded as an irrefutable presumption that the perpetrator did not act with criminal intent,<sup>14</sup> a concept that was developed to avoid the severe punishments for *hadd* and *qisas* crimes. It has been discussed whether this principle is limited to crimes of *hadd* and *qisas* or whether it can be applied in cases of *ta‘zir* crimes as well. The prevalent opinion of the jurists is that it does not comprise *ta‘zir* crimes.<sup>15</sup> But at least one famous modern author disagrees, namely the Egyptian Muslim brother ‘Abd al-Qadir ‘Auda, the author of the most widespread modern book about Islamic criminal law, who was condemned to death and hanged in 1954. He states that “The doctrine of invalidation of had on grounds of doubt essentially pertains to offences entailing hadd, but there is nothing inhibiting the application thereof to penal crimes; for this doctrine is designed to ensure justice and guarantee to safeguard the interest of the accused.”<sup>16</sup>

## The Right of Defence

One of the fundamental principles of fair trial is the guarantee of defence for the defendant that finds its expression in a number of detailed provisions. In Islamic law defence was not discussed as a theoretical question but there are different traditions about the behaviour of the Prophet that let us understand that the defendant has to be informed about the charges against him. When the Prophet granted Ali governorship of Yemen, he said to him: “O Ali, people will appeal to you for

<sup>12</sup> Hussein, *supra* note 2, 45.

<sup>13</sup> EI (2) s.v. “shubha”, (E. K. Rowson)

<sup>14</sup> Though it may happen that the perpetrator actually knows very well that he has committed a crime.

<sup>15</sup> Al-‘Awwa, *supra* note 4, 146.

<sup>16</sup> Abdul Qader ‘Oudah (shaheed), *Criminal Law of Islam*, vol. 1, 2<sup>nd</sup> ed., Karachi 1994, 263 et seq.

justice. If two adversaries come to you for arbitration, do not rule for the one, before you have similarly heard from the other. It is more proper for justice to become evident to you and for you to know what is right.”<sup>17</sup> And Calif Omar is told to have advised some judges by saying “If an adversary whose eye had been blinded by another comes to you, do not rule until the other party attends. For perhaps the latter had been blinded in both eyes”.<sup>18</sup>

First of all, as a logical result of the right to defence, the defendant has to be informed about all the charges brought against him (art. 14 (3) (a) ICCPR). In the Afghan Constitution this right is granted, but only to the “accused upon arrest”. There is no ruling about the time at which the information has to be given. The international covenants speak of due course or due time, the Afghan Constitution does not contain a similar provision but limits itself to the expression “within the limits determined by law” (art. 31 para. 2). This does not exclude information within a short time but on the other hand it does not make it obligatory either. Islamic law does not prescribe any exact frame of time for the information and Islamic jurists held different opinions as to the right of the accused to know all the allegations and their proofs already during the stage of investigation.<sup>19</sup> Taking, however, into consideration that the accused has to be regarded as innocent and has the right of defending himself against every charge of a crime it can be said that there is at least no rule in Islamic law that would expressly hinder information of the suspect about the charges against him at the earliest time possible. More or less the same can be said about the guarantee of adequate time and facilities for the preparation of defence given in art. 14 (3) (b) ICCPR but not in the Afghan Constitution. There is no reason why Islamic law should deny this right to the accused.

Another aspect of defence is the right of the accused to speak or to remain silent. It is the general opinion of Islamic jurists that the accused is not obliged to speak before the court and if he decides to confess he must do that absolutely free and without any pressure.<sup>20</sup> This has always been one of the fundamental requirements for a punishment imposed for the commission of a *hadd* crime, which are the most serious crimes. Furthermore it is not sufficient if the defendant confesses his guilt once. In order to be sure and to exclude every influence the accused must have confessed the crime twice or four times (depending on the crimes) in different sessions of the court and if he withdraws his confession afterwards it cannot be used as evidence against him.<sup>21</sup> It is remarkable that the Afghan Constitution contains a definition of what confession in the sense of criminal law means, namely a voluntary confession before an authorized court by an accused in a sound state of mind (art. 30).

<sup>17</sup> Awad M. A w a d, The Rights of the Accused under Islamic Criminal Procedure, in: Mahmoud Cherif Bassiouni (ed.), (note 3), 91-107, (97).

<sup>18</sup> A w a d, *ibid.*, 97; K a m a l i, *supra* note 4, 83.

<sup>19</sup> A w a d, *ibid.*, 97.

<sup>20</sup> A w a d, *ibid.*, 106; K a m a l i, *supra* note 4, 83.

<sup>21</sup> Al-S a l e h, *supra* note 10, 73.

It is a consequence from this principle that torture is forbidden in international (art. 7 ICCPR) and Islamic law. According to the majority of Islamic jurists, torture is strictly forbidden and the results of torture cannot be used as evidence.<sup>22</sup> As a word of the Prophet says: “God shall torture on the Day of Recompense, those who inflict torture on people in life”<sup>23</sup>, and Omar Ibn al Khattab reportedly said: “a man would not be secure from incriminating himself if you made him hungry, frightened him, or confined him”.<sup>24</sup> There is only a small number of Islamic jurists, mostly of later Hanafi jurists, the most famous of them Ibn Abidin, who allowed beating of the accused in order to get a confession of guilt if he was already known as an evil man. Some other jurists, e.g. Ibn Hazm, did not permit torture as such but they allowed the use of the results of torture as evidence, except in *hadd* crimes.<sup>25</sup> (The problem whether it is allowed to use evidence that has been obtained by illegal means is known in Western law as the fruits of the poisonous tree.) Modern authors, however, unanimously hold the opinion that torture is forbidden,<sup>26</sup> a view that is also found in important documents such as the draft of the Islamic Constitution published by the Islamic Research Academy of al-Azhar University in 1979 (art. 33) or in the Cairo Declaration on Human Rights in Islam (art. 20). The Afghan Constitution dedicates two detailed articles to torture, art. 29, that contains the prohibition of torture (“I. Torture of Human beings is prohibited. II. No person, even with the intention of discovering the truth, can resort to torture or order the torture of another person who may be under prosecution, arrest or imprisoned, or convicted to punishment.”) and art. 30 that declares every statement, testimony or confession obtained by means of compulsion as invalid.

According to art. 14 (3) (e) ICCPR the defendant has the right to examine, or have examined, witnesses against and on his behalf under the same conditions. In Islamic law confessions and witnesses are the most important means of evidence and sometimes the only means of evidence that are admitted. Thus it is natural that witnesses are among the most discussed topics in Islamic law of criminal procedure. It may be true that the Islamic judge is not as free in his assessment of evidence as a Western judge as the presentation and evaluation of evidence is much more specified in Islamic than in western law. But on the other side a witness will be examined much more severely as to his credibility before being admitted to testimony than a witness in Western proceedings. A witness must be of stainless char-

<sup>22</sup> Cf. Taha Djabir Al-‘Alwani, *Huquq al-muttaham fi marhalat at-tahqiq*, Al-Markaz al-‘arabi lid-dirasat al-amniya wat-tadrib bi r-Riyadh (ed.), (note 4), vol. I, 15-50, (42 et seq.); Ahmad Abdallah al-Halifa, *Al-‘Itiraf au al-iqar ghair al-iradi*, Al-Markaz al-‘arabi lid-dirasat al-amniya wat-tadrib bi r-Riyadh (ed.), (note 4), vol. II, 87-126, (102 et seq., 116 et seq.); Kamali *supra* note 4, 81 et seq.

<sup>23</sup> Awad Mohammed El Morr, *Human Rights in the Constitutional Systems of Egypt and Other Islamic Countries: International and Comparative Studies*, in: Kevin Boyle/Adel Omar Sherif (eds.), *Human Rights and Democracy – The Role of the Supreme Constitutional Court of Egypt*, London/The Hague/Boston 1996, 161-215, (171); Al-Saleh, *supra* note 10, 72.

<sup>24</sup> Al-Saleh, *ibid.*, 10, 73.

<sup>25</sup> Awad, *supra* note 17, 106.

<sup>26</sup> Cf. *supra* note 22.

acter (*'adil*); if he is not his testimony will not have any value in the proceedings and the accused can bring about all his doubts concerning the righteousness of the witness. As is said in the Quran Al-Hujurat XLIX, 6: "O ye who believe! If a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly and afterwards become full of repentance." Furthermore as it is regulated in the rules referring to *qisas* the defendant can contradict the oath that has been taken by the adversary party.

Art. 14 (3) (d) ICCPR grants the right of a counsel to every suspect. As to the position of Islamic law, of course, the profession of a legal counsel to a defendant as it exists today did not exist in the time of the Prophet and the following centuries when the most important developments of Islamic law took place. But modern authors hold the opinion that the general principles of the *Shari'a* do not deny to the accused the right to be assisted by a counsel.<sup>27</sup> The following statement in the *sunna* is interpreted today as a basis for legal counsel: "Since I am only human, like all of you, I might, when litigants come before me to decide between them, rule in favour of the more eloquent of them. If I should thereby transfer to him what is rightfully his brother's I warn him to take not that which is not his, or I shall reserve for him a piece of hell."<sup>28</sup> This saying suggests that the judge may be misled by a clever and eloquent litigant and therefore may judge incorrectly. Today it is understood as a basis for allowing the accused who is not able to defend himself sufficiently to seek the help of an attorney who has more knowledge in questions of law than himself and is more experienced in presenting the situation of the accused to the court. It is regarded as a matter of equality of arms. The question of payment of the legal counsel is not touched upon as far as I see, but I dare say if it is necessary to realize the right of the accused to defence, the general principles of Islamic law will not hinder such a right. According to the Afghan Constitution (art. 31, para. 1, 3) every person upon arrest can seek an advocate to defend his rights and if an accused is destitute the state shall appoint a counsel for him. But unlike art. 14 (3) (d) ICCPR the Afghan constitution does not prescribe the information of the suspect about his right to have a counsel.

The free assistance of an interpreter (art. 14 (3) (f) ICCPR) is a relatively new right also in Western law, in a world in which people speaking different languages are getting in contact more and more and in different ways. In a country like Afghanistan where the speakers of many different languages are living together it is obvious that the assistance of interpreters is a prerequisite for defence in a considerable number of cases. The assistance of an interpreter finds a detailed expression in the Afghan constitution in art. 135 that is, however, silent about the question of payment.

The ICCPR (art. 14 (1)) prescribes that all persons are equal before courts and tribunals. This means that there is no difference especially as to gender, religion, social class, nationality and so on. In Islamic law the equality before the law and

<sup>27</sup> Al-Saleh, *supra* note 10, 81 et seq.

<sup>28</sup> Awad, *supra* note 17, 98.

before courts was guaranteed in many of these aspects and there is a famous tradition of the Prophet that runs: “men are equal like the teeth of a comb”.<sup>29</sup> One aspect that has been discussed often was the position of the ruler and it was generally accepted that the ruler was not above the law but had to act in accordance with the law as well<sup>30</sup> (cf. art. 19 a, Cairo Declaration on Human Rights in Islam: All individuals are equal before the law, without distinction between the ruler and the ruled). Notwithstanding this principle, equality before the law and before the courts did not exist in all cases in the field of criminal law and the law of criminal procedure. In crimes of *hadd* and *qisas* the evidence of women counted half of the evidence of a man and the evidence of non-Muslims against Muslims was not admitted at all. As to the *qisas* crimes there was no *qisas* if a man had killed a woman or a Muslim a non-Muslim and the bloodmoney (*diyya*) for women and for non-Muslims was half the amount of bloodmoney for a man or for a Muslim. Today these cases probably belong to the group of legal problems that are most discussed in the dialogue between Western and Islamic scholars. The question of non-Muslims does not play any role in Afghan practice. Let me remark for the moment that it would be a restriction of the right of the accused to have examined witnesses if the testimony has a lesser value or no value at all merely because of sex or religion of the witness. But it should not be forgotten that apart from these facts in all the other stages of criminal procedure these differences do not have any importance and the Afghan Constitution declared in art. 21 para. 2 that “The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law” thus being in line with the international conventions signed by Afghanistan, namely the International Covenant on Civil and Political Rights. Let us hope that this provision will help to avoid problems regarding the right of having witnesses examined.

According to art. 14 (1) of the ICCPR, the accused has the right to be adjudicated by a competent, independent and impartial court. The requirements of the courts are formulated in one short sentence. In the Afghan Constitution we do not find such a comprehensive provision, but there are some regulations about judges and courts. Art. 116 para. 1 states that “the judicial branch is an independent organ of the state of the Islamic Republic of Afghanistan”. This guarantee, however, is not formulated as a right of the accused but as a guarantee for the judiciary as an institution (similar to art. 67 draft of an Islamic Constitution of al Azhar University). The guarantee of a competent court is to be found in art. 25 of the Afghan Constitution. Furthermore there is a provision regarding the qualities of judges of the Supreme Court, namely art. 118. A member of the Supreme Court shall have the following qualifications (among others regarding age and citizenship): They shall have a higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan, they shall have high ethical standards and a reputation of good deeds, and they shall not be

<sup>29</sup> Al-Saleh, *supra* note 10, 80.

<sup>30</sup> Kamali, *supra* note 4, 65.

convicted of crimes against humanity and other crimes and sentenced to deprivation of their civil rights. During their term of official duty they shall not be a member of any political party. When taking their oath they have to swear that they will execute the duty of being a judge with utmost honesty, righteousness and nonpartisanship.

The description of these provision shows that the members of the Supreme Court are expected to be personalities who deserve a high esteem for their intellectual and moral qualities. The word nonpartisanship occurs only in the oath they have to take, but also the prohibition of the membership in any political party shows that they shall be impartial. There are however no similar provisions regarding lower courts and their judges. Why does the Afghan Constitution contain such detailed provisions about judges and not about the courts as such? It is interesting to study the background of Islamic law. The personality of the judge has been a topic of interest for Islamic jurists over centuries. He was expected to be well versed in legal matters but also to be a personality of high moral standards who exercised his duties in accordance with the law. On the basis of the principle of equality before the law Islamic jurists conclude that the judge is obliged to treat all those who come before him in an impartial manner.<sup>31</sup> May be we can say that the knowledge and character of the model judge should guarantee to the accused the protection that in a modern state is guaranteed by strict rules of procedure. This interest in the judge may be an explanation for the detailed description of the conditions that have to be fulfilled when being appointed judge of the Supreme Court. Furthermore if Islamic law attaches such a great importance to the qualities of the judge it is logic that it would not be contrary to a provision that makes clear that an accused is entitled to be trialed by a competent, independent and impartial court. Therefore there would not have been a problem from the point of view of the Islamic law to join a sentence to the Afghan Constitution that corresponds to art. 14 (1) ICCPR.

Trials have to be held open according to international law and to Islamic law as laid down in the Afghan Constitution (art. 14 (1) ICCPR, Afgh. Const. 128). Furthermore art. 14 (3) (d) of the ICCPR grants the accused the right to be tried in his presence. In the constitution of Afghanistan there is no similar provision. In Islamic law we find rules about the presence of the accused at least in one group of crimes, namely the *hadd* crimes, where most of the jurists hold that the accused has to be present. For example, in the Iranian Code of Criminal Procedure a trial in absentia is forbidden when the charge refers to crimes that violate the rights of God which is not in all but in most cases congruent with *hadd* crimes (art. 217).

Art. 14 (5) ICCPR grants to every convicted person the right to his conviction and sentence being reviewed. The Afghan Constitution is silent in regard to such a right. In Islamic law a system of stages of appeal, lower courts – higher courts, as known in modern Western law, does not exist. But there had always been ways,

<sup>31</sup> Cf. ‘Abdal-Wadud Muhammad As-Sariti, *Al-Hukm al-qada’i wa-atharuhu fi l-fiqh al-islami*, Alexandria, n.d., 10 et seq.

even if limited, to set aside a sentence by the ruler if it was contrary to the divine law. Even the judge himself could quash a sentence if he became aware that it violated the laws of God. Today it is interesting to observe that after the Islamic Revolution in Iran the former system of revision of the decisions of lower courts was formally abolished but the possibility of revising the judgment of lower courts continued to exist in practice. According to the opinion of modern authors Islamic law does not reject new developments in the problem of sentences being reviewed.<sup>32</sup>

### The Situation of Juvenile Offenders

The Afghan Constitution does not contain a guarantee of special procedures for juveniles that takes account of their age as provided for in art. 14 (4) of the ICCPR. In most of the Western countries young people are regarded as partially responsible for their criminal acts at the age of 14 and fully responsible at the age of 18. Islamic law considers a person as fully responsible when he/she has reached the age of *bulugh*. This means the physical maturity, not necessarily the mental maturity, which in our time is often by no way the same. There may also be a difference between the age at which girls and boys are regarded to be criminally responsible (e.g. in Iran boys at 15 and girls at 9 years). In most of the Muslim countries following one of the schools of Sunni Islam the age of full criminal responsibility is fixed at 18 years as in the European countries. In Islamic law only persons who have reached the age of maturity (*bulugh*) can be punished for a *hadd* crime. In the *qisas* law the crime of an immature child is never regarded as committed by intent but only by pure negligence. This means that retaliation can never be exercised against a juvenile and that the bloodmoney that has to be paid has to be paid by the whole kinship, not by the juvenile himself. Again, fixed rules in the field of the *ta'zir* crimes are missing but the rules in the field of *hadd* crimes and *qisas* crimes show a general principle of Islamic law namely to take into account the age and the state of development of the juvenile delinquent. It may not be obligatory to insert a provision about juvenile delinquency into the Afghan constitution but it would have been useful as the Afghan population is very young, especially in comparison with the population in Western countries.

### III. Conclusion

Comparing the International Covenant on Civil and Political Rights, the Afghan Constitution and Islamic law of criminal proceedings, we see that many important principles are laid down in the Covenant and in the Afghan Constitution and are recognized in Islamic law in general, e.g. the principle of legality, the principle of

---

<sup>32</sup> Al-Saleh, *supra* note 10, 80.

defence and others. Other rules of the Covenant do not have a counterpart in the Afghan Constitution though they are not contrary to Islamic law. This may have different reasons. In some cases the rules of the International Covenant on Civil and Political Rights are very detailed and maybe the general rule in the Afghan Constitution had been regarded as sufficient. Some other rules of the Covenant may be contained in ordinary statutory law. There are only very few principles in the International Covenant on Civil and Political Rights where we meet difficulties when comparing them with Islamic law, e.g. the value of testimony given by female witnesses. As a whole, apart from all these considerations that are rather theoretical, it is a great task for Afghanistan to grant to the citizens all the rights contained in the Constitution in the everyday reality in the courts.

ZaöRV 64 (2004)