- Council of Guardians
- Basij
- Mustafa Kemal Ataturk
- Supreme Council of Judges and Public Prosecutors
- Constitutional Court

INTRODUCTION

IN THE INTRODUCTION to this text it was mentioned that some countries view the purpose and function of law in a different context from that which emerged in the West. For our purposes, Islamic law will illustrate this fact. It is important to point out that Islam is primarily a religion, a belief system that espouses a specific moral code. Islam means submitting to God's will. From its inception, the most important group associated with Islam was the *umma*, the community of believers, and the ultimate goal of Islam was to establish a theocratic society. In such a context, the state is viewed as a vehicle to enhance and foster the revealed religion throughout the community of believers.

Islam is often referred to as one of the three Abrahamic faiths; the other two are Judaism and Christianity. What these three religions have in common is monotheism, the belief in one God. Today, Islam is the second largest religion in the world with more than 1.3 billion followers; Christianity is the largest with more than 2.1 billion adherents, of which 1.1 billion are Roman Catholic.

The Quran

It should be noted that it was not the intent of the Prophet Muhammad (570?–632) to establish a new religion; rather, his objective was to reform the religion of one God. The Quran (trans. 2004) clearly states:

> We sent Jesus, son of Mary, in their footsteps, to confirm the Torah that had been sent before him: We gave him the Gospel with guidance, light, and conformation of the Torah already revealed—a guide and lesson for those who take heed of God. So let the followers of the Gospel judge according to what God has sent down in it. Those who do not judge according to what God has revealed are lawbreakers.
>
> We sent to you [Muhammad] the Scriptures with the truth, confirming the Scriptures that came before it, and with final authority over them: so judge between them according to what God has sent down (5:46–48).

Thus, Muslims believe that Muhammad was the last of the great prophets. Those preceding him were Abraham, Moses, and Jesus.

Before proceeding further, it should be noted that when citing the Quran, the first number following the quote refers to the chapter, and the number or numbers following the colon indicate the specific verse(s). Because there is not one standard method of transliteration of Arabic to English, names and terms often have several different spellings.

I have attempted to use a simplified form that is free of many diacritical marks. Any quotations, however, are retained in the original form.

As the aforementioned passage indicates, according to the Quran, Muhammad received messages from God through the angel Gabriel. These messages represented God's final revelations to humankind, with the previous noteworthy revelations coming to Moses and Jesus. As a result, Muslims believe that Islam supersedes Judaism and Christianity, for it is the culmination of God's message to humankind.

Muhammad received the revelations over a 23-year period, which represented two distinct phases of the Prophet's life in Mecca and Medina. Initially, Muhammad had tried to introduce the revelations to the people of Mecca, but they were unwilling to believe in the principal feature of his message: that there was one God. As such, he left Mecca, the place of his birth, for Medina, where he would establish the first Islamic government and where he also died in 632.

While the largest number of revelations was received during the initial 12 and one-half years in Mecca, it was during Muhammad's time in Medina that the legal rules and various regulations pertaining to everyday life were revealed. According to the Quran, "We sent it in this way to strengthen your heart [Prophet]; We gave it to you in gradual revelation" (25:32). In light of this approach, the Prophet and his Companions were able to memorize the Quran. The Quran also states: "[Prophet], do not rush your tongue in an attempt to hasten [your memorization of] the Revelation: We shall make sure of its safe collection and recitation. When We have recited it, repeat the recitation and We shall make it clear" (75:16–18). Because the Arab population was largely illiterate at the time, they found this gradual method of revelation beneficial. During the Prophet Muhammad's life, parts of the Quran were written. It was not until after his death, however, that a single authorized version of the entire text became available.

Thus, the Quran is Islamic scripture; it is the primary source of these revelations or the Word of God. The Quran consists of 114 chapters or *surats* (*surah*, singular) and 6,342 verses or *ayas* (*ayah*, singular). Each chapter has a title, with the longest of the chapters appearing first and the remainder getting progressively shorter in the text. It has been pointed out that the "contents of the Qur'an are not classified subject-wise. The ayat [signs of God] on various topics appear in unexpected places, and no particular order can be ascertained in the sequence of its text" (Kamali, 1989).

Of the 6,342 verses in the Quran, scholars offer differing figures on how many verses deal with legal issues. It ranges from 350 to 500, and many of these are concerned with religious duties, such as prayer and fasting. With regard to the legal verses, it has been suggested that "most of which were revealed in response to problems that were actually encountered. Some were revealed with the aim of repealing objectionable customs such as infanticide, usury, gambling and unlimited polygamy. Others laid down penalties with which to enforce the reforms that the Qur'an had introduced. But on the whole, the Qur'an confirmed and upheld the existing customs and institutions of Arab society and only introduced changes that were deemed necessary" (Kamali, 1989). It was further estimated that approximately 30 verses dealt with crimes and corresponding sanctions, while another 30 pertained to matters of justice, equality, and rights and obligations of people.

In the introduction to his translation of the Quran, which is used in this chapter to cite Quranic verses, M.A.S. Abdel Haleem pointed out:

> The Qur'an was the starting point for all the Islamic sciences: Arabic grammar was developed to serve the Qur'an, the study of Arabic phonetics was pursued in order to determine the exact pronunciation of Qur'anic words, the science of Arabic rhetoric was developed in order to describe the features of the inimitable style of the Qur'an, the art of Arabic calligraphy was cultivated through writing down the Qur'an, the Qur'an is the basis of Islamic law and theology; indeed, as the celebrated fifteenth-century scholar and author Suyuti said, "Everything is based on the Qur'an." The entire religious life of the Muslim world is built around the text of the Qur'an.

Muslims consider the Quran as a moral and ethical blueprint for a civilized society, which is neither unique to nor restricted to the society of believers, that is, the Muslim community. The Quran explains the importance of compassion, fairness, honesty, and justice. Although the Quran addresses how a devout Muslim should conduct himself or herself with regard to other people, it is especially concerned with the relationship that a devout Muslim has with God. Moreover, the right to interpret the Quran was not restricted to an elite group. Anyone with a pious disposition and the willingness and aptitude could study the Quran.

The Sunna

The Quran is the primary source of Islamic scripture, because it reveals the Word of God, but another primary source is the Sunna. Sunna means "clear path" or, in this context, established practice. Various approaches have been taken to organize the Sunna. First and foremost, the Sunna consists of three basic methods in which a message was transmitted: verbal, practical, and approved. The verbal method consists of the sayings of the Prophet Muhammad that are called *hadiths*. The practical method includes the actual deeds of the Prophet. The approved method encompasses the actions or sayings of the Companions that the Prophet approved. The Companions were the initial small group who were followers of Muhammad and who referred to themselves as his Companions.

The Quran indicates the importance of the Sunna on several occasions:

> You who believe, obey God and the Messenger, and those in authority among you. If you are in dispute over any matter, refer it to God and the Messenger, if you truly believe in God and the Last Day: (4:59).
>
> By your Lord, they will not be true believers until they let you decide between them in all matters of dispute, and find no resistance in their souls to your decisions, accepting them totally (4:65).
>
> When the true believers are summoned to God and His Messenger in order for him to judge between them, they say, "We hear and we obey." These are the ones who will prosper (24:51–52).

What makes the Quran the superior source of Islamic teaching is that it is believed to be received from God. The Sunna, on the other hand, consists of recollections of people who witnessed either a verbal, practical, or approved hadith from the Prophet.

The Sunna is a significant source of Islam in its own right for at least three reasons. It reiterates the rules and standards that were already revealed in the Quran, thereby confirming its authenticity. It is a significant aid in explaining or clarifying Quranic verses that are vague or unclear. Finally, it is the source of pronouncements on which the Quran was silent. The rulings from the Sunna, however, could not contradict or oppose a standard that was clearly stated in the Quran. Obviously, it is this last characteristic that makes the Sunna such an important independent source.

The Pillars of Islam

The central beliefs of Islam that unite the umma, the community of believers, and that are prescribed in the Quran are referred to as the Pillars of Islam. The Pillars of Islam are the five practices that devout Muslims are required to follow. Thus, these practices or tenets unite the worldwide community of Islam. The first tenet is the *shahada* (testimony): "There is no god but God, and Muhammad is His messenger." The second tenet is the *salat* (ritual prayer) that is said each day at five different times: dawn, noon, afternoon, sunset, and evening. The third tenet is *sawm* (the obligatory fasting) during the month of Ramadan. Fasting includes refraining from food, drink, and sexual activity from sunrise to sunset during this month. Exceptions are made for people who are old, ill, or traveling. The fourth tenet is the obligation to participate in the *hajj* (pilgrimage) to the Kaba in Mecca at least once in a lifetime. The Kaba is a cube-shaped structure that is the major shrine of Islam. Muslim tradition claims that it was built by Abraham and Ishmael. It contains the Black Stone that Muslims believe was given to Abraham by the angel Gabriel. As such, it is considered the sanctuary of the "House of God." It should also be noted that the pilgrimage is expected of those who are physically and financially able. The fifth tenet is the imposition of the *zakat*. Zakat means purification and is considered a religious obligation. It is a tax on Muslims for the care of the poor (see Aslan, 2006; Esposito, 2002).

Sunni and Shia

Christianity is divided into several denominations that embrace the basic Christian message. There are differences among the denominations that often deal with biblical interpretations and church governance. Islam is not divided along these same lines, because all devout Muslims adhere to certain core beliefs that include a belief in God, the Quran as divine revelation, the Prophet Muhammad and his teachings, and the basic tenets found in the Pillars of Islam. It should be noted that there are some differences on theological questions, but those are beyond the scope of our purpose.

The significant division in Islam was over the political and religious leadership of the umma, the community of believers, upon the death of Muhammad. When Muhammad died in 632, his efforts to reform the religion of one God was still in its infancy. Because

Muhammad had not designated a successor, the elders of Medina, the seat of his reform movement, selected Abu Bakr as leader. Abu Bakr had excellent credentials in that he was noted for his piety and wisdom and the fact that he was an advisor and father-in-law to Muhammad. Abu Bakr's tenure as *caliph* (successor to Muhammad) lasted only two years. Upon his death, he was succeeded by Umar, who ruled from 634 to 644 and is credited with expanding Islam to additional cities in the region. The third caliph was Uthman, who managed to antagonize a number of people in the Muslim community, which led to his assassination in 656. He was succeeded by the fourth caliph, Ali, who was both a cousin and son-in-law of Muhammad. Some within the Muslim community were angry over Uthman's murder and opposed Ali's selection. This led to Ali's murder in 661.

Two groups emerged over the leadership issues that plagued the umma during its first four decades of existence. Sunni Muslims (from followers of the Sunna of Muhammad) are the main or orthodox branch of Islam. They noted that Muhammad did not name a successor; as a result, they were of the opinion that the most qualified person should be selected as leader or caliph, and the selection should not rely on hereditary succession. From the Sunni perspective, because Muhammad was the last prophet, a caliph's authority would be limited to the political realm and would not be given a theocratic status. Of course, the caliph was expected to be a protector and defender of the Islamic faith. Thus, Sunnis believe that an Islamic government is a civil matter without any religious authority. Sunni Muslims account for about 85 percent of the adherents to the Islamic faith.

Shia Muslims (from the party of Ali) gradually developed a movement that asserted the hereditary succession of Ali's descendants to the position of leader, because they believed that Muslims should be ruled by a male descendant of Muhammad. As such, the people should have no voice in determining the ruler, because it is a prophetic matter. These leaders, who were descendants of Ali, were called *Imams*, and their leadership authority extended to the realms of both religion and politics. As religious leaders, they were considered the interpreters of God's will. Although they did not have the status of a prophet, the speeches and writings of Imams are considered important religious texts. Shias became the largest sect in Islam, and Shia Muslims, known as Shiites, represent about 15 percent of Muslims worldwide.

Within Shia Islam there are divisions that are based on differences over how many Imams succeeded the Prophet Muhammad. Today, the largest of these divisions are known as Twelver Shias. They believe that Muhammad, the twelfth Imam, who was born in 869 and a descendant of the Prophet Muhammad through his son-in-law Ali, went into hiding in the ninth century. Originally, it was thought that this period of seclusion would not last long. As the period of Occultation continued over centuries, there emerged the belief that the Imam Muhammad would return on Judgment Day.

While the Imam was in seclusion, there emerged the belief among the Shia community that the *ulama*, the religious scholars, were the only legitimate authority to offer guidance on governance, for it was the ulama who had undertaken long years of study of the Quran and Sunna. The ulama were not mandated to govern, but they were to offer moral and ethical guidance to the Shia community. The Shia community had its greatest concentration and development in Persia (modern-day Iran). Over time, the ulama of the Shia community

established a clerical hierarchy. The upper echelons of this hierarchy are senior leaders who are called *ayatollahs* (signs of God) that are noted both for their piety and religious knowledge.

What makes this sect of Islam significant and different from Sunni Islam is that from its inception Islam had not established a church hierarchy or an ordained clergy, as those terms are used in a Christian context. Any Muslim could lead a prayer service or preside over a religious ceremony. Today, every mosque has an imam. Here, the term imam is used in a different context from that mentioned previously. An imam is a respected member of the community who is recognized for his piety and knowledge; he leads the prayer service and provides a Friday sermon (Alsaif, 2007; Aslan, 2006; Esposito, 2002; Martin, 2003).

It is important to interject here that the ulama is not unique to Shia Islam. The term ulama is associated with all Muslim men of extensive religious learning. They initially studied at a *madrassa*, an informal Islamic religious school. These men went beyond merely memorizing the Quran though. They studied the subject in greater depth and were identified by their community for their religious learning. They became the guardians of the beliefs, values, and practices of the umma. Some became noted as famous theological scholars, while others were noted for their legal scholarship and were referred to as jurists. The elite among the ulama were called upon to serve as judges in important courts, as teachers at the famous schools, and as preachers in the major mosques.

HISTORICAL DEVELOPMENT OF ISLAM

As mentioned in the Preface and Introduction, Islamic law will not be examined in the context of a single country, but rather it will be viewed in the manner in which it has influenced the justice system of a few countries associated with Islam. Three countries have been selected; today they are called Saudi Arabia, Iran, and Turkey (see Figure 7.1.) Each was selected because the overwhelming majority of their populations are Muslim, but also because each has embraced Islam in distinct ways. Some of the distinctions are based on the cultural traditions of each country that predate the arrival of Islam; some are based on when Islam was received and how Islam evolved in the geographical areas that we call Saudi Arabia, Iran, and Turkey. In light of this, a brief sketch is presented of the historical reception of Islam to these three regions.

The Arabian Peninsula

In pre-Islamic times, the Arabian Peninsula was inhabited by Bedouins, whose culture was based on a patriarchal tribal social structure. The various tribes initially created unwritten rules that over time established customary laws for a tribe. A single executive and legislative authority, as we use those terms today, did not exist. As a result, there was no organization for the administration of a central government in general or for criminal justice in particular. Law and order was based on rules established by the tribes.

Much of the region consisted of a vast desert terrain, and its significance to the rest of the known world was limited to that of providing important trade routes, especially when the principal empires in the region—Persian and Byzantium—were at war with one another.

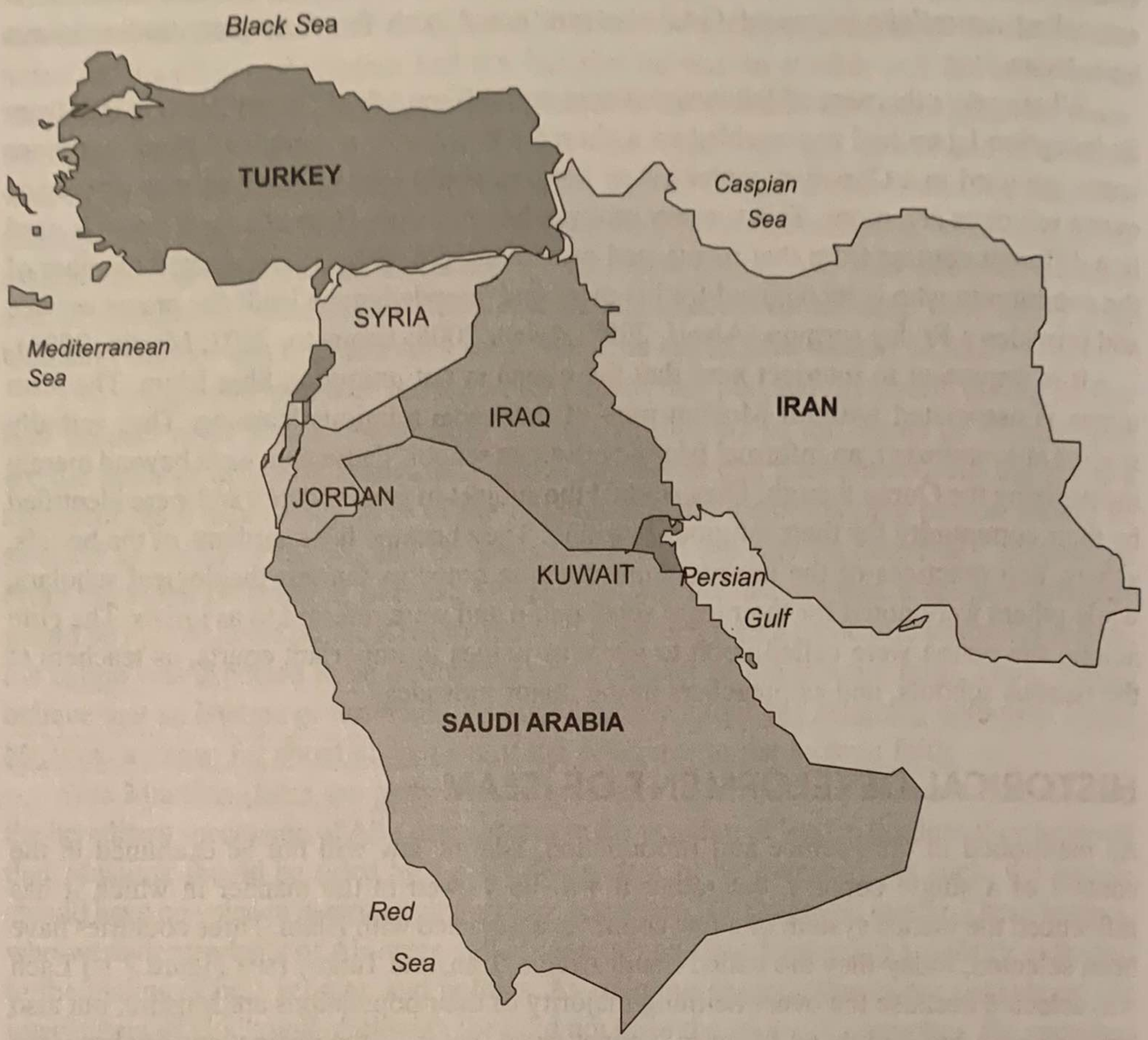


FIGURE 7.1 | Saudi Arabia, Iran, and Turkey

Map courtesy of Bruce Jones Design Inc.

During the fourth, fifth, and sixth centuries, however, these empires experienced a period of peaceful coexistence. As a result, the significance of the region for trade routes declined somewhat. With regard to religion, it should be noted that the Zoroastrian faith was dominant in Persia, while Christianity was establishing a strong foothold in Byzantium. Both of these, along with the Jewish faith, were more sophisticated than the primitive pagan practices of the Arab region. Through the various trade routes across the peninsula, Arabs were becoming familiar with these religions.

In or around the year 570, Muhammad was born in the small market town of Mecca. His family was a member of the Quraysh tribe. When Muhammad was about 40 years of age, it is said that he began to receive messages from God through the angel Gabriel. For Muhammad, these were God's final revelations to humankind. Because of his monotheistic beliefs, he was associated with the prophets of the Jewish and Christian religions. Both of these religions had small communities within the Arabian Peninsula. While Muhammad

began to gather around him a small group of followers, most people in the Arabian Peninsula in general and his Quraysh tribe in particular worshipped multiple gods. As such, they rejected his message, which caused him to leave Mecca and move to Medina, an oasis community. In time the people of Mecca would accept Muhammad's message and welcome him back.

According to one scholar, "Muhammad worked to create a community based on shared religious beliefs, . . . which would transcend the traditional social structure based on families, clans, and tribes and would unite disparate groups into a new Arabian society." He further pointed out that the "idea of the family was at the core of the Muslim conception of the individual person and the umma, the community of believers. The family ideals reinforced the concept of individuality by stressing the religious importance of individuals as God's creatures rather than as mere objects in the clan system of society, and by stressing the individual's responsibility for moral relations within the family" (Lapidus, 2002). It is important to note that the Middle East is another region of the world where there is a long cultural tradition in which the group is more important than the individual. This is a very significant cultural feature that impacts personal responsibility in general and issues associated with criminal justice in particular.

While creating his community of believers in Medina, Muhammad established the first Islamic government. It has been pointed out by one scholar that unlike the founder of Christianity, Jesus of Nazareth, who said, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's" (Matthew 22:21), Muhammad was establishing an Islamic state that would be ruled by God's messenger, Muhammad, on behalf of God. Thus, whereas Christianity made a distinction between the functions of the imperium and sacerdotium, Muhammad did not acknowledge such a division. His state would be governed by a law found in a new scripture that was designed to supplant the two previous religious testaments revealed by this same God.

That scholar has also pointed out:

> There is thus a crucial difference between the career of Muhammad and those of his predecessors, Moses and Jesus, as portrayed in the writings of their followers. Moses was not permitted to enter the promised land, and died while his people went forward. Jesus was crucified, and Christianity remained a persecuted minority religion for centuries, until a Roman emperor, Constantine, embraced the faith and empowered those who upheld it. Muhammad conquered his promised land, and during his lifetime achieved victory and power in this world, exercising political as well as prophetic authority. As the Apostle of God, he brought and taught a religious revelation. But at the same time, as the head of the Muslim Umma, he promulgated laws, dispensed justice, collected taxes, conducted diplomacy, made war, and made peace. The Umma, which began as a community, had become a state. It would soon become an empire (Lewis, 1996).

Thus, this was a religious reform movement with a difference. Its leader set out to conquer territory and to preach his spiritual message. The spread of Islam throughout the Arabian Peninsula set the stage for a rapid expansion beyond these borders. Islam would extend its

reach throughout the Middle East and beyond to include northern Africa and Spain. While this was carried out by conquest and colonization, a number of scholars have indicated that the objective was not to impose this new faith by force, for the Quran clearly states, "There is no compulsion in religion" (2:256).

When Muhammad died in 632, his reform movement was still limited to the Arabian Peninsula. The caliphs that succeeded him continued the military expeditions that he had initiated. By the end of the reign of the second caliph, Umar, Arabs controlled all of the Arabian Peninsula and areas in the Persian and Byzantium empires that are known today as Iran, Iraq, Syria, and Egypt. By the middle of the seventh century, the political climate in the region had been transformed in a unique way, and it was the direct result of God's revelation to Muhammad. As Islam spread through Arab conquest, so also did the Arab language. The Quran was the first book written in Arabic. Arabs were given a heightened status because Islam originated in their region. It should also be noted that it was during the reigns of the first four caliphs that the introduction of Islamic law or Sharia began to develop through the interpretation of the Quran. Finally, many of the early converts to Islam tended to live in urban areas. As their numbers grew, Islamic institutions were established. Among the most notable were the mosque and law court. The emergence of these courts will be discussed later.

The Arab empire that had been created as a result of these military conquests was short-lived, however. Like most empires, it failed because of internal decay, which is frequently precipitated by a combination of internal political, social, and economic factors coupled with an external superior military threat. Through various battles in 749 and 750, the Arab Umayyad dynasty was defeated by the Persian leader, Abu'l-'Abbas, which established the Abbasid Caliphate. With this development, the center of political power moved from Medina to Baghdad. Of course, the spiritual center would remain in Mecca, the site of the Kaba. Nevertheless, the Arabian Peninsula receded in significance until oil was discovered and it became a significant resource in the twentieth century.

Persia

Persia had a long and famous cultural tradition that extended back to the Achaemenid dynasty that ruled from 559 to 330 BCE. Among the famous rulers associated with this ancient dynasty were Cyrus II, Darius I, and Xerxes I. It was the Sasanian Dynasty (224–651 CE) of the Persian Empire that was weakened by prolonged wars with the Byzantine Empire that ultimately led to its defeat by the Arabs. In the 650s, Arab culture was in the ascendancy throughout the region, and many Persians converted to Islam. In spite of this change in faith, Persians retained their language and their long-standing cultural traditions. While they may have embraced Islam, they were not Arabs, but Persians. One hundred years after their defeat in 651, the fortunes of war were reversed with the creation of the Abbasid Caliphate. This dynasty would remain in power until 1258.

For our purposes, Persia was important in the development of Islam because of its cultural and intellectual traditions that were enhanced further by the fertilization of Greek and Roman ideas. Two examples, which are intimately related and intertwined at times, will suffice to illustrate both this tradition and its continued significance that has evolved

up to the present time. One deals with politics and political theory, while the other example focuses on the long-standing significant place of religion in Persian culture and society.

Ever since the death of the Prophet Muhammad, there was an ongoing debate over who was the legitimate ruler of the umma, the community of believers. Initially, the umma was small and highly localized in Medina. At the time of his death, however, Muhammad had established an Islamic state that was essentially within the boundaries of the Arabian Peninsula. With further military conquests by succeeding caliphs, an Islamic empire had been created that extended well beyond the geographical confines of Arabia. The principal participants in this leadership debate were members of the ulama, the religious scholars. They had long been acknowledged as the only legitimate authority to offer guidance on governance, for it was the ulama who had undertaken long years of study of the Quran and Sunna.

At issue in this leadership debate was not only who should be the legitimate ruler, but also what should be the extent of the leader's authority. One of the more fruitful areas for this debate occurred in Baghdad, a center of intellectual activity. Two of the contributors to this debate were Abu Al-Hasan Al-Mawardi (972–1058) and Abu Hamid Muhammad al-Ghazali (1058–1111). Al-Mawardi had a distinguished career in the service of the Abbasid Caliphate, which began with a judgeship, progressed to Chief Justice at Baghdad, and also led to ambassadorial service. He was noted for making scholarly contributions as a jurist, sociologist, and political scientist. Al-Mawardi favored a powerful caliphate and indicated that support for this position could be found in the Quran: "You who believe, obey God and the Messenger, and those in authority among you" (4:59). The ultimate purpose of the caliphate was to protect the umma and administer justice that was based on Islamic jurisprudence.

In the matter of the extent of the leader's authority, a good deal of tension developed over the authority of the ruler and the specific role of the ulama, who were considered the guardians of Islam. Abu Hamid Muhammad al-Ghazali contributed to this issue. He was a scholar who wrote a number of books on such diverse subjects as theology, philosophy, psychology, science, and jurisprudence. From al-Ghazali's perspective, the caliphate consisted of three parts or duties. First, the caliphate was the appropriate successor to the Prophet as the political leader of the umma. Second, the caliph was also responsible for the administration of government and the military. Finally, the caliph had a duty to guard and defend the faith. Al-Ghazali was of the opinion that each of these responsibilities should be placed in the care of a single person, the caliph. If this was not possible, the caliph should retain the position of successor to the Prophet and the remaining duties should be distributed to others in positions of leadership. The role of the ulama was always that of guardian of the beliefs and practices of Islam. The issue over the amount of power accorded the secular political leaders and the authority granted to the religious leaders of Islam was not resolved in the tenth century, although the debates did help to clarify the issue. As empires emerged and then declined, and as nation states were parceled out of these old empires with populations overwhelmingly Muslim, the issues of power and authority were addressed, and they continue to be addressed in a number of contexts up to the present time.

How this aforementioned political debate specifically played out in Persia and later Iran can be traced in part to the long-standing significant place of religion in Persian culture and society. For our purposes, the significant role of religion for Persia began with Zoroastrianism. Zoroaster (630?–550 BCE) was a Persian religious prophet who taught a form of monotheism. Rather than believing that there were many gods, which was a much more common belief at the time, he maintained that there were two forces in the world. Ahura Mazda is the Creator who represents the powers of light, good, and order. Ahriman is the Destroyer who represents the powers of darkness, evil, and disorder. The concepts of paradise and hell were important features of this religion. People determined their fate regarding the hereafter by the manner in which they responded to the battle between good and evil on earth. A significant feature of Zoroastrian beliefs was social justice, that is, the ultimate goal of humankind's battle against evil was to improve society for all. It was believed that the elimination of disorder and the establishment of order could be achieved by a powerful king ruling in the name of justice. It is important to note that in this context and period of time the administration of justice was a duty of the king and not a right of an individual. Thus, this religion had not only a spiritual dimension but also a social and political mission. The first king of Persia to acknowledge this religion was Darius I (558?–486 BCE). Zoroastrianism had become the dominant faith in Persia during the period of the Sasanian dynasty and served an important role in supporting the role of the king throughout the Persian Empire. It has been suggested that the "Persian theory of kingship was basically religious. . . . [It] had introduced a kind of state Church, which in turn sanctified the royal power, and took an active part in social and political life" (Lewis, 1996).

Shia Islam, which was explained earlier, emerged as a distinct but small sect in the late ninth century and had devout followers throughout the Islamic world. It was in Persia, however, where a significant number of followers were found, and Persia's rich intellectual tradition enabled the nurturing and development of the Shia sect of Islam. It would eventually become the state religion of Iran in 1501, when the Safavid dynasty (1501–1736) established it as such. Thus, it has been suggested that "Islam broke the centuries-old Zoroastrian bond between subject and ruler, faith and state. In its place, Muslims were called to commit to something greater than the state—the Ummah, the community of believers whose only boundaries are faith" (Mackey, 1996).

Over time, there emerged the belief among the Shia community that the ulama, the religious scholars, were the only legitimate authority to offer guidance on governance. As noted earlier, although the ulama were not mandated to govern, they were to offer moral and ethical guidance to the Shia community. Within this community, the ulama established a clerical hierarchy that assumed the legitimate mantle of authority to offer guidance on governance. This clerical hierarchy is a unique feature of Shia Islam, for Sunni Muslims, who represent the largest number of adherents to the Islamic faith, do not subscribe to a clerical hierarchy. The role of religious leaders in the Iranian Revolution of 1979 and the subsequent creation of the Islamic Republic of Iran illustrate the most recent chapter in the debate surrounding the amount of power accorded the secular political leaders and the authority granted to the religious leaders of Islam.

The Ottoman Empire

A noted scholar on the history of the Arab world pointed out:

> By the end of the tenth century there had come into existence an Islamic world, united by a common religious culture expressed in the Arabic language, and by human links which trade, migration and pilgrimage had forged. This world was no longer embodied in a single political unit, however. There were three rulers claiming the title of caliph, in Baghdad, Cairo, and Cordoba, and others who were in fact rulers of independent states. This is not surprising. To have kept so many countries, with differing traditions and interests, in a single empire for so long had been a remarkable achievement. It could scarcely have been done without the force of religious conviction, which had formed an effective ruling group in western Arabia, and had then created an alliance of interests between that group and an expanding section of the societies over which it ruled (Hourani, 1991).

By the eleventh century, however, another group, the Turks, was moving across the northern frontiers of the Islamic empire. Turkish military slaves had been used in Islam since the eighth century. Now Turks were migrating into Islamic territory and converting to Islam. One group, led by the Seljuk family, was noted for their military prowess. The leader of the family, Tughrul, assumed the title of sultan following his conquest of Baghdad. This illustrated not only his political right to rule as a king but also was claiming the Islamic right to be the defender of the Islamic faith. It was noted that "Turkish Islam was dedicated from the start to the defence or advancement of the faith and power of Islam, and never lost this militant quality" (Lewis, 1996). To illustrate, it was largely Turkish-led armies that fought the medieval European crusaders who sought to recapture the Christian religious sites in and around Jerusalem. As a result of a number of factors, the caliphate was being eclipsed by the Ottoman sultanate.

The conquests would continue under Ottoman sultans. They conquered Constantinople in 1453, which had been the capital of the Byzantine Empire. They seized Athens in 1458, Damascus in 1516, Cairo in 1517, Baghdad in 1534, and Tripoli in 1551. In 1529, they had reached the outskirts of Vienna and were a threat to that city for more than a century. In light of these developments, it is understandable why devout Muslims would view so many successes as proof that they had a sacred duty to continue to expand their true faith over more regions of the world. While retaining the use of their Turkish language, the Ottomans succeeded in centralizing their administrative governing authority and with expanding the size of the Islamic empire through military expeditions. The Western world had not seen such dominance since the time of the Roman Empire.

Scholars have often commented on the large bureaucratic state that was created and that enabled the Empire to operate for so long. One summarized it in this manner: "Ottoman rule was based upon a mixture of imperial and patrimonial modes of governance" (Sunar, 2004). The sultan was at the top of this governing hierarchy. He relied upon two groups to administer the day-to-day functions of the empire. The military corps already had a long tradition among the Turkish people; the development of a civil service bureaucracy benefited

from Persian influences. Of course, the sultan had a fundamental duty to defend and protect the Islamic faith. Because Islam was not organized along the lines of a church with a bureaucracy, the sultan recognized the ulama as a third element in the administration of the empire. They were the official guardians of the beliefs and practices of Islam.

The height of the Ottoman Empire was between the sixteenth and eighteenth centuries. This empire, with its capital in Istanbul, had come to dominate all Arab-speaking countries. It has been suggested that the "Turks consider the Ottoman period to have been a golden age of ethnic harmony and cultural diversity" (Kinzer, 2001). Three languages dominated the Middle East: Arabic, Persian, and Turkish. Each contributed in its way to the administrative, legal, religious, and secular culture of the region. The principal centers of power were Turkey, Iran, and Egypt. It would be the Ottoman Empire that was "the last great expression of the universality of the world of Islam" (Hourani, 1991).

The Ottoman Empire began its decline in the nineteenth century. The decline "was due not so much to internal changes as to their inability to keep pace with the rapid advances of the West in science and technology, in the arts of both war and peace, and in government and commerce" (Lewis, 1996). One example will illustrate the dilemma facing the empire. From its inception, the Ottoman Empire employed three sources of law. First and foremost was Sharia, the Islamic law, derived from the Quran and Sunna. Second were the rules and principles established to address issues that were not explained in the Sharia. The very process of creating these rules, however, was guided by the Quran. A third source of law was official rulings or directives to cope with various social circumstances at a particular time and a specific place in the vast empire. A fourth source of law emerged during the nineteenth century. As a result of the importance of commercial enterprises and the borrowing of scientific and technological advances from the West, the empire sought additional assistance with nagging problems in other areas of governance. Initially, the empire adopted legal ideas from the codes of European countries. By the late nineteenth century and with specific reference to criminal justice, they were adopting a Penal Code (1857) and a Code of Criminal Procedure (1879) that was based on the contemporary legal codes of France.

This has been a very brief sketch of the historical reception of Islam to the regions that we now call Saudi Arabia, Iran, and Turkey. We will return to these three countries later in this chapter in order to examine the role that Islamic law plays in the contemporary context of each country. First, it is important to provide the reader with an orientation to Islamic law in general and its application to issues associated with criminal justice in particular.

SHARIA

Historical Development

The primary objective of the Prophet Muhammad was religious reform and not the transformation of the customary traditions of Arabia (Khadduri, 1961). Those in opposition to Muhammad maintained that he was indeed violating the tenets of the established law. At the time, religion and law were interrelated in Arabia, as was the case in most primitive

societies. It was difficult to suggest that one was reforming one without impacting the other. To illustrate, Muhammad claimed he was simply replacing the idols that had been worshipped in the past with the one true God, Allah. Idolatry, however, was part of the customary tradition of Arabia.

During the early formative years of Islam's development, law emerged from the decisions of the Prophet and upon his death by his political successors, the caliphs. As a result of these decisions and a familiarity with the Quran and Sunna, jurisprudential debates arose over the interpretation of law in the Muslim community. From these debates emerged the theory that the Sharia was "the comprehensive and preordained system of God's commands, a system of law having an existence independent of society, not growing out of society but imposed upon society from above" (Coulson, 1969).

Upon the death of the Prophet in 632, the caliphs led a series of military campaigns that significantly expanded the geographical region associated with Islam. These conquests were instrumental in the development of Islamic law. The decrees of the early caliphs introduced answers to some legal problems that confronted them in their new territories. Caliphs could initiate legal rules that were outside the realm of Sharia, for the Quran gave them that authority: "You who believe, obey God and the Messenger, and those in authority among you" (4:59). Issues that tended to deal with a specific local problem, however, were resolved through the customs and legal traditions of the local community.

The caliphs were interested in the introduction of Islamic law, for it was considered both a code of law and a code of morals. Thus, a distinction was not made between the two concepts. The Quran, in particular, is the fundamental vehicle that defines what is appropriate in the Islamic community of believers. Various Quranic verses clearly illustrate what is right and wrong or what is proper or inappropriate. For example, "[T]hey say, 'Trade and usury are the same,' but God has allowed trade and forbidden usury" (2:275–276); "You who believe, intoxicants and gambling, idolatrous practices and [divining with] arrows are repugnant acts" (5:90); and "Do not go near the orphan's property, except with the best [intentions], until he reaches the age of maturity" (17:34).

In Islamic society, religious morality was instilled in people through both religious teachers and preachers but also by public officials, like the Muhtasib, the market inspector, who had some authority to sanction law violators. Islamic law established "the code of life for the Muslim community, covering religious obligations (*ibahat*) as well as social relations (*muamalat*). Thus, law (*fiqh*) plays a more vital role in Islamic society than that played by modern or secular law in western societies" (see Kamel, in Bassiouni, 1982).

For the most part, the caliphs retained the administrative organization that existed in the territories that they conquered. The local chiefs of police and judges that were appointed by the provincial administrator and given the authority to hold a court to adjudicate local disputes were expected to utilize local law or custom to resolve issues. It should be noted that in addition to local customs, some of these new territories had been previously influenced by Roman, Byzantine, and Persian legal ideas. Moreover, because there was no hierarchy of courts from which a local judge could seek guidance, he was left to his own discretion in deciding disputes. Initially, the extent to which Islamic legal norms were integrated into legal decisions was totally dependent on the extent to which the judge understood Islamic law. Even with an understanding of the Quran, the legal verses were

still often subject to interpretation when confronting the facts in a specific case. Thus, the judge was still dependent on his discretion. In light of this situation, legal historians of Islam questioned whether the law of the Quran was actually being implemented in these newly conquered territories.

Although there were no appellate judges in a court hierarchy, a litigant could appeal a judgment to the head of state. When the sovereign elected to sit as a court himself or through his designate, it was known as the court of *mazalim* (complaints). This was based on the notion that the ruler, whether a caliph or a sultan, had a responsibility to correct any wrong and ultimately to guarantee justice to all his people. In the context of criminal cases, the political authority or the delegate exercised a legal prerogative to resolve an apparent wrong that had occurred in an Islamic court. There were no rules or texts that defined the limits of the jurisdiction of mazalim. Whereas judges in the regular Islamic courts were bound by rules based on Islamic law, mazalim judges were free to exercise their discretion beyond such procedural or evidentiary rules in order to achieve the goal of righting a wrong.

The criminal law was singled out as a facet of law in which the jurisdiction had been essentially delegated to the police by the *wali al-jara'im*, who was the official authorized to handle criminal offenses by the political leader. Thus, criminal law became a particular focus of mazalim jurisdiction. Senior police could hold a court, and they often ignored the procedural rules established by the Sharia. For example, they entertained the use of circumstantial evidence; they heard the testimony of questionable witnesses; they imprisoned suspects; and they extorted confessions. While the police courts could apply the punishments of *hudud* offenses (which are explained later), they were not required to do so if the Sharia standards of proof were not met. These highly flexible criminal procedural standards enabled them to use a good deal of discretion when determining an appropriate sanction for the convicted offender (Coulson, 1964). Thus, very early in the development of Islam there was a dual court system. One court was clearly Islamic and was presided over by an Islamic judge that handled a host of legal issues, especially those that related to family law (marriage, divorce, and inheritance). The other court was of local origin and dealt with local issues, often assuming in particular the responsibility for issues associated with criminal offenses.

It has been pointed out that there emerged a tension among the jurists, the Islamic legal scholars, who were the guardians of the ideal interpretation of Sharia and how the law was actually interpreted in practice in the various courts that existed throughout the expanding Islamic territories (Coulson, 1969). At issue was the fact that Sharia represented the ideal order of things for Islam, but the political rulers of Islamic territories had to be concerned with practical matters associated with the community of believers or what we would today call the public interest.

By the eleventh century, the tension began to dissipate. The notion of mazalim courts and judges eventually led to the development of the doctrine of *siyasa* (administrative justice policy). Essentially, siyasa permitted the sovereign a good deal of authority in the administration of justice. It is important to remember that this doctrine was embraced because it was assumed that the sovereign was ideally qualified to serve in his capacity. The most significant qualification was a degree of religious piety and an understanding of God's purpose for the community of believers.

One of the early responsibilities that the political leaders assumed under the doctrine of siyasa and focused on was the development of criminal procedural rules. While a procedural process could conform to cultural and societal norms, it ultimately had to be in compliance with Sharia. The term *siyasa sharia* means an administration of justice policy that is essentially in conformity with Sharia. Therefore, a distinction was made between Sharia and siyasa. Sharia is that blend of both a code of law and a code of morals. Siyasa sharia is the method of introducing practical pragmatic policies for the administration of justice that are in conformity with the spirit of Sharia, especially when Sharia does not provide specific guidance.

Many contemporary scholars maintain that Islamic law has a rich and important history that introduced concepts and principles that would not be achieved in other legal systems for hundreds of years. For example, they maintain that the idea of equal treatment before the law was introduced to Muslim societies at the beginning of the Islamic era. In pre-Islamic Arab society, customary criminal law placed more severe sanctions on the accused if his victim was of a higher social rank, which was obviously associated with wealth and power. With regard to a retributive sanction, an entire tribe might suffer the consequences of the crimes of one of their tribe because of the collective responsibility of the tribe for its members. With the advent of Islam, Muslims were guided by Quranic verses that such societal distinctions were no longer applicable. For example, "People, We created you all from a single man and a single woman, and made you into races and tribes so that you should recognize one another. In God's eyes, the most honoured of you are the ones most mindful of Him: God is all knowing, all aware" (49:13). As such, the laws of Islam did not permit the gradation of sanctions based on the social rank of the perpetrator or the victim.

Madhahib

It has been pointed out that: "The first 150 years of Islam were characterized by an almost untrammeled freedom of juristic reasoning in the solution of problems not specifically regulated by divine revelation" (Coulson, 1969). In the eighth century, however, there emerged conflict in Islamic jurisprudence. The basis for the conflict was the tension between divine revelation from Islamic scriptural sources and human reason associated with legal questions and practical cases. This tension was central to the debates and emergence of Islamic legal theory. From these disagreements emerged an acknowledgment to establish a coherent Islamic legal doctrine that would be found in the Quran and Sunna. There was also a recognition that legal reasoning had to become more consistent and less arbitrary. This would lead to the use of analogical deduction.

Unlike the common law of England, which was originally based on case law decisions of the judiciary, Islamic law was developed by jurists, the legal scholars of Islam. Initially, the term *sunna* was employed to speak in a general way of established practices of the community of believers and those of the Companions. It has been pointed out that the Sunna of the Prophet Muhammad was introduced as legal theory by jurists at the end of the seventh century, and by the end of the eighth century the juristic use of the term Sunna was in reference solely to the Prophet. It should also be noted that originally, hadith was a

narration of some act of the Prophet, while Sunna was an example or law that could be deduced from a hadith. Hadith also was used to cite statements attributed to the Companions and their Successors. Eventually, hadith was only used when mentioning an act or saying of the Prophet. As a result, the distinction between Sunna and hadith was eliminated (Kamali, 1989).

Initially, there were many *madhahib* (singular, madhhab) or schools of Islamic law. They existed throughout the expanding territories of Islam and participated in the debates on legal theory. Two of the central features associated with the debates focused on jurisprudential methods. The first of these was the importance and emphasis placed on established doctrines that were gleaned from the Quran and Sunna. The second was a significant reliance on reasoning based on analogical deduction rather than the arbitrary views of judges that were expressed in court decisions.

Historians consider the formative period of the development of Islamic law between the seventh and ninth centuries, and this coincides with the emergence of two major schools of Islamic legal theory in the late eighth century. One school was located in Kufa and was therefore influenced by Persian ideas, while the other school was located at Medina, a significant city in Arabia. In addition to Arab and Persian influences on Islamic legal theory, contact with the Byzantine Empire brought another dimension to the discussions on law. Ultimately, Islamic law was developed through the doctrines of the jurists and appeared in medieval texts. It has been suggested that by the tenth century "the law was cast in a rigid mould from which it did not really emerge until the twentieth century" (Coulson, 1964).

Since the fifteenth century, four legal schools in Sunni Islam have continued to exist. What follows is a brief sketch of these schools. The sketches are followed by some examples of how these schools either agree or disagree when addressing various legal issues.

Hanafi

The Hanafi madhhab was founded by Abu-Hanifa (d. 767), who was open to ideas from other legal systems. Given the ongoing territorial spread of Islam at the time and in light of local conditions, this school favored the freedom to recognize supplementary sources of law. This school originated in Kufa, an urban center, and was influenced by Persian ideas. The jurisprudential approach to Sharia of the Hanafi madhhab was adopted by the Abbasid dynasty (750–1258) of Islam. The Hanafi madhhab came to dominate much of the Middle East region. Today, this encompasses Turkey, Syria, Lebanon, Iraq, Jordan, and Egypt in addition to India.

Maliki

Medinan scholar Malik ibn-Anas (d. 796) produced the first compendium of Islamic law. His name is associated with the Maliki madhhab. It is noted for adhering closely to the traditions of Arabian tribal society. It also favors recognizing supplementary sources of law in the name of the public interest. The Maliki madhhab is noted for emphasizing a moralistic approach to law, and it is dominant in various regions of Africa.

Shafii

Muhammad ibn-Idris ash-Shafi-i (767–820) was noted for his theory of the sources from which law is derived. His treatise, *Risala*, states this theory. According to Shafi-i, there are four principal sources of Islamic law. The first source was obviously the Quran. He interpreted the Quranic verses that commanded devout Muslims to obey God and to obey the Prophet to mean that Muhammad was also a source of law, albeit a secondary source when compared to God. The pronouncement that Muhammad was a lawgiver was an important theme in Shafi-i's treatise. The second source was the Sunna of Muhammad, which displaced the sunnas of local legal schools. Thus, instead of multiple sunnas representing various schools, there was now recognized in this theory a single Sunna, that of Muhammad. The third source was *ijma* or consensus. Shafi-i rejected the authority of a single school to establish a consensus. From his perspective, a consensus must be reached among the entire community of Islamic scholars. The fourth source was reasoning by *ijtihad* or analogy. This method was employed to resolve issues in which the other sources did not provide an answer; however, the other sources should serve as a guide in the resolution of an issue. This source of Islamic law is considered strikingly significant by today's scholars, because it has enabled Islamic legal scholars to develop new theories of law. This is especially pertinent with the development of modern fields of law. While Shafi'i's theory acknowledged the obvious importance of God's will in law, he enhanced the status of human reason through the resolution of legal issues. The Shafii madhhab dominates southern Arabia, east Africa, and Southeast Asia.

Hanbali

Ahmad ibn-Hanbal (d. 855) collected hadiths into a work titled *Musnad*. He rejected human reason as a source of law and claimed all legal rules could be found either in the Quran or the Sunna of the Prophet. Thus, the followers of this school rejected judicial reasoning by analogy. They were of the opinion that the prophet's Sunna, in particular, was being compromised through the broadening of the sources of Islamic law by the other schools. They strongly favored the traditional approaches or sources of Islamic law and focused on both the legal and moral teachings that could be derived from the Quran. This madhhab did not dominate a region until it was adopted by the Wahhabi movement in the eighteenth century. It then became the official interpreter of Sharia in Saudi Arabia.

There was agreement among the four madhahib regarding the principal tenets of the Islamic faith, the Five Pillars of Islam. There was also a consensus among the schools regarding the political sovereignty in the Islamic state. All supported the doctrine of the Caliphate, the successor to Muhammad would be the political leader of the Islamic community, and the caliph would assume this position following his election by the qualified representatives of the community of believers. Moreover, his authority would be limited by law. There were differences among the schools, however, when interpreting the actual implementation of certain laws. A few examples that relate to criminal law and procedure should illustrate these differences.

For instance, the Quran states that: ". . . if anyone repents after his wrongdoing and makes amends, God will accept his repentance: God is most forgiving, most merciful" (5:39). Jurists differed on how this verse should be interpreted. While the Hanifa madhhab maintained that repentance did not eliminate punishment in this life, but only in the hereafter, the Shafii madhhab were of the opinion that repentance meant the elimination of punishment in this life and the hereafter. In reference to the conditions of witnesses, Islamic law established certain standards that potential witnesses were required to meet before they were permitted to testify in court. One of the standards was that the witness must be able to speak. The madhahib had varying opinions on the testimony of people who could not speak or hear. The Malik and Hanbali madhahib accepted the written testimony of a person who could not speak, whereas the Hanafi madhhab rejected the testimony.

On the subject of confessions, the Hanafi madhhab maintained that a valid confession had to occur in court, whereas the Maliki, Shafii, and Hanbali madhahib were of the opinion that a confession was valid outside of court, if there were two witnesses to the testimony. In reference to compensation as a legal punishment, it was considered a payment by the perpetrator, as a ransom for a lost life or an injury received. In cases of murder, however, it was argued by some that if the perpetrator was to undergo the penalty of retribution, the victim's family could not impose upon him a demand for compensation. The Shafii and Hanbali madhahib disagreed with that position and maintained that a murderer was obliged to pay compensation if the victim's family demanded it. On another matter, the Shafii madhhab employed ijtihad to justify inflicting the penalty of stoning for sodomy. The other schools claimed that this was not necessary, because the legal definition of fornication already included sodomy.

Finally, in the matter of wine drinking as an offense, the various madhahib had been in disagreement over whether it should be expanded to include other alcoholic beverages and other drugs. In addition, the Hanafi and Maliki madhahib maintain that the sanction for this offense is 80 lashes, but the Shafii madhhab is of the opinion that the penalty should be 40 lashes. They make this distinction based on the practices of the first Caliph, Abu Bakr, and the fourth Caliph, Ali.

Legal Theory and Shia Islam

There is agreement between Sunni Islam and Shia Islam regarding the principal tenets of the Islamic faith, the Five Pillars of Islam. With regard to law, Shia Islam maintains that the Quran established a new legal system. The principal sources of Shia law are the Quran and Sunna. As such, customary law was eliminated, unless it was supported in the Quran. One of the major distinctions between Shia Islam and Sunni Islam is associated with legal sovereignty. Sunni Islam supported the doctrine of the Caliphate, that is, the successor to Muhammad would be the political leader of the Islamic community, and the caliph would assume this position following his election by the qualified representatives of the community of believers. Moreover, his authority would be limited by law. With regard to legal sovereignty, the Shia Imam had supreme authority of the divine lawgiver. The difference politically has been characterized as that between a constitutional form versus an absolute form of government. Finally, a significant difference with Sunni Islam is in the

area of inheritance. Whereas Sunni Islam emphasized the customary law of the tribal heirs, that is, the male agnate relatives of the deceased person, the inheritance law in Shia Islam emphasized the immediate family. It was based on the closeness of the deceased to the relation. Moreover, gender was irrelevant under this legal interpretation. The origins of these distinct legal interpretations are usually traced to the Ja 'fari school of jurisprudence. Associated with Ja 'far as-Sadiq, a sixth-century Imam, this school is noted for the importance it places on *ijtihad*, that is, the role of applying reason when interpreting the laws of Islam. A further elaboration of ijtihad is offered below. Moreover, the Ja 'far school is the principal school of jurisprudence in Shia Islam. Shia legal theory has been dominant in Iran, India, East Africa, and Iraq.

Sources of Sharia

Islamic law is characterized as a series of standards that are religious and moral in nature and that are designed to establish and to explain appropriate conduct of the believers of Islam. As the Quran proclaims: "Be a community that calls for what is good, urges what is right, and forbids what is wrong: those who do this are the successful ones" (3:104). Thus, Islamic law emphasizes a series of duties rather than focusing on rights, which is often a major concern of legal systems in the West. The principal sources of the Sharia are the Quran and Sunna.

Quran

Throughout the Quran there are several verses that provide the devout Muslim with an explanation for the legitimacy of Islamic law. For example, scholars cite: "Authority belongs to God alone, and He orders you to worship none but Him: this is the true faith, though most people do not realize it" (12:40), and "Follow what has been sent down to you from your Lord; do not follow other masters beside Him" (7:3).

By extension, the legitimate authority bestowed on the agents of the theocratic community is also noted. One was specifically directed at Muhammad: "So [Prophet] judge between them according to what God has sent down. Do not follow their whims, and take good care that they do not tempt you away from any of what God has sent down to you" (5:49). Scholars have interpreted that other verses are directed at state leaders and those authorized specifically to adjudicate civil and criminal disputes. To illustrate:

You who believe, obey God and the Messenger, and those in authority among you (4:59);

Those who do not judge according to what God has sent down are rejecting [God's teachings] (5:44);

Those who do not judge according to what God has revealed are doing grave wrong (5:45); and

Those who do not judge according to what God has revealed are lawbreakers (5:47).

It is important to point out that the Quran is not a constitutional document or legal code. The Quran clearly states: "This [revelation] is a means of insight for people, a source of guidance and mercy for those of sure faith" (45:20). The Quran is a blueprint for establishing a civilized society that speaks to such notions as fairness and compassion. Because it is a source of guidance, many of the legal-oriented verses are presented as general principles in recognition that societal conditions might change. The Quran is specific, however, with regard to issues that are considered immutable (Kamali, 1989). The distinction between general principles and that which is immutable will become clear when explaining the range of crimes and corresponding punishments.

It was mentioned earlier that the Quran consists of 6,342 verses and that scholars often differ over how many verses deal with legal issues. The debate ranges from 350 to 500. Those verses that are clearly legal in nature usually begin with either a command to enhance the security of the Muslim community or a prohibition to prevent acts that are detrimental to the well-being of Islamic society. In order to comprehend the meaning of the legal verses, Muslims relied on the analysis of jurists, scholars of Islamic law.

Sunna

Sunna or established practice is also considered a scriptural source for Muslims. The Quran states: "accept whatever the Messenger gives you, and abstain from whatever he forbids you" (59:7). The Sunna consists of the spoken words of Muhammad and deeds attributed to him that were reported by authoritative sources. Whereas the Quran is the revealed Word of God, the Sunna is another source that is both sacred and divinely inspired. The Quran proclaims: "Obey God; obey the Messenger" (24:54). Upon Muhammad's death, the significance of the Sunna was enhanced in guiding the Islamic community. It has been suggested: "The Sunna plays its significant role as a source of Islamic law either by complementing the Quran or by interpreting its texts" (Sanad, 1991).

For our purposes, the Sunna can be divided between legal and nonlegal criteria. For the most part, the nonlegal consists of the normal everyday activities of the Prophet that had nothing to do with Islamic law. The legal consists of the verbal, practical, and approved that address or explain some aspect of Islamic law found in the Quran. As mentioned earlier, the verbal are the sayings of the Prophet Muhammad; the practical are the actual deeds of the prophet; and the approved are the actions or sayings of the Companions that the Prophet approved. These legal explanations occurred either in the prophet's capacity as messenger of God, as head of state, or as judge. It should also be noted that reference to the hadiths by the founders of the major legal schools reinforced the importance of the Sunna.

Ijma

In the early years (roughly the seventh through the ninth centuries), when Islam was establishing its foundation in various geographical areas, there was a good deal of diversity in interpreting Islamic law. Part of this diversity was associated with differences of opinion

regarding interpreting the Quran or the context of the Sunna. Part had to do with accommodating the local customary law and procedural customs of tribunals with the introduction of the Sharia. As a result of this diversity, there gradually emerged another source of Islamic law, *ijma*. Ijma is a general consensus about a legal ruling that is reached among jurists, Islamic legal scholars.

In support of the use of ijma, jurists cited the Quranic verse: "[Believers], you are the best community singled out for people: you order what is right, forbid what is wrong, and believe in God" (3:110). A unanimous general consensus among jurists meant that the ruling was binding. Such a consensus, however, could not conflict with rulings based on the superior sources of Islamic law, namely the Quran and Sunna. The Quran is very clear on this point: "if anyone opposes the Messenger, after guidance has been made clear to him, and follows a path other than that of the believers, We shall leave him on his chosen path—We shall burn him in Hell, an evil destination" (4:115). Thus, although inferior to the Quran and Sunna, ijma became another source of Islamic law, as long as it was consistent with the superior sources of law. Of course, a consensus established at one point in time could be overturned with a new consensus. It has been pointed out that a decision based only on ijma was rare (Sanad, 1991).

Ijtihad

A final source of Islamic law is *ijtihad* or legal reasoning by analogy. Ijtihad is the process in which jurists determine a rule based on analogy. It is utilized when a rule conflicts with another rule or when a rule is rather vague and somewhat questionable. Moreover, jurists turn to ijtihad when neither the Quran nor the Sunna has specifically addressed the issue at hand. The ultimate goal of ijtihad is to resolve a conflict or clarify an issue that is in the best interests of the Muslim community. Originally, the use of ijtihad led to contentious debates over its validity. Opponents cited the Quranic verse, "We have missed nothing out of the Record. . ." (6:38), to justify their position. Proponents, however, also cited the Quran with a rejoinder: "Learn from this, all of you with insight!" (59:2). Ijtihad eventually won the day and is an especially valuable legal source in modern times, because it is the mechanism that allows Islamic law to evolve with time. To illustrate, originally the Quran forbade the drinking of wine, which was common in ancient times. Over time and through ijtihad, all alcoholic beverages were prohibited. More recent translations of the Quran now refer to intoxicants, which enables the inclusion of illegal drugs. Like ijma, ijtihad is not a totally independent source, because it must be consistent with the superior sources of law, namely the Quran and Sunna.

Basic Assumptions

In order to understand Islamic law, it is important to begin with an understanding of two basic assumptions that Muslims embrace. First, God is the sole source of authority and the lawgiver.

The Quran states:

> Judgment is for God alone: He tells the truth, and He is the best of judges (6:57);
>
> Your Lord is God, who created the heavens and earth in six Days, then established Himself on the throne; He makes the night cover the day in swift pursuit; He created the sun, moon, and stars to be subservient to His command; all creation and command belongs to Him (7:54); and
>
> Authority belongs to God alone, and he orders you to worship none but Him: this is the true faith, though most people do not realize it (12:40).

While God is the sovereign lawgiver, "God has made a promise to those among you who believe and do good deeds: He will make them successors to the land, as He did those who came before them; He will empower the religion He had chosen for them; He will grant them security to replace their fear" (24:55). This verse has been interpreted as acknowledging that man is God's trustee on earth and thus has the authority to make law, but it must be in conformity with Sharia. Thus, while God is the lawgiver, man has the authority to be a lawmaker. These passages illustrate the basis for the Islamic theocratic state. Obviously, it differs from the modern political tradition of the West that places sovereignty with the people.

The other basic assumption is the emphasis of both the individual and collective moral duties of Muslims. While many Western societies speak to the importance of individual rights, the Quran focuses on community obligations. One of the most important examples of a collective duty is the call of the community to prayer five times a day, but especially on Friday. "Believers! When the call to prayer is made on the day of congregation, hurry towards the reminder of God and leave off your trading—that is better for you, if only you knew—then when the prayer has ended, disperse in the land and seek out God's bounty" (62:9–10). Another is related to the notion of man as a trustee of God on earth. "It was He who created all that is on earth for you" (2:29). Collectively, man has a duty to care for all of God's creations. He has a particular obligation to help maintain the social order of the community. "The believers are brothers, so make peace between your two brothers and be mindful of God, so that you may be given mercy" (49:10). Finally, man has a collective duty to pursue justice. The Quran states: "You who believe, be steadfast in your devotion to God and bear witness impartially: do not let hatred of others lead you away from justice, but adhere to justice, for that is closer to awareness of God" (5:8). Moreover, "God commands justice, doing good, and generosity towards relatives and He forbids what is shameful, blameworthy, and oppressive" (16:90). The importance of community, an obligation to care for one another and all things created, and a duty to pursue justice are lofty objectives. These are among the general assumptions found in the Quran that explain why scholars have referred to it as "a constitution and an organic law which concerns fundamental rights. These general principles are immutable. But particular provisions may be modified as long as they remain subordinate to the spiritual interest of the community" (see Kamel, in Bassiouni, 1982).

Principles of Islamic Criminal Justice

Islamic law deals with a wide range of legal topics that include the person, property, the family, and inheritance. For our purposes, we focus only on that which relates to crime and the penal law. The aforementioned verse of the Quran points out that "God commands justice." Three principles are gleaned from the Quran that explain how justice is pursued within the realm of Islamic criminal justice. The first principle is that of criminal responsibility. According to contemporary scholars, "Islam guarantees five essential things to all persons and prevents unwarranted infringement of them by the state. These include (1) religion, (2) life, (3) mind, (4) posterity, and (5) property" (see Abd-el-Malek al-Saleh, in Bassiouni, 1982). Collectively, this is known as the theory of protected interests. Essentially, these scholars maintain that this theory is designed to allow a person to live his or her life with dignity.

In order to benefit from participating in this arrangement with the state, people were expected to be individually responsible for their actions. The Quran states: "Each soul is responsible for its own actions; no soul will bear the burden of another" (6:164). Thus, an important condition for imposing a punishment on a person was that he or she intended to commit a criminal act. With reference to criminal justice, the person is also entitled to a degree of security when accused of a crime. It also states, "Whoever does good does it for his own soul and whoever does evil does it against his own soul"(41:46), and "anyone who does wrong will be requited for it and will find no one to protect or help him against God" (4:123). Therefore, a person is responsible only for acts of commission or omission that he or she committed and is not answerable for crimes committed by others. This is a significant change from the ancient notion of collective tribal responsibility, which was the norm in Arab society. But it is important to point out that the collective responsibility of the family was retained with regard to paying any damages for a crime committed by one of its members.

Moreover, degrees of accountability were recognized, based upon the extent to which one participated in a criminal offense; that is, was the person a principal or an accomplice? If a person had not reached the age of majority, he or she could not be held criminally responsible for his or her actions. Thus, legal penalties could not be imposed on children; however, a judge could reprimand young people who had committed a criminal act. Moreover, people with insufficient mental capacity were not held liable. Islamic scholars maintain that the principle of individual responsibility was established in Islamic law much earlier than in other legal systems.

The second principle deals with legality, specifically the issue of crime and punishment. Throughout the Quran, there are countless examples of God refraining from imposing a punishment until he had first told man through a messenger that a specific behavior was wrong. To illustrate, the Quran states: "No soul will bear another's burden, nor do We punish until We have sent a messenger" (17:15). Moreover, a person cannot be punished for acts that were not criminal at the time they were committed. Islamic scholars cite several Quranic verses to support the origin of this principle. Some verses are general announcements of the important role of the messenger. For example, "They were messengers bearing good news and warning, so that mankind would have no excuse before God, once the messengers

had been sent: God is almighty and all wise" (4:165), and "This Qur'an was revealed for me to warn you [people] and everyone it reaches" (6:19). Other verses are a bit more specific and clearly warn that certain conduct will lead to punishment:

> Your Lord would never destroy towns without first raising a messenger in their midst to recite Our messages to them, nor would We destroy towns unless their inhabitants were evildoers (28:59); and
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> We have sent you with the Truth as a bearer of good news and warning—every community has been sent a warner. If they call you a liar, their predecessors did the same: messengers came to them with clear signs, scriptures, and enlightening revelation and afterwards I seized the disbelievers—how terrible My punishment was! (35:24–26).

As a result of such guidance, jurists concluded that no person could be accused of a crime or suffer punishment unless it was specified in a law. This concept is now well known and embraced in the modern world.

In the context of Islam, only those offenses expressly cited by God the lawgiver and those legislated by the duly authorized lawmakers of a government have the force of law. Like the principle of criminal responsibility, the principle of legality is designed to protect the security of an individual from arbitrary, capricious, and discriminatory intrusions by the government. It is also designed to curb the possible excesses of a judge at the sanctioning phase of a criminal procedure. "Those who do not judge according to what God has revealed are lawbreakers" (5:47). Thus, judges were expected to impose sanctions that were in compliance with the Quran.

The third principle addresses the nonretroactivity of criminal law, which is associated with the principle of legality. Once again, this is designed to protect the individual who may be a recent adherent to Islam and ignorant of the law. We turn to the Quran for examples. On the subject of marriage, "Do not marry women that your fathers married—with the exception of what is past—this is indeed a shameful thing to do, loathsome and leading to evil" (4:22). On the subject of usury, "Trade and usury are the same, but God has allowed trade and forbidden usury. Whoever on receiving God's warning, stops taking usury may keep his past gains—God will be his judge—but whoever goes back to usury will be an inhabitant of the Fire" (2:276). The prohibition against adultery and the drinking of wine are also noted as behavior that did not constitute a crime in the pre-Islamic period but was now deemed forbidden. In modern times, the principle of nonretroactivity tends to focus more on protecting the individual from the abuse of governmental power.

Crime and Punishment

With regard to punishment, the Quran offers a general guideline: "If you [believers] have to respond to an attack, make your response proportionate" (16:126) and "Let harm be requited by an equal harm, though anyone who forgives and puts things right will have his reward from God Himself—He does not like those who do wrong" (42:40). It is important to interject at this point that the sanctions imposed under Islamic law are also considered

religious decisions, because they are either directly or indirectly inspired by religious texts. They often not only speak of a temporal punishment for a crime against the community of believers but also indicate that a punishment will be imposed in the hereafter for the sin against God. To illustrate, "if anyone kills a believer deliberately, the punishment for him is Hell, and there he will remain: God is angry with him, and rejects him, and has prepared a tremendous torment for him" (4:93). For the crime of highway robbery or unlawful rebellion, the perpetrator will experience "a disgrace for them in this world, and then a terrible punishment in the Hereafter" (5:33).

With regard to violations of Islamic law, the Quran alerts all Muslims to the consequences of their actions:

> These are the bounds set by God: God will admit those who obey Him and His Messenger to gardens graced with flowing streams, and there they will stay—that is the supreme triumph! But those who disobey God and His Messenger and overstep His limits will be consigned by God to the Fire, and there they will stay—a humiliating torment awaits them! (4:13–14)

The significance of this religious element should not be ignored or overlooked, for it has been pointed out that for the devout Muslim "each person becomes in effect his own judge, with his faith in God preventing him from indulging in forbidden pursuits and doing injury to the rights of others" (see Salim al-'Awwa, in Bassiouni, 1982). What makes the Islamic legal system unique compared to other legal systems is that it traces its origins to divinely inspired sources. Therefore, with regard to criminal justice there is no distinction between the criminal law and the moral law.

Islamic law recognizes two categories of crime and punishment. Determined crimes and the corresponding sanctions refer to those offenses and punishments that have been specified either by God in the Quran or by the Prophet Muhammad in the Sunna. Discretionary crimes are those not mentioned specifically in the aforementioned sources; however, the Quran and Sunna did offer examples of sanctions that are associated with discretionary crimes. As such, scholars note that there is an important relationship with these discretionary offenses and the original sources of Islamic law. Discretionary crimes are categorized as criminal by an appropriate authority and process within an Islamic state.

Hudud

Determined crimes are of two types. The crimes of *hudud* (which means limits), in which a *hadd* punishment is imposed, are associated with threatening the social order and security of the community of believers. Because hudud crimes are specified in the Quran or Sunna, the corresponding punishment is also cited. In such a context, a judge is not permitted to exercise discretionary judicial authority that might contradict the punishment found in the sacred texts.

Hudud offenses include theft, banditry, and rebellion against a legitimate (political) authority, because they threaten public property and security; adultery and fornication, because they threaten the family structure; defamation, because it threatens a person's

reputation; apostasy, because it threatens the religious order of the community; and the drinking of wine, because it threatens the moral conduct of individuals. Scholars of Islamic law suggest that the rationale for the sanctions of hudud offenses were an early version of general and specific deterrence.

The sanctions associated with hudud crimes are harsh and are designed to protect the public interest of Muslim society. To illustrate, the Quran clearly states what the hadd (singular for hudud) punishment is for theft: "Cut off the hands of thieves, whether they are man or woman, as punishment for what they have done—a deterrent from God: God is almighty and wise" (5:38). Over time there was a good deal of discussion among jurists, usually after consulting the Sunna, as to when such a sanction could be imposed for theft. For example, the intention to take fraudulently another's property had to be established. It was concluded that the sanction should not be used for petty theft, which was when the value of the item(s) was less than 20 dirhams. The sanction could only be imposed when the theft occurred in a private area rather than a public space. Finally, the sanction would not be imposed if the theft occurred among members of a family.

Banditry or highway robbery and the endangering of public safety through unlawful rebellion were addressed in one Quranic verse: "Those who wage war against God and His messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land: a disgrace for them in this world, and then a terrible punishment in the Hereafter" (5:33). The amputation of the right hand and left foot is often associated with highway robbery. In addition, banishment or exile could also be interpreted to mean imprisonment. Given the variety of punishments mentioned, the Maliki madhhab concluded that the judge would determine the sanction in light of the specific criminal act and the person's involvement in the act. The other Sunni madhahib (Hanafi, Shafii, and Hanabli) developed a rank order of sanctions that was dependent on the gravity of the act committed. Accordingly, "If a bandit kills, he will be subject to execution by sword; If he steals money, his hands and feet will be cut off from opposite sides; If he only threatens the travelers and frightens them without killing or stealing, he will be expelled out of the land (this includes imprisonment); If the bandit kills and steals property at the same time, he will be crucified" (Sanad, 1991). With this system no discretion is extended to the judge. Finally, if an offender repented before being caught and turned himself in, the punishment could be suspended, for it was written: "unless they repent before you overpower them—in that case bear in mind that God is forgiving and merciful" (5:34).

Rebellion against a legitimate political authority was considered a serious offense against the public order. While legal scholars have disagreed over a precise definition, there is agreement that it involves treason or some type of armed rebellion. According to the Quran: "If two groups of the believers fight, you should try to reconcile them; if one of them is oppressing the other, fight the oppressors until they submit to God's command, then make a just and even-handed reconciliation between the two of them: God loves those who are even-handed" (49:9). Early in Muslim society it was determined that rebels who refuse to be reconciled should be put to death. It has been pointed out by scholars, however, that lesser sanctions had been imposed.

Adultery and fornication were both considered crimes against the family structure and public morality. The Quran warns: "And do not go anywhere near adultery: it is an outrage, and an evil path" (17:32). As for other hudud offenses, the punishment was fixed. In such cases, the Quran states: "Strike the adulteress and the adulterer one hundred times. Do not let compassion for them keep you from carrying out God's law—if you believe in God and the Last Day—and ensure that a group of believers witnesses the punishment" (24:2). Some jurists, however, made a distinction between offenders who were single and those who were married. If the offender was single, then the aforementioned punishment was considered appropriate. If, however, the offender was married, the Sunna cited the punishment was death by stoning. Not all jurists adopted this position; some imposed exile for a year in addition to the flogging. Others limited the punishment to flogging in order to comply with the Quran. Whereas hudud offenses generally require the testimony of two men of sound reputation, in matters of adultery and fornication, four witnesses or a confession by the adulterer were required. Finally, it is important to note that any sexual activity less than intercourse was not considered a hadd offense. Other acts would fall under the category of a *tazir* crime, which is explained later. The crimes of adultery and fornication are excellent illustrations in the Islamic context of how the Sharia is both a code of law and a code of morals for the community of believers.

The most common example of defamation cited by Islamic legal scholars is associated with fornication. For those falsely accused, the Quran states: "As for those who accuse chaste women of fornication, and then fail to provide four witnesses, strike them eighty times, and reject their testimony ever afterwards: they are the lawbreakers, except for those who repent later and make amends—God is most forgiving and merciful" (24:4). Only an innocent accused person can file a grievance in such a case.

Apostasy threatens both the public order and the spiritual order of the community in a significant way. As mentioned earlier, Islam is first and foremost a religion. An apostate is a person who once embraced Islam and is now rejecting it. According to the Quran, "If any of you revoke your faith and die as disbelievers, your deeds will come to nothing in this world and the Hereafter, and you will be inhabitants of the Fire, there to remain" (2:217). Moreover, "As for those who believe, then reject the faith, then believe again, then reject the faith again and become increasingly defiant, God will not forgive them, nor will He guide them on any path" (4:137). Obviously, these passages suggest that the punishment for an apostate will occur in the hereafter.

During the formative years of Islam, when the leaders were attempting to establish a theocratic society, a consensus was reached that the sanction for apostasy in this life should be death. Before this sanction is imposed, however, it must be clear that the accused committed an act that illustrates rejection of the Islamic faith. Denying the existence of God or any of the five tenets of the faith (the five Pillars of Islam explained earlier) would be sufficient grounds. In addition, the person must be given an opportunity to repent his or her actions and return to the Islamic faith. A consensus was not reached among jurists on the length of time a person should be given to recant.

The prohibition against drinking wine has been expanded over the years to include all alcoholic beverages and even the use of illegal drugs. As such, a modern translation of

the Quran states, "you who believe, do not come anywhere near the prayer if you are intoxicated, not until you know what you are saying" (4:43). It also admonishes: "With intoxicants and gambling, Satan seeks only to incite enmity and hatred among you, and to stop you remembering God and prayer. Will you not give them up? Obey God, obey the Messenger, and always be on your guard: if you pay no heed, bear in mind that the sole duty of Our Messenger is to deliver the message clearly" (5:91–92). The sanction for this offense is 80 lashes, but the Shafii madhhab is of the opinion that the penalty should be only 40 lashes.

It is important to interject that the Quran points out that: ". . .if anyone repents after his wrongdoing and makes amends, God will accept his repentance: God is most forgiving, most merciful" (5:39). Jurists differed on how this should be interpreted. The Shafii madhhab was of the opinion that repentance meant the elimination of punishment in this life and the hereafter, whereas the Hanifa madhhab maintained that repentance did not eliminate punishment in this life, but only applied to the hereafter.

It is also important to note that neither the victim nor the state may pardon a person for a hadd crime. Moreover, because hudud crimes threatened the social order and security of the community, the execution of the sanction was carried out in public. For those who object to such severe hudud penalties, such as amputation, proponents maintain that "[t]hose who protest amputation should consider the welfare of society, since the occasional use of that sanction has proven to be an effective deterrent in Islamic societies" (see Mansour, in Bassiouni, 1982).

Moreover, on the subject of theft, Muslims maintain that one of the Pillars of Islam, the five required practices that devout Muslims are required to follow and that unite the worldwide community of Islam, is specifically designed to reduce the need to steal. The *zakat*, which means purification, is a religious tax on Muslims. The purpose of the tax is to help the poor, sick, disabled, and elderly. The beneficiaries of such a tax were not limited to Muslims but included the People of the Book, in particular Christians and Jews. Because Christians and Jews did not pay zakat, they were assessed the *jizya* tax, which not only provided them with a protective status in a Muslim community, but also enabled them to contribute to this community chest for the poor, sick, and elderly.

Finally, scholars of Islamic law offer a final rationale for the use of hudud sanctions. They point out that these are physical penalties over a limited time frame, which inflict severe pain that is designed to prevent the perpetrator from ever forgetting the sanction and to cause the offender to cease his or her criminal lifestyle. In addition, because the sanction occurs over a limited period of time, the perpetrator is able to return to his or her family and assist in their support. Scholars also question the wisdom of relying too much on the use of imprisonment as a sanction. The downside to imprisonment, they maintain, is that imprisonment not only reduces the deterrent effect over a period of time but it also reduces the inmate's sense of responsibility: a sense of responsibility not only for his or her criminal actions but also for the support of his or her family. In other words, the inmate has all of his or her basic needs provided by the state and often the family of the inmate becomes a recipient of welfare. In addition, the precarious state of the inmate's family may lead to delinquency and serious criminal activity among other family members (see Mansuor, in Bassiouni, 1982).

Quesas

The other type of determined crimes is *quesas* (which means equality). These offenses are deemed violations against the rights of an individual. As a result, these offenses are associated with retribution and compensation or *diyya* (also known as blood money). In light of the fact that there was no organized system of criminal justice administration during the emergence of Islamic societies, this was viewed as a sound method for imposing a sanction on a criminal while at the same time attempting to preserve the social order. The Quran warns: "You who believe, uphold justice and bear witness to God, even if it is against yourself, your parents, or your close relatives. Whether the person is rich or poor, God can best take care of both. Refrain from following your own desire, so that you can act justly—if you distort or neglect justice, God is fully aware of what you do" (4:135). The rationale for the sanctions of quesas crimes were like those for hudud offenses, that is, an early version of deterrence.

Homicide, assaults, and other offenses associated with the physical security of a person are included among these offenses. With quesas crimes, the punishment was of a retributive nature, equal to the harm suffered by the victim. If the victim waived his or her right to retribution (and in some cases this waiver was not necessary), the offender or the offender's family paid compensation to the victim or the victim's family for the harm caused.

With regard to homicide, the Quran admonishes: "Do not take life, which God has made sacred, except by right: if anyone is killed wrongfully, We have given authority to the defender of his rights, but he should not be excessive in taking life, for he is already aided [by God]" (17:33). The Quran essentially acknowledges two kinds of homicide: intentional and accidental. With regard to intentional homicide and assaults, the Quran continued the Judeo-Christian tradition of *lex talionis* (retaliation): "In the Torah We prescribed for them a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, an equal wound for a wound: if anyone forgoes this out of charity, it will serve as atonement for his bad deeds" (5:45). What this verse clearly indicates is that murder is punishable by death. The Quran offers additional guidance on this matter. "You who believe, fair retribution is prescribed for you in cases of murder: the free man for the free man, the slave for the slave, the female for the female. But if the culprit is pardoned by his aggrieved brother, this shall be adhered to fairly, and the culprit shall pay what is due in a good way" (2:178). In this verse there is the assurance that *diyya* (blood money or compensation) would be paid, even if the family elected to pardon the murderer and not seek the ultimate form of retribution.

With regard to *lex talionis*, scholars of Islamic law have pointed out that a number of rules were developed by the various legal schools. They included that the retaliatory punishment inflicted cannot be greater than the harm caused by the offender. In the case of murder, the right to decide to inflict the sanction or forgo it belonged to the male parents of the victim, that is, the father and then the grandfather. Distinctions were made with the killing of a male versus a female. The family of a female victim was only entitled to diyya, and its value was half what it would be if the victim had been a male. If the victim was an infant, insane, or physically handicapped, the victim or the victim's family was also treated differently, with the sanction less harsh than if the victim were a healthy male.

It is important to keep in mind that these rules were developed in a patriarchal setting, when men were considered the essential economic source for the family in particular and society in general. These rules clearly fail any equality test based on the policies that have emerged in the West. It would be prudent, however, to keep in mind that many of our modern Western policies of equality were primarily introduced during the twentieth century.

In cases of accidental homicide, the Quran states:

> Never should a believer kill another believer, except by mistake. If anyone kills a believer by mistake he must free one Muslim slave and pay compensation to the victim's relatives, unless they charitably forgo it; if the victim belonged to a people at war with you but is a believer, then the compensation is only to free a believing slave; if he belonged to a people with whom you have a treaty, then compensation should be handed over to his relatives, and a believing slave set free (4:92).

In cases associated with assaults and other physical injuries, whether intentional or accidental, reference was again made to the Quranic verse: "In the Torah We prescribed for them a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, an equal wound for a wound: if anyone forgoes this out of charity, it will serve as atonement for his bad deeds" (5:45). Thus, an equal amount of pain was called for, but a monetary compensation was also expected in those cases that were intentional. It was further determined that only a monetary compensation was required for accidental physical injury.

Although the punishment for quesas crimes is of a retributive nature, equal to that suffered by the victim, scholars of Islamic law have argued that the Quran is supportive of forgoing the retributive sanction and replacing it with a just compensation or diyya. For example, they cited the following Quranic verses: "By an act of mercy from God, you [Prophet] were gentle in your dealings with them—had you been harsh, or hard-hearted, they would have dispersed and left you—so pardon them and ask forgiveness for them. Consult with them about matters, then, when you have decided on a course of action, put your trust in God: God loves those who put their trust in Him" (3:159). Moreover, "God commands you [people] to return things entrusted to you to their rightful owners, and, if you judge between people, to do so with justice: God's instructions to you are excellent, for He hears and sees everything. You who believe, obey God and the Messenger, and those in authority among you. If you are in dispute over any matter, refer it to God and the Messenger, if you truly believe in God and the Last Day: that is better and fairer in the end" (4:58–59). Acts of mercy and forgiveness are reminders that the Quran is a religious text. Some scholars have suggested that replacing the retributive sanction with the diyya is a predecessor to the modern notions of victimology.

With regard to diyya, it is important to note that it is not completely divorced from having a punitive quality. Moreover, the state is involved in the process to assure that the victim or the victim's family receives the compensation from the perpetrator or the perpetrator's family. Debates have occurred among the legal schools as to the responsibility for paying the diyya. As mentioned earlier, one of the fundamental principles of Islamic law from its inception was individual criminal responsibility: "Each soul is responsible for

its own actions; no soul will bear the burden of another" (6:164). As a result, why is the family of a criminal required to pay or assist in the payment of diyya? The Quran maintains that there is a collective duty to secure social order and to pursue justice. It was pointed out that "the overriding policy is one of social solidarity by which the family knows that it has responsibility for its members. Such a policy leads to a system of social compliance by having family members exert control over one another because all fear a certain financial responsibility for the deeds of each individual member of the family" (Bassiouni, 1982). It was mentioned earlier in the chapter that the Middle East is another region of the world where there is a long cultural tradition in which the group is more important than the individual. This aforementioned Quranic policy is an illustration of how it impacts personal and group responsibility for issues associated with criminal justice.

Finally, in order to prove a quesas offense, certain evidentiary rules had to be met. For example, some crimes required at least one eyewitness or a confession. The judge had to be assured that the confession was given voluntarily and without coercion. In cases of homicide, two male witnesses were required or one male witness and two female witnesses. In the event there was insufficient evidence to prove a quesas offense, the judge might be able to impose a tazir sanction, which is explained later.

A useful summary of the rules associated with quesas offenses was developed and is cited here.

1. The accused must be an adult who is of sound mind and understanding at the time of the act, and the act must have been done intentionally.
2. The victim must be a male Muslim or a Dhimmi (Christian or Jew), or according to a majority of writers, a Musta'amin (a non-Christian or non-Jew who has entered the Land of Islam pursuant to a peace treaty or guarantee of safe conduct).
3. Only the male blood relative (father or grandfather) in line of ascendancy can claim Quesas in case of the death of the victim. Only the victim can claim it in case of maiming, although some jurists require that the ascendant male parent agree.
4. A Muslim or Dhimmi cannot be executed or maimed (based on the equivalency principle) for the killing or maiming of someone not ma'asoum (immune), that is, in the case of a Kafir (an idolater, not a Musta'amin), one who has abandoned Islam, or a rebellious Muslim (one who commits the Had crime of rebellion as set forth under Islamic law).
5. According to most jurists, the Had crime must be inflicted with the sword (the weapon known in early Islam to be swiftest and least capable of inflicting more pain than necessary).
6. The infliction of the Quesas must be in the least painful manner.
7. As responsibility is personal, the death of the offender extinguishes all other claims.
8. Pardon or forgiveness extinguishes Quesas but not Diyya, according to some jurists, while others say it also extinguishes Diyya.
9. If the offender is a minor or is insane there is no Quesas but only Diyya, which a majority of jurists impute to his family. Others say that there also is no Diyya if the aggressor is a minor or insane.

10. Female Muslim victims or their families are only entitled to Diyya, the amount being equivalent to half that of the male. This rule exists by analogy to the rule that the male's inheritance is twice that of a female.
11. Reconciliation is encouraged between the parties even before adjudication, although the collectivity retains the right to impose a Ta'azir penalty.
12. The Diyya is otherwise applicable to all other forms of killing and maiming and to those cases in which the requirements of Quesas are not met. The Diyya does not require that the victim or aggressor be an adult, sane, or male. No Diyya is payable for one who is not a ma'asoum (see supra number 4).
13. An exception to Quesas is made in the case of Quesama (oath), that is, when fifty members of the community, who are adult, sane, and devout Muslims, swear that the accused could not have committed the crime (Bassiouni, 1982).

Once again, it is important to be mindful that these rules were developed in a patriarchal setting, when men were considered the essential and often the sole economic source for the family in particular and society in general. Obviously, these rules fail any equality test based on the policies that have emerged in the West during the modern era.

Tazir

Discretionary crimes are referred to as *tazir* offenses. The rationales for hudud or quesas offenses have already been noted as focusing on deterrence. The sanctions associated with tazir crimes are also designed to seek an effective deterrent, but they also claim that the primary purpose is to achieve a corrective or rehabilitative purpose. It has been suggested that both the Quran and Sunna illustrate examples of sanctions that are associated with tazir crimes. Thus, the sanctions for tazir offenses have a basis in the original sources of Islamic law and are not solely determined by the authorities of the Islamic state (see Salim al-'Awwa, in Bassiouni, 1982). It has also been argued, however, that tazir offenses are not determined by religious law. As a result, the sanction is left to the discretion of the judge or some public authority (see Kamel, in Bassiouni, 1982). Strictly speaking, this discretionary authority actually belongs to the sovereign and is delegated to the judge by the sovereign.

When compared to hudud or quesas offenses, it has been pointed out that "[c]rimes of Ta'azir, by contrast, are not subject to the principle of legality in the same manner. Islamic law has not specified all violations subject to Ta'azir to the same extent as for other crimes. However, it considers that regardless of circumstances, all acts that infringe on private or community interests of the public order are subject to Ta'azir" (see Benmelha, in Bassiouni, 1982). Thus, the goal of maintaining the public and moral order of the community of believers, which is a significant theme throughout the Quran, provides a valid though expanded interpretation of the principle of legality.

Tazir offenses are considered less serious because they do not involve physical injury to a victim. It has been suggested that these crimes can be grouped into two categories: (1) offenses against religion, public order, and public morals, and (2) offenses that violate the rights of individuals. Because the Quran does not state a specific sanction, yet the behavior

is clearly prohibited, judicial discretion is relied upon to determine an equitable punishment (Khadduri and Liebesney, 1955).

While violations of religious obligations of Muslims are punished in the hereafter, it is generally recognized in Islamic countries that such failure can also lead to a tazir punishment in this life. In reference to public order and morals issues, the Quran admonishes: "You who believe, intoxicants and gambling, idolatrous practices, and [divining with] arrows are repugnant acts—Satan's doing—shun them so that you may prosper" (5:90). Here a judge would determine the sanction that is appropriate and in the process take into consideration the age, gender, and social standing of the person in conjunction with the seriousness of the offense. The typical punishments include flogging, imprisonment, warning, and fines.

Fraud is a good example of a tazir offense that violates an individual. The Quran states: "Do not withhold from people things that are rightly theirs, and do not spread corruption in the land" (11:85) and "Give full measure: do not sell others short. Weigh with correct scales: do not deprive people of what is theirs. Do not spread corruption on earth" (26:181–183). These practical examples clearly indicate that it is wrong to violate the rights of individuals and that there was no physical injury to the victim. Moreover, the Quranic verses are silent on an appropriate sanction. Thus, the judge determines the punishment, while always being guided by the Quran and Sunna.

Sanctions for tazir crimes are divided into two categories. One group consists of traditional sanctions that include corporal punishment, deprivation of liberty, and fines. The corporal punishment sanctions consist of the death penalty and flogging. While the death penalty is normally associated with hudud or quesas crimes, there are a few tazir offenses that can lead to a death sentence. They include espionage and heresy. Both are considered a serious threat to the public and moral order of the community. The logic for employing flogging as a sanction for tazir crimes is the same justification for its use with hudud offenses. The sanction can be imposed quickly, which allows the offender to return to his or her family and place of employment. Thus, the offender and the offender's family do not become a financial burden on the community. Moreover, as a term of imprisonment might lead the offender to become a more dangerous or a persistent violator, that concern is eliminated by imposing a corporal punishment. One scholar has pointed out that flogging is usually carried out by using a stick or an unknotted whip. After protecting those parts of the body that might prove fatal to the whipping, the individual lashes are supposed to be administered over the entire body and not limited to one area, such as the back. Jurists disagree on the number strokes an offender should receive, with the range as high as 65 to as low as three (see Benmelha, in Bassiouni, 1982).

Imprisonment was employed when flogging did not appear to work. The period of incarceration could generally range from one day to one year, with the period of time determined by the judge. Islamic law also utilized an indeterminate sentencing scheme. It was reserved for offenders who were recidivists, especially those deemed dangerous. Moreover, other offenders may be sentenced to a term of restricted liberty or probation.

A fine is another form of traditional sanction for tazir crimes. It was introduced with some degree of reluctance on the part of legal scholars. Part of the concern was that judges might utilize the fine too much. While some jurists viewed a fine as a principal penalty,

others considered it only as a supplemental sanction. It is interesting to note that when a fine was imposed by a judge, part of the wealth or possessions of the offender were confiscated. If the offender was contrite for his or her actions and displayed a rehabilitative change in general behavior, he or she might possibly have the money or possessions returned.

The other category of sanctions for tazir crimes tends to have an educational and moral purpose within the context of Islamic society. For example, an offender could be fired from his or her place of employment if the job and actions were a threat to the public interest; the offender could be summoned to court where a judge would admonish him or her either in public or in private; or the offender could be sent a letter indicating the wrong committed and the expectation that the behavior will cease.

Criminal Procedure

It is important to note that Islamic law or Sharia did not provide a detailed process for criminal procedure in general or the investigative and prosecutorial stages in particular. With regard to the practice of justice, the Quran offers a general principle: "God commands you [people] to return things entrusted to you to their rightful owners, and, if you judge between people, to do so with justice: God's instructions to you are excellent, for He hears and sees everything" (4:58) and "You who believe, be steadfast in your devotion to God and bear witness impartially: do not let hatred of others lead you away from justice, but adhere to justice, for that is closer to awareness of God" (5:8).

The responsibility for developing procedural rules was a delegated authority to the sovereign or ruler. While the process could conform to cultural and societal norms, it ultimately had to be in compliance with Sharia. This delegated authority to a ruler is a feature of *siyasa*, which literally means administrative justice policy. More specifically, the term *siyasa sharia* means an administration of justice policy that is in conformity with Shària. Therefore, a distinction was made between Sharia and siyasa. Sharia is that blend of both a code of law and a code of morals. Siyasa sharia is the method of introducing practical pragmatic policies for the administration of justice that are in conformity with the spirit of Sharia, especially when Sharia does not provide specific guidance.

Ultimately, the objective was to establish an administrative justice process that was in the best interests of the Muslim community. As such, "Islamic law has adopted rules of criminal procedure based on the principle that justice not only requires the offender to be punished for his guilt but also protects the innocent from punishment for crimes committed by another" (see Abd-el-Malek al-Saleh, in Bassiouni, 1982). Originally, the administration of Islamic criminal justice was delegated to a number of different officials, depending on the region in question. Among the officials delegated this authority were the Caliphate, the Office of Complaints, the military commander, the governor, the chief of police, and the judge.

It should be noted that this delegated authority has not escaped criticism from some scholars, especially during the second half of the twentieth century. For example, with specific reference to criminal justice, it was pointed out that:

many state officials have in the past inflicted unwarranted exemplary penalties on suspects on the assumption that the matter was purely political (or administrative) and not a matter for the Shari'a. They wrongly believed it was their right and duty to regulate such matters without restrictions. Their ignorance of the true meaning of the Shari'a cause grave injustice and impermissible changes in administrative practice and policy (siyasa) which were either falsely attributed to the Shari'a or blatantly substituted for it. They have further claimed that the Shari'a was inadequate and failed to protect the public welfare and thereby replaced it with generalities that contradicted sound Shari'a teachings and precepts (see Awad, in Bassiouni, 1982).

What follows is a general sketch of how a criminal offense might be investigated and prosecuted under the rules and guidelines of Islamic law.

Initiation of a Criminal Action

The initiation of a criminal action generally takes one of two forms. If the offense is an act of commission or omission against God, it is considered against the public interest. In such cases, the state would commence the criminal action. While the victim does not have a right to initiate such an action, he or she does have the right to seek damages. For example, in the case of theft, both the state and the victim have an interest in the case. The state would have the right to seek and inflict a punishment on the guilty party, while the victim would have the right to seek compensation or restitution. If an offense is an act of commission or omission solely against an individual, the criminal action is considered a violation of a private right. As such, the victim would initiate the action. Crimes dealing with assault, defamation, and tazir offenses fall under this category. Once the victim requests that an action be taken, then the agents of the state would assume responsibility for the investigation and prosecution of the matter.

Presumption of Innocence

As mentioned earlier, Islamic law embraced the presumption of innocence as a right for all people. Without such a presumption it would generally be difficult in the extreme for people to prove that they had not committed the crimes of which they were accused. As a result, the burden of proof rested with the accuser. Moreover, the evidence produced must lead to a conviction that was based on a certainty of guilt and not based on a mere probability.

An indictment, which was carried out by a specific agency, charged a person with a crime by confronting them with an accusation or in the case of some suspects their arrest and detention for preventive purposes. The indictment limited the rights and freedoms of the accused. This was justified on the grounds that it was in the interests of seeking truth and justice. The person under indictment had a number of rights, however, the most important of which was the right of a defense.

Jurists frequently cited the comment the Prophet Muhammad made to Ali when he named him governor of Yemen. "O' Ali, people will appeal to you for 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 who is right." As such, the accused must be informed of what he or she was charged with and be presented with sufficient and valid evidence that supported the accusation. The purpose of the defense was either to deny the accusation by placing doubt on the nature or quality of the evidence or by introducing evidence that proved the person is innocent.

While acknowledging that a person had a right to a defense, this did not necessarily mean that he or she had a right to retain counsel. Islamic law was not explicit in this regard. Moreover, it is interesting to note that scholars have suggested that defendants did not often secure legal counsel. The reason for this was that judges consulted with jurists on complex issues in the course of an investigation and trial. As such, it was often felt that there was no need for an independent and disinterested opinion in the matter at hand, because the jurist had often already provided it to the judge (see Awad, in Bassiouni, 1982).

Criminal Responsibility

In Islamic law a person could not be held criminally responsible for his or her actions under the following conditions or circumstances. The first involved the age of the accused. A child under the age of seven was considered not to have reached the age of reason. Children between the age of seven and the beginning of puberty may be partially responsible for their criminal actions. It should be noted that there was a lack of agreement on defining puberty in Islam. Some jurists were of the opinion that one must differentiate between males and females. In addition, there was disagreement over citing a specific age—11 or 12 were often mentioned—or simply making a determination based on the signs of puberty. While children between seven and the onset of puberty could not be held responsible for either a hudud or quesas offenses, they could be disciplined for any tazir crimes. With reference to tazir cases, the Shafii madhhab maintained that any damages imposed by a court should be paid from the child's money, while other madhahib suggested that the family should incur the expense. Once puberty had begun, a person was considered criminally responsible, as long as he or she was of sound mind.

The second condition dealt with the mental state of the accused. A person was not held responsible if he or she was insane when they committed the offense. Certain kinds of mental deficiencies, like retardation, might not protect the accused from criminal responsibility unless it was proven that the offender did not know the difference between right and wrong. Voluntary intoxication was another condition. Jurists were of the opinion that hudud or quesas penalties should not be imposed but that tazir sanctions were appropriate.

Investigation

In earlier periods of Islamic society, there was often an investigative phase before a trial. What was different at that time was that there was not a clear distinction between the investigative and trial phases. The reason for this was that it was not unusual for a judge to conduct the investigation and then also sit as the trial judge.

On the subject of searching for evidence, the Quran acknowledged that a person should have a right to privacy. "Believers, do not enter other people's houses until you have asked permission to do so and greeted those inside—that is best for you: perhaps you will bear this in mind. If you find no one in, do not enter unless you have been given permission to do so. If you are told, 'Go away', then do so—that is more proper for you. God knows well what you do" (24:27–28). And "Believers, avoid making too many assumptions—some assumptions are sinful—and do not spy on one another or speak ill of people behind their backs:" (49:12). These verses have been interpreted to mean that a person was free from unreasonable searches and seizures. Moreover, the second verse reminded agents of the justice system that they must be sensitive to and cautious of baseless accusations. Generally, the search of a person or their property was achieved by seeking a warrant from the *Mazalim* (Minister of Complaints).

There was a recognition that society benefits from permitting agents of the state to enter a home with the purpose of discovering the truth in a criminal case. As such, a person did not have an absolute right to privacy in his or her home, as long as the state abided by various criteria and adhered to certain restrictions. Contemporary laws have been approved that provide the individual person with a right to privacy that extends beyond his or her home. Because the state has a compelling interest in maintaining order and securing the safety of the public, an investigator is permitted to arrest, search, and seize relevant evidence at the home or on the person of the accused and to hold the person in preventive detention. Accused persons are given an opportunity to present a defense to the investigator in the case, which could involve introducing evidence that contradicts that of the accuser or providing witnesses in support of their innocence. This could even involve the use of a technical expert.

The seizure and preventive detention of a suspect was also a concern among Islamic legal scholars. On the one hand, they recognized that preventive detention was a necessary state function. On the other hand, a basic assumption of Islam was that humans should be free. Scholars frequently cited the Quranic verse: "It is He who has made the earth manageable for you—travel its regions; eat His provision—and to Him you will be resurrected" (67:15). As a result, scholars tended to oppose detention unless it was absolutely necessary.

Interrogation

A distinction was made within Islamic law between simple questioning and an interrogation. An interrogation involved charging the suspect and presenting evidence that was the basis for the charges. The interrogation enabled the suspect either to admit guilt or object to the authenticity of the evidence. If the accused admitted guilt, then the interrogation had produced another piece of oral evidence.

During an interrogation, the accused was not required to speak; he or she could remain silent and could not be forced to admit guilt. Legal scholars were in agreement that neither the Quran, Sunna, or ijma condoned tactics that lead to a forced confession. Of course, torture was an acceptable method of securing a confession throughout the ancient world and on into the European Middle Ages. According to one scholar, "Islamic law expressly

prohibits torture, beating, and other cruel and inhumane treatment. The Prophet forbade torture[,] saying: 'God shall torture on the Day of Recompense those who inflict torture on people in life' " (see Abd-el-Malek al-Saleh, in Bassiouni, 1982). In the modern era, constitutions and due process rules of procedure have prohibited such conduct. Nevertheless, agents of the criminal justice system in many countries continue to use physical coercion, especially psychological techniques, to intimidate a suspect, which often leads to incriminating statements.

According to scholars of Islamic law, a system was established that was designed to reduce the likelihood of abuse during the interrogation stage. In addition to a judge, the *Mohtasib* was authorized to receive reports of alleged crimes and to investigate them. The work of the Mohtasib was then submitted to the Mazalim (Minister of Complaints), who referred the matter to a judge who would in turn adjudicate the matter. In the event the complaining party did not prosecute the matter, it was the responsibility of the Mohtasib to prosecute the case at trial (see Abd-el-Malek al-Saleh, in Bassiouni, 1982).

In the case of both hudud and quesas crimes, the accused could not be forced to take an oath during an investigation. With specific reference to hudud offenses, the accused had the right to remain silent and refuse to answer the questions of an investigator. Moreover, exercising the right to remain silent was not admissible as evidence against the accused. Finally, under Islamic law the accused had the right to withdraw a confession before the execution of a sentence. As a result, the confession could not be used as part of the evidence to convict the individual.

Evidence

Because the presumption of innocence for the accused was fundamental in Islamic law, an accuser must prove his or her claim that a crime had occurred. The rules that had emerged over time had a basis in the Quranic verse: "As for those who accuse chaste women of fornication, and then fail to provide four witnesses, strike them eighty times, and reject their testimony ever afterwards: they are the lawbreakers, except for those who repent later and make amends—God is most forgiving and merciful" (24:4–5). For a period of time, three madhahib (Hanafi, Shafii, and Hanbali) maintained that evidence was limited to oral testimony, in part because of the aforementioned Quranic verse. In time the acceptance of other types of evidence was accepted. There was one exception; hudud crimes required the testimony of witnesses.

Because of the harsh penalties associated with hudud crimes, the admissibility of evidence had to conform to some specific rules: (1) two eyewitnesses were required for most crimes and four witnesses in cases involving unlawful sexual intercourse, (2) hearsay accounts were unacceptable, (3) the testimony had to be unambiguous, (4) the witnesses had to possess moral integrity, (5) the testimony had to be provided expeditiously from the time of the alleged offense, and (6) the witnesses had to maintain their adherence to their testimony and not deviate from it. With specific reference to the crime of adultery, special conditions for the testimony were established. The four prosecution witnesses had to be male. The testimony of women for the defense was accepted, but it was often required

that two females had to testify for every male witness. There was also disagreement among the legal schools over the admissibility of testimony from the husband.

Islamic law established various standards that a person had to meet in order to be a witness. First, it has already been mentioned that the witness had to be an eyewitness and not someone providing hearsay testimony. This rule met the authenticity standard. Second, the witness had to meet a moral integrity standard by being of good character. It should be noted that there was not a consensus on how to determine the probity of a witness. The Maliki and Shafii madhahib maintained that a person's good character was based on their trustworthiness and their avoidance of sin. The character of a person was presumed to be good unless proof was offered to the contrary. Third, individuals must be rational, that is, they must have been in possession of their mental faculties when they observed the event and when they testified. Fourth, the person had to be an adult. The testimony of a minor was inadmissible, unless in a case of homicide where a minor's testimony was used to refute the testimony of another minor, and both witnesses had been deemed rational. Fifth, the witness must have the ability to retain and recollect past events. Those who possess a bad memory were deemed not competent to testify. Sixth, the person must be able to speak. Different madhahib had varying opinions on the testimony of people who could not speak or hear. The Malik and Hanbali madhahib accepted the written testimony of a person who could not speak, whereas the Hanafi madhhab rejected the testimony. Seventh, an individual had to have seen the event about which he or she was testifying. As such, most jurists claimed that the testimony of a blind person was inadmissible. Finally, the acceptance of the Islamic faith was a prerequisite to permitting a person to testify in an Islamic law court. This was based on the Quranic verse: "Call two just witnesses from your people and establish witness for the sake of God" (65:2). However, if a Muslim witness did not exist or was not available, a non-Muslim could testify. This deviation from the previous standard was also supported by another verse: "You who believe, when death approaches any of you, let two just men from among you act as witnesses to the making of a bequest, or two men from another people if you are journeying in the land when death approaches" (5:106). With respect to hudud and quesas crimes, most jurists maintained that the witnesses must be male.

Confession was another type of evidence in Islamic law. The admissibility of a confession was based on three standards. First, the confession was being offered freely, that is, the accused was not being tortured or coerced in any way. Second, the person understood the legal consequences of admitting guilt. Third, the person must describe or explain his or her specific actions that had been deemed criminal. It should be noted that the Hanafi madhhab maintained that a valid confession must occur in court, whereas the Maliki, Shafii, and Hanbali madhahib concluded that a confession was valid outside of court, as long as there were witnesses to the testimony. The judge determined the admissibility of the confession.

Although eyewitness testimony was the primary form of evidence, secondary forms of proof were considered. Several Quranic verses had been interpreted to support the use of secondary proofs. They included: "Our messengers came to them with clear signs," (5:32); "Say, I stand on clear proof from my Lord," (6:57); "The disbelievers say,

'Why does he not bring us a sign from his Lord?' Have they not been given clear proof confirming what was in the earlier scriptures?" (20:133); and "those who were given the Scripture became divided only after they were sent [such] clear evidence" (98:4). Thus, any kind of evidence was acceptable as long as it enabled the process to reach the truth of the matter at hand. Nevertheless, and not surprising, Islamic law favored criminal evidence that was based on eyewitness testimony.

One scholar of Islamic law concluded that "the Shari'a rules of evidence reflect the idealism of the Muslim jurists. The strict burden of proof imposed upon the plaintiff or prosecutor requires him to establish his claim to a high degree of certainty, on the principle that it is better for several actual offenders to escape liability than for one innocent person to suffer liability." He went on to point out that "the rule of oral testimony places an unrealistic burden on the prosecution," in light of the fact that most crimes were usually not committed in the presence of two adult males that were noted for their integrity (Coulson, 1969).

Rights of the Accused at Trial

The Quran emphasized the importance of justice and equality among people. "So [Prophet] judge between them according to what God has sent down. Do not follow their whims, and take good care that they do not tempt you away from any of what God has sent down to you"(5:49). Also "God commands you [people] to return things entrusted to you to their rightful owners, and, if you judge between people, to do so with justice: God's instructions to you are excellent, for He hears and sees everything" (4:58).

It was the practice of the Prophet Muhammad and the caliphs that succeeded him who established rights for the accused. To illustrate, the admonition of Caliph Omar to a newly appointed judge was:

> The right to adjudication is an absolute duty in accordance with the Sunna. Investigate any case you suspect (to bring about right), for right without execution is futile. Equalize between the parties before you in your expressions and in your judgment. Your judgment should not be on the basis for the noble to hope for your favor, and for the poor to despair from your justice. . . . If you render a judgment and after a period of time you find it to be unjust, do not hesitate to revise it, unless it is so old that no one can change it. The revision of judgments is better than preserving injustice (Sanad, 1991).

In the early development of Islamic law, the jurists maintained that trials should not be conducted in private. In addition, the decision of the court should also occur in a public setting. Because Islamic law employed an accusatorial procedural method, the accused was guaranteed certain protections from abuse, especially by the authority of the state. For example, the accused had the right of assistance of counsel in his or her defense to prove either that he or she was not legally guilty or was factually innocent.

The right to assistance of counsel traced its origin to the theory of protected interests, which was mentioned earlier in the section on the principles of Islamic criminal justice. This theory essentially stated that people are guaranteed protection from the unwarranted

infringement of the state with regard to: religion, life, the mind, posterity, and property. The right to assistance of counsel was specifically designed to protect or assure the accused of his or her right to live with dignity. The right to assistance commenced at the investigative stage of the process and in particular at the interrogation phase. In those cases in which the accuser was a private citizen, both the accuser and the accused had the right to appoint another person to represent their interests before a judge.

It is important to note that within the Islamic legal system there were no attorneys, at least as the term is employed in legal systems that originated in the West. For purposes of legal representation in court, a person hired a *wakil* (an agent). These people were not members of any professional organization, like a bar association, nor were they required to achieve certain conditions, such as passing an examination, in order to serve in this capacity. These wukala (the plural of wakil) were recognized as unique because they possessed a good deal of legal knowledge and were particularly familiar with court procedures.

The ability of a wakil to utilize his powers of persuasion on behalf of his client was indeed important in light of the various procedural rules. To illustrate, a person could not be convicted of hudud or quesas offenses if there was reasonable doubt as to the guilt. This rule prevented a judge from imposing a hadd punishment. In the case of theft, for example, the amputation of the accused's hand would be prohibited if the value of the property was minimal or the items taken were not personal property. Of course, a person found innocent of a hudud offense because of reasonable doubt could be convicted with a tazir punishment. In the event the prosecution failed to provide adequate evidence to make a case or if the evidence presented by the prosecution and defense contradicted one another, the judge would be required to acquit the accused of the crime and not subject the person to a tazir sanction.

Judge

A judge (qadi) was a representative of the governor of a region. As such, his authority was not independent but rather a delegated authority. Thus, Sharia courts never attained independent judicial authority, for the judiciary always held office at the pleasure of the political authority. Moreover, because it was a delegated authority, the governor retained the right to administer justice. Obviously, under this arrangement, the concept of separation of power did not apply. The role of the judge was to apply the basic customary law of the Islamic territory. There was no hierarchy of courts to which a trial judge could turn. Thus, the decision was often his personal judgment, based on knowledge of local law and the Quran.

Although judges served at the pleasure of the political authority, there were certain requirements that a person had to attain before seeking such an appointment. First and foremost, an Islamic judge was a religious judge. As such, they had to be a Muslim. Second, they must know the Quran and Sunna, the principal sources of Islam and Islamic law. The judge acquired this knowledge by attending a special school, a *madrassa*, which was an Islamic religious school. Each madrassa was associated with one of the four madhahib, which were discussed previously, that contributed to the development of Islamic legal theory. It has been pointed out that the religious nature of a judge's job also made him qualified

to preside over religious functions. This included presiding over Friday prayers, preaching at a mosque, reciting the ritual funeral prayer, opening the Ramadan fast, and being present at the ceremony of conversion of a non-Muslim to Islam (Khadduri and Liebesny, 1955).

During the early period in the development of Islam, a person appointed as a judge did not solely function as a judge. He was often given other delegated responsibilities, such as law enforcement. As mentioned earlier, the right to prosecute belonged to the judge in addition to the pretrial examination of witnesses. In Islamic law, a judge acted only when a request was submitted by an interested party. In the realm of criminal law, this meant that the victim must initiate an action. If the case involved a hudud offense or involved a threat to the public interest, a judge could initiate an action. Only later did a judge focus solely on his judicial duties.

The ultimate responsibility of the judge at a trial was to determine the guilt or innocence of the accused. In the event the accused was found guilty of a tazir offense, the judge determined the appropriate sanction. In the course of reaching a punishment, the judge considered the personality of the criminal, the nature and circumstances of the offense, and the harm caused to the victim. These criteria were important for they were in keeping with a frequent Quranic exhortation that God is most forgiving and merciful. As such, these factors could mitigate the punishment. There could also be grounds to aggravate the sanction, with the most frequent justifications being that the offender committed the same crime in the past or appeared to have embraced a life of crime.

The tradition of permitting a single judge to handle a case in an Islamic court was justified by the fact that the judge often consulted with jurists on technical or difficult legal issues. These jurists were private scholars who were noted for interpreting Islamic law. When they issued an opinion or ruling on a specific interpretation of law, the opinion was known as a *fatwa*. While fatwas were acknowledged as a legal authority, they were not considered law. Thus, although a single judge was imposing a ruling, the ruling was often based on the advice received from a jurist. While a judge was not obligated to consult with jurists, they usually did. Moreover, it was common for jurists to be present during trials.

During the eighth and ninth centuries, a chief judge (*qadi al-qudat*) was appointed to a region that enabled the chief to appoint and dismiss deputy judges on behalf of the political authority. In spite of this development, there were no appellate judges in a court hierarchy as that term is understood in legal systems that emerged in the West. A litigant could ultimately appeal a judgment to the head of state. When the sovereign elected to sit as a court himself or through his designate, it was known as the court of Mazalim (complaints). This was based on the notion that the ruler, whether a caliph or sultan, had a responsibility to correct any wrong and ultimately to guarantee justice to all his people. In the context of criminal cases, the political authority or the delegate exercised a legal prerogative to resolve an apparent wrong that had occurred in an Islamic court. There were no rules or texts that defined the limits of the jurisdiction of mazalim. Whereas judges in the regular Islamic courts were bound by rules based in Islamic law, mazalim judges were free to exercise their discretion beyond such procedural or evidentiary rules in order to achieve the goal of righting a wrong.

In some geographical areas, Sharia courts were restricted to the field of family law, while in other territories they retained an almost comprehensive jurisdiction. It has been pointed out that over time Islamic law had essentially developed two kinds of courts: "the distinction between the Mazalim and Shari'a jurisdictions came very close to the notion of a division between secular and religious courts" (Coulson, 1964). The Sharia court judges were characterized as being representatives of God's law, while Mazalim court judges were portrayed as representatives of the ruler's law.

Police and Sanctions

Shurta (police) was a police organization with responsibilities for order maintenance. Because Islamic procedural law did not provide for a prosecutor, the jurisdictional duties of the shurta were extensive. They were authorized to investigate crimes in Sharia that were punishable by a fixed penalty or hudud and carried out the corporal penalties imposed. They carried out the retaliatory sanctions of quesas offenses, such as the death penalty, and they were authorized to identify acts considered devious, although not infractions of law. This kind of power suggests a type of autocratic political authority that was prevalent at that time in territories where Islam was the dominant faith.

Senior police had the authority not only to investigate criminals, but also to serve as a judge and to execute a sentence. When the shurta sat as a court, it was supposed to respect Sharia standards of proof, but it was not bound by them. As a result, circumstantial evidence could be introduced, and the testimony of witnesses whose integrity was questionable was admitted. This kind of procedural flexibility led to an enhanced degree of discretion when determining an appropriate sanction. While on some occasions this could be an exercise in compassionate power, there was also a concern that it could illustrate autocratic power.

With regard to sanctions in the context of Islamic law, the primary purpose was deterrence (both specific and general) rather than retribution. The sanctions were ultimately viewed as mechanisms designed to maintain the stability of the umma, the community of believers. The punishments for hudud and quesas crimes were illustrative of a deterrent goal in light of the fact that the sanctions were carried out in public. It is important to note, however, that an equally important rationale for imposing some sanctions was the rehabilitation of the criminal.

Imprisonment had been legitimized under Islamic law and employed as a form of punishment for tazir crimes. In this context, there was an acknowledgment that prisoners were entitled to certain protections, for example, against torture or other forms of physical and verbal abuse. In addition, it was thought that imprisonment should be limited to dangerous or recidivist criminals. It is interesting to note that because the state was depriving the prisoner of his or her freedom, it was the state's responsibility to provide the inmate with the necessities of life. This included conjugal visitations of prisoners who were married.

This section has provided the reader with an introduction to Islamic law, Sharia, within the context of criminal justice. Brief mention was made of the historical development of this legal system and the important role played by the madhahib in establishing Islamic

jurisprudence. The principal sources of Sharia were identified. The basic assumptions that make this legal system unique from other systems were explained, and the principles associated with Islamic criminal justice were clarified. The various categories of crimes and punishments were described to a considerable degree. Finally, critical issues associated with criminal procedure and the authorities appointed to carry out the procedural rules were described.

SHARIA: THREE CONTEMPORARY CASE STUDIES

The remainder of this chapter will return to the three regions of the Middle East that are identified when discussing the historical reception of Islam: the Arabian Peninsula, Persia, and the Ottoman Empire. By way of an introduction and orientation, it is important to note that the Ottoman Empire had reached its peak between the sixteenth and eighteenth centuries. In the initial years of the empire, Islamic armies had successfully invaded parts of Christian Europe. These centuries were fairly stable periods for the region of Islam. The various Muslim societies in the Middle East were loosely connected to the notion of the caliphate or successor to the Prophet Muhammad. This period of stability and self-sufficiency, however, was about to change. It is also important to remember that although Islam viewed the ideal Muslim community or umma as under the political administration of one caliph, the reality was that Islam was divided politically into several independent states, both worldwide and in the Middle East.

From the eighteenth through the twentieth century, the Middle East was influenced and at times dominated by Western ideas. Initially, this was limited to European countries, especially under British and French colonial rule. By the twentieth century, they were joined by the Soviet Union and the United States. Part of the influence in the region had to do with trade and strategic military interests. With the advent of the industrial revolution in the eighteenth and nineteenth centuries in Europe and America, modern science and technology were transforming the world with a host of developments, such as steamships, railroads, and the telegraph. No longer could a stable region of the world be free from the significance and power of these technological advances. The discovery of oil and natural gas in the region enhanced the significance of this colonial and Western domination further. The economic and military interests of the West are factors that have created a good deal of tension for a considerable period of time in the Middle East. With the advent of the cinema, radio, television, and most recently the Internet, Western popular culture has had a further significant influence on more recent generations of people living in the Middle East. For older generations, Western culture has often been characterized as decadent, and this has been a factor causing tension in the region. The principal concern for these people was that the Middle East, like Europe, would forsake its religious roots and embrace a more secular society.

The interest in acquiring modern military technology from the West began in the nineteenth century. The importance was not limited to weaponry, however; it included tactics in training and organization. This led to an interest in broader ideas associated with the emerging science of public administration. Of particular interest was the desire to centralize the administrative authority of government further in order to weaken any dissidents. With

concerns about government administration, law was singled out for particular benefit. A degree of familiarity with Western European legal systems had already been achieved during the colonial period, because European countries arranged to have their citizens, who were residing in the Middle East, subject to the laws of their mother country rather than those of the local jurisdiction. Initially, the Ottoman Empire adopted legal ideas from the codes of European countries. By the late nineteenth century and with specific reference to criminal justice, they were adopting a Penal Code (1857) and a Code of Criminal Procedure (1879) that was based on the contemporary legal codes of France.

Although there was opposition by Islamic jurists to this reception of European law, there were two long-standing traditions in Islam that justified these adaptations. First, the responsibility for developing procedural rules had always been a delegated authority to the sovereign or ruler. While the process could conform to cultural and societal norms, it ultimately had to be in compliance with Sharia. As mentioned earlier, this delegated authority to a ruler was a feature of siyasa, that is, administrative justice policy. As noted earlier, the term *siyasa sharia* means an administration of justice policy that is in conformity with Sharia. Therefore, a distinction was made between Sharia and siyasa. Sharia is that blend of both a code of law and a code of morals. Siyasa sharia is the method of introducing practical pragmatic policies for the administration of justice that are in conformity with the spirit of Sharia, especially when Sharia does not provide specific guidance.

Second, the Islamic legal tradition had long recognized the right of the sovereign to sit as a court himself or through his designee; it was known as the court of Mazalim (complaints). As mentioned earlier in the chapter, this was based on the notion that the ruler, whether a caliph or a sultan, had a responsibility to correct any wrong and ultimately to guarantee justice to all his people. In the context of criminal cases, the political authority or the delegate exercised a legal prerogative to resolve an apparent wrong that had occurred in an Islamic court. There were no rules or texts that defined the limits of the jurisdiction of mazalim. Whereas judges in the regular Islamic courts were bound by rules based in Islamic law, mazalim judges were free to exercise their discretion beyond such procedural or evidentiary rules in order to achieve the goal of righting a wrong.

In spite of these justifications to borrow from the Western legal tradition, this legal reception was cause for tension. After all, Sharia explains to the umma what is the will of God. According to one legal expert, "Islamic law is the epitome of the Islamic thought, the most typical manifestation of the Islamic way of life, the kernel of Islam, itself" (Schacht, 1964). Moreover, it has been pointed out that the acceptance of Western legal ideas raised questions about "the role and nature of the divine command in law. The attitude of classical and traditional jurisprudence to this question rested upon two fundamental and unassailable propositions; first, that the divine revelation prescribed rules and standards that were valid in all conditions and for all time; second, that divine revelation answered, directly or indirectly, every legal problem. In short the divine command was comprehensive and eternally valid" (Coulson, 1969).

As if these aforementioned tensions were not enough, a final, all-encompassing issue confronting many of the countries in the Middle East centered on a basic societal dilemma: What is at the core of a society? As was mentioned in the introductory chapter to this text, the concept of the nation state emerged in the eighteenth century and has been a significant

political unit of analysis throughout the world since that time. The intellectual milieu of the Enlightenment helped foster the qualities associated with this nation state, as the Age of Reason replaced the Age of Faith that had dominated Europe since the medieval period. Among the characteristics associated with this nation state are performing political activities over a specific sovereign territory and sharing certain common societal features that may include language, religion, and a common cultural or historical experience. In addition, the institutional development of a nation state has often placed a good deal of emphasis on secular law, because law has usually played a significant role in establishing various legitimate political processes. Finally, the most successful of the nation states in the modern era have embraced democratic principles. The core ideals associated with a modern secular democracy include a recognition of the importance of government by rule of law, a goal to achieve equality for all members of the community, an objective to establish a right for all members of the community to participate in the conduct of government, and a policy to control and limit government by representatives of the community. The basis for these ideals is the notion that people have individual rights and freedoms.

It is important to remember that the ideals of modern secular democracy are a fairly recent development in the history of political theory. Like the nation state, another concept that emerged in the eighteenth century was the notion of popular sovereignty, that is, the source of political authority rests in the will of the people. Initially, popular sovereignty was an ideal that took hold in the early nineteenth century, but it did not represent reality. In many countries, monarchs, the nobility, and members of other elite classes opposed the idea and for a time were successful at preventing it from coming to fruition. Over time, popular sovereignty gained the ascendancy in the West. By the late nineteenth century, and especially in the first half of the twentieth century, it became a reality in the form of modern secular democracy.

The concept of a nation state did not emerge in the Middle East until the twentieth century. As a result, the countries in the region are only now grappling with a host of issues associated with this newfound independence as a nation state. Creating a good deal of tension within each country and among the countries in the region is a central issue confronting each country: the ongoing debate over where their allegiance lies. Is their allegiance to an Islamic society? From the inception of Islam, the most important group associated with it was the umma, the community of believers. Today, because Islam is a worldwide religion, the umma extends beyond the borders of any and all nation states. Because God is considered the supreme head of the umma, in countries that have embraced all aspects of Islam, the state is considered subordinate to Islam. This kind of state is often described as a theocratic state. The purpose of such a state is to secure the maintenance and enforcement of God's will or law. This is designed to prepare the believers for life in the hereafter. To assist in that preparation, the state seeks to purge society of all sources that create a decadent secular society.

In this aforementioned debate, one alternative allegiance is toward a secular democratic society. While not precisely mimicking what happened in eighteenth-century Europe, some within the Islamic Middle East want to replace their age of faith with an age of reason. The proponents of a secular democratic society see the Muslim world's failure to modernize

as the cause of both economic and social poverty among the people and often political tyranny in the governance of the states in the region. One scholar has warned that there is "an unstable mix" of a growing population in the Middle East that includes many uneducated and unemployed young people, especially men, who are increasingly frustrated by their plight (Lewis, 2003). Social scientists have long noted and cautioned that political democracy is impossible without social democracy.

Another scholar contends that "there is no inherent and irreconcilable contradiction between Islam and democracy. Circumstantial variables and contextual factors have constrained the growth of democracy in large parts of the Muslim world" (Ayoob, 2008). Muslim countries had neither the time, centuries of political evolution, nor the independence of countries in Europe, and have only recently achieved their geographical boundaries as nation states. As such, it is not surprising that the ruling elites that assumed political positions of leadership in these new nation states were authoritarian in their approach to governance in light of the internal and external issues that they were confronting. No doubt, these factors have contributed to a delay in some Muslim countries even considering, let alone embracing, democracy. Since the end of World War II, three factors have inhibited some countries in the Middle East from pursuing a democratic form of government: (1) regional issues, often of a security nature; (2) ruling elites' negative attitudes toward representative government; and (3) the policies of external Western powers toward Muslim countries that at times have been detrimental to democratic development in favor of support for autocratic regimes (Ayoob, 2008).

The choice between an allegiance to an Islamic society or to a secular society offers fundamentally different views of society. To explore how the region is grappling with this significant debate, we turn to the nation states of Saudi Arabia, Iran, and Turkey. The objective is to examine the role that Islamic law plays in the contemporary context of these countries. Specifically, our attention is directed at the law and its application within the context of criminal justice.

KINGDOM OF SAUDI ARABIA

The Kingdom of Saudi Arabia is roughly one-fifth the size of the United States at 784,233 square miles. Much of its territory is desert. It shares land borders with Jordan, Iraq, Kuwait, Qatar, United Arab Emirates, Oman, and Yemen. It has a coastline along the Red Sea and the Persian Gulf. The population is almost 29 million, of which 5.6 million are foreigners. Until the 1960s, much of the population was described as being nomadic or semi-nomadic. The development of the economy, especially in the petroleum and petrochemical industries and the mining of natural resources, and urban growth have led more than one-third of the people to settle in four metropolitan areas. Of the native population, 90 percent are Arab and 10 percent are Afro-Asian. Approximately 85 percent are Sunni Muslims, and 15 percent are members of the Shia sect of Islam. Saudi Arabia is also home to two of Islam's holiest sites: Mecca and Medina.

When discussing the Arabian Peninsula, it was pointed out that the region was largely populated by Bedouin patriarchal tribes. Given the desert terrain and sparse vegetation in

the region, the most significant social unit was the family. These units often existed in isolation; therefore, people were totally dependent on their family for support and survival. As a result, the importance of the family was a significant Bedouin value that remains part of the Saudi cultural and social tradition. The teachings of Islam simply reinforced the importance of the family further. This attitude about family and tribe led to Arabian society not being terribly receptive to assimilating other peoples or ideas. Today, Saudi society continues to emphasize the family or extended family. Protecting the family and the security of its members is paramount. In addition, the rigid patriarchal familial structure from Bedouin times continues. As such, the notion of individuality is essentially absent. Thus, individual rights and freedoms are alien concepts to many people of the region.

The Arabian Peninsula was the birthplace of Islam and Mecca, the spiritual center. Various military skirmishes with the Persians in the eighth century led to the defeat of the Arabs and the transfer of Islamic political power to Baghdad. As a result of these events, the Arabian Peninsula receded in political and economic significance until oil was discovered and became an important resource in the twentieth century. Throughout these centuries of self-imposed isolation, Mecca retained its status as the spiritual center of Islam.

While the modernization of a society usually follows an evolutionary trajectory, this has not been the case for Saudi Arabia. Efforts at modernization, which were initiated during the last third of the twentieth century, have been abrupt and often have no relationship with the past cultural traditions. It has been suggested: "The people and their leaders believed that they could buy the physical development that they wanted without disturbing the stability of their traditional society. It is an illusion they still fight to preserve" (Mackey, 2002). Today, the most important stabilizing factor of that traditional society is Islam. "Islam for the Saudis is more than a theology, it is an entire way of life. Religion is the central force of their existence. Religion is life and life religion. Such an intense theology immensely complicates the Saudis' accommodation to modernization" (Mackey, 2002).

The Kingdom and Wahhabism

The Kingdom of Saudi Arabia was officially founded in September 1932. The origins of the kingdom, however, began in the middle of the eighteenth century with an alliance between two men: Muhammad ibn Saud (1710–1765), who was a local ruler in the market town of Dir'iyya, and Muhammad ibn Abd al-Wahhab (1703–1792), who was a religious reformer. Their objective was to establish a Muslim state that would follow the teachings of Islam as explained by the Hanbali madhhab. As mentioned earlier, this legal school claimed that all legal rules could be found in either the Quran or the Sunna of the Prophet. Thus, they strongly favored the traditional approaches or sources of Islamic law and focused on both the legal and moral teachings that could be derived from the Quran. Over the course of 150 years, the Saud family would expand and surrender the territory of their Islamic state through conflicts with other Arabian families and with Egypt and the Ottoman Empire. In 1902, Abdul Aziz al-Saud (1880?–1953) recaptured Riyadh, which the Saud-Wahhabi alliance had established as its capital back in 1824. He then led a succession of campaigns to recapture more territory throughout the peninsula. In 1932, he proclaimed himself king and named his consolidated territories the Kingdom of Saudi Arabia.

It has been pointed out by a contemporary scholar that:

> Wahhabism is rarely defined. Many of the regimes and movements labeled as Wahhabi in the contemporary era do not necessarily share the same theological and legal orientations. The reality is that Wahhabism has become such a blanket term for any Islamic movement that has an apparent tendency toward misogyny, militantism, extremism, or strict and literal interpretation of the Quran and hadith that the designation of a regime or movement as Wahhabi or Wahhabi-like tells us little about its actual nature. Furthermore, these contemporary interpretations of Wahhabism do not necessarily reflect the writings or teachings of Ibn Abd al-Wahhab (Delong-Bas, 2007).

When Muhammad ibn Saud and Muhammad ibn Abd al-Wahhab formed their alliance in 1744 to establish the Saudi state, it was understood that Saud would serve as emir or independent ruler and Wahhab would assume the duties of imam or leader of the Islamic community. Saud created a political system that merged the religious and secular aspects of life into one. Wahhab was one of several religious reformers in the eighteenth century concerned about the state of the Islamic faith. Part of the decline in piety of the adherents to the faith was associated with increased contact with Europeans. One of Wahhab's goals was to emphasize *tawhid*, that is, the Islamic belief in absolute monotheism. There is only one God, and only God should be worshipped. What had happened over the centuries was the erection of monuments to the companions of the Prophet and to previous caliphs. These monuments attracted people who venerated the memory of the person. For reformers like Wahhab, these displays of reverence should have been reserved for God alone. As a result, his followers destroyed such monuments that venerated either Muslims or non-Muslims.

Wahhab's most important concern was directed at the ulama. As mentioned earlier, the ulama were men who had pursued a religious education of the Quran, Sunna, and Sharia. Because Islam did not have an ordained clergy or a method to certify scholars, they were simply identified by their community for their religious learning. They became the guardians of the beliefs, values, and practices of the umma, the community of believers. Some became noted as famous theological scholars, while others were noted for their legal scholarship and were referred to as jurists. The elite among the ulama were called upon to serve as judges in important courts, as teachers at the famous schools, and as preachers in the major mosques. By Wahhab's time, members of the ulama were not studying the original sources of Islam, the Quran and Sunna in particular, but were relying on legal manuals and secondary literature. The reformers, like Wahhab, called for a return to the study of the original sources of Islam and the gleaning from those sources of the true meaning of Islam and what it meant to be a devout Muslim.

Wahhab wrote The Book of God's Unity, which was a theological treatise that focused on the importance of monotheism. Although Wahhabism is associated with the Hanbali madhhab, this text did not address legal issues, rather it was concerned with what beliefs and practices were appropriate for a member of the umma (Commins, 2009). As a preacher, Wahhab's message was to return to the original, purer form of Islam through a strict obedience to the Quran and a rejection of the newer interpretations of Islam. He maintained

that a Muslim should evaluate the context of the messages derived from the Sunna and then make comparisons with the Quran in order to discover the truth. It was during this time that the Saud-Wahhabi state adopted the Hanbali madhhab version of Sharia as the only legitimate law of their state.

In keeping with his approach of relying on the original sources for guidance, Wahhab maintained that the Prophet Muhammad went to war only as a defensive tactic in order to protect the Muslim community. Scholars have pointed out that his writings indicate that *jihad* was a special kind of war that was designed to protect the Muslim community from an aggressor. The ultimate goal was to end the aggression by establishing a truce or a treaty. Moreover, Wahhab has been described as opposing violence because it would reduce the likelihood of converting people to Islam, which was one of the original goals of the Prophet, and he was not a proponent of Muslim martyrdom. On the subject of women, scholars have indicated that Wahhab's writings indicate a concern for the rights of women that were similar to those of the Prophet Muhammad.

Wahhab's Islamic conservatism was clearly evident in his support for the Hanbali method of Islamic jurisprudence and his rejection of the notion that Islamic law and local custom should be synthesized. It has been pointed out that he was more focused on the intent of a person in a legal case rather than on the act itself. Thus, he was skeptical of legal decisions that were based solely on a literal interpretation of the Quran or Sunna (Delong-Bas, 2007).

Wahhab was recognized as both a theologian and a jurist or legal scholar. While he took strong exception to the ulama of his day and their distortions of the faith, he was also concerned about the lack of knowledge that both religious and political leaders had of Islamic law. His principal means of reform was through education. He was of the opinion that discussion and debate was the approach that should be taken to teach people about their faith, and possibly even to convert people to Islam.

Muhammad ibn Saud's objective of expanding the territory of his state took precedence over Muhammad ibn Abd al-Wahhab's desire to reform Islam. In 1773, Wahhab resigned as imam and withdrew from public life. When he died in 1791, the Saud-Wahhabi alliance had only started to achieve its significance in the region. Today, while some who hold fundamentalist positions in the Kingdom appear to trace their beliefs to Wahhab's conservative views, they prefer to be referred to as salafi, one who adheres to the traditions of the forefathers of Islam, or muwahhidun, the upholders of monotheism (Commins, 2009). In light of Wahhab's concern for the rights of women and his opposition to making legal decisions solely on a literal interpretation of the Quran, it is questionable whether he would support some of the fundamentalists of today that employ his name to describe and advance their social policies.

Government

The government of Saudi Arabia is based on a near absolute monarchial system. The Saudi Arabian king exercises very broad powers in his capacity as head of state and head of the government. From its inception in 1932, the legitimate foundation for the Kingdom of Saudi Arabia was the Sharia. While King Abdul Aziz acknowledged that Sharia was the only law

of the kingdom, he astutely expanded his right to legislate through royal decrees. This was justified through siyasa sharia. As mentioned earlier, this is the method of introducing practical pragmatic policies for the administration of justice that are in conformity with the spirit of Sharia, especially when Sharia does not provide specific guidance. With regard to contemporary legal reform, Saudi Arabia is clearly a work in progress. Over the past three decades a number of factors have led to incremental changes in the law and legal system. Those factors include attempts to grapple with the Kingdom's modern societal changes, pressures from international human rights groups, and events in Iran since 1979 (which will be discussed later in the subsection of this chapter on Iran). To illustrate, a fairly recent and important use of siyasa sharia occurred in 1992 when the Basic Law of Government was adopted by a royal decree from King Fahd. It serves as the constitution of the Kingdom. It is alleged that no government body was consulted on the contents of the Basic Law other than members of the House of Saud (Human Rights Watch, 1992).

Article 1 of the Constitution states: "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution." Even before the Basic Law of Government was adopted, there was a prohibition against the open practice of any other religion in the country. This is generally not the case in other countries where the dominant religion is Islam.

The importance of Islam is ever present in this document. To illustrate, article 7 indicates that "Government in Saudi Arabia derives power from the Holy Qur'an and the Prophet's tradition," and article 8 explains that "Government in the Kingdom of Saudi Arabia is based on the premise of justice, consultation, and equality in accordance with the Islamic Shari'a." This article is an expression of the long-standing uniqueness that the Kingdom of Saudi Arabia exhibits among the various Islamic countries in the world. Whereas many Islamic countries might adhere to various Sharia principles, they have reformed their legal system in light of modern contemporary society. With specific reference to Sharia, that is not the case in Saudi Arabia. One scholar has described this unique character.

> The legal system of Saudi Arabia is an exceptional one in the world of Islam. In most countries where the Shari'a is applied, the state determines which parts of the Shari'a are enforced. Moreover, in order to assert their power to determine what is law, states as a rule have codified—and thereby modernized—those parts of the Shari'a that are applied by the courts. In Saudi Arabia, however, the state does not interfere with the substantive laws of the Shari'a. The Saudi state regards uncodified Shari'a as the law of the land, and enacted law is subordinate to it (Peters, 2005).

Without a modern codified context, judges are trained and refer to commentaries of the Sharia that were written for the most part in the Middle Ages.

The long-standing policy of the House of Saud to ban any political dissent is given added legal support with article 12 of the Basic Law. It declares: "The consolidation of national unity is a duty, and the state will prevent anything that may lead to disunity, sedition and separation." As such, people do not have the right to assemble unless the government authorizes a demonstration that is in support of one of its policies. Of course, there are

people in the country that hold a range of views across the conservative to liberal political spectrum, but there are no formally established political parties in the country. The nature of the political groups that have emerged in the Middle East over recent decades has only reinforced the position of the House of Saud to prohibit organized political groups. Moreover, the notion of the importance of a free press is absent. The government generally determines all the news that it deems fit to print. Finally, the Ministry of Information owns and operates Saudi radio and television.

Constitution

The Basic Law of Government or Constitution of Saudi Arabia is divided into nine chapters and includes a total of 83 articles. While some facets of the constitution will be discussed in other parts of this section on government, it is worth highlighting two chapters that illustrate that Sharia remains intimately part of the constitution and central to an understanding of the Saudi legal system. Chapter 3 of the Basic Law is titled "Features of the Saudi Family." Article 9 declares: "The family is the kernel of Saudi society, and its members shall be brought up on the basis of the Islamic faith, and loyalty and obedience to God, His Messenger, and to guardians; respect for and implementation of the law, and love of and pride in the homeland and its glorious history as the Islamic faith stipulates." Article 10 states: "The state will aspire to strengthen family ties, maintain its Arab and Islamic values and care for all its members, and to provide the right conditions for the growth of their resources and capabilities." Article 11 explains that "Saudi society will be based on the principle of adherence to God's command, on mutual cooperation in good deeds and piety and mutual support and inseparability." These articles illustrate the Saudis' ongoing commitment to the most significant social unit of their society, the family, which was also the centerpiece of ancient Bedouin society. Finally, article 13 indicates: "Education will aim at instilling the Islamic faith in the younger generation, providing its members with knowledge and skills and preparing them to become useful members in the building of their society, members who love their homeland and are proud of its history."

Chapter 5 is devoted to rights and duties. The state's duties are placed within the context of Islam and Islamic law. For example, article 23 proclaims: "The state protects Islam; it implements its Shari'a; it orders people to do right and shun evil; it fulfills the duty regarding God's call." Article 26 declares: "The state protects human rights in accordance with the Islamic Shari'a." Individual rights and those associated with criminal justice issues in particular are prominent in this chapter. To illustrate, article 36 indicates: "The state provides security for all its citizens and all residents within the territory and no one shall be arrested, imprisoned, or have their actions restricted except in cases specified by statutes." Article 37 continues along these lines in stating: "The home is sacrosanct and shall not be entered without the permission of the owner or be searched except in cases specified by statutes." Finally, article 38 indicates: "Penalties shall be personal and there shall be no crime or penalty except in accordance with the Shari'a or organizational law. There shall be no punishment except for acts committed subsequently to the coming into force of the organizational law." A more detailed discussion of criminal procedure follows.

Monarch

Many countries in the world that were historically associated with monarchial governance have abandoned this form of government, especially during the course of the twentieth century. Those that have retained the monarchy have often limited the role to symbolic and ceremonial duties. This is clearly not the case in Saudi Arabia. As mentioned previously, article 7 of the Basic Law states: "Government in Saudi Arabia derives power from the Holy Qur'an and the Prophet's tradition." This is in keeping with the Sunni Islam tradition that grants the leader authority in the political realm but does not bestow a theocratic status. Of course, the leader is expected to be a protector and defender of the Islamic faith. Thus, Sunnis believe that an Islamic government is a civil matter without any religious authority. It would be the responsibility of the ulama, the religious scholars, to offer moral and ethical guidance to the community, although they are not actually mandated to govern. Thus, the office of monarch is a sacred trust imposed on and accepted by the individual, which includes protecting Islam. Moreover, article 6 commands: "Citizens are to pay allegiance to the King in accordance with the Holy Qur'an and the tradition of the Prophet, in submission and obedience, in times of ease and difficulty, fortune and adversity."

Chapter 2 of the Basic Law of Government is devoted to monarchy. Article 5 states: "The system of government in the Kingdom of Saudi Arabia is that of a monarchy." The article continues with four statements that outline the act of succession to the monarchy.

> Rule passes to the sons of the founding King, Abd al-Aziz Bin Abd al-Rahman al-Faysal Al Sa'ud, and to their children's children. The most upright among them is to receive allegiance in accordance with the principles of the Holy Qur'an and the Tradition of the Venerable Prophet.
>
> The King chooses the Heir Apparent and relieves him of his duties by Royal order.
>
> The Heir Apparent is to devote his time to his duties as an Heir Apparent and to whatever missions the King entrusts him with.
>
> The Heir Apparent takes over the powers of the King on the latter's death until the act of allegiance has been carried out.

A few comments are in order regarding this method of succession. First, the Saudis have always employed an agnatic order of succession, that is, only males are eligible to become the monarch. This is not surprising in light of the historical and contemporary patriarchal character of the society. It should be noted, however, that countries with monarchies that have long been associated with democratic principles have only recently either adopted or are considering the introduction of cognatic succession, that is, the eldest child (male or female) is the heir. Second, most monarchial methods of succession, whether agnatic or cognatic, claim the right to the eldest child. That is not necessarily the case in Saudi Arabia, where the Basic Law reiterates the tradition of selecting "the most upright among" the heirs of King Abdul Aziz. Because the King had so many children, there is unlikely ever to be a shortage of royal princes eligible for consideration. The king selects his heir, the crown prince, among the royal princes, but this is always done in consultation with senior members

of the royal family and religious leaders. Article 8 of the Basic Law speaks of the importance of government by consultation, and this important decision is an illustration of that principle in action. In the past, the selection of the crown prince was a rather secretive and somewhat informal process. In 2006, King Abdullah announced that an Allegiance Commission was formed to handle the selection process and thus bring some sense of transparency to the procedure. Finally, it is noted that the heir apparent would take over upon the king's death. There have been instances in which a crown prince has actually functioned in place of the monarch when the reigning king was incapacitated.

In his capacity as head of state and head of the government, the monarch's duties are extensive, and most are cited throughout the Basic Law of Government. They include overseeing the administration of the government, chairing the Council of Ministers, appointing ministers to the Council and heads of various departments, appointing members to the Consultative Council, declaring states of emergency as the commander-in-chief of all armed forces, carrying out the policies of the country, overseeing the implementation of Sharia, issuing royal decrees that have the force of law, appointing judges, and implementing judicial rulings. The king delegates some of the breadth and depth of these duties to others.

Although the king's authority is significant, he should not be considered an absolute monarch, for he must adhere to Sharia and Saudi traditions. Thus, the monarch's authority is rooted in two sources: Islam and Bedouin society. It was already mentioned that the Sunni tradition acknowledges that the political leader is responsible for the administration of the Islamic government as a civil matter. He does not have any religious authority, but in his capacity as leader, he is expected to be a protector and defender of the Islamic faith. This is particularly the case in Saudi Arabia, the home of two sacred sites: Mecca and Medina. The king, however, would consult with the ulama, the religious scholars, whose responsibility it is to offer moral and ethical guidance for the community.

As mentioned earlier, Bedouin society was based on a patriarchal tribal social structure. The various tribes initially created unwritten rules that over time established customary laws for a tribe. As such, a single executive or legislative authority did not exist in the Arabian Peninsula. Each sheikh held the leadership position in his tribe. These sheikhs would meet periodically to resolve disputes among the various tribes in the region. When Abdul Aziz declared himself king of the newly formed Kingdom of Saudi Arabia, he became the first sheikh among the sheikhs in the region. To assure their allegiance, King Abdul Aziz continued the Bedouin tradition of consultation with the local leaders. What follows are three examples of the consultative process in Saudi governance. They illustrate the value of forming a consensus on policy matters for the Kingdom.

Council of Ministers

In addition to holding the title of king, the monarch is also the prime minister, for he chairs the Council of Ministers. As article 56 of the Basic Law indicates in part, "The Council of Ministers establishes the prerogatives of the Council regarding internal and external affairs, the organization of and co-ordination between government bodies. It also establishes requirements to be fulfilled by ministers, their prerogatives, the manner of their questioning

and all issues concerning them." King Abdul Aziz created the Council in 1953 as an advisory body to the king. By 1958, Crown Prince Faisal had enhanced the authority of the Council by giving it both administrative and legislative duties. While the Council can issue decrees, this authority is not separate from that of the king, who must approve all of the Council's decisions.

In addition to the king, the Council is composed of the crown prince, some royal advisors, and the heads of various ministries. The most prominent ministries include defense and aviation, foreign affairs, finance, interior, justice, education, health, industry, information, labor and social affairs, petroleum and mineral resources, public works and housing, pilgrimage affairs and religious trusts, and the Saudi Arabian National Guard.

Consultative Council

Muslims believe that God is the sole source of authority and the lawgiver. As mentioned previously, the Quran states: "Authority belongs to God alone, and he orders you to worship none but Him: this is the true faith, though most people do not realize it" (12:40). While God is the sovereign lawgiver, "God has made a promise to those among you who believe and do good deeds: He will make them successors to the land, as He did those who came before them; He will empower the religion He had chosen for them; He will grant them security to replace their fear" (24:55). This verse has been interpreted as acknowledging that man is God's trustee on earth and thus has the authority to make law, but it must be in conformity with Sharia. Thus, while God is the lawgiver, man has the authority to be a lawmaker.

While the Council of Ministers has both administrative and legislative functions, the Consultative Council can be characterized as a type of legislature within the context of Saudi governance. Article 68 of the Basic Law of Government created this Council in 1992, and article 69 indicates that "The King has the right to convene the Consultative Council and the Council of Ministers for a joint meeting and to invite whoever he wishes to attend that meeting to discuss whatever matters he wishes." Once again, this passage illustrates both the king's broad authority and the important role that consultation plays in the governance of the Kingdom.

The Consultative Council is composed of 150 people selected by the king for a four-year term. Half of the members must be newly selected every four years. Until recently, membership on the Council was limited to men. In early 2013, King Abdullah appointed 30 women to the organization and indicated that forthwith the composition of the Council should always include at the very least one-fifth of the seats reserved for women. Membership on the Council consists of highly educated people who do not hold governmental or private management positions, unless the king waives this rule. The Council is designed to serve as a sounding board on government policy, and it can propose new or amended legislation. It does not, however, have the independent authority to legislate. Any legislation under consideration must secure the approval of two-thirds of the members of the Consultative Council for it to become law. Ultimately, for legislation to become law, it must be approved by the Consultative Council, the Council of Ministers, and the monarch.

Senior Council of the Ulama

In 1971, the Senior Council of the Ulama was created. It is composed of between 30 and 40 of the leading senior religious scholars and is chaired by the Grand Mufti. A *mufti* is a specialist in Islamic law and is authorized to issue fatwas. Although this Council is not part of the legislative process as the aforementioned councils are, it is consulted on various pieces of proposed legislation to seek its guidance on conformity with the moral and ethical teachings of Islam in general and Sharia in particular. One of its principal duties is to provide fatwas that establish general rules regarding questions submitted to it by the government. Traditionally, a fatwa was a legal opinion from any religious scholar or jurist on an issue. While fatwas are acknowledged as a legal authority, they are not considered law. A fatwa is distinct from a judge's ruling in a court of law, although a judge can be guided in his deliberations by a fatwa.

Judiciary

There have been two kinds of courts in Saudi Arabia: Judicial Courts and the Board of Grievances. In October 2007, King Abdullah issued a royal decree designed to modernize the judiciary and impact both types of courts. The Board of Grievances, which is now referred to as Administrative Courts, have a parallel structure to that of the Judicial Courts. The Administrative Courts are responsible for disputes among government departments and cases involving administrative decisions by the government or an independent corporate entity. The other type of courts are referred to as Judicial Courts, and they are of particular interest for our purposes. While some of the reforms are still being introduced, the new judicial system is presented here. Before the court system is described, however, it may prove beneficial to explain the role of the Supreme Judicial Council, which has a significant responsibility for the administration of justice.

Supreme Judicial Council

Prior to the introduction of the 2007 judiciary reforms, the Supreme Judicial Council functioned as the highest court in the court hierarchy. It also had several administrative functions. As a result of the reforms, the Supreme Judicial Council is primarily limited to handling administrative matters. To illustrate, it has supervisory authority over the courts and judges. This includes appointing judges, issuing regulations on the role of judges, inspecting courts, and addressing court organizational issues. The Ministry of Justice maintains financial control over the judiciary along with some administrative duties.

Members of the Council include the Chief Judge of the High Court, four chief judges of the Appellate Courts, a deputy Minister of Justice, the Chief of the Bureau of Investigation and Prosecution, and three members who have the qualifications of judges from Appellate Courts. With the exception of the Chief Judge of the High Court, the Chief of the Bureau of Investigation and Prosecution, and the deputy Minister of Justice, all the other appointees are selected directly by the king. The term of the appointment is for four years, which can be renewed.

Judicial Courts

There are three tiers in the hierarchy of the Judicial Courts: High Court, Courts of Appeal, and First-Degree Courts (see Figure 7.2).

The High Court is located in Riyadh, the capital of Saudi Arabia, and it has two functions. It has certain administrative responsibilities that include overseeing the implementation of Sharia in the courts and regulations decreed by the king. It also reviews the decisions made by and upheld by the Courts of Appeal. The court's other function is to entertain appeals that are essentially based on questions of law or questions of procedure. A panel of three judges would normally hear appeals to the court. There is one exception to this rule. In cases coming from a criminal circuit of a Court of Appeal, the panel will consist of five judges, because the court is mandated to review judgments involving major punishments, such as the death penalty, stoning, amputation, or quesas cases other than death. At least one Court of Appeal is located in each of the 13 provinces of the country. Courts of Appeal are subdivided into specialized circuits: Civil, Commercial, Criminal, Labor, and Personal Status. These circuits entertain appeals from the First-Degree Courts.

First-Degree Courts are located throughout the country. These courts are also subdivided into divisions of specialization: Commercial, Criminal, General, Labor, and Personal Status. With regard to the Criminal Court, it is further subdivided into circuits that specialize in hudud, quesas, tazir, and juvenile offenses. The hudud, quesas, and tazir offenses were explained in the previous section, "Crime and Punishment." They indicate the manner in which criminal offenses are categorized in Islamic law. The Criminal Court is composed of a three-judge panel. Any other offense that does not fit under the aforementioned categories would be handled by a single judge.

In 2008, a Specialized Criminal Court in Riyadh was established to deal with terrorism cases. Particular attention is directed at those accused of joining Al-Qaeda or threatening national security. Charges can involve implementing a terrorist act, such as armed attacks,

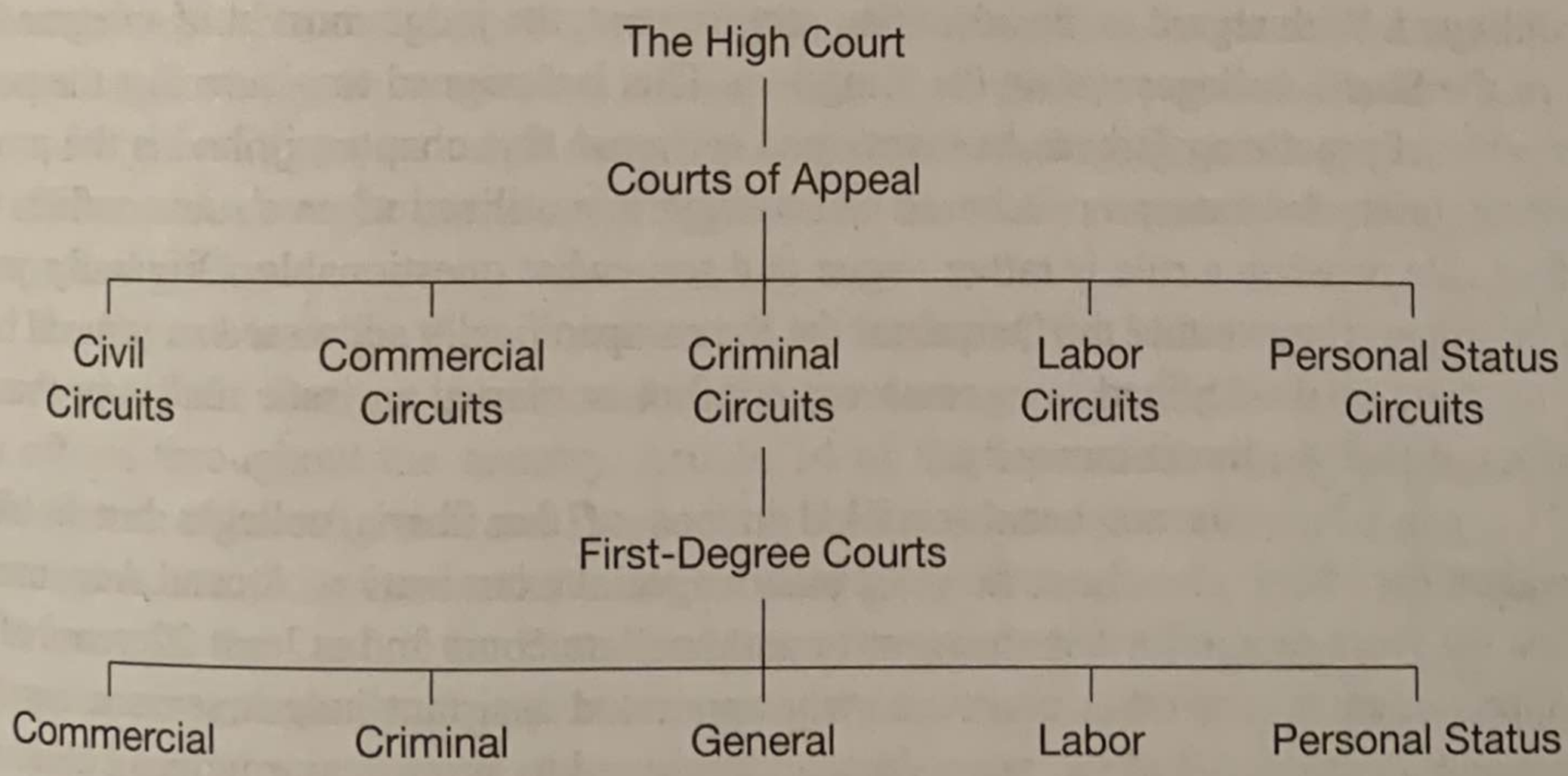


FIGURE 7.2 | Organization of the Judicial Courts of Saudi Arabia

the manufacture and processing of explosives, car bombings, and hiding known terrorists. Other terrorist charges may include collecting information about people and places, recruiting members, training recruits, fundraising for a movement, illicit arms trading, and facilitating members of a terrorist cell. If a person is found guilty, the sanctions can range from a fine, travel restrictions, house arrest, imprisonment, and the death penalty.

Judges

According to article 1 of the Law of the Judiciary: "Judges are independent and, in the administration of justice, they shall be subject to no authority other than the provisions of Shari'a and laws in force. No one may interfere with the Judiciary." The objective of this statement is to give the appearance that the power of the executive branch of government is reduced regarding the judiciary. The revised Law of the Judiciary has essentially removed the minister of justice from a significant role either in the appointment of judges or in the judicial decision-making process, but the ministry is still responsible for the budget. Ultimately, the executive branch is involved, because of the role that the king plays either directly or indirectly in the appointment of members to the Supreme Judicial Council.

The role of the judge is not that of a disinterested umpire, as common law judges are often described; rather, their task is to seek the truth through an inquisitorial method of probing questions of the parties, witnesses, and evidence, and then concluding by dispensing justice. The judges are guided by one of two types of procedures employed in the adjudication process, depending on the nature of the case. The procedural rules are titled the Law of Procedure before Sharia Courts and the Law of Criminal Procedure.

Article 31 of the Law of the Judiciary explains the qualifications necessary to become a judge. Requirements include being a Saudi national, of good character and conduct, qualified to hold the position in accordance with the Sharia, meeting the educational requirements, and not having been sentenced for a crime affecting his religion or honor or dismissed from public office for disciplinary reasons, unless the person has been rehabilitated. With regard to the education requirement, the judge must hold a degree from one of the Sharia colleges within the Kingdom. This is designed to assure that the person is capable of practicing ijtihad. As mentioned earlier in this chapter, ijtihad is the process in which jurists determine a rule based on analogy. It is utilized when a rule conflicts with another rule or when a rule is rather vague and somewhat questionable. Originally, jurists turn to ijtihad when neither the Quran nor the Sunna specifically addressed an issue at hand. The ultimate goal of ijtihad is to resolve a conflict or clarify an issue that is in the best interests of the Muslim community.

If a candidate has not been schooled in one of the Sharia colleges but holds an equivalent certificate elsewhere, he must pass a special examination. A candidate must be at least 40 years of age for appointment to an appellate court and at least 22 years of age for appointment to the other courts. Newly appointed assistant judges serve a two-year probationary period. All of their decisions are reviewed by more senior judges before they are announced in court.

One of the criticisms directed at Saudi judges is their overly broad use of discretion when interpreting Sharia. On the one hand, people in the West favor judicial independence and see it as a good thing. In the Saudi context, on the other hand, some features of judicial independence impede the development of a uniform and just legal system. To illustrate, Saudi judges do not rely on precedent; rather, they may depend solely on their own reasoning. Moreover, because judges are religiously educated men, they tend to be from a fairly conservative mind-set.

This often extreme conservative interpretation of the law prompted efforts at judicial reform. For example, the authority of the Supreme Judicial Council to function as the ultimate court of appeal was removed. The goal is to make the High Court more sensitive to modern legal issues that are associated with a broad range of concerns, from business ventures to human rights. In addition, the very narrow legal schooling that judicial candidates have received at Sharia colleges was another concern. As a result, the Judicial Academy and an Institute of Public Administration were established in 2000 and are designed to offer additional training by enhancing the expertise and skills of members of the judiciary. While these reforms are welcome, it is important to keep in mind that implementing them will be extremely slow given the conservative nature of the society in general and the current judges in particular.

Saudi Arabia is below the international average for the number of judges per 100,000 people. The international standard suggests that the Kingdom should have 5,200 judges, yet the Ministry of Justice identified 662 active judges in 2006 (Human Rights Watch, 2008d). The aforementioned educational reforms are designed to rectify this problem. Nevertheless, the current active judges are overworked, which inevitably leads to errors. Given the nature of the pretrial and trial processes, these errors can contribute to issues associated with human rights violations against those accused of crime.

Bureau of Investigation and Public Prosecution

With regard to the Saudi criminal justice process, the Bureau of Investigation and Public Prosecution is the most important component of their system. As the name suggests, the Bureau may investigate crimes, but it does not have exclusive responsibility for that. Other law enforcement agencies might have jurisdictional authority, depending on the nature of the offense and where the crime occurred. The Bureau is also responsible for the prosecution of criminal offenses.

The Bureau is under the administrative leadership of the Ministry of the Interior. The Chairman of the Bureau is responsible for the management of the organization, which has offices throughout the country. Article 14 of the Law of Criminal Procedure states: "The Bureau of Investigation and Prosecution shall conduct its investigation and prosecution in accordance with its Law and the implementing regulation thereof." The Law that article 14 refers to is the Law of the Bureau of Investigation and Public Prosecution. This piece of legislation explains the organization, management, and jurisdiction of the Bureau. It also provides an extensive internal procedure for disciplining members of the Bureau who are accused of either a criminal or noncriminal violation.

While the name of the Bureau explains two of its key responsibilities, article 3 of the Law of the Bureau of Investigation and Public Prosecution offers a more encompassing list of its duties. The article states, in part:

> The Bureau shall have jurisdiction, in accordance with the law and as specified by the implementing regulations, as follows:
>
> a. Investigating crimes;
> b. Taking action with respect to an investigation through filing a case or taking no action in accordance with relevant regulations;
> c. Prosecuting before judicial bodies in accordance with the implementing regulations;
> d. Appealing judgments;
> e. Supervising the execution of criminal sentences;
> f. Monitoring and inspecting prisons, detention centers and any places where criminal sentences are executed, as well as hearing complaints of prisoners and detainees, insuring the legality of their imprisonment or detention and the legality of their remaining in prison or the detention center after the expiry of the period, taking necessary steps to release those imprisoned or detained without a legitimate cause and applying the law against those responsible for such action. The Minister of Interior shall be informed of any relevant observations, and a report shall be submitted to him regarding the conditions of the prisoners and detainees every six months;
> g. Any other power conferred upon it by the law, regulations issued pursuant to this Law, the resolutions of the Council of Ministers or the High Orders.

Thus, in addition to investigating some cases and prosecuting all offenses, the Bureau appeals court judgments, supervises the execution of sentences, and oversees the management of the prison system and detention centers. Critics have suggested that the Bureau's oversight of prisons and detention centers has been minimal at best. Finally, article 25 of the Law of Criminal Procedure authorizes the Bureau to supervise the overall investigation of an offense that is being handled by criminal investigators from another law enforcement agency. Indeed, this agency wields a significant amount of authority throughout the Saudi justice system. In light of that authority, it has been suggested that the Bureau should not fall under the jurisdiction of the Ministry of the Interior but rather under that of the Ministry of Justice.

Finally, within the Bureau there is a Bureau Administration Committee composed of senior members, including the Chairman and Vice Chairman of the Bureau. While much of the Committee's duties focus on administration, such as studying issues associated with investigation and prosecution and the production of an annual report, it does have one significant substantive responsibility: It is charged with the review of all indictments in which the death penalty, amputation, or stoning are sought. The Saudis are well aware of the objections that many nations and international organizations have with regard to some of the Sharia sanctions. In view of that, in those cases where such a sanction is sought, the

Bureau examines the indictment even before the case goes to trial. Because the Saudis have proclaimed their adherence to Sharia in a host of legal documents, they are unlikely to deviate from their support for the sanctions that others find objectionable. From the Saudi point of view there are several steps in their criminal process that are designed to prevent miscarriages of justice. With regard to the aforementioned sanctions, the review of the indictment by the Bureau Administration Committee is the first step, which may be followed by a trial, an appeal, and then ultimately a review by the High Court.

Law

There are three main sources of law in Saudi Arabia: Islamic law, statutory law, and royal orders. The principal sources of Islamic law or Sharia are the Quran and Sunna. These sources, along with ijma and ijtihad, were explained in the previous section, "Sources of Sharia." The application of Sharia is guided by the interpretation of the Hanbali madhhab. This is one of the four orthodox madhahib or Islamic legal schools that were discussed earlier in the section on madhahib. It is important to reiterate the importance and uniqueness of Islamic law. Sharia is "the comprehensive and preordained system of God's commands, a system of law having an existence independent of society, not growing out of society but imposed upon society from above" (Coulson, 1969). Moreover, Sharia is considered both a code of law and a code of morals. Thus, a distinction was never made between the two concepts. The Quran, in particular, is the fundamental vehicle that defines what is appropriate in the Islamic community of believers. As mentioned earlier, not only is the law unique, but the Kingdom of Saudi Arabia's application of Sharia is essentially different from other Islamic countries in the world. Whereas many Islamic countries might adhere to various Sharia principles, they have reformed their legal system in light of modern contemporary society. With specific reference to Sharia, that is not the case in Saudi Arabia.

Statutory laws and regulations are the result of deliberations of the Council of Ministers, the Consultative Council, and the monarch. These statutes deal with a host of private and public law issues associated with a modern contemporary society. They include drug-related offenses, embezzlement, explosives, and official abuses of power. In order to become law, these pieces of legislation have to be in compliance with Sharia. Finally, the king also has the authority to issue royal decrees, of course, in conformity with Sharia. Royal decrees may or may not be subjected to consultation, either with the Council of Ministers or possibly with that Council as well as the Consultative Council. That decision rests totally with the monarch.

One of the ongoing criticisms directed at the Saudi justice system is the fact that the criminal law has not been codified. A number of Saudis have indicated the merits of codification, but it has not come to fruition. Presently, there are three kinds of crime. The origins of this categorization are explained in the previous section, "Crime and Punishment." Crimes of hudud are considered against God, because they threaten the social order and security of the community of believers. Quesas crimes are violations against the rights of an individual. These are associated with retribution and compensation. Finally, tazir offenses are considered less serious, because they essentially do not involve physical injury to a victim. They are also referred to as discretionary crimes, because the judge has the

discretion to determine if the action or inaction is a crime and what constitutes an appropriate sentence. Because Saudi judges are not required to follow precedent, they exercise a considerable amount of discretion in this context, which has led to allegations of serious abuse. Obviously, an accused person is placed in a very difficult situation if he or she cannot refer to a formally approved definition of the offense they are accused of committing. Among the examples left to a judge to define are defrauding people, failure to observe prayer, and lewd behavior (Human Rights Watch, 2008d).

As mentioned earlier, there are two types of procedural law: the Law of Procedure before Sharia Courts and the Law of Criminal Procedure. Some of the contents of the Law of Criminal Procedure were borrowed from Egyptian and French procedural law (Ansary, 2008). Naturally, it is the Law of Criminal Procedure that is of interest for our purpose. Attention is paid to both the pretrial and trial processes.

It is important to point out straightaway that this law was approved in 2001. A number of the provisions of the law have been criticized as deficient in either protecting or securing due process rights. A reoccurring point of contention is that this procedural law suffers from far too many vague statements (Human Rights Watch, 2008d; Human Rights Watch, 2013; Human Rights Watch, 2013a; Human Rights Watch, 2014). As is the case with any procedural law, its successful implementation is often totally dependent on a vigilant judiciary. Criticisms have been raised that various aspects of the pretrial and trial processes have not always been implemented or adhered to in the spirit in which they were intended. This may in part be attributed to the document's vagueness, but it may also be an expression of opposition on the part of the judiciary. Time will tell if these concerns can be resolved, especially in light of the implementation of reforms associated with judges.

Pretrial Procedures

Chapter 5 of the Basic Law of Government is devoted to rights and duties. Within this chapter, individual rights and those associated with criminal justice issues in particular are prominently featured. Article 26 declares: "The state protects human rights in accordance with the Islamic Shari'a." To illustrate, article 36 indicates: "The state provides security for all its citizens and all residents within the territory and no one shall be arrested, imprisoned, or have their actions restricted except in cases specified by statutes." Article 37 continues along these lines, stating: "The home is sacrosanct and shall not be entered without the permission of the owner or be searched except in cases specified by statutes."

It is the Law of Criminal Procedure that establishes guidelines for agents of the justice system on how they are to proceed with a criminal investigation. These guidelines are similar to those found in many countries of the world, irrespective of the legal family with which they are associated. Following some general comments about the Saudi investigative process, the rules associated with the right to assistance of counsel, the powers associated with searches and seizures, the powers associated with interrogations, and the powers associated with arrests and detention will be explained.

With regard to the general comments, there are essentially two ways in which a case can be opened and an investigation initiated. The law authorizes the Bureau of Investigation and Prosecution to initiate a criminal investigation. Moreover, article 17 of the Law

of Criminal Procedure indicates: "The victim or his representative and his heirs may initiate criminal action with respect to all cases involving a private right of action, and shall follow-up any such case before the competent court." In such cases, the court would inform the prosecutor of the matter, and the prosecutor would then initiate an investigation if it deemed that it would serve the public interest.

According to article 26 of the Law of Criminal Procedure, there are a number of government agencies that are authorized to conduct a criminal investigation within their respective jurisdictions. The agencies include members of the Bureau of Investigation, directors of police and their assistants, public security officers, secret service officers, passport officers, intelligence officers, civil defense officers, prison directors and officers, border guards, National Guard officers, and military officers. The heads of the Commission for the Promotion of Virtue and the Prevention of Vice are also authorized to conduct investigations with respect to matters falling within their jurisdiction. (The Commission for the Promotion of Virtue and the Prevention of Vice is explained below.) Irrespective of the agency conducting the investigation, article 25 indicates that they are all "subject to the supervision of the Bureau of Investigation and Prosecution." Critics have suggested that the Bureau has not been terribly vigilant in its oversight of other law enforcement agencies, singling out secret service and intelligence officers as examples, which should come as no surprise given the nature of their work. They have also avoided supervising the Commission for the Promotion of Virtue and the Prevention of Vice, which is politically accountable only to the monarch.

With roots both in Islamic procedural law and with modern procedures borrowed from some Romano-Germanic countries, the Saudi procedure acknowledges the standing of the person harmed in the course of the commission of a criminal offense. While the prosecutor is primarily representing the public as a victim in a criminal case, which is referred to as the public right of action, the actual victim also has a claim with respect to a private right of action. In that context, article 69 addresses the pretrial rights of a victim during the course of an investigation. "The accused, the victim, the claimant in respect of the private right of action, and their respective representatives or attorneys may attend all the investigation proceedings. The Investigator may, however, conduct the investigation in the absence of all or some of the above mentioned, whenever that is deemed necessary for determining the truth. Immediately after the necessity has ended, he shall allow them to review the investigation."

With regard to the right to assistance of counsel, article 4 of the general provisions of the procedural law declares: "Any accused person shall have the right to seek the assistance of a lawyer or a representative to defend him during the investigation and trial stages." This right is reiterated at article 64: "During the investigation, the accused shall have the right to seek the assistance of a representative or an attorney." Thus, a person has the right to assistance when suspicion is directed at him or her. Critics have pointed out that many accused people are never told of their right to representation. Moreover, there is no public defender system. Therefore, when the accused is made aware of the right to assistance, he or she may not, and often does not, have the means to employ an attorney (Human Rights Watch, 2008d; Human Rights Watch, 2013; Human Rights Watch, 2013a; Human Rights Watch, 2014). In early 2010, the Consultative Council, the legislative

body mentioned earlier, did approve legislation that would create a public defender program. The government has yet to implement this law, however. This is another example of the extremely slow pace of implementing reform in light of the very conservative nature of Saudi society and government in particular.

The powers associated with searches and seizures may involve a person, place, or belongings. Regarding a person, article 42 indicates: "A criminal investigation officer may search the accused where it is lawful to arrest him, which may include his body, clothes, and belongings. If the accused is a female, the search shall be conducted by a female assigned by the criminal investigation officer."

With specific reference to places, article 41 focuses on the importance of a search warrant. It states:

> A criminal investigation officer may not enter or search any inhabited place except in the cases provided for in the laws, pursuant to a search warrant specifying the reasons for the search, issued by the Bureau of Investigation and Prosecution. However, other dwellings may be searched pursuant to a search warrant, specifying the reasons, issued by the Investigator. If the proprietor or the occupant of a dwelling refuses to allow the criminal investigation officer free access, or resists such entry, he may use all lawful means, as may be required in the circumstances, to enter that dwelling.

Article 45 points out that searches are designed to collect information associated with the crime under investigation. It indicates, however, that if a search "incidentally reveals unlawful material the possession of which is unlawful or any evidence associated with any other crime, the criminal investigation officer shall collect such evidence and a note to that effect shall be entered into the record."

Article 51 states: "The search shall be conducted during the daytime, after sunrise and before sunset in accordance with the powers conferred by law. No access to dwellings during the night shall be allowed except during the commission of a crime." Moreover, article 46 indicates that a search of a dwelling should be conducted in the presence of either the owner or his representative. If this is not possible, two witnesses should be secured to oversee the search.

Article 55 indicates: "Mails, cables, telephone conversations and other means of communication shall be inviolable and, as such, shall not be perused or surveiled except pursuant to an order stating the reasons thereof and for a limited period as herein provided for." Article 56 elaborates on this qualification: "The Director of the Bureau of Investigation and prosecution may issue an order authorizing seizure of mail, publications, and parcels and surveillance and recording of telephone conversations, if such procedure is deemed useful in determining the truth related to a crime that has actually been committed. Such order shall state the reasons thereof and shall be for a period not exceeding ten days renewable according to the requirements of the investigation."

With regard to the whole issue of searches and seizures associated with a person, place, or belongings, critics claim that these rights have been violated to a significant degree (Human Rights Watch, 2008d). The lack of compliance with the rules can be attributed in part to the fact that they are still a fairly new feature of the Saudi judicial process.

With appropriate training, the next generation of police officers might be more willing to follow these procedural rules. Even this will not totally eliminate abuses, a result to which many democratic countries that embraced due process rights long ago can attest. Moreover, the reforms that were introduced in 2007 to improve the quality of the judiciary should also assist in this endeavor. Of course, the slow pace in which those reforms are being implemented will contribute to the continued criticism over the lack of compliance with criminal procedure rules.

In reference to the powers associated with interrogations, article 101 offers only brief guidelines: "When the accused appears for the first time for an investigation, the Investigator shall take down all his personal information and shall inform him of the offense of which he is charged. The Investigator shall record any statements the accused expresses about the accusation. The accused may be confronted with any other accused person or witness. After statements of the accused have been read to him, he shall sign them. If he declines to sign, a note to that effect shall be entered into the record." According to article 126, if the investigator is of the opinion that there is sufficient evidence against the accused, the investigator refers the matter to the court, which would then issue a summons if the accused is not already in custody. It is important to note that the Saudi Law of Criminal Procedure does not provide a person with the right to remain silent. Moreover, a number of claims have been made that the accused is often subjected to various forms of poor treatment and even torture, if the person does not comply with the investigator's interrogation (Human Rights Watch, 2008d; Human Rights Watch, 2013; Human Rights Watch, 2013a; Human Rights Watch, 2014).

The Saudi Law of Criminal Procedure addresses issues associated with both arrest and detention. Depending on the circumstances of the case, either a summons or an arrest warrant may be issued. If the person under suspicion ignores the summons, an arrest warrant is issued. Article 104 points out that "an arrest warrant shall instruct the public authority officers to arrest and bring the accused promptly before the Investigator in the event he refuses to appear voluntarily. Furthermore, the detention warrant shall instruct the detention center officer to admit the accused into detention center after explaining the offense with which he is charged and the basis thereof." With specific reference to an arrest, article 109 indicates: "The Investigator shall promptly interrogate the accused, who has been arrested. If this is not possible, he shall be kept in a detention center pending his interrogation. The period of detention shall not exceed twenty-four hours." And article 33 states: ". . .In all cases, the person under arrest shall not be detained for more than twenty-four hours, except pursuant to a written order from the Investigator."

A good deal of attention in the procedural law is devoted to the issue of detention. For example, article 112 states: "the Minister of the Interior shall, upon a recommendation by the Director of the Bureau of Investigation and Prosecution, specify what may be treated as a major crime requiring detention." This decision is often based on the interrogation of the accused and an evaluation as to whether evidence might be compromised if the person remains free or the possibility that the accused is a flight risk. In such cases, article 113 authorizes the investigator to "issue a warrant for his detention for a period not exceeding five days from the date of arrest." According to article 114, the investigator can seek an extension of the detention order from the provincial branch of the Bureau of Investigation

and Prosecution. He may be granted an order that extends "the period of the detention for a period or successive periods provided that they do not exceed in their aggregate forty days from the date of arrest, or otherwise release the accused." If there is a desire to extend the detention further, the article indicates that "the matter shall be referred to the Director of the Bureau of Investigation and Prosecution to issue an order that the arrest be extended for a period or successive periods none of which shall exceed thirty days and their aggregate shall not exceed six months from the date of arrest of the accused. Thereafter, the accused shall be directly transferred to the competent court, or be released."

While the accused is detained, the procedural law notes certain protocols that are to be followed. For example, article 119 states: "In all cases, the Investigator shall order that the accused may not communicate with any other prisoner or detainee, and that he not be visited by anyone for a period not exceeding sixty days if the interest of the investigation so requires, without prejudice to the right of the accused to communicate with his representative or attorney." Article 120 indicates: "An Investigator in charge of the case may, at any time, whether of his own accord or pursuant to a request by the accused, issue an order for the release of such accused, if he considered that there is no sufficient justification for his detention, that his release would not impair the investigation, and that there is no fear of his flight or disappearance, provided that the accused undertakes to appear when summoned."

Once again, a number of claims have been made that agents of the Saudi justice system are not complying with the spirit of the rules associated with detention. In some instances, people are being held without formal charges being brought against them. One justification for this policy is that the person is being reeducated. The person is eventually released upon a successful period of reeducation. "Substituting such a program of involuntary 'reeducation' for an impartial adjudication of criminal charges in a court of law denies defendants the chance to prove their innocence and clear their names. A senior Saudi official told Human Rights Watch that the reeducation approach largely replaces trials." This strategy has been employed for both violent and nonviolent detainees (Human Rights Watch, 2008d; Human Rights Watch, 2013; Human Rights Watch, 2013a; Human Rights Watch, 2014).

Trial Procedures

As indicated earlier, trials occur in First-Degree Courts, which are located throughout the country. These courts are also subdivided into divisions of specialization: Commercial, Criminal, General, Labor, and Personal Status. With regard to the Criminal Court, it is further subdivided into circuits that specialize in hudud, quesas, tazir, and juvenile offenses. The hudud, quesas, and tazir offenses were explained in the previous section, "Crime and Punishment." They indicate the manner in which criminal offenses are categorized in Islamic law. Recall that the Criminal Court is composed of a three-judge panel. Any offense that does not fit under the aforementioned categories would be handled by a single judge.

In all cases involving a major crime, the accused must appear in person, while accused persons in a minor offense may have their attorney or another person represent their defense.

In 2002, the Ministry of the Interior specified the following offenses as major crimes: murder, rape, kidnapping, drug or intoxicant abuse or dealing, theft through forced entry, using weapons or implements, forming a gang, fighting, firing weapons resulting in serious injury, impersonating a security officer, bribery, embezzlement, and forgery. According to article 140 of the procedural law, the court can order a person to appear in any case. Article 141 indicates that if the accused fails to appear and has not sent a representative, the court can proceed to hear the plaintiff and enter the evidence into the court record: "The judge shall not render a judgment except in the presence of the accused. If the accused fails to appear without an acceptable excuse, the judge may issue a warrant for his detention."

Reference was made earlier to the private right of action in which a person harmed during the course of a crime could seek a private action against the accused. Article 148 indicates that if the private action was rejected following the investigation into the offense, it could be resubmitted to the trial court for its consideration. Moreover, article 149 authorizes the court to appoint a person to pursue the action if the victim "lacks the capacity and has no guardian or trustee." Article 150 provides the same service if the accused is in similar circumstances to that of the victim.

The courtroom work group for a court hearing involving a major crime would consist of the following people: a three-judge panel, in which the senior judge would be recognized as the chair; a prosecutor; representatives or attorneys for the accused; and any victim seeking a private right of action. Civilians are not used as jurors or as lay judges in Saudi courts. Although the procedural law calls for court hearings to be open to the public, it has been suggested that "few trials appear to be open to the public" (Human Rights Watch, 2008d; Human Rights Watch, 2013; Human Rights Watch, 2013a; Human Rights Watch, 2014). Article 155, however, indicates: "The court may exceptionally consider the action or any part thereof in closed hearings, or may prohibit certain classes of people from attending those hearings for security reasons, or maintenance of public morality, if it is deemed necessary for determining the truth." Although the accused is under guard during the proceedings, he or she is not restrained, according to article 158, "unless he gives cause thereof. In that case, the proceedings shall continue and the accused may be admitted to the hearing whenever such cause for his removal ceases to exist. The court shall keep him informed of any action that has been taken during his absence."

When the hearing commences, the court is not "bound by the description included in the memorandum of the charges" (article 159). Moreover, article 160 permits the prosecutor to amend the charges "at any time." The article also indicates that the accused is to be informed of any amendment and given sufficient time to revise his or her defense. These procedural rules again illustrate that the role of the Saudi judge is not that of a disinterested umpire, as common law judges are often described. His task is that of an inquisitor to seek the truth during the hearing and then conclude by dispensing justice.

The standard court hearing would follow these steps:

1. The court would inform the accused of the charges against him or her and provide him with a copy of the charges.
2. If the accused admits guilt either at the beginning of the hearing or at any time during the hearing, the court would hear his statement and examine him on the details of the

matter. If the court was satisfied with the validity of the confession, it would decide the case.

3. If the accused denies guilt in the matter or stands mute, the court would proceed to hear the evidence.
4. The court would first hear from the prosecutor.
5. The accused or his representative would then respond to the charges. The court would examine the accused regarding the charges and the evidence.
6. The court would then hear the claimant of the private right of action.
7. Each of the parties is permitted to comment on the statements of the other parties.
8. All witnesses may be cross-examined by the parties. Moreover, the court may call witnesses to hear or cross-examine them. Witnesses are kept separate from one another and testify separately.
9. The court can assign expert witnesses on technical questions. Their report is provided not only to the court but also to the litigants.
10. The accused has the last opportunity to speak to the court.
11. The court would then render a judgment either by acquitting the accused or convicting the person and imposing a sentence. If a private right of action was also being entertained, the court would also rule on that matter.

With regard to determining the outcome of a hearing, article 8 of the Law of Criminal Procedure indicates: "Decisions shall be rendered either unanimously or by majority vote. A dissenting judge shall declare his dissent and explain the reasons thereof, and the majority shall explain their opinion in the response to the dissent, which shall be entered into the record." The procedural law permits the accused, prosecutor, and claimant of the private right of action to appeal the conviction or acquittal. The law also authorizes both the convicted person and the prosecutor the right to appeal the sentence of the court. Following a reading of the judgment in the court, all the parties to the case must receive a copy of the judgment within 10 days from the date of the reading. The parties then have 30 days to file any appeal.

As mentioned earlier, at least one Court of Appeal is located in each of the 13 provinces of the country. Courts of Appeal are subdivided into specialized circuits: Civil, Commercial, Criminal, Labor, and Personal Status. These circuits entertain appeals from the First-Degree Courts. A panel of three judges would normally hear appeals to the court, except in certain criminal cases in which the panel will consist of five judges, because the court is mandated to review judgments involving major punishments, such as the death penalty, stoning, amputation or quesas cases other than death. If a sentence involving the aforementioned major punishments is affirmed by a Court of Appeal, it must still be affirmed by the High Court. If the High Court does not affirm the sentence, then the case is remanded for another hearing before another panel of judges. If the sentence is affirmed for one of these major punishments, it can only be carried out following the issuance of a royal order from either the king or his representative.

Finally, it is interesting to note that article 201 of the procedural law indicates that "A judgment shall be reversed if it contradicts the text of the Qur'an or Sunnah or the consensus of Muslim jurists." Once again, this is another illustration of the Quran as the

fundamental source that defines what is appropriate in the Islamic community of believers and that Islamic law has always been considered both a code of law but also a code of morals.

In 2006, Human Rights Watch conducted a study of the application of the Saudi Law of Criminal Procedure. They interviewed a number of people, including defendants, lawyers, judges, prosecutors, prison officials, and officials from the Ministry of the Interior. While they offered a good deal of comment and criticism on how the procedural law was either being employed or ignored, they recommended reforms in four general areas. First, the Saudi Law of Criminal Procedure should be more in compliance with international human rights law. Second, there is a need for greater transparency in the procedures associated with the arrest and interrogation of suspects. Third, the rights of defendants should be enhanced, including providing free counsel to indigent defendants. Finally, the Bureau of Investigation and Public Prosecution should not be reporting to the Ministry of the Interior, but rather to the Ministry of Justice. In addition, they contend that the Bureau should not have the power to arrest, detain, and release suspects from prosecution (Human Rights Watch, 2008d; Human Rights Watch, 2013; Human Rights Watch, 2013a; Human Rights Watch, 2014). As mentioned earlier, efforts are under way to introduce a public defender system. It remains unclear when this might actually be implemented.

Critical Issues

While commenting on the Saudi criminal justice system, one Western author who is familiar with the Kingdom pointed out: "Whether it is due to severe punishment or public humiliation, Saudi Arabia unquestionably enjoys a remarkably low rate of crime" (Mackey, 2002). The author also reminded her readers that "the legal system is designed to protect society, not the rights of individuals." As mentioned earlier, a number of nations and several international organizations have objected to some processes employed by agents of the Saudi criminal justice system. This section identifies some examples that illustrate either how the Saudi justice system places a good deal of emphasis on protecting society rather than an individual, or the nature and context of severe punishment or public humiliation.

Status of Women

From a Western perspective, a significant amount of humiliation appears to be directed at women. Much condemnation is directed at the Kingdom for the perceived lack of freedom for women. Saudi women must seek permission from their male guardian, who is often either their father or husband, to work, travel, study, or marry. In the case of a widow, her son is often called upon to serve in this capacity as "guardian." For some, male guardianship has led to concerns about family violence and varying levels of potential abuse that are neither easily identified nor likely to be reported given the patriarchal nature of the society.

Human Rights Watch recently reported that a series of articles published in 2010 addressed the issue of domestic violence. The articles suggested, among other things, that domestic violence be classified as a crime, that police should be trained to deal with this issue, that cases of domestic violence should be expedited through the system, and that

obstacles should be removed for women who are seeking a judicial resolution of their case. The government has not acted on these suggestions (Human Rights Watch, 2010b). It should be noted that in 2005 the government established the National Family Safety program that is designed to provide assistance to victims of domestic violence. Moreover, in 2012, at least some police stations were staffing women to assist other women in addressing concerns or complaints to police. Unfortunately, the government has not enacted a draft law designed to address violence against women and children.

This secondary status is associated both with Saudi cultural traditions and Islam and is justified by the claim that these traditions are designed to protect the personal honor of women. To understand this justification, one must begin with the understanding that in Saudi society men are considered superior because they are responsible for protecting the family and maintaining it economically. The Quranic verse frequently cited to support this claim is: "Husbands should take good care of their wives, with [bounties] God has given to some more than others and with what they spend out of their own money. Righteous wives are devout and guard what God would have them guard in their husbands' absence" (4:34). Critics of this logic suggest that this position may have made sense during premodern times when "women were more vulnerable to poverty, harm, and exploitation than men," but that it is no longer justified in contemporary society (Human Rights Watch, 2008c).

Some women work, but for a long period of time, professional occupations have been limited primarily to teaching and nursing. There are no female judges or prosecutors in Saudi Arabia. In 2008, the first class of female law students graduated from King Abdul Aziz University, but the Ministry of Justice refused to grant women the license to practice law (Human Rights Watch, 2008c). In 2010, it was announced that a new law would enable women lawyers to appear in court as consultants representing female clients involved in personal status matters, such as child custody, divorce, marriage, and other issues associated with the family. Once again, this reform had yet to come to fruition (Human Rights Watch, 2010b). Recently, the Ministry of Justice approved the granting of a license to practice law to Saudi female lawyers. To qualify, they must have a law degree and have three years of practical experience.

It should be noted that many women accept this arrangement of not seeking employment and staying at home for the security of the family. Moreover, one commentator on Saudi society has pointed out: "It is estimated that forty percent of private wealth in Saudi Arabia is held by Saudi women, and even though women are not permitted to hold a business directly, many do so through the front of a male representative, often a family member" (Ahmed, 2008). No doubt, the role that women play in contemporary Saudi society has probably not gone unnoticed by those who recall that the Prophet Muhammad had a similar role after he married Khadija, a 40-year-old widow who was a wealthy merchant and who enabled him to associate with the societal leaders of Mecca.

It is important to point out that the various dress codes, in particular the veil, date back to around 1500 BCE. Thus, these dress codes do not have a basis in Islam, but are rather part of the cultural traditions of the region. The lack of freedom of movement for women is also associated with Saudi cultural traditions, namely, protecting the personal honor of

women. Thus, women must often be escorted by a male family member if they leave their home. It was this attitude that led King Saud in 1957 to issue a royal decree that forbade women to drive. Again, this decision was based on Saudi culture and did not have its basis in Islam. Although it was announced that the ban on women driving cars would be lifted, this has not occurred. This is another example of the slow pace of reform on a host of social issues.

Some have offered a telling argument that given the male-dominant society, the real honor that is being protected is that of the man. The *ird*, or sexual honor of the females of a family, is often cited in support of this position. Finally, the cases in which a daughter is killed for dishonoring the family is not an issue that was determined by an Islamic court, rather this has been a matter associated with *urf* or traditional local law, which predates the emergence of Islam. In fact, a number of commentators have pointed out that when Islam was introduced, it actually granted women some protections by providing them with various legal rights that did not exist in the patriarchal tribal society at that time (Mackey, 2002).

Although the second-class status of women in Saudi society may be traced originally to the cultural traditions of the region that predate Islam, presently senior religious leaders have a significant role to play in perpetuating this attitude through their involvement with determining the social policies of everyday life that impact women. These religious leaders control the educational system, sit as judges, and have a profound influence on the Commission for the Promotion of Virtue and the Prevention of Vice, which will be explained shortly. To illustrate the role that religious leaders play, a few examples should indicate the significant authority associated with the Senior Council of the Ulama that was created in 1971. The Council is composed of between 30 and 40 of the leading senior religious scholars and is chaired by the Grand Mufti. As noted earlier, a mufti is a specialist in Islamic law. It was the Senior Council of the Ulama that caused Saudi Arabia to withdraw from attending a 1994 United Nations conference on population and development that was being held in Cairo, Egypt. Among the topics discussed that the Council claimed were against the laws of God and nature included birth control as well as equality between men and women.

Although this Senior Council is not part of the legislative process, it is consulted on various pieces of proposed legislation to seek its guidance on conformity with the moral and ethical teachings of Islam in general and Sharia in particular. One of its principal duties is to provide fatwas that establish general rules regarding questions submitted to it by the government. Among the fatwas issued by the Council on women, two will suffice to indicate how they impact not only the everyday life of women now but also the prospects of future generations. On the subject of postponing marriage in order to finish secondary or university education, the Council proclaimed:

> For women to progress through university education, which is something we have no need for, is an issue that needs examination. What I see [to be correct] is that a woman finishes elementary school and is able to read and write, and so she is able to benefit by reading the Book of God, its commentaries, and Prophetic hadith, that is sufficient

> for her. This is so unless she excels in a field that people need, such as medicine or its like, and as long as this study involves nothing prohibited, such as the mixing of the sexes and other things.

On the subject of employment, the Council announced: "God Almighty . . . commended women to remain in their homes. Their presence in the public is the main contributing factor to the spread of fitna [strife]. Yes, the Shari'ah permits women to leave their home only when necessary, provided that they wear hijab and avoid all suspicious situations. However, the general rule is that they should remain at home" (Human Rights Watch, 2008c). These examples clearly indicate that the religious leaders of Islam in Saudi Arabia are facilitating the maintenance of a perpetual second-class citizenship for Saudi women. One frequent visitor to the Kingdom, however, has suggested that the "gender apartheid committed in the name of Islam is already dying, rasping its last, soured breaths" (Ahmed, 2008). One small illustration of this is that the Ministry of Labor announced in 2012 that women no longer needed the permission of their guardian to work in amusement parks, as cashiers, in clothing stores, or in food preparation. Nevertheless, the segregation of women and men in the workplace continues. Finally, on a somewhat lighter note, two women were permitted to participate in the 2012 Summer Olympics, which was a first.

Moreover, it is important to note that the encroachment of values associated with Western societies into Saudi Arabia is often considered an attack on the family in general and possibly women in particular. As such, the attitude that women must be protected is advanced further. To illustrate, this Islamic patriarchal society observes modern Western culture forsaking its religious roots and embracing a more secular society. They read of the large number of divorces and the significant number of births to single women throughout the West and conclude that the dignity of women is being compromised. This reinforces their abhorrence of that which is associated with secularism and individualism.

Law Enforcement

There are essentially two kinds of police in the Kingdom: the civil or Public Security Police, and the religious police or *matawain*. The Public Security Police are a national law enforcement organization that is accountable to the Ministry of the Interior. It is responsible for the typical law enforcement and order maintenance issues that confront any society. One of the main criticisms directed at the security police is the manner in which they handle foreign guest workers when they skirt Saudi law. The pretrial rules found in the Law of Criminal Procedure may alleviate some of these concerns, once they are further refined in light of the criticisms just mentioned. There is also a Directorate of Intelligence that collects, analyzes, and coordinates the intelligence work of all agencies; it reports directly to the king.

Within the Public Security Police is a directorate called the *Mabahith* or secret police. They are responsible for domestic security and counterintelligence functions of the ministry. In recent years, they have come under increased criticism for their program to reintegrate jihadists back into Saudi society. These jihadists have essentially included three groups of people: those who experienced fighting outside the country before 2001; those who had

been identified as part of the new generation of radicals who were often planning to attack domestic targets after the invasion of Iraq by the United States in 2003; and those Saudi Guantanamo detainees that had been transferred to Saudi Arabia. The transfer was specifically to a mabahith prison.

At issue for the critics have been three areas of particular concern regarding the mabahith policies. First, international standards regarding what constitutes a fair trial have been raised. To illustrate, there is no presumption of innocence; defendants are not informed of the charges against them; they are not provided legal assistance or adequate time to prepare a defense; and they are denied the right to a public trial. Second, mabahith prisons are not part of the regular Saudi prison system. Many inmates in the mabahith prisons remain incarcerated even after they have completed serving their sentence. In addition, those identified as suspected jihadists have been detained without having been charged or convicted of a crime. It has been suggested that part of the reason why inmates are not released after serving their sentence relates to the third criticism, that is, religious counseling. Mabahith prisons employ both a religious and a psychological counseling program. The religious counseling focuses, among other things, on the correct understanding of jihad, rather than the distorted interpretation employed by various radical groups. Failure to participate in these counseling programs can lead to an inmate remaining in detention following serving his sentence (Human Rights Watch, 2009; Human Rights Watch, 2010b).

It is the matawain (matawain is the plural of matawah, an enforcer of religious law) or religious police that are the subject of a good deal of criticism associated with Saudi law enforcement. The matawain are the enforcement arm of the Commission for the Protection of Virtue and the Prevention of Vice that was briefly alluded to earlier. The Commission holds ministerial status, and it is recognized for building mosques, distributing Qurans, and providing religious educational programs. It has also been criticized for being too zealous in its attempts to uphold the morals of Saudi society. Some have suggested that it is too powerful and should be placed under the Ministry of the Interior.

The matawain were created by King Abdul Aziz early in his reign. Although such an enforcement agency seems out of place in contemporary society, there is a certain logic for its existence. Since the establishment of the Islamic faith, the political leader of the umma or community of believers was always expected to be a protector and defender of the faith. The matawain are the group that assists in that endeavor. The focus of their attention is on public morality, and it is the basis for the criticism directed at them.

One of the principal problems associated with the matawain is that the vice they are empowered to prevent has not been defined to any significant degree. As a result, the matawain are associated with the following types of enforcement actions: raiding homes in search of bootlegged alcohol or illegal drugs; reprimanding men and women in cars who are not related; homosexuality; overseeing that shops close for the five daily prayers; identifying those wearing a Christian cross or a star of David; monitoring business establishments to assure that women are not employed in certain occupations, of which there are many; discouraging members of the opposite sex who are not related from congregating in public; detecting gambling; raiding photo-developing labs to evaluate the type of pictures being printed; preventing foreign books and magazines from entering the Kingdom; censoring images in magazines, especially pictures of women and ads for

alcohol; preventing barbers from providing Western-style haircuts for men; forbidding women from riding bicycles or jogging; and enforcing a modest dress code. Given the nature of their very broad mandate, the matawain have been characterized as a very powerful vigilante force that even politicians are reluctant to confront (Ahmed, 2008; Alrabaa, 2010; Human Rights Watch, 2008d; Human Rights Watch, 2013; Human Rights Watch, 2013a; Human Rights Watch, 2014; Mackey, 2002).

What critics find particularly troubling are the matawain who are out on the streets enforcing this rather vague definition of vice. The matawain consist of two groups of people: the religious police and volunteers. Neither group wears a uniform, but they carry a badge. Although both are characterized as religious fundamentalists, the volunteers are identified as people who are recruited from local mosques and who are young, often uneducated, and poor. The matawain carry whips that are often used to encourage virtue and to deter vice. They can arrest people, and in some instances, they will take the offender to one of their jails for further harassment. Cases have been reported in which people were not only whipped in public but beaten further while in custody. In some cases, people died from their treatment at the hands of the matawain (Alrabaa, 2010).

It is unlikely that the government will curb the work of the matawain. They have been a useful tool in maintaining Saudi morality throughout the Kingdom. Moreover, critics acknowledge that they help address two social problems confronting the Kingdom: the high unemployment rates, especially among young people, and the surplus of graduates from various religious studies programs.

Status of Juveniles

In addition to the typical petty offenses associated with juveniles throughout much of the world, young people in Saudi Arabia are frequent targets of several of the kinds of vice-related issues that are generally enforced by the matawain. When confronted with the matawain, some incidents are yet another illustration of humiliation for girls and young women. For boys and young men, however, it is not uncommon for them to receive the brunt of the physical abuse. For example, eating in restaurants with young women or walking in groups in family-only sections of malls has led to punishments such as flogging (see Gilani, in Friday and Ren, 2006).

One of the central criticisms raised regarding juveniles is the matter associated with the age of criminal responsibility and how that is determined. In 2006, the age of criminal responsibility for boys was raised from seven to 12; however, the law did not set a minimum age for girls. Human Rights Watch has argued that this law is not well publicized or enforced (Human Rights Watch, 2008a). Moreover, young people are often treated like adults even though their crime was committed when they were under the age of 18. At issue is when a child can be tried as an adult. In Saudi Arabia, it frequently depends on the child's physical development rather than a consideration of the mental and emotional maturity of the person. Usually, judges decide this question based on the physical signs of puberty. This method has been employed by Islamic judges for centuries and was discussed previously under the subsection on criminal procedure of the section on Sharia.

This situation is exacerbated further by weaknesses in the justice system that directly impact juveniles. For example, the Bureau of Investigation and Public Prosecution does not employ investigators that specialize in juvenile cases. It is also worth repeating that there are no female prosecutors or judges that would likely offer a different perspective on handling young people. Finally, juveniles are most vulnerable in that they frequently are without legal counsel to defend them.

In their 2008 report, *Adults Before Their Time: Children in Saudi Arabia's Criminal Justice System*, Human Rights Watch offered several recommendations for improving the plight of juveniles caught up in the Saudi justice system. Among the recommendations were the following: detain children only as a last resort and for the shortest period of time; protect children from abuse while in detention; eliminate the use of corporal punishment, solitary confinement, and denial of family visits; provide access to adequate legal assistance; and abolish the sentence of death for those who committed their offense while under the age of 18. Human Rights Watch continues to highlight the plight of young people in the Saudi justice system, but change does not appear any time soon (Human Rights Watch, 2013a; Human Rights Watch, 2014).

Nature of Punishment

It has been pointed out that "Saudi Arabia's criminal justice system, perhaps more than any other, encompasses the true philosophy of 'an eye for an eye and a tooth for a tooth.' In the customs of Arabia, a person convicted of harming his neighbor was punished by the same act suffered by the victim" (Mackey, 2002). In addition to the status of women, also leading to much of the criticism directed at the Saudi criminal justice system are the public beheadings of those sentenced to death, the amputation of a hand or foot for a less serious offense, and the flogging of people for offenses that in some cases are not even considered criminal in most countries. The objections have been led by various international organizations associated with human rights and have been supported by a number of countries.

With specific reference to the death penalty, Human Rights Watch reported at least 69 people were executed between January and September 2012. The crimes were usually murder or drug offenses. Moreover, eight people between 16 and 19 years of age had received a death sentence (Human Rights Watch, 2012a). In the period between January and September 2013, at least 64 people were executed; these were primarily for murder, drug offenses, and armed robbery. The common method of carrying out the sentence is by public beheading (Human Rights Watch, 2014).

Thus far, international criticisms have been largely ignored by the authorities within the Kingdom. As mentioned earlier, not only is Sharia unique, but Saudi Arabia's application of it is essentially different from many other Islamic countries in the world. Whereas many Islamic countries might adhere to various Sharia principles, they have reformed their legal system in light of modern contemporary society. With specific reference to Sharia, that is not the case in Saudi Arabia.

Most experts on Saudi Arabia maintain that the House of Saud will remain wedded to their highly conservative interpretation of Islam. They do so because the faith of the leaders

of the House is rooted in that orthodoxy. From a pragmatic point of view, it is also in their political interests to do so. As described earlier, the government of Saudi Arabia is based on a near absolute monarchial system. The Saudi Arabian king exercises very broad powers in his capacity as head of state and head of the government.

The greatest concern for the House of Saud has been the military and ideological threat that Iran poses in the region. That ideology is associated with the religious and political authority granted to a highly structured clerical organization in Iran following the 1979 revolution. From the House of Saud's perspective, its form of Islam provides it with a degree of security from that Iranian ideology. Where one finds some agreement between the two countries, however, is over the threat that modernization poses to their religious and cultural traditions.

Recently, another concern for the House of Saud has been the Arab spring or Arab awakening, that is, the series of demonstrations and protests in 2011 that brought down the autocratic rulers in Tunisia, Egypt, and Libya. Various protests have also occurred in other Middle Eastern countries, such as Bahrain, Jordan, Syria, Yemen, and Saudi Arabia. In the case of Jordan and Saudi Arabia, the protests were not designed to remove the monarchs—rather, they were seeking more freedom. Late in 2011, Amnesty International released a report expressing concerns that the Saudi security forces were arresting and detaining demonstrators. While many were released without charges being brought against them, others remain detained without charges for specific offences. When coupled with the creation of the Special Criminal Court in 2008 to handle terrorism cases and a draft of a new law on terrorism, Amnesty is concerned that these developments will lead to further human rights violations in the country (Amnesty International, 2011).

One should not be left with the view that all or most of the criticism of the Saudi justice system is coming from outside the kingdom. There are some social and political rights activists attempting (at a price) to change not only the justice system but also to seek greater political participation among both male and female citizens. They have been utilizing social media to garner support for their endeavors. They have been victims of harassment, arrest, and detention without charges filed.

As mentioned earlier, one criticism of the Saudi justice system is that the criminal law has not been codified. As such, tazir offenses, which were explained earlier, are referred to as discretionary crimes, because the judge has the discretion of determining if the action or inaction is a crime and what constitutes an appropriate sentence. This kind of judicial discretionary authority has led to serious abuses in general and against these rights activists in particular. To illustrate, they have been charged with such arbitrary "crimes" as "attempting to distort the reputation of the kingdom," "breaking allegiance with the ruler," "inciting public opinion against the state," and "insulting the judiciary." In spite of these difficulties and the tremendous uphill battle confronting them, activists continue to advocate for greater human rights and freedoms within the country (Human Rights Watch, 2013a).

ISLAMIC REPUBLIC OF IRAN

As noted earlier, since the end of World War II, Muslim countries in the Middle East were inhibited from even considering democratic forms of governance in light of regional

security issues, the ruling elites' opposition to democracy, and the policies of Western powers who favored supporting autocratic regimes (Ayoob, 2008). In the middle of the eighteenth century, the Saud family began incrementally to acquire more real estate and power in the Arabian Peninsula, which led to the official formation of their kingdom in the twentieth century. The Islamic Republic of Iran is a more recent phenomenon. Like Saudi Arabia, Iran proclaims itself and its policies Islamic; that is, Islamic values are considered the ideal for a practicing Muslim, and Sharia law has a profound impact on the administration of justice in particular and governance in general. The form and function of governance in Saudi Arabia and Iran, however, are different. At the core of what differentiates these respective states are the roles accorded religion versus secularism in the public sphere.

Saudi Arabia adheres to a Sunni interpretation of Islam, and as noted above, follows a strict version of the Hanbali school of jurisprudence. Iran embraces the Shia perspective of Islam and the Ja 'fari school of jurisprudence. This difference illustrates that there has almost never been one way to interpret Islam, and that is certainly the case in the modern era. Both countries grapple with issues associated with modern forms of governance. Moreover, they differ significantly in how the religious establishment in each country is accorded a voice in the governance of their countries. Whereas Saudi Arabia employs a near absolute monarchical system, Iran may best be described as a theocratic republic with some curious democratic characteristics. We now focus our attention on the Islamic Republic of Iran.

Iran is slightly larger than the state of Alaska, at 636,295 square miles. Its territory consists of both desert and mountains. It shares land borders with Iraq, Turkey, Armenia, Azerbaijan, Turkmenistan, Afghanistan, and Pakistan. It has a coastline along the Caspian Sea, the Persian Gulf, and the Gulf of Oman. The population is estimated at almost 81 million, of which 61 percent are Persian. Among the important industries are petroleum, petrochemicals, textiles, cement, and building materials. Most Iranians are Muslims with between 90 to 95 percent Shia and 5 to 10 percent Sunni. Other religions represented in the population are Zoroastrian, Jewish, Christian, and Bahai.

It was mentioned earlier that Persia's rich intellectual tradition enabled the nurturing and development of the Shia sect of Islam. It would eventually become the state religion of Iran in 1501 when the Safavid dynasty (1501–1736) established it as such. Over time, there emerged the belief among the Shia community that the ulama, the religious scholars, were the only legitimate authority to offer guidance on governance. Although the ulama were not mandated to govern, they were to offer moral and ethical guidance to the Shia community. Within this community the ulama established a clerical hierarchy that assumed the legitimate mantle of authority to offer guidance on governance. This clerical hierarchy is a unique feature of Shia Islam, for Sunni Muslims, who represent the largest number of the adherents to the Islamic faith, do not subscribe to a clerical hierarchy. The role of religious leaders in the Iranian Revolution of 1979 and the subsequent creation of the Islamic Republic of Iran illustrate the most recent chapter in the debate surrounding the amount of power accorded the secular political leaders and the authority granted to the religious leaders of Islam.

To provide context for this struggle over the degree of authority accorded to the secular and religious leaders in contemporary Iran, a brief outline of the country's twentieth-century

political events is in order. Historians have pointed out that the Safavid period (1501–1722) had created three institutional sources of authority in Iran. One was the state, which was often weakly centralized because it was vying for power with the second source, the provincial tribal groups. The third source was the independent Shia religious establishment.

The Safavid dynasty was followed by a period of anarchy until the Qajar dynasty (1779–1925) established itself. During its tenure in power, it did not succeed in changing these three centers of authority. At the onset of the twentieth century, the Qajar's were offering the country weak leadership and a bankrupt treasury, in part because of their extravagant royal spending. This led to an alliance among the ulama, merchants, and intellectuals, who were demanding a parliamentary government. They succeeded in forcing Shah Muzaffar ad Din to sign a constitution into law in December 1906. A good deal of turmoil followed, including civil war, suspending the constitution, and World War I.

Finally, Reza Khan, an army officer, seized power in 1921. Following periods in which he was minister of war and prime minister, the Iranian Majlis (parliament) gave Reza Khan and his heirs the crown, having earlier deposed the Qajar dynasty. Reza Khan became Reza Shah Pahlavi; thus began the Pahlavi period (1925–1979). Reza Shah initiated an effort both to modernize the country along Western lines and to enhance the power of the central government. He modeled his efforts of reform after another army officer who had assumed the position of leadership in another country in the region, Mustafa Kemal Ataturk of Turkey. Reza Shah needed to curb the independent power of the ulama and bring it under the control of his centralized government. He achieved this largely through his efforts at modernizing the country. For example, he created a secular education system and placed religious schools under the oversight of the government. He introduced Western law codes to replace Sharia. As a result, judges were required to hold law degrees from the secular Tehran University faculty of law or a foreign law school, which disqualified members of the ulama from sitting as judges in the secular state courts. While the Islamic law courts were not eliminated, they were noticeably curtailed in the issues they were permitted to address, such as marriage and wills. The position of women was significantly improved in terms of educational opportunities and freedom of movement in public. The Iranian *chador*, or veil, that covered the head and body, but not the face and hands, was outlawed. Finally, Reza Shah changed the name of the country from Persia to Iran.

Reza Khan would serve as shah from 1925 to 1941. He helped extend the institution of Persian kingship that dated back to the fourth century BCE. Part of his success can be attributed to the cultural traditions of the country. It has been pointed out that "Iranian culture has held within itself a deep-rooted authoritarian tradition in which society demands submission to the will of those who hold a position, higher than oneself" (Mackey, 1996). What Iranians often seek from this authority figure is the assurance of internal security and national independence. Clearly, Reza Shah was that authority figure during the 1920s and 1930s. He had removed the independent source of power that the Shia religious establishment had held during the Safavid and Qajar dynasties. For their part, the ulama were unable to find among their group a figure that could serve as an alternative religious source of authority to counter the secular vision of Reza Shah.

Reza Shah was succeeded by his son, Muhammad Reza Shah, who ruled from 1941 to 1979. A brief period, 1951 to 1953, marked a time when the weak shah lost control of

the country. Muhammad Mossadeq, a popular politician, assumed greater control, which led to the shah fleeing the country. Following a coup that was organized by Britain and the United States, the shah returned to power. While Muhammad Reza Shah continued his father's efforts at modernizing the country, he also enhanced efforts to consolidate more power solely to the House of Pahlavi and to spend lavishly on the royal family. At a time when he was losing the support of his people through his autocratic style of rule, he was also claiming to be God's agent to save his country from both internal and external threats (Hiro, 2005). Hence, the shah perceived himself to be the only authority figure capable of assuring both the internal security and national independence for the country. Both secular and religious opposition grew against the shah; it finally came to a head in 1978 and in early 1979, the Pahlavi dynasty was deposed. For a more detailed examination of the nineteenth- and twentieth-century Iranian political developments, see Keddie, 2006; Lapidus, 2002; and Lewis, 1996.

Shia Islam and Ayatollah Khomeini

Some of the differences between Sunni and Shia Muslims have already been explained in the section, "Sunni and Shia." To place Shia Islam in the context of twentieth-century Iran, a brief summary of that explanation of Shia Islam is in order. Shia Muslims (from the party of Ali) gradually developed a movement that asserted the hereditary succession of Ali's descendants to the position of leader, because they believed that Muslims should be ruled by a male descendant of Muhammad. Ali was the Prophet Muhammad's cousin who also became his son-in-law when he married the Prophet's daughter, Fatima. With this claim of hereditary succession, the people would have no voice in determining the ruler, because it was considered a prophetic matter. These descendants of Ali were called Imams, and their leadership authority extended to the realms of both religion and politics. As religious leaders, they were considered the interpreters of God's will. Although the Imams do not have the status of a prophet, their speeches and writings are considered important religious texts.

Today, the largest group within Shia Islam is known as Twelver Shias. They believe that Muhammad, the twelfth Imam, who was born in 869, went into hiding in the ninth century. Originally, it was thought that this period of seclusion would not last long. As the period of "Occultation" continued over centuries, there emerged the belief that the Imam Muhammad would return on Judgment Day. While the Imam was in seclusion, there emerged the belief among the Shia community that the ulama, the religious scholars, were the only legitimate authority to offer guidance on governance, for it was the ulama who had undertaken long years of study of the Quran and Sunna. The ulama were not mandated to govern, but they were to offer moral and ethical guidance to the Shia community. The Shia community had its greatest concentration and development in Persia, which is now Iran.

As stated earlier, Persia's rich intellectual tradition helped to nurture the development of the Shia sect of Islam, which would eventually become the state religion in 1501 when the Safavid dynasty (1501–1736) established it as such. It is important to note that this tradition was associated with the study of philosophy and other subjects, and it represents another difference between Sunni and Shia. Sunni scholars tend to focus only on the Islamic

sources, such as the Quran, Sunna, and Sharia. Hence, their intellectual interests tend to emphasize issues associated with Islamic law. Shia scholars are learned not only in the traditional Islamic sources, but their interests also extend to other fields of study. For example, philosophy remains an important area of study, and this no doubt has contributed to their recognition as leaders in theological debates.

It has also been suggested that from the sixteenth to the twentieth century people did not make a pronounced distinction between being a Shia Muslim or a Persian. When these concepts were distinguished, people were more apt to identify with Shia Islam (Keddie, 2006). Within this context there emerged the belief among the Shia community that the ulama were the only legitimate authority to offer guidance to political leaders. This, in turn, led the ulama to establish a clerical hierarchy that assumed the mantle of authority to offer that guidance on governance. The upper echelons of this hierarchy are senior leaders who are called ayatollahs (signs of God), who are noted both for their piety and religious knowledge.

It is important to note that within the clerical hierarchy there is a group who are referred to as *mujtahid*. The mujtahid are jurists who are recognized as qualified to interpret Islamic law through independent reasoning or ijtihad. Ijtihad was discussed earlier in the section on sources of Sharia. Briefly, it is the process by which jurists determine a rule based on analogy. It is utilized when a rule conflicts with another rule or when a rule is rather vague and somewhat questionable. Jurists turn to ijtihad when neither the Quran nor the Sunna has specifically addressed an issue. Thus, a mujtahid is a cleric who has achieved distinction with the study and interpretation of Sharia. These men hold significant positions throughout the governmental system of the Islamic Republic.

Finally, it should be further noted that the vast majority of Shia clerics have simply studied for a time at an Islamic college, with much of their studies focusing on Islamic jurisprudence. To become an entry-level cleric, the male Muslim need not complete a specific course of study that would lead to a degree, and there is no ceremony of ordination. A person who has achieved a level of competence that is acknowledged by others would be called a *mullah*. Mullahs staff most of the religious posts in Iran; they also serve as judges in the lower courts.

Throughout the twentieth century, the Pahlavi dynasty curtailed the authority of the Shia clerics in general and the clerical hierarchy in particular. Specific examples were mentioned earlier. Throughout the 1960s and 1970s, they were highly critical of Muhammad Reza Shah and his government. When a significant secular opposition emerged in the late 1970s, the ulama joined with them in the Iranian Revolution of 1979 to depose the shah.

Before highlighting the significant role that Ayatollah Khomeini played in the Iranian Revolution, it is important to note that there were two general groups that could claim victory with the overthrow of the shah. The secularists wanted to democratize the political system, while the Islamists wanted to install Islam as the basis of governance. Initially, the country experienced a significant level of Islamization at the expense of the secularists. This Islamization movement would impact all aspects of society: political, economic, judicial, educational, and social.

Before the Revolution, Shia religious institutions, like the mosque and seminaries, were viewed as part of civil society but separate from the government. During the initial decade

of the Revolution, clerical authority would extend over political and legal institutions as the most significant illustration of Islamization. It was at this time that authoritarian rule was enhanced in a religious guise at the expense of the secular revolutionaries' desire to associate with democratic principles and the rule of law.

Shia Islam focused on the religious duties of pious Muslims, not on human rights. It was based on the rule of clerics, not on the rule of law. It was interested in fostering an authoritarian theocracy, not on democracy. In 1979, the first modern theocracy was being created in an environment in which a crime was also a sin and a sin was also a crime. Ayatollah Khomeini was the principal architect of this Islamization movement (Mohammadi, 2008).

Ayatollah Ruhollah Khomeini (1900–1989) had been a leading critic of the shah and his government since the early 1960s. His opposition led to imprisonment for a while and eventually to his exile from 1964 to 1978. It has been suggested that "Khomeini was popular because of his uncompromising attitude to the shah, his anti-imperialist and populist rhetoric, his simple lifestyle and language, and his religious status" (Keddie, 2006). Khomeini had established himself as a serious Shia scholar who had written treatises on ethics, law, and philosophy. He also had a good deal of support from the working class, who deferred their allegiance largely to him. Khomeini would emerge as the cleric who would lead the revolution that would overthrow the shah and his regime.

One of his treatises on Islamic government would become a guide, if not a blueprint, for the form of government that would be created following the removal of the shah. The work, *Velayat-e faqih* or *Guardianship of the Jurist*, argued that monarchy was an unsuitable form of government for Islam. Moreover, while God is the lawgiver, as reflected in the Quran and Sunna, man is God's trustee on earth and has the authority to make law, as long as it is in conformity with Sharia. While awaiting the return of the Twelfth Imam, it is left to the Islamic jurists to govern, for it is they who have studied and understand God's law. Thus, Khomeini was arguing that the ulama should not limit their authority only to offering moral and ethical guidance, but rather they should assume a significant degree of actual political power. This thinking became the basis for the establishment of a type of Islamic theocratic state. Finally, it was maintained that the ulama had a responsibility to cleanse Iran, because much of society during the Pahlavi dynasty was corrupted by the many years of secular materialistic ideas from the West.

With the Islamic revolution not only was the type of government changed from a monarchial system to a curious republican theocratic form, but the secular laws introduced by Reza Shah were abandoned and the Sharia prominently reinstated. On the subject of the form of government, Khomeini supported a republic system in which a parliament elected by all citizens would have a role in the legislative process. Not all Shia clerics were supportive of Khomeini's ideas, though. Some maintained that the ulama's historical role of offering guidance to the political authorities should be retained rather than members of the ulama actually assuming positions of governance. Some opposed the proposed form of government on the grounds that it was associated with Western political ideas. Nevertheless, the style of government was eventually formulated, and "the constitution reflects the goals and values of Khomeini's Islamist movement and of Khomeini himself" (Martin, 2003). One scholar reminds us: "In Iran as elsewhere, the so-called Islamic

Revival does not mean that most people are more religious than they used to be: for the majority the degree of religiosity shows no sign of significant change. Rather, it means that Islam is reentering politics and government in a stronger and more militant way than it had in most areas for many decades" (Keddie, 2006). Finally, another scholar maintains that the reason there has been a good deal of political unrest in Iran since the late 1990s can be attributed to the inability of *velayat-e faqih* and the institutions that it spawned to gain national acceptance (Afshari, 2011).

The Islamic Republic of Iran is unique in that it is the only modern Muslim country that has turned legal and political power over to the clergy. Within that governmental system, Ayatollah Khomeini would hold the ultimate position of authority, as Supreme Leader, until his death in 1989. Other Shia clerics would head many of the other important units of the government. All laws had to conform to Sharia, and all judges had to base their decisions on Sharia. With the secular law of the shah being abandoned, most judges were removed and replaced by Shia jurists. A few secular judges retained their positions after a period of training in Sharia. Today, either all or almost all the judges are Shia clerics whose knowledge of law is almost exclusively limited to Sharia.

Government

On March 30 and 31, 1979, all Iranians who were at least 16 years of age were encouraged to vote in a referendum on whether the monarchy should be abolished and an Islamic republic created. The provisional government announced that 98 percent of the voters approved the creation of the Islamic Republic of Iran, and its 1979 Constitution was subsequently approved in December of that year. The document was revised slightly in 1989, following the death of Ayatollah Khomeini.

It is in the first chapter of the Constitution that the reader is presented with some general principles regarding governance in this Islamic Republic. First among these is the "long-standing conviction in the rule of truth and justice of the Quran." Article 2 states, in part:

> The Islamic Republic is a system based on faith in:
>
> 1. The One and only God [There is no God but Allah], His exclusive Sovereignty and Legislation and the necessity of submission to His commands.
> 2. The Divine Revelation and its basic role in exposition of laws.
> 3. The concept of Resurrection and its constructive role in the course of evolution of Man toward God.
> 4. The justice of God in the Creation and Legislation.
> 5. Perpetual Imamat and leadership and its fundamental role in perpetuation of the Islamic Revolution.
> 6. Eminent dignity and value of Man, his freedom coupled with his responsibility before God, which provides justice and political, economic, social, and cultural freedom and national unity.

Thus, the criteria for all laws and regulations would be based ultimately on the Islamic sources of the Quran and Sunna.

Another constitutional principle is the importance placed on the development of policy through consultation with various institutions of government, and ultimately, the role that the public plays through elections. Like the Saudi constitution, the Iranian document acknowledges the important role of the family in an Islamic society. Article 10 states: "Since the family is the basic unit of the Islamic society, all laws and regulations and pertinent [plannings] shall strive to facilitate the setting up of a family to protect its sanctity and to stabilize family relations on the basis of Islamic laws and ethics."

Finally, while the official religion of Iran is Shia Islam, article 12 specifically acknowledges that the Sunni branch "shall enjoy full respect." This includes not only how they practice their Islamic faith, but also suggests that deference should be paid to differences in legal interpretations, as a result of the four Sunni legal schools mentioned earlier, when a lawsuit reaches a court. Unlike the Saudis, the Iranians recognize certain rights of three religious minorities: Zoroastrians, Jews, and Christians. Article 13 indicates that they "shall be free to carry out their religious rites and practice their religion in personal status and religious education."

Constitution

The Constitution of the Islamic Republic of Iran is divided into 14 chapters and includes a total of 177 articles. Some features of the Constitution will be discussed later in other parts to this section on government. First, it is worth highlighting Chapter 3, which is titled "The Rights of the People." Article 19 states: "The people of Iran, of whatever tribe and clan, shall enjoy equal rights, and color, race, language and the like shall not be a privilege." Article 20 continues: "All members of the nation, both men and women, shall receive equal protection of the law and enjoy all human, political, economic, social, and cultural rights, with due observance of the principle of Islam." The rights of women are singled out, in particular, for attention in article 21:

> The government shall be required to guarantee the rights of women in all respects, by observing the principles of Islam, and shall carry out the following:
>
> 1. To create a suitable environment for the growth of personality of woman and to restore material and moral rights.
> 2. To protect mothers, particularly during the period of pregnancy and custody of children, and to protect children without guardians.
> 3. To create competent courts for preserving the existence and survival of family.
> 4. To create special insurance for widows, elderly women, and women without guardians.
> 5. To grant guardianship of children to worthy mothers for protecting the children's interests, in case there is no legal guardian.

Issues that are often associated with the privacy rights of an individual are also addressed in this chapter. For example, article 23 states: "Investigation of one's beliefs shall be prohibited. No one may be offended or reprimanded simply because of having a certain belief." Article 25 indicates: "It shall be prohibited to inspect or fail to deliver letters,

to record and divulge telephone conversations, to disclose telegraphic and telex communications, to censor them or fail to communicate or deliver them, to eavesdrop or to make any other search whatsoever, unless by order of law."

Issues that are often associated with group or societal rights are explained, although there are some generalized qualifiers that are associated with Islam. To illustrate, article 24 notes: "Publications and the press shall have freedom of expression unless they violate the essentials of Islam or public rights. Its details shall be set forth by law." Article 27 states: "It shall be allowed to hold assemblies and marches, without carrying arms, provided that it does not violate essentials of Islam." Finally, the freedom to associate with others is covered in article 26: "It shall be allowed to form parties, societies, political or professional associations and Islamic or other religious societies of the recognized minorities, provided that they do not violate the principles of freedom, independence, national unity, Islamic standards and essentials of the Islamic Republic. No one may be stopped from participating in them or forced to participate in one of them." The formal development of political parties is a relatively new feature. Various reform groups have emerged in recent years. People, however, are more apt around election time to associate with a particular group and its agenda, which then usually disbands following an election.

Finally, Chapter 3 addresses rights that are often associated with protecting the individual from abuse by agents of the criminal justice system. Article 32 points out:

> No one may be arrested unless by order of and in the manner provided for by law. In case of an arrest, the accused person must immediately be served with in writing and made to understand the charges he is accused of and the grounds thereof. The preliminary files must be sent to competent judicial authorities within a maximum period of 24 hours and the trial proceedings must be started within the shortest period of time. The violator of this article shall be punished in accordance with the provisions of law.

Article 34 continues: "It shall be the established right of every one to plead for justice. Every one may refer to competent courts to seek justice. All members of the nation shall have the right to have access to such courts. No one can be stopped from referring to the court to which he has a right to refer according to law." Moreover, article 35 states: "Both parties to a lawsuit have the right to appoint a lawyer in all courts and if they are not able to appoint a lawyer, facilities for appointing a lawyer shall be provided for them."

Article 37 proclaims: "Innocence is always presumed and thus no one shall be regarded as guilty in the eye of law unless his guilt is proven in a competent court." Article 36 indicates: "Penal judgments can only be passed by and enforced through a competent court in accordance with law." Article 38 cautions: "It shall be prohibited to apply any form of torture to obtain a confession or information. It shall not be allowed to force a person to give testimony, make a confession or take an oath; such testimony, confession or oath shall have no validity whatsoever. The violator of this article shall be punished according to law." Finally, article 39 concludes: "Defamation or aspersions in any manner whatsoever of persons arrested, detained, jailed, or exiled by order of law shall be prohibited and punishable by law."

All of these aforementioned rights, whether they are associated with basic human rights, privacy rights, associational rights, or those that focus on procedural protections involving agents of the criminal justice system, are essentially dependent on two factors. First, a country that proclaims these rights in its constitution must have an executive branch of government that is willing to abide by the ideals spelled out in the constitution. Second, it must have a judiciary that is truly independent from other branches of government. As such, there can be no interference with the judiciary, especially when it is exercising its constitutional authority to interpret the spirit and letter of the law. Another important feature of judicial independence is that individual judges are free to exercise their discretion in reaching a judgment that is based on their understanding of the law rather than encumbered by political or ideological considerations.

Iran has been criticized by a number of commentators and international human rights groups for failing to adhere to its constitutional provisions. One scholar has pointed out that in the rather short history of the Islamic Republic it has "behaved remarkably similar to other authoritarian states." It has permitted and in some cases authorized actions on the part of agents of state security that are in clear violation of human rights. Moreover, it is suggested further that relying solely on Sharia is an inappropriate legal foundation for a contemporary state (Afshari, 2011).

Much of the criticism is coming from a democratic, rule-of-law perspective that envisions an independent judiciary determining constitutional issues associated with rights. As one scholar has pointed out: "The Constitution is not what the courts say it is; the ruler and the circle of his loyalists (the Guardian Council) say what the Constitution is" (Mohammadi, 2008). The roles of the ruler and the Council of Guardians, among other groups, are explained below. Each illustrates the absence of rule-of-law principles in the Islamic Republic of Iran.

The Faqih

In the office of Faqih or Leader, one sees the hand of Ayatollah Khomeini. His treatise, *Velayat-e faqih*, or *Guardianship of the Jurist*, argued that while awaiting the return of the Twelfth Imam, it is left to the Islamic jurists to govern, for it is they who have studied and understand God's law. Moreover, while God is the lawgiver, as reflected in the Quran and Sunna, man is God's trustee on earth and has the authority to make law, as long as it is in conformity with Sharia. This thinking became the basis for the establishment of a type of Islamic theocratic state. Article 5 of the Constitution indicates that the Islamic Republic is under the leadership of a Faqih, "who is just, virtuous, has contemporary knowledge, is courageous and an efficient administrator," while article 107 recognized Ayatollah Khomeini as the first person to occupy this office. Thus, the Leader is the head of state.

Article 109 outlines the qualifications and attributes of the Leader. They include: "1. Academic qualifications necessary for issuing decrees on various issues of religious jurisprudence[;] 2. Fairness and piety necessary for leading the Islamic Nation[;] 3. Proper political and social insight, prudence, courage, authority and power of management necessary for leadership." The article further states that "[i]n case there are many individuals who qualify the above conditions, the one who has stronger insight in religious jurisprudence

and politics shall be preferred." The Assembly of Experts, which is discussed shortly, is responsible for selecting the Leader when the office becomes vacant.

The functions and authority of the Leader are explained in article 110 and include both general and specific duties. To illustrate, the Leader is tasked to determine and to supervise the general policies of the Islamic Republic; to decree referendums; to be the Supreme Commander of the Armed Forces; to declare war and to make peace; to resolve disputes among the executive, legislative, and judicial branches of government; to resolve problems that cannot be settled by the Expediency Council; to approve candidates for the presidency, sign the order of appointment once a president has been elected, and dismiss a president impeached by the Majlis or found negligent by the Supreme Court; and to pardon or mitigate sentences of condemned people upon the recommendation of the Head of the Judiciary. In addition to these duties, the Leader has the authority to appoint and dismiss a number of people from specific offices of the central government. These include the jurists of the Guardian Council, the chief judges of the judicial branch, the head of the Islamic Republic of Iran Broadcasting Corporation, the chief of staff of the armed forces, the chief commander of the Pasdaran or Islamic Revolutionary Guards, and the chief commanders of the armed forces and the police forces. This office is obviously an extremely powerful position of authority. While only two people have held this office in the relatively recent creation of the Islamic Republic of Iran, the requirements for the office limit the candidates to those Shia clerics who are already members in the upper echelons of the clerical hierarchy. These senior clerics are called ayatollahs (signs of God) and are noted both for their piety and religious knowledge. In reference to only two people holding the office of Leader thus far, Ayatollah Ali Khamenei succeeded the Ayatollah Khomeini upon his death in 1989.

The Assembly of Experts

Articles 107 and 108 explain the singularly important duty of the Assembly of Experts. It is the responsibility of this group to select a Leader when that office becomes vacant either through death, resignation, or removal by the Assembly. The Assembly is composed of 86 clerics, of which some would hold the status of mujtahid, who are elected by the people to an eight-year term. The chairman of the Assembly of Experts holds the rank of ayatollah in the Shia clerical hierarchy.

President

Article 113 of the Constitution states that "the President shall be the highest official State authority who is responsible for the implementation of the Constitution and, as the Chief Executive, for the exercise of the executive powers, with the exception of those matters that directly relate to the Leader." The president of Iran is elected by the people to a four-year term, and can be reelected consecutively to one additional term. As mentioned earlier, the Leader must approve the candidacy of all contestants for the office of president. Candidates must be Shia Muslims of Iranian citizenship and possess distinguished religious and political qualifications. In order to secure the office, a candidate must achieve an

absolute majority of the votes. If no candidate achieves the majority, the two candidates that achieved the most votes would participate in a run-off election. Article 99 authorizes the Guardian Council to supervise the presidential election.

As noted earlier, Iran is a theocratic republic with some curious democratic characteristics. The office of president is one of those democratic characteristics in that citizens have the right to vote for a candidate. Unfortunately, this quasi-democratic process is seriously flawed at the front end. The Council of Guardians is authorized to vet all of the candidates for the office. In the presidential election of 2013, more than 680 people registered as candidates for the office, among them 30 women; all but eight—all men—were disqualified by the Council of Guardians (Human Rights Watch, 2014).

The president functions as the head of the government of the Islamic Republic. His duties consist of responsibility for state planning, the budget, and administering the civil service; appointing members to the Council of Ministers; signing bills approved in the Majlis into law; and signing treaties and other types of international agreements. The Council of Ministers consists of 21 people who head various government departments. The responsibilities of the departments are common to many governments throughout the world and include agriculture, commerce, defense, education, foreign affairs, interior, and justice. There is also a Ministry of Culture and Islamic Guidance.

The Expediency Council

This Council was created in 1988 by the Ayatollah Khomeini. Originally, it was called upon to resolve differences between the Majlis and the Council of Guardians over legislative matters. More recently, it has been given the mandate to resolve conflicts throughout the system of governance. The Council is composed of approximately 40 people, and it includes the president, speaker of the Majlis, the clerical members of the Council of Guardians, the chief justice, and others appointed by the Leader to three-year terms. Again, some of these appointments by the Leader would be from the ranks of those clerics who have attained the status of mujtahid. The chair of the Expediency Council holds the rank of ayatollah in the Shia clerical hierarchy.

Majlis

The Majlis or National Assembly is the unicameral legislative branch of the Islamic Republic's government. The Majlis is composed of 290 deputies who are elected by the people to a four-year term. Each deputy represents a specific geographical constituency. Five seats are reserved for the non-Muslim religious minorities: two for Armenian Christians and one each for Assyrian Christians, Jews, and Zoroastrians. Before a person can run for a seat in the Majlis, the person's candidacy must receive the approval of the Council of Guardians. The Majlis is the other quasi-democratic branch of the Iranian government. Like the office of president, the process is flawed at the front end. To illustrate, the Council of Guardians disqualified 2,000 people from running for a parliamentary seat in the 2012 elections (Human Rights Watch, 2013).

The leader of the Majlis is the speaker who is selected from among the deputies. The Majlis has a number of permanent committees that focus on specific government departments. Ministers of those departments can be called before the Majlis and questioned about government policies. One responsibility of the Majlis is to approve the president's choice of members to the Council of Ministers. The Majlis can also vote no confidence on a minister's performance or that of the government. While most legislation is presented through bills approved by the Council of Ministers, a deputy may submit a bill if it receives the support of at least 15 other deputies. According to article 72, "The Majlis may not enact laws contrary to the principle and rules of the official Faith of the country or the Constitution."

Council of Guardians

The Council of Guardians consists of 12 members. Six of the members are appointed by the Leader, and according to article 91, they are jurists who have a reputation as "just and acquainted with the needs of the time and issues of the day." The other six, also according to article 91, are "jurists specializing in various branches of law, elected by the Majlis from among Muslim jurists proposed to the Majlis by the Head of the Judiciary." Members of the Council hold their position for a six-year term. Half of the membership is changed every three years. No doubt, people who have attained the status of mujtahid would be represented on this Council, and the chairman of the Council holds the rank of ayatollah in the Shia clerical hierarchy.

One of the responsibilities of the Council of Guardians is to assure that laws passed in the Majlis are not contrary to the principles of Islam or of the Constitution. Article 96 specifically mandates: "The majority of faqihs (jurists) of the Guardian Council shall decide whether or not the legislation passed in the Majlis is in conformity with the precepts of Islam. The majority of all members of the Guardian Council shall decide whether or not the same complies with the provisions of the Constitution." If the Council finds inconsistencies in a bill, it is returned to the Majlis for reconsideration. In this context the Council functions like a second house of a parliament. In determining if a bill is in compliance with the Constitution, it is functioning like a constitutional court. Even before such judgments are issued, however, article 97 enables members of the Council to attend the Majlis and "express their views" about bills that are under consideration.

In addition to this legislative function, the Council of Guardians provides oversight for all the major elections. Article 99 indicates that the Council "shall be charged with the responsibility of supervising the elections of the Assembly of Experts, the President, the Majlis, and referendums." Obviously, the Council of Guardians has extraordinary power and has consistently utilized it to protect the authority of the Islamists at the expense of those who favor a more secular approach to governance.

Judiciary

Like the executive and legislative branches of government, the judiciary has a prominent place in the Constitution of the Islamic Republic. Article 156 states:

The judiciary shall be an independent power that protects individual and social rights, shall be responsible for implementing justice and shall carry out the following functions:

1. To examine and pass judgments in respect of litigations, violations, complaints; to settle lawsuits, resolve hostilities and to take necessary decision and action in respect of that part of matters of personal status to be laid down by law.
2. To restore public rights and to promote justice and lawful freedoms.
3. To supervise the proper implementation of laws.
4. To uncover crimes, to prosecute and punish the criminals and implement hudud and the Islamic codified penal provisions.
5. To take suitable measures for preventing the commission of crime and to reform the offenders.

To reiterate the importance of judicial independence, article 170 indicates that "Judges of courts shall be required to refrain from implementing Government decrees and regulations which are contrary to law or the rules of Islam or beyond the limits of authorities of the Executive." In order to carry out the aforementioned duties of the judiciary, several offices have been created to address specific responsibilities. These, for the most part, are explained in the Constitution.

At the top of the Iranian judicial hierarchy is the head of the judiciary. This person is appointed to the position by the Leader for a five-year term. The person must have attained the status of mujtahid, explained earlier. Presently, the head holds the rank of ayatollah in the Shia clerical hierarchy. Article 158 authorizes the head to develop an organizational structure to administer justice. The head is also responsible for all things associated with judges. This includes defining their jurisdictional duties and their appointment, transfer, promotion, and dismissal.

The minister of justice is responsible for coordinating relations with the executive and legislative branches of government. The person who holds this position is appointed by the president, but the head of the judiciary proposes individuals who are suitable for appointment to the post. The head of the judiciary can delegate to the minister of justice those administrative responsibilities that fall under his constitutional mandate, for example, dealing with budgetary or personnel issues.

The attorney general is the chief state prosecutor. This person is appointed by the head of the judiciary after consulting with members of the Supreme Court. The attorney general is appointed to a five-year term and has already attained the status of mujtahid. He is responsible for the prosecution of criminal offenses.

The Iranian judiciary has never been an independent branch of government. None of the various governmental iterations in the twentieth century were able to embrace the rule of law, even if they had wanted to, because an unstable political climate prevented any serious attempt at judicial reform. As such, the goal of establishing an impartial, equitable, and effective judicial system was never seriously considered. While the present constitution speaks of the "independent power" of the judiciary, that is simply not the reality. When Islamic reforms of the judiciary were introduced following the Revolution, the criticisms and concerns illustrated the judiciary's lack of independence in a number of

contexts. For example, the judiciary was accountable only to the Leader's office and not to any elected group. This led to a good deal of incompetence and the inability to control corruption. There is a serious backlog of cases, which has led to people being held in jail without bond. The public also objected to the harsh sentences of the Islamic Penal Code: amputation, decapitation, lashing, and stoning (Mohammadi, 2008).

Moreover, the judiciary has served as the principal vehicle of the Islamist reform of criminal procedure. To illustrate, there are numerous reports of torture and abuse at the pretrial stage. People are not being promptly charged with an offense. Access to a lawyer is often denied, and when it is, there is little time to prepare a defense. The courts are found to be neither impartial nor competent. The accused is often not allowed to examine the state's evidence or to present his or her own. Courts have been found to ignore scientific and social science methods of investigation. A conviction is often denied a review by a higher court. The types of sanctions already alluded to are executed both in public and in prisons. The death penalty carried out on people under the age of 18 has sparked a good deal of criticism. The failure to adopt principles associated with due process and the rule of law clearly points to the absence of an independent judiciary (Human Rights Watch, 2012a; Human Rights Watch, 2013; Human Rights Watch, 2014; Mohammadi, 2008).

The proponents of the Islamic state counter such criticism by pointing out that rule of law, due process, and democracy are Western concepts associated with Western perceptions of jurisprudence and governance. Some dismiss these concepts, especially the Western definitions ascribed to them, as alien to their intellectual tradition. From the Iranian Islamist perspective, Sharia is an ideal law that provides structure for a pious Muslim. It is a guide to all aspects of a person's life. Moreover, Shia Islam's political doctrine enables a unique association between religious institutions and political institutions. What is somewhat unique is that the Islamic Republic of Iran has been able to establish itself as a religious state in the modern world, with some clerics serving as members of the political elite and others dominating the judiciary as jurists (Ayoob, 2008; Mohammadi, 2008).

Courts

There are several courts operating in Iran, with varying degrees of judicial responsibility (see Figure 7.3). At the top of the court hierarchy is the Supreme Court. According to article 161, the Supreme Court supervises "the proper implementation of law by the courts of law, creating uniform and binding judicial precedent and carrying out the responsibilities assigned to it by law." The head of the judiciary determines the rules of the Supreme Court and appoints the president of the court, who would serve a five-year term. The president of the Supreme Court must have attained the status of mujtahid. The Supreme Court essentially has appellate jurisdiction over the Iranian court system.

The public courts are essentially divided into two categories: civil and criminal. First- and second-level civil courts deal with a variety of noncriminal issues. The first-level courts deal with issues in which the value of the property in dispute or the level of punitive damages is high, whereas the second-level courts deal with minor civil disputes. Correspondingly, the first-level criminal courts are responsible for the more serious criminal offenses, and

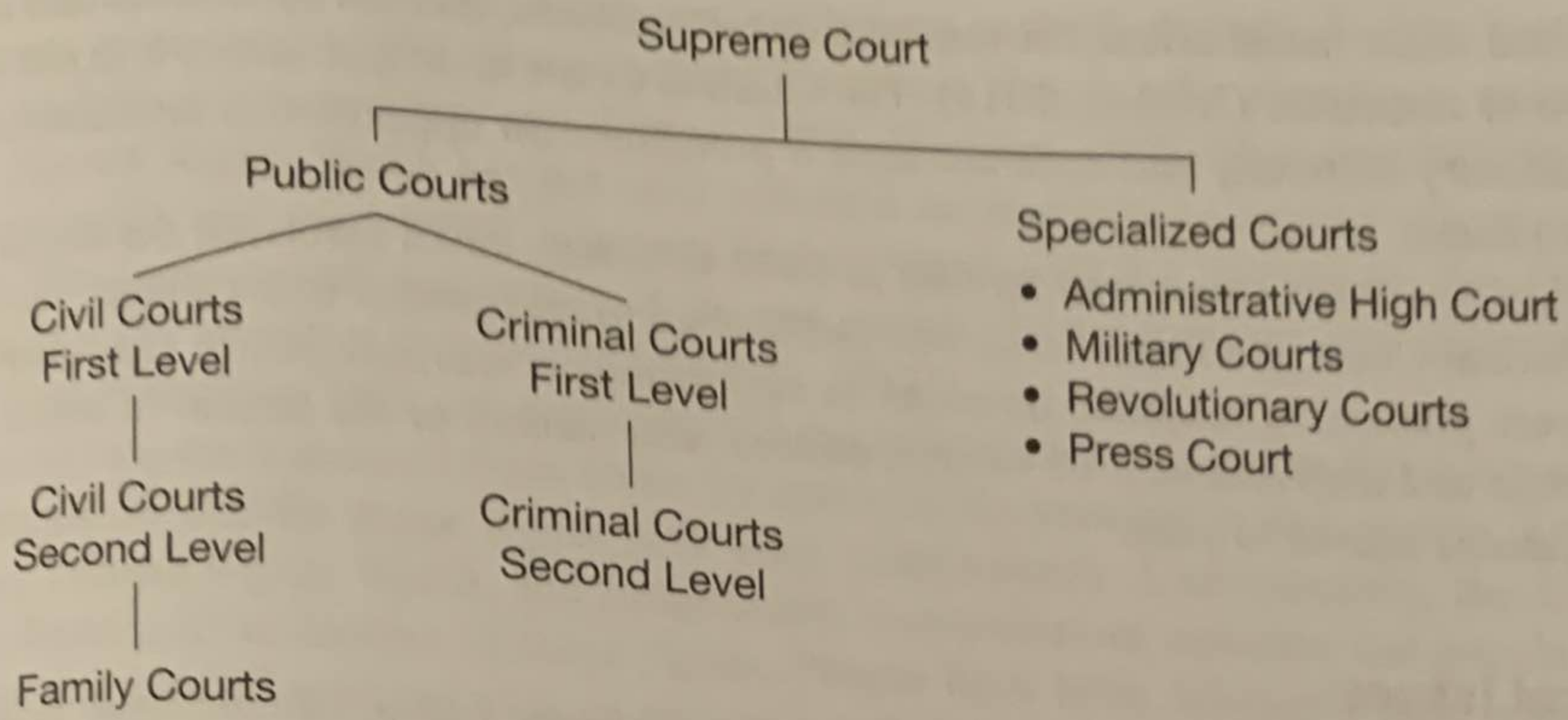


FIGURE 7.3 | Organization of the Courts of the Islamic Republic of Iran

the second-level criminal courts handle offenses that may lead to sanctions that are less punitive. There is also a separate civil court that specializes in family law, such as divorce and child custody matters.

According to article 173, the Administrative High Court was established to deal "with complaints, grievances and objections of people against Government employees, institutions or administrative regulations and redressing their rights." Article 172 established special military courts that are designed to investigate "crimes related to the special military or police duties of the members of the Army, Police and Islamic Revolutionary Guard Corps." The article also indicates, however, that ordinary crimes committed by such people "in their capacity as law enforcement officers shall be investigated by the public courts."

As is the case with any successful revolutionary movement, there is an immediate need to establish a system to hold trials against the enemies of the movement. The victors in Iran's revolution continued that tradition by forming revolutionary tribunals that tried opponents quickly and often harshly. Today, the responsibility of the revolutionary courts has been curbed considerably with the creation of the public courts. Nevertheless, they are mandated to handle cases dealing with terrorism or other issues associated with national security.

Two additional specialized courts have been established. The Clerical Court was created in 1987, and it handles cases in which a cleric is charged with a flawed interpretation of Islamic principles. While the court might have this as one of its responsibilities, it has been suggested that it is primarily employed to stifle clerical criticism of the status quo. As mentioned earlier, not all Shia clerics were supportive of Khomeini and the ideas expressed in the *Velayat-e faqih*. One group argued that while the ulama's historic role of offering guidance to political authorities should be retained, members of the ulama should not assume positions within the government. Some of these critics had attained the status of ayatollahs, that is, senior leaders of the Shia clerical hierarchy. Clerical critics have continued to express their concerns that this has led to some being imprisoned

or placed under house arrest, the loss of clerical positions, and the detainment and alleged torture of associates (Afshari, 2011). The Clerical Court is unique in that it is not part of the judiciary hierarchy and does not have a procedure for appeals. It is accountable only to the Leader.

Finally, a Press Court was formed in 1990 to handle cases involving the media. Like the Clerical Court, the Press Court was established to curb and at times silence the media that were publishing reasoned opinions in opposition to *velayat-e faqih*. This also led to the arrest and imprisonment of writers, editors, and owners of the media. In some cases, publications ceased to exist.

Critical Issues

Time and space do not permit a more extensive coverage of the Islamic legal system of Iran, in particular that part associated with the criminal justice system. It is important, however, to mention at least briefly some of the criticisms that have been directed at the justice system of the Islamic Republic of Iran. Some of the criticisms come from those who either live or have lived for extended periods of time in the country since the 1979 revolution or from independent commentators or international human rights organizations.

Constitutional Rights

The first criticism is directed at the law, the Constitution of the Islamic Republic of Iran (Tamadonfar, 2001). Three examples should suffice to illustrate the concern. Article 24 states: "Publications and the press shall have freedom of expression unless they violate the essentials of Islam or public rights. Its details shall be set forth by law." As alluded to earlier, this is simply not the case in actuality. There have been a number of instances in which the press has been censored and even required to close down. When the United Nations was preparing its report on human rights in Iran, it found that "some 22 newspapers and journals have been closed, and at least an equal number of publishers and writers have been convicted, jailed or fined, or served with a summons by one of the various tribunals now exercising jurisdiction over the press." The report also stated that the "press court seems to have become simply another control agency dedicated to the suppression of free expression rather than the protection of that right" (Copithorne, 2000). Human Rights Watch has been monitoring the arbitrary detention, torture, and sentences of four Internet journalists since 2004 and has continued into 2009. Recently, Reporters without Borders indicated that 48 journalists and bloggers were in prison in late 2012 (Human Rights Watch, 2013). Furthermore, the government owns the Iranian radio and television broadcasting corporation and thus controls the news that it sees fit to disseminate. With regard to satellite television, the police periodically remove the dishes from houses and apartment buildings (Moaveni, 2009). While the media is censored by the government, Internet access is available.

Article 27 states: "It shall be allowed to hold assemblies and marches, without carrying arms, provided that it does not violate essentials of Islam." Of course, the crux of the problem here is how the agents of the government interpret violations of the "essentials of

Islam." The United Nations report mentioned earlier was particularly critical of the treatment of students protesting in 1999. Some Iranians have been able to offer eyewitness examples 2003). Human Rights Watch has not only reported on prohibitions against assembly, but also on speech and association (Human Rights Watch, 2008e; Human Rights Watch, 2012a). The government essentially does not permit demonstrations that question its authority or any aspect of its policies (Afshari, 2011).

A final example of criticism regarding the constitution focuses on the rights associated with protecting the individual from abuse by agents of the criminal justice system. Articles 32 through 38 explain these rights and were cited already. Unfortunately, the United Nations, Human Rights Watch, and independent commentators maintain that people have been subjected to violations of these rights. People have been arbitrarily held without a warrant, deprived of meeting with an attorney, and tortured while being interrogated. The government often justifies such tactics on the grounds that the person is suspected of violating the country's national security. Many of these people are eventually released, but the experience obviously creates a chilling effect regarding how one lives (Afshari, 2011; Human Rights Watch, 2012a; Human Rights Watch, 2013; Human Rights Watch, 2014; Ghahramani and Hilman, 2009; Mohammadi, 2008).

Status of Women

A second criticism is associated with the status of women. Iran and Saudi Arabia are similar in that they are both based on a traditional patriarchal society. They differ in that Iran's House of Pahlavi, for all of its mistakes, introduced a number of rights for women. This involved greater educational opportunities and more equitable treatment in the event of a divorce. Moreover, women were not subjected to a mandatory dress code. However, all or most of that changed with the 1979 revolution. For example, the Family Protection Law was suspended. It had raised the age of marriage for girls to 18 and granted women the right to seek a divorce without their husband's permission. Following the revolution, all matters dealing with the family were delegated to Sharia courts rather than secular courts (as they had been abolished). As a result of these reversals, there has been a concern over the vulnerability of women as victims to violence in general and domestic violence in particular (Copithorne, 2000; Sahebjam, 1994). In addition, when a woman is murdered and her family seeks the death penalty for the perpetrator, her blood price is only half that of a man. It is important to note that this tradition dates back further than the establishment of Islam.

Gender segregation in public places was also reintroduced. With the exception of universities, coeducation was abolished, and in universities, classroom seating segregates men and women. In 1981, the Majlis passed the Islamic Dress Law, which required all women to wear the hijab. They were also required to avoid wearing jewelry, hairstyles, and makeup that was considered un-Islamic. Violators could receive a sentence of up to one year in jail (Hiro, 2005). Women strongly objected to this. While it is still the law, there have been periods when the dress law is not enforced to any significant degree. For example, women can wear a scarf as a veil during times when the political climate is willing

to allow people a degree of personal freedom. The political climate can quickly change, however, and women find themselves singled out in particular for public humiliation by the morality police for such transgressions (Afshari, 2011; Moaveni, 2005, 2009; Nafisi, 2003).

Human Rights Watch has recently identified several issues that highlight how women are treated in this patriarchal state. It alleges that women are discriminated against in matters of marriage, divorce, inheritance, and child custody. Moreover, they must seek their guardian's permission to marry or to apply for a passport. Finally, at some universities, women are prohibited from enrolling in some majors, such as engineering and sciences, and quotas are placed on the number of women permitted in some courses (Human Rights Watch, 2013).

Law Enforcement

The morality police or *basij* is the source of a third criticism directed at the Islamic Republic. Iran has two regular law enforcement agencies that are modeled somewhat after the French. The National Police handle the regular law enforcement and order maintenance needs of larger cities, while the Gendarmerie is responsible for the rural areas of the country. Both are accountable to the Ministry of the Interior.

The basij (mobilization) is accountable to the Iranian Revolutionary Guard or *Pasdaran*. The Guard was created by Ayatollah Khomeini to assist in the establishment and protection of the Islamic revolution. The basij are an auxiliary militia force. They are the frontline "soldiers" that have a mandate to protect Islamic society from the threat of cultural and moral decay either from within or influences from Western societies. The basij is composed of both a full-time force as well as volunteers. Members include young boys who are often too young to join a branch of the military and older men who have concluded a military career. The basij is not limited to men, however; there is a large contingent of women who assist in the mission of policing public spaces. The basij is often used to quell demonstrations, which has led to a good deal of criticism regarding the tactics it employs. It has also been employed to secure information about university students. In policing public spaces, it is specifically in search of any behavior that might appear un-Islamic. Road blocks have been set up to check motorists for alcohol, other drugs, inappropriate CDs or DVDs, passengers of opposite sexes who are not married, and dress code violations. People have been detained, beaten, and in some cases brought to court. The extrajudicial tactics of the basij have been noted by various human rights groups and commented on by independent observers (Afshari, 2011; Copithorne, 2000; Ghahramani and Hilman, 2009; Hiro, 2005; Human Rights Watch, 2008e; Moaveni, 2005, 2009; Nafisi, 2003).

In recent years, the tactics of the basij have subsided somewhat. It has been pointed out that revolutionary vigor can only be sustained for so long before strong objections are raised by the citizenry that initially embraced the revolutionary movement. Presently, the political climate has permitted more freedoms and has relaxed the religious order maintenance agenda of old. Of course, the political climate could change again and the role of the basij be enhanced once more.

Nature of Punishment

A fourth criticism is directed at the sanctions imposed on people found guilty of crimes in Iran. The types of Sharia sanctions for hudud, quesas, and tazir offenses have already been explained in general and noted in particular in contemporary Saudi Arabia. As was the case with Saudi Arabia, the human rights concern is over the physical harshness of the sanctions. Immediately following the overthrow of the Pahlavi dynasty, revolutionary courts were established and began to dispense justice according to the laws of Islam. In the early 1980s, a series of laws were passed that essentially codified Islamic criminal law. Some of the more modern offenses were incorporated into these laws, but the punishment was changed. For example, driving a car without a license could lead to the offender being flogged. Flogging appears to be the most common of the traditional sanctions employed. Moreover, quesas offenses were associated with retribution, that is, the victim had the right to seek a retaliatory punishment, but it could not be greater than the harm caused to the victim. This characteristic of ancient forms of justice has been retained. To illustrate, in late 2008, an Iranian court ordered a man blinded with acid after he had been convicted of blinding and disfiguring a woman with acid whom he had been stalking. The 1991 Penal Code essentially consolidated these earlier pieces of legislation. The objections to the harshness of a number of sanctions have been led by various international organizations associated with human rights and have been supported by a number of countries (Peters, 2005).

With regard to the case of ordering the man blinded with acid, this decision was reached by the court when the victim sought this punishment because the offender's crime was a quesas offense. Shortly before the sanction was to be carried out in 2011, the victim pardoned her attacker. Thus, he was not blinded; however, he must continue to serve his 10- to 12-year prison sentence. Moreover, the victim originally sought compensation for the medical expenses she incurred as a result of her injuries. Until the compensation is paid, the offender could remain incarcerated beyond the original sentence.

Until recently, the types of offenses that could lead to the death penalty were murder, rape, drug trafficking, drug possession, armed robbery, espionage, sodomy, adultery, and apostasy. In 2011, more than 600 offenders were executed; in 2012, more than 540 were executed. In 2013, official government sources claimed that 270 prisoners had been executed as of October of that year, but it was believed the numbers were higher (Human Rights Watch, 2013; Human Rights Watch, 2014).

Of particular concern is the use of harsh sanctions imposed on juveniles, especially imposing the death penalty on young people who committed their crime before they reached the age of 18. The Iranian Penal Code exempts children who have not reached puberty from criminal responsibility. The Civil Code of 1991, however, is more specific regarding the age of responsibility by citing boys at 15 and girls at nine. According to Human Rights Watch, the majority of juvenile executions were the result of the child being found guilty of murder (Human Rights Watch, 2008b). Moreover, it is believed that Iran executes more juveniles than any other country. Between 2007 and 2009, it is believed that 26 juveniles under the age of 18 were executed. The common method of carrying out the sentence is by hanging. Moreover, it was estimated that at least 130 juveniles were presently on death row.

In 2008, two policy changes were announced regarding executions. The head of the judiciary ordered a halt to all public executions unless authorized by him. Late in the year, judges were instructed not to impose the death penalty on juveniles. Unfortunately, these policy changes have not been implemented. Human Rights Watch reported that at least eight juvenile offenders were executed in 2007, seven in 2008, five in 2009, one in 2010, and at least three in 2011. Of the 13 people executed in the first four months of 2011, two were identified as people who were convicted when they were 17 years of age. In late 2012, there were 100 juveniles on death row. Changes in the Penal Code prohibit the death sentence for discretionary crimes, such as drug offenses, but a death sentence can still be applied for crimes of murder, rape, and sodomy, as long as the offender understood the nature and consequences of the act.

In 2012, the Council of Guardians gave their final approval to amendments to the Penal Code. While one notable issue has changed when sentencing juveniles, much of the harsh treatment that the international community has condemned for years has been retained. For example, the amended Code left standing the age of criminal responsibility at the age of puberty under Sharia law, that is, girls at age nine and boys at age 15. The Code also retains the sanctions that have long been condemned by the international community, such as amputation, flogging, and stoning. Activities that may not even be considered crimes in many countries have been retained for sanction, including adultery, sodomy, selling illicit drugs, and insulting the Prophet Mohammad or his daughter, Fatima, or any of the 12 Shia Imams.

Another concern is expanding the definition of the crime of "sowing corruption on earth," which is punishable by death and previously was used against terrorists. This crime's definition has been expanded to include: the publication of lies, damaging the economy, serious disturbance to the public order, and operating centers of corruption (e.g., houses of prostitution).

Finally, the amended Code retains the death penalty for juveniles in two key areas where the sanction is required by Sharia law. If a juvenile commits a retribution crime, such as intent to murder, which is one of the most common offenses, the death penalty is retained. Moreover, when the juvenile commits a crime against God, which includes apostasy or consensual sex outside of marriage, the death sentence is also retained. As noted, the death sentence is no longer employed for offenses deemed discretionary crimes, such as drug offenses; rather, the juvenile would be sent to a correctional or rehabilitation facility. Discretionary crimes are tazir offenses, which were explained in the section on Crime and Punishment. One caveat regarding the abolition of the death penalty for discretionary crimes, however, is in the area of national security. In this context, political offenders are tried in the revolutionary courts and could receive a death sentence (Human Rights Watch, 2012a).

Democracy or Theocracy

A final criticism impacts many of the other concerns and is associated with the political and administrative system of the government. The Islamic Republic has some quasi-democratic features with an elected parliament and presidency. Unfortunately, candidates

for either branch of government must first be approved by the Council of Guardians, which is dominated by senior Shia jurists. The Leader, who holds the ultimate and extensive political and spiritual authority, is a senior Shia cleric. He is selected by the Assembly of Experts, whose membership is limited to Shia clerics. The Expediency Council, which is charged with resolving conflicts among the various branches or departments of government, is dominated by Shia clerics. Finally, a number of deputies in the Majlis are also Shia clerics.

While it should be noted that the vast majority of Shia clerics do not hold positions in the government, there is a good deal of criticism over the degree to which Shia clerics control the political system by occupying so many key governmental offices. Among those concerned are Shia clerics themselves, and some are high-ranking clerics in the hierarchy. Nonclerical critics are generally concerned about the theocracy that has been created since 1979. Many Iranians who supported the overthrow of the shah were not seeking to replace him with a theocracy. Within that group there was a good deal of support to establish a democratic system of government.

Unfortunately, a new conservative political movement emerged at the beginning of the twenty-first century composed of young reactionaries. The conservative ascendance has attempted to focus on economic development, which has attracted the attention of many people. At the time, the liberal agenda of continuing attempts at reforming government was not considered as intriguing as the conservative goal of improving people's economic condition (Takeyh, 2009). In light of the status quo, the conservative political leaders and their agenda will continue to inhibit efforts by the political opposition to move the country in the direction of establishing a democratic system of government.

A recent example of suppressing any attempt to move in the direction of establishing some type of democratic system of government occurred during the protests over the presidential election in June 2009. In addition to the claim of election fraud, there were a host of charges that indicated the authorities did not adhere to the provisions in their constitution, specifically issues associated with violating the right to assemble, arbitrary arrests and detentions, various other due process violations, the prohibition against torture, and extrajudicial killings (Human Rights Watch, 2010a). While various agents of the criminal justice system participated in suppressing the protests over how the election was carried out and the ultimate result, the basij, the auxiliary militia force that is mandated to protect Islamic society from threats to cultural and moral decay, was a prominent force in the government's efforts to silence the protestors.

A number of well-educated people left the country following the 1979 revolution, and that trend has continued as the theocracy took hold and stifled various forms of individual freedom. This "brain drain" in a host of professions has had an adverse impact on the country. Since the death of Ayatollah Khomeini in particular, the tension over the desire for more democracy and less clerical hegemony rises and subsides depending on the success of internal political policies, especially those associated with the economy.

Exacerbating this tension is the often continued visible acquisition of significant wealth by the Shia hierarchy. While some of this wealth is used for worthy causes, it is also noted that a select group of Shia clerics has enhanced its personal wealth considerably since the 1979 revolution. By way of comparison, this is another difference between Iran and Saudi Arabia. The Sunni religious establishment in the Kingdom receives almost all of its

finances from the government, which is controlled by the House of Saud (Mackey, 1996). It is important to remember that opposition to clerics in government is not a rejection of Islam.

Finally, a number of commentators have addressed the issue of whether Iran is capable of introducing a truly democratic system of governance. The proponents within the country for establishing a democratic system of government are confronted with two pressing issues. First, democracy tends to advocate support for individual rights. The cultural traditions—namely, the dominant patriarchal society and the tenet within Islam that the most important group is the umma, the community of believers—has long subordinated the individual in Iranian society. Though both of these traditions are capable of changing and have done so in other countries, the question for Iran remains, how long would this transformation take? Second, conservative elements of society have some reservations about democracy because of its secular nature. For many conservatives, that secular nature is associated as the vehicle that ultimately leads to the moral decay of society.

In spite of these issues, the ongoing decline of support for clerics in positions of government has not abated, and this should enhance the interest to change the status quo. Moreover, it is clear that Islam has not been able to address many of the problems confronting Iran's fairly modern society, a society whose basis for modernity is not rooted in Islam. One scholar has noted: "In the Islamic Republic, Islam is at stake. A vigorous push towards democracy will put an end to the contention over the capacity of religion to foster modernity." He also rightly points out that "[m]odernisation and democratisation are long and continuous processes. The complete transformation of a traditional society requires time and enormous efforts" (Alsaif, 2007). Obviously, the opposition to the Islamic Republic must first grow significantly in numbers and then be in a position to change the system of governance in Iran. If and when that happens, and if the proponents of a truly democratic system assume positions of leadership as agents of change undertaking this long and enormous task, they may be in search of a primer. One might suggest that they look to the far northwest reaches of their own neighborhood—to the Republic of Turkey—as one example for such a transformation.

REPUBLIC OF TURKEY

Unlike Saudi Arabia, a near absolute monarchy in which the government is based on substantive laws based on Sharia, and unlike Iran, which established a type of theocratic state during the last quarter of the twentieth century along with Sharia law prominently reinstated, Turkey has embraced a secular form of governance and justice, although the overwhelming majority of the population is Muslim. The demise in the significance of Islamic law came about in the 1920s, and Islamic law has remained of little public significance to this day. The Turks are an example of a people that have largely embraced modernity with all of its problems while still accommodating those citizens who remain devout members in varying degrees to their Islamic faith.

At 300,948 square miles, Turkey is slightly smaller than the combined area of the states of Washington, Idaho, and Montana. Its territory consists of hilly, fertile regions and rugged, mountainous areas. It shares land borders with Bulgaria, Greece, Georgia, Armenia, Iran,

Azerbaijan, Iraq, and Syria. It has a coastline along the Black, Mediterranean, and Aegean Seas. The population is more than 81.5 million, and the principal ethnic groups are Turkish and Kurdish. The Turks represent 75 percent of the population, while the Kurds are the largest ethnic minority representing approximately 18 percent. Until recently, the Kurds were a nomadic tribal people. They are presently divided among six countries in the region. In each of those countries, with Turkey being but one example, there are tensions over issues associated with Kurdish nationalism. Muslims represent 99 percent of the population of Turkey, with about 80 percent of them Sunni. The Shia population at 18 percent tends to be located in the southeast region of the country. Minority faiths include Christian, Bahai, and Jewish.

It was mentioned earlier that the height of the Ottoman Empire was between the sixteenth and eighteenth centuries, and that it was this empire that was "the last great expression of the universality of the world of Islam" (Hourani, 1991). Even before the empire began to decline, two groups had emerged regarding the direction it should take to assure its viability. On the one hand were the restorationists, who essentially looked back to the glorious period of the reign of Sulayman the Magnificent (1520–1566) and wanted to recapture that kind of prominence for the empire. On the other hand, the modernists encouraged the adoption of European ideas, especially those associated with military training, organization, and administration (Lapidus, 2002). By the nineteenth century, the modernists had won that debate. Nevertheless, the Ottoman Empire was in a state of decline. Scholars point out that the decline "was due not so much to internal changes as to their inability to keep pace with the rapid advances of the West in science and technology, in the arts of both war and peace, and in government and commerce" (Lewis, 1996).

It is instructive to point out that the Ottoman Empire was noted for its goal of inclusiveness as part of its political agenda. Although Islam was the established religion, the Empire was not ruled as a theocratic state. Religion was viewed as a moral guide to good governance. While there was a strong centralized political authority for a number of years, there was also an acknowledgement of the diversity of the peoples within the empire. This was illustrated in the millet system in which select people within a religious community acted as intermediaries with the political authorities. Muslims had millets, but non-Muslims, such as the Armenian, Greek Orthodox, and Jewish communities, also had millets. This strategy helped facilitate an integrated, diverse, and pluralistic population throughout the empire. That sense of inclusiveness has been absent since the demise of the empire (see Barkey in Kuru and Stepan, 2012).

Finally, as noted earlier, the Ottoman Empire from its inception employed three sources of law. First and foremost was Sharia, the Islamic law, derived from the Quran and Sunna. Second were the rules and principles established to address issues that were not explained in the Sharia. Of course, the very process of creating these rules was guided by the Quran. A third source of law was official rulings or directives to cope with various social circumstances at a particular time and a specific place in the vast empire. A fourth source of law, however, emerged during the nineteenth century. As a result of the importance of commercial enterprises and the borrowing of scientific and technological advances from the West, the empire sought additional assistance with nagging problems in other areas of governance. Initially, the empire adopted legal ideas from the codes of European countries.

By the late nineteenth century and with specific reference to criminal justice, they were adopting a Penal Code (1857) and a Code of Criminal Procedure (1879) based on the contemporary legal codes of France.

The large Ottoman bureaucratic state has long been noted for contributing to the longevity of the empire. The Turkish military was also a key component of the Ottoman system of governance. It had a storied tradition before the empire was established and was largely responsible for its creation. At the top of the government was the sultan who had the additional title of caliph. It should be remembered that the title of caliph was given to the successors of the Prophet Muhammad as the temporal rulers of the umma or community of believers. Thus, the sultan was the political and religious head of the Muslim community. The sultan, as caliph, did not have any spiritual responsibilities to the community; rather, his fundamental duty, as the political leader, was to defend and protect the Islamic faith. Because Sunni Islam did not have a clerical bureaucracy, the ulama's official role was limited to that of guardian of the beliefs and practices of Islam. Moreover, the sultan acknowledged the ulama as an important component of his administration.

Ataturk and His Legacy

The dissolution of the Ottoman Empire occurred following the end of World War I in 1918. Although Turkey was a loser in terms of the warfare, it was actually a winner in that it emerged as an independent nation state. It was also fortunate to have a person with leadership skills to step forward during this extraordinary time for the country and lead it toward the establishment of a modern society. That person was Mustafa Kemal (1881–1938), who would later add the surname Ataturk, or "father of the Turks." He was an Ottoman army officer who had been active in the political intrigues among the army, liberals, and Muslim conservatives before and during World War I. It was Ataturk who founded the Republic of Turkey in 1923 and was named president for life. This is the man (briefly mentioned in the section on Iran) to whom Reza Shah turned as a model to emulate when he initiated efforts to modernize Iran along Western lines and to enhance the power of his central government.

Whereas most revolutionary transformations in government, like those in the United States, France, and Russia, are associated with endeavors at the grassroots level, Turkey was somewhat unique in that its revolution is often referred to as a revolution from above. Ataturk's first task was to control the territory that was the new nation state of Turkey. For his fledgling republic he retained the civil service and military from the Ottoman Empire to assist in this process. Those two bureaucracies, along with the Republican People's Party, which he had founded, would serve to carry out his agenda for the country (Sunar, 2004). His principal goal was to emulate the West, and to achieve this, the strategy was to transform Turkey both economically and culturally into a modern society. During his tenure as president, Ataturk frequently had to adjust the balance between liberty and order. One established commentator on Turkey has pointed out: "Ataturk's priority was order. It is because the order which he established has largely held, that the Turks can now embrace democracy, as the new secular, universal religion" (Mango, 2004). That order would be of a secular kind; Islam would no longer be needed to secure the social order in this new

emerging country. Scholars tend to agree that Ataturk's authoritarian style of governance was undoubtedly necessary initially in order to move his country in the direction of a modern democratic state. Ataturk died in 1938 and was succeeded by his trusty lieutenant, Ismet Inonu, who carried on the pragmatic policies of the founder of the republic.

One of the principal targets of Ataturk's reform efforts was directed at Islam. He had a radical secularized agenda which was achieved in several ways. For example, the position of sultan was abolished in 1923, and this was followed in 1924 with the elimination of the office of caliph. The position of caliph had served as an important symbol throughout the Muslim community. A new government office, the Directorate of Religious Affairs, was placed in charge of the ulama. Among its responsibilities that continue to this day is the appointment of imams to mosques. Moreover, the Directorate is charged with preparing the Friday sermon that is then read by the hatip. He also authorized that people had the right to change their religion, and he closed the religious courts. The weekly day of rest was changed from Friday to Sunday. In 1925, he decreed that traditional male headgear should be replaced with European-style hats. Although he did not prohibit the wearing of the veil for women, it has been suggested that the veil was abolished "by a kind of social pressure and osmosis, without the apparatus of legal enforcement" (Lewis, 1996). In addition, a new Latin script was introduced to replace the Arabic alphabet in 1928. He also replaced the Muslim calendar with the Gregorian or Western calendar. Finally, the educational system was secularized.

Ataturk's ultimate goal was to control religion and reduce it to a private affair; however, he was not trying to separate the state from the mosque (see Hanioglu in Kuru and Stepan, 2012). Recently, the secularism debate in Turkey has been classified as one of two types. Passive secularism is illustrated when the state avoids "the establishment of any religion, but allows for the public visibility of religion." Assertive secularism, in contrast, appears when "the state excludes religion from the public sphere and plays an assertive role as the agent of a social engineering project that confines religion to the private domain" (see Ozbudun in Kuru and Stepan, 2012). Ataturk's agenda was clearly of the assertive sort. The issue of secularism and Islam has become a central feature in a number of contemporary political debates in Turkey. That issue will be touched on below.

As mentioned earlier, the Ottomans had already begun to abandon some aspects of Islamic law in the nineteenth century. The Turks would continue that endeavor and borrowed extensively from European legal codes during the 1920s and 1930s, in particular the Swiss civil law, the Italian criminal law, and French administrative law. Specifically, a new family law was gleaned from the Swiss, replacing Sharia. Legislation abolished polygamy and enhanced efforts at equity in divorce. Muslim women were permitted to marry non-Muslim men. Women had already experienced new economic opportunities because of the shortage of men resulting from World War I. Both employment and educational opportunities were increased for women, with the changes introduced by Ataturk's government. These changes established the foundation for a new type of society: the "crucial difference is that in Turkey women are much more emancipated and better able to realize their potential than in most Islamic countries" (Mango, 2004). All the aforementioned changes were significant in the cultural transformation of the new secular Turkish society that Ataturk was creating. It is also important to note that he had the full support of the educated classes and professions.

Most scholars agree that the twentieth-century history of Turkey can be divided into two periods. The first occurred from 1921 to 1950 and essentially was dominated by the one-party, authoritarian rule of Ataturk and Inonu. It was during this period that the foundations of a constitutional, democratic, multiparty political system were established and the initial stages of an industrial, modern, economic society were created. Since 1950, Türkey has experienced rapid economic change, which, in and of itself, can create a good deal of tension. Another type of tension is associated with political governance as it relates in particular to the role of the military, a multiparty political system, and ideological conflict (Lapidus, 2002).

While the post-1950 tensions are important in order to understand the country, a detailed examination of them is beyond the scope of our purpose. Nevertheless, two tensions are summarized that are interrelated with the military, politics, and ideology. The first tension is associated with the military. On two occasions, there have been military coups to rescue the country from ineffective governments. The first occurred in 1960 and lasted one year. The generals abolished the Democratic Party, which had been in power and had altered Ataturk's secular policy by supporting greater tolerance of Islam in public life. The generals were also instrumental in writing a new constitution for the country. In 1980, the army would again take control of the country as a result of political and economic instability. They suspended the constitution and dissolved parliament and all political parties. This coup also led to a new constitution that was submitted to the people in a referendum in November 1982. It was approved by 91 percent of the voters. In addition to these coups, there have been other occasions in which there were threats, subtle and not so subtle, that the military might intervene in the governance of the country.

It is important to note that there are some segments of the population, often referred to as Kemalists (for the founding father of modern Turkey, Mustafa Kemal Ataturk), who have preferred an authoritarian style of government when it is in their economic or political interests. To illustrate, in a poll published in August 2003, 88 percent of the sample stated that the armed forces were the most trustworthy institution in the country. The army has long been viewed as facilitating Turkey's efforts at modernization. One of their specific tasks has been to intervene if politicians are not capable of maintaining the law and order that are vital to achieving modernization. They have been called upon to reintroduce a level of Ataturk's style of authoritarianism in order to assure the continued nurturing of democratization throughout the political process (Mango, 2004).

It has been suggested that having the army in the background, ready to intervene when voters make mistakes at the polls and civilian governments become inept at handling issues often of a domestic nature, leads to a "permanently immature" electorate. "It allows them to avoid ultimate responsibility for the consequences of their votes. . . . As long as the army is around to do the system's dirty work, voters can avoid confronting the urgency of political change. . . . It does not, however, serve the cause of democracy" (Kinzer, 2001). Presently, the power of the military to intervene in domestic political affairs has been curbed significantly over the past decade (Ayoob, 2008). While this is viewed as a positive development for those citizens who wish to see politicians take seriously the goal of establishing a more mature form of democratic governance, it is unlikely that this will happen anytime soon.

The other tension presently dominating Turkish political life is associated with the Justice and Development Party. To understand the current crisis, it is important to review briefly the tensions created by opposition parties that either have an active Islamic political agenda or are at least willing to accommodate the existence of a religious political party. First, opposition political parties were for the most part suppressed while Ataturk was alive. On only two occasions did parties emerge, but they were short-lived: the Progressive Party of 1924 and the Liberal Party of 1929 and 1930. A competitive political party system did not develop until the 1950s. Second, Ataturk's emphasis on the secular state leading the country to modernity and a higher standard of living as seen in the West had led to Islam being removed from having a prominent voice in public life. With the emergence of a multiparty political landscape in the 1950s, those with an Islamic political agenda began to organize themselves. It was the Democratic Party that was instrumental in allowing this to happen. It had won a parliamentary majority in 1950 by defeating the Republican People's Party, the party of Ataturk. One of its agendas was to relax the overly strict secularist policies that Ataturk considered essential to enabling Turkey to transform itself into a modern state.

As noted, Ataturk was not trying to separate the state from the mosque. There are illustrations of how his political party, in particular following his death, continued to assert its control over Islam, while relaxing some policies. For example, elective religion courses were permitted in middle schools, and theology faculty gained admittance to colleges. The Democratic Party relaxed Ataturk's secularist policies in some ways. One of its notable changes was to permit state vocational high schools to create a curriculum tract to train imams and hatips. These schools employed the same curriculum as other high schools but added the religion courses for those seeking a career in those vocations. Of course, it was the Democratic Party that was banned as a result of the military coup in 1960.

By 1970, the first Islamic party emerged as the National Order Party, but it was quickly eliminated in 1971 on the grounds that it opposed the secular nature of the state. It was replaced by the National Salvation Party in 1972, and it called for a return to an Islamic way of life. This party lasted until the military coup of 1980, when all political parties were banned. Shortly after the reemergence of a civilian government in 1982, the Welfare Party became the standard bearer for political Islam in Turkey throughout much of the 1980s and 1990s. It was clearly opposed to Western influences. In 1998, it was eliminated with the help of the military, and several of its members were banned from politics for five years. The Virtue Party replaced the Welfare Party and established a position that was not hostile to Western influences. Nevertheless, the Constitutional Court closed its operations in 2001 on the grounds that it advocated an anti-secular position. The ability to ban a religious political party that carries its agenda too far has a basis in Turkish constitutional law. Article 68, which deals with political parties, states in part: "The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, and principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime." This has been the legal basis to ban such political activities that are considered in conflict with "the principles of the democratic and secular republic."

Two groups emerged following the demise of the Virtue Party. The more conservative group formed the Felicity Party, while the moderates established the Justice and Development Party. In the 2002 parliamentary elections, the Justice and Development Party won 34 percent of the vote, which was ahead of the Republican People's Party, which received 19 percent of the vote. With 363 seats in the new parliament, the Justice and Development Party formed a government. During this time it was pointed out that "official Islam in Turkey is developing a philosophy of religious humanism as an alternative to the secular humanism of the intellectual elite. . . . Turkish Islam is emerging from decades of intellectual stagnation to meet the modern world on its own terms" (Mango, 2004). Moreover, one scholar indicated that ". . . there are now hurried attempts by even secularist official circles to introduce an Islamic morality and larger doses of nationalism into the socialization process of school children and the young. Islam, therefore, will continue to play an important role in society—not, however, in the form of a mass movement, an Islamic revolution or revolt, but largely as an ethical guide to promote good civic behavior and social peace, and as a private experience for individuals" (Sunar, 2004). As such, the Justice and Development Party attempted to accommodate itself to the secular society that Kemalists were determined to maintain.

For many people, the Justice and Development Party was considered a center-right party rather than a religious party. It had pursued a moderate approach, especially on issues associated with Islam. One of its principal objectives was to initiate reforms in the law and in particular the administration of criminal justice in order to establish grounds for gaining Turkey's admission into the European Union. In the 2007 parliamentary elections, the Justice and Development Party received 46.6 percent of the vote, for 341 seats, while the Kemalist Republican People's Party secured 20.8 percent of the vote, for 112 seats. Following its second victory, the government in early 2008 proposed lifting the ban on women wearing headscarfs at Turkish universities. The ban had been introduced in 1997. This prompted the Chief Public Prosecutor to request that the Constitutional Court ban the Justice and Development Party and 71 of its leading members, which included the President and Prime Minister of the country, from active involvement in politics for five years, because of their active antisecular activities. In addition to the headscarf controversy, there was a charge that the education minister was attempting to insert Islamic teachings in school textbooks. The leadership of the Justice and Development Party denied that they were attempting to transform the country into an Islamic state.

It is important to interject that "polls show that there is little support in Turkey for an Islamic state. A large majority of Turks, including religious Turks, support the secular state" (Rabasa and Larrabee, 2008). To illustrate, in one respected poll from 2006, only 9 percent of the population supported a state that was based on Sharia. Nevertheless, one commentator of contemporary Turkey has pointed out that: "The relatively low proportion of Islamic fundamentalists revealed by social surveys has not stilled the fears of defenders of secularism or reduced the vigilance of the armed forces, which see themselves, and are seen by society, as the ultimate guarantors of the modern, secular republic" (Mango, 2004).

In the summer of 2008, the Constitutional Court handed down two decisions that would address the concerns that Turkey's secular state was in jeopardy. First, it reimposed the ban on headscarfs, indicating that the government's policy was a violation of the secular

principles of the constitution. With regard to banning the Justice and Development Party and its leaders from politics for five years, six of the 11-member Court voted yes, but the rules required a majority of seven members to secure such a decision. Ten of the justices agreed that the party had been involved in antisecular activity, but they disagreed on the punishment. As a result, the party was fined for its activities. The events of 2008 created both a political and constitutional crisis for the country. At the core of that crisis was the issue of ideology: secularism and Islam.

These tensions did not abate, for in 2010 the Justice and Development Party secured passage of several amendments to the constitution through a referendum. The most sensitive amendments were authorizing military personnel to be tried in civilian courts for crimes against the state or constitution and enabling the president to have an increased role in the selection of candidates to the Constitutional Court. In June 2011, the Justice and Development Party won its third general election, but it did not win a super majority, which would have enabled it to draft a new constitution without consulting the opposition parties. Replacing the 1982 Constitution has long been a central goal of the party, for the constitution was a product of the last military coup and is not considered reflective of today's human rights standards. At issue in any future debate over a new constitution will be the matter of freedom for religion or beliefs. Thus, the tension between secularism and Islam will remain a particular focus of attention.

It has been suggested that the Party "can no longer be considered an Islamist party, even though its top leadership came from Islamist roots. It can more correctly be described as a conservative democratic party inspired by faith-based values in social and cultural matters" (see Ozbudun in Kuru and Stepan, 2012). While many would accept this characterization, others would take issue with the extent to which the party is democratic, as opposed to a party that strives to embrace democratic values.

Many of the Justice and Development Party's democratic reform efforts were prompted by Turkey's interests in joining the European Union, and the Union's requirements imposed on the country in the application process. Examples include the supremacy of the constitution and a reform of the present document; other legal reforms; curbing the power of the military; assuring an independent judiciary; and generating civil reforms. While Turkey is making strides in some of these endeavors, critics (among them the European Union and Human Rights Watch) have raised several concerns. Central features of a true democracy are institutions that assure the existence of the rule of law, the establishment and protections of human rights, and the concern for minorities in this context of rights. Unfortunately, the Justice and Development Party has emphasized at times its majoritarian political power over the rule of law. The judiciary is not an independent branch of the government. The police have utilized excessive force oftentimes when dealing with the Kurds and more recently in 2013 with the protests against the urban development plan of Istanbul's Gezi Park. Restrictions on speech and assembly were also illustrated in a pronounced way with the Gezi Park protests. These concerns have led to the government being characterized not as espousing democratic principles, but rather as an uncompromising authoritarian entity that thinks it knows what is best for the country. This strategy is strikingly similar to the approach taken by Ataturk and the Kemalists throughout the first half of the twentieth century. In fact, some critics argue that while the Justice and

Development Party has curbed the power of the military, it is employing the police and judiciary to impose their form of authoritarian governance (Akca, Bekmen, and Ozden, 2014; Aydin, Erdal, Sancar, and Atilgan, 2011; Ayoob, 2008; Hammarberg, 2011; Kuru and Stepan, 2012). Finally, the government's actions toward the media (for example, intimidating statements by government officials, judicial investigations of editors and journalists, and in some cases the jailing of journalists) has led to a chilling effect on the media that results oftentimes in a period of self-censorship (European Union, 2013; European Union, 2014; Human Rights Watch, 2014b).

It should be noted further that one of the laws, the infamous article 301 of the Turkish Penal Code, enables judicial investigations and arrests of people with detention before trial, which is not solely limited to journalists, but could involve other writers and is vague enough to encompass curbing free speech. The earliest iteration of this law has existed since 1926 and was designed to protect Turkish values and the state. Under both the old and newer versions, people could be found guilty of committing the crime of insulting Turkishness. If a person was found guilty, they could receive a sentence of between six months and three years in prison (Algan, 2008). While domestic and international criticism has been leveled at this law, the government elected to amend it rather than strike it from the Penal Code. The amendments attempt to address two issues. First, the concept of Turkishness is too vague, so it would be replaced by the "Turkish nation," and second, the penalty is too harsh, so the amendment proposes to reduce the maximum punishment from three to two years.

The face of the Justice and Development Party is Recep Tayyip Erdogan. Until Erdogan's election to the office of president of Turkey in August 2014, he was the prime minister. In the presidential election, he received 52 percent of the vote, while the National Action Party's candidate garnered 38 percent. Turks have long viewed the state as providing the infrastructure to transform the country into a modern state. While Ataturk and his party initiated those efforts, Erdogan and his party have continued in their pursuit of that goal. A tremendous building boom has fueled the recent successes of the Turkish economy, and universal health care was established.

Like Ataturk, Erdogan is viewed as a very charismatic figure, especially among women. A number of the policies he initiated have helped women in particular. According to the human development index, improvement can be seen in the education level of women, maternal health care, and maternal mortality rates. Unfortunately, a 30 percent participation rate of women in the official labor force is considered good. Informal jobs that are not counted for social security and unpaid family farm workers are not counted in the official labor statistics. Erdogan is also a proponent of helping the poor. He comes from a squatter settlement himself and rose to mayor of Istanbul before entering national politics. This is another characteristic that contributes to his favorable image among women, but not all people are enamored with his policies and leadership style. A Pew poll conducted shortly before the presidential election found that 48 percent of respondents thought Erdogan was a positive influence, while the same percentage was of the opinion that he was having an adverse effect (Pew Research Center, 2014).

While criticisms of Erdogan's authoritarian style and policies will be noted below in the sections on government and critical issues, it should be noted that the citizenry have indicated their displeasure with him and his party by denying them a parliamentary majority

in the recent legislative elections in June 2015. The Justice and Development Party remains the largest party with 258 seats in the 550-seat legislature, but it does not have enough seats to govern alone. Other parties that increased their membership in parliament included: Republican People's Party (132), Nationalist Movement Party (80), and Peoples' Democratic Party (80).

Before turning to the section on government, one should not be left with the notion that there are not critical issues confronting women in Turkey. In some quarters, it remains a very patriarchal society. Like many countries in the alleged civilized world, there is a problem with domestic violence. There are also issues associated with forced marriages and honor killings (see Pervizat in Idriss and Abbas, 2011). To its credit, the government implemented the Law on the Protection of Family and Prevention of Violence against Women in 2012. A report on the action plan to implement this legislation is scheduled for late 2015 or early 2016. Initial concerns focus on the number, training, and abilities of the staff dealing with domestic abuse. The legislation calls for the establishment of shelters for abused women, but some local governments have lacked the funding to comply with this mandate. Finally, official statistics do not exist on the extent of the problems of domestic violence, forced marriages, and honor killings (European Union, 2014).

Government

In the twentieth-century history of Turkey, the country has been guided by four constitutions. The Constitution of 1921 was essentially a transitional document during the Turkish War for Independence. It consisted of 23 articles and introduced the principle of national sovereignty. While it delegated governing authority to the executive and legislature, there was no discussion of a role for the judiciary. The Constitution of 1924 was enacted following the proclamation in 1923 declaring Turkey to be a republic. With this document, the authority of the executive, legislature, and judiciary are noted. Ataturk had a fundamental role to play in the preparation of both the 1921 and 1924 constitutions. Following the 1960 coup, the Constitution of 1961 was approved, and it was noted for two things: the establishment of a bicameral legislature and, most important, the acknowledgment of individual human rights. Following the military coup in 1980, the constitution was suspended and parliament dissolved. In 1982, the people voted overwhelmingly in a referendum to approve a new constitution. In form it was modeled in several ways after the 1958 Constitution of the Fifth Republic of France. This does not mean that it functions precisely within the Turkish context like that of the French constitution. For example, the 1982 constitution abandoned the bicameral legislature for a unicameral legislature.

Constitution

The 1982 Constitution of the Republic of Turkey consists of seven parts and contains 177 articles. The Preamble to the document begins with the following statement: "In line with the concept of nationalism and the reforms and principles introduced by the founder of the Republic of Turkey, Ataturk, the immortal leader and the unrivalled hero, this Constitution, which affirms the eternal existence of the Turkish nation and motherland and the indivisible

unity of the Turkish state." Thus, the father of modern Turkey, Ataturk, remains a revered figure.

Part One of the Constitution establishes the general principles. While article 1 indicates that Turkey is a Republic, article 2 identifies characteristics that are central to the Republic. They state, in part, that Turkey "is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Ataturk." Article 4 is of interest because it declares that articles 1 through 3 of the Constitution are irrevocable and indicates that they cannot be amended. What is of particular interest for our purposes is that the article is essentially proclaiming that Turkey is to remain a secular society. Article 6 acknowledges that sovereignty rests in the nation and that it cannot be "delegated to any individual, group, or class."

Part One also indicates that political power and authority will reside in the legislative, executive, and judicial branches of government and that each is subject to the provisions of the Constitution. Although Turkey has two offices associated with the executive branch, it essentially functions as a parliamentary system. Finally, article 10 addresses the issue of equality before the law. It states:

> All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.
>
> Men and women have equal rights and the State is responsible to implement these rights. No privilege shall be granted to any individual, family, group or class.
>
> State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.

Of particular interest here, given the previous discussion in the sections on Saudi Arabia and Iran, is the statement that religion and gender are protected by the principle of equality before the law.

Part Two is devoted to a host of fundamental rights and duties that are frequently associated with a modern democracy. It was mentioned earlier about the tension created over the agenda of religious political parties and the constitutional principle of Turkey as a secular state. We return to that theme in the area of fundamental rights and duties. For our purposes, article 24, dealing with freedom of religion and conscience, is of interest. It states, in part: "Everyone has the right to freedom of conscience, religious belief and conviction. Acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14." Article 14 is titled "Prohibition of Abuse of Fundamental Rights and Freedoms." It declares:

> None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights.

No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.

The sanctions to be applied against those who perpetrate these activities in conflict with these provisions shall be determined by law.

This is another illustration (of which there are several in the Constitution) that adheres to Ataturk's goal of establishing a secular democracy in which Islam would no longer have a prominent independent role in securing or maintaining the social order. Article 24, however, also states: "Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools."

Whereas secularism in the West has meant a separation of church and state, this is not the case in Turkey. The Kemalist policy toward religion in general, and Islam in particular, was to control or regulate it. As mentioned earlier, this strategy is an illustration of assertive secularism in which the state removes religion from the public sphere and limits it as a private matter. This decision was based on the history of Islam in the region and its role not only as a religious faith but also as a source for establishing a system of law and a political philosophy that acknowledges a role for it in the governance of the umma or society of believers. As such, article 136 acknowledges that the "Department of Religious Affairs, which is within the general administration, shall exercise its duties prescribed in its particular law, in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity."

Part Three of the Constitution is devoted to the three branches of government. Turkey has a unicameral legislature called the Turkish Grand National Assembly. It consists of 550 deputies who are elected by citizens who have reached the age of 18 through open, free, and competitive elections. The deputy serves a four-year term. The principal duties of the National Assembly consist of proposing, amending, and repealing laws; supervising the Council of Ministers; and approving the budget.

The executive branch is composed of three elements. Until 2007, the president of the Republic was the head of state and elected by colleagues in the National Assembly. The candidate had to achieve a two-thirds majority of the vote, and once elected, he resigned his seat in the Assembly and severed any affiliation with a political party. The term of office was for seven years, and it was not renewable. A constitutional amendment that was approved by the voters in late 2007 now permits the citizens to vote directly for the president to a five-year term that is renewable once.

As mentioned earlier, the first presidential election by the citizens of Turkey occurred in August 2014. The president has duties that are associated with all three branches of the government. For example, with regard to the legislature, the president calls it into session, promulgates the laws passed, can appeal to the Constitutional Court regarding a law, and calls for new elections of the Turkish Grand National Assembly. Among the executive duties of the president are appointing a prime minister, appointing ministers to the Council of

Ministers on the recommendation of the prime minister, ratifying treaties, mobilizing the Turkish armed forces, appointing the chief of the General Staff, presiding over the National Security Council, proclaiming martial law or a state of emergency, and signing decrees. Although it appears on paper that a good deal of responsibility resides in the office of the president of Turkey, the Constitution illustrates in an important way the parliamentary nature of the system of government. Article 105 deals with presidential accountability and nonaccountability. Essentially, the president is not authorized to sign decrees alone. Rather, a decree must be countersigned by the prime minister and the minister who is responsible for implementing the policy associated with the decree. Finally, with regard to the judiciary, the president has the authority to appoint members to the Constitutional Court, one-fourth of the members to the Council of State, the chief public prosecutor and deputy chief public prosecutor, members of the Military High Court of Appeals, members of the Supreme Military Administrative Court, and members of the Supreme Council of Judges and Public Prosecutors.

The other two elements of the executive branch are the prime minister and the Council of Ministers. The prime minister is appointed by the president from a member of the Turkish Grand National Assembly. He is the head of the government. The ministers of the Council of Ministers are nominated by the prime minister and appointed by the National Assembly. Ministers are responsible for various departments of the government that include defense, education, finance, foreign affairs, health, industry and commerce, interior, and justice.

Judiciary

The judiciary is the third branch of government for the Republic of Turkey. Article 9 states: "Judicial power shall be exercised by independent courts on behalf of the Turkish Nation." Article 138 is more specific in its definition of what is meant by independent courts.

> Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, law, and their personal conviction conforming with the law.
>
> No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.
>
> No question shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial.
>
> Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.

It is clear from these provisions that both the executive and legislative branches of government are expected to comply with the decisions of the courts and not interfere with their judicial deliberations. Both domestic and international critics contend that the judiciary is not functioning as an independent entity in the governance of the country. Specific concerns are cited below in the critical issues section.

Before a description of the organization of Turkish courts is presented, it is important to mention three offices associated with the work of the judiciary as well as one court. The Supreme Council of Judges and Public Prosecutors is chaired by the minister of justice and includes a deputy minister of justice and five senior judges appointed by the president of the Republic. They serve a four-year term and may be reappointed. Article 159 of the Constitution explains that the Council is responsible for "the admission of judges and public prosecutors of courts of justice and of administrative courts into the profession." They also determine the appointment, transfer, promotion, discipline, and removal from office of judges and public prosecutors. Criticism has been directed at both the composition and method of selecting people to serve on this Council. Members are either part of and or selected by the executive branch of government. This raises serious questions about the independence of the judiciary (European Union, 2013; European Union, 2014; Hammarberg, 2011). If a person wishes to become a judge following graduation from a secular law school, he or she would apply to the Ministry of Justice. If selected, the person would serve a two-year apprenticeship before being eligible for appointment by the Council.

It is the minister of justice, a member of the government's Council of Ministers, who proposes the aforementioned personnel issues to the Council. The Ministry of Justice is responsible for preparing any new or amended legislation to the National Assembly. Public prosecution also falls under the authority of the Ministry of Justice. The prosecutorial service exists throughout the country; it is the responsibility of the state to prosecute those cases that it deems appropriate after a preliminary investigation into a matter has been completed. Finally, the chief public prosecutor represents the state in the Constitutional Court and in any of the High Courts of Appeal. The person is appointed by the president of the Republic to a four-year term and may be reappointed to the post.

Constitutional Court

A number of countries permit the highest appellate court in the regular court hierarchy to entertain issues associated with the constitutionality of its law. Others have elected to create a separate Constitutional Court that has exclusive judicial control over such matters. Turkey opted to establish such a court in the 1982 Constitution. Article 148 explains the functions and powers of the Court.

> The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. However, no action shall be brought before the Constitutional Court alleging unconstitutionality as to the form and substance of decrees having the force of law issued during a state of emergency, martial law or in time of war.

In its appellate capacity the Constitutional Court receives cases in one of two ways. First, article 150 of the Constitution permits the president of the Republic, a parliamentary group of either the government's party or the main opposition party, or one-fifth of the membership

of the National Assembly, to raise an issue of unconstitutionality. Second, an individual can seek judicial review with the claim that his or her individual rights have been violated. It should also be noted that the Constitutional Court is authorized to function as a trial court if senior members of the government, the president of the Republic and members of the Council of Ministers, or members of high courts are scheduled for trial for an offense associated with their constitutional functions.

The Constitutional Court is composed of 17 members. The president of the Republic is authorized to make the appointments to the Court; however, most of the candidates are actually nominated by the other high courts. These include the Court of Cassation, Council of State, Military Court of Cassation, the High Military Administrative Court, and the Court of Accounts. In addition to these candidates, the president will select one member to the Court from among the nominees put forward by the Board of Higher Education, and he will personally select three members from among the senior civil service and lawyers who have practiced for at least 15 years. Members of the Court retire at the age of 65, which is the retirement age for other members of the judiciary.

It has been noted that neither the Constitution nor the Constitutional Court were implemented to protect the rights of citizens; rather, they were designed to guard the ideology of the state (Kuru and Stepan, 2012). Recently, however, this perception of the court is changing. The court has annulled parts of Erdogan's autocratic legislation as unconstitutional. To illustrate, when the government tried to ban Twitter, the court overturned the order. They also stepped in to prevent the government from blocking YouTube and Facebook. These rulings have led to Erdogan's government attacking the court for defending certain basic democratic freedoms and opposing an increasingly powerful authoritarian executive branch. Specific examples identified by critics as executive power reach involve enhancing the minister of justice's authority, which further puts in jeopardy any independence of the judiciary. In addition, the government has attempted to grant to the Communications Technologies Institute the authority to protect the privacy of users on the web. The opposition maintains that the Institute is controlled by the government. (Human Rights Watch, 2014b).

Courts

Within the civilian justice system there are two kinds of courts: administrative courts and judicial courts. For our purposes, it is the judicial court hierarchy that is associated with criminal justice issues (see Figure 7.4).

At the top of the judicial court hierarchy is the Court of Cassation. It handles all appeals associated with the legality of lower civil and criminal court decisions. This court is divided into chambers that specialize in issues associated with the lower courts. Presently, there are 21 civil law and 11 criminal law chambers. Serious concerns have been raised regarding the efficiency of the appellate court process. The number of cases pending before the Court of Cassation as of July 2014 was 582,642. This was an increase from the 544,169 cases awaiting a resolution in July 2013 (European Union, 2014). Legislation that had introduced a regional appeals court system was scheduled for implementation in 2007 and would obviously have reduced the workload of the Court of Cassation.

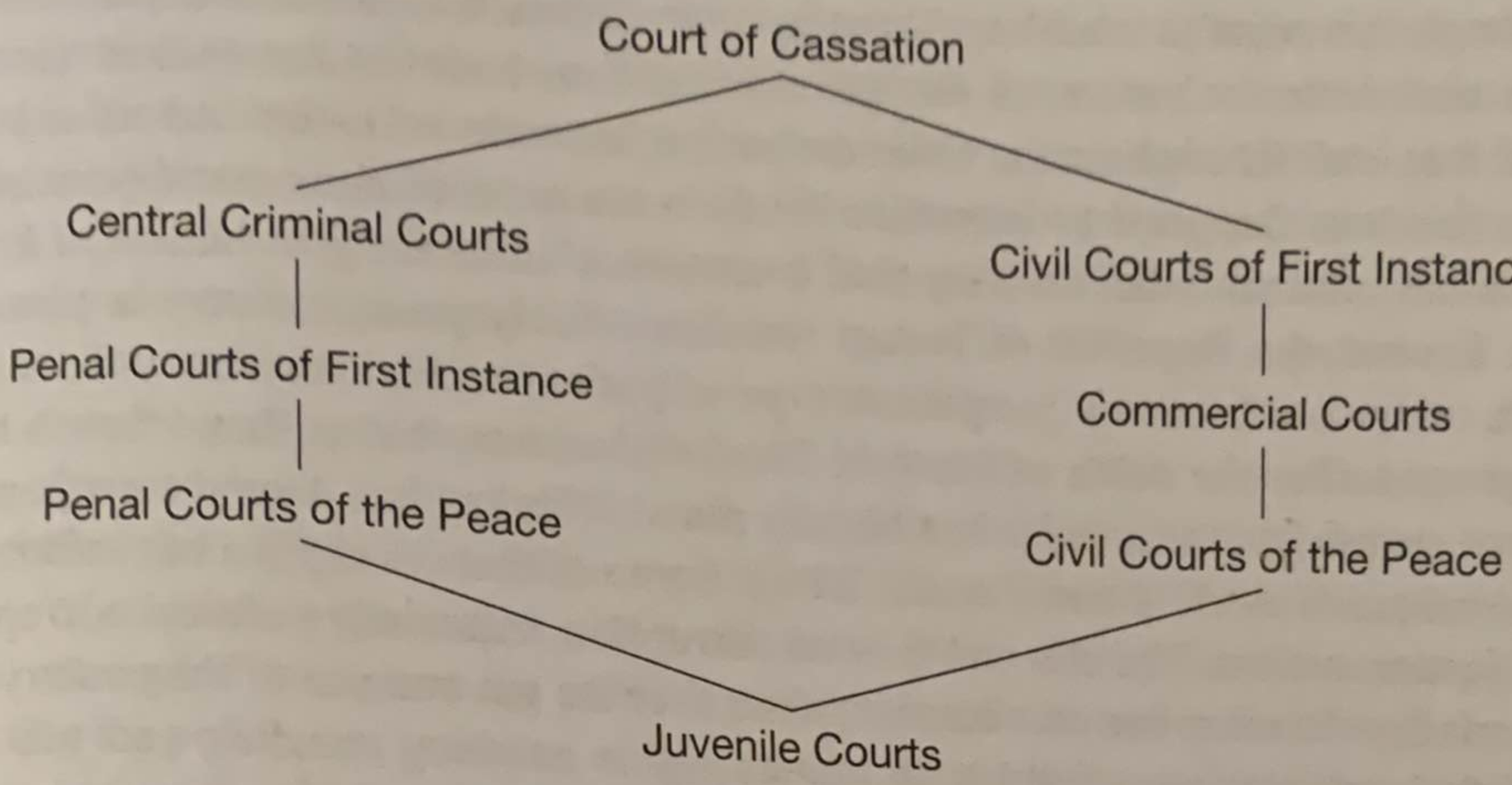


FIGURE 7.4 | Organization of the Judicial Courts of the Republic of Turkey

Central Criminal Courts handle offenses for which the penalty could be at least 10 years of imprisonment. These cases are handled by a panel of three judges. It should be noted that Turkey does not use a jury of laypersons in any of its courts. Whereas the Penal Courts of the Peace handle minor misdemeanors, the Penal Courts of First Instance are responsible for adjudicating cases not handled by the other two criminal trial courts. Moreover, a single judge would handle cases in the Penal Courts of First Instance and the Penal Courts of the Peace. Finally, Juvenile Courts would handle cases involving people under the age of 18. In Turkey, the age of criminal responsibility is 12. Young people who are found guilty of offenses committed while they were between the ages of 12 and 17 would receive a reduced sentence from that imposed on an adult. For example, if an adult is found guilty of a crime that usually calls for a sentence of life imprisonment, a juvenile found guilty of the same offense would receive a sentence of between seven to nine years.

It should also be noted that while Saudi Arabia and Iran have retained the death penalty, the most severe punishment imposed on people convicted of a crime in Turkey is life imprisonment without parole. The last time the death penalty was carried out in Turkey was in 1984. In 2002, the sanction was abolished for ordinary crimes; in 2004, it was abolished for all crimes.

Critical Issues

For a number of years, agents of the criminal justice system have been the focus of a good deal of criticism associated with Turkey's human rights record. These criticisms have come from international organizations such as Amnesty International, Human Rights Watch, and Transparency International. Concerns have also been expressed by other countries, such as the European Union, and from the work of journalists and scholars. To illustrate the peculiar nature of the country's problem, it has been suggested: "Of all the countries with bad human-rights records, Turkey is the freest. To put it the other way, Turkey has the worst human-rights record of any free country. This is its deepest and most troubling contradiction" (Kinzer, 2001).

Although this point is troubling, there is, nevertheless, a reasonable explanation for it. First, the authoritarian nature of the government has been an entrenched feature for centuries. It existed throughout the Ottoman period; it continued under Ataturk as he began a process that was designed to introduce Western concepts of democratic principles and the rule of law; and all indications are that it continues under the government of President Erdogan. Second, the Republic of Turkey remains a fairly young country in terms of its attempt to adopt democratic principles. A type of parliamentary democracy did not begin to emerge until after the death of Ataturk. Third, the country has suffered from a number of political scandals. One scholar has bluntly noted: "Turkey has a very corrupt political past" (Cerrah, in Haberfeld and Cerrah, 2008). Some of that corruption has infiltrated the criminal justice system. The ebb and flow of corruption, especially political corruption, is one reason why the army has on occasion taken over the governance of the country. While many of the problems associated with human rights are long-standing and will not be resolved overnight, the country has begun in recent years to turn its attention to improving the justice system by attempting to address problems associated with accountability, transparency, and zero-tolerance for corruption. This was in part prompted by Turkey's interest in joining the European Union. While several critical issues remain, of which some will be highlighted below, they are at least identified as problems to the country's goal of becoming both more democratic and adhering to the rule of law. No doubt, the country will continue to grapple with many of these issues into the foreseeable future.

With regard to police, it should be noted that the country has two kinds of police organizations: the Turkish National Police and the Gendarmerie. Like all units of Turkey's government, the Turkish National Police is a highly centralized organization. For many years its approach to law enforcement and order maintenance was to impose it on the citizenry from above. The Gendarmerie is a highly disciplined military police force that serves rural areas of the country. Because it is a military organization, it has always been somewhat remote from the community of citizens. An illustration of the separateness of the Gendarmerie is that they live in barracks; as such, the opportunities to interact with the citizenry outside the job are reduced considerably.

Some of the criticism directed at the police over human rights concerns involved the style of policing employed by the two agencies. Specific concerns cited include police violence against those demonstrating in public, arbitrary detentions, police violence while in custody, the use of torture, and on occasion cases of employing lethal force (see Uysal, in Khalili and Schwedler, 2010). A recent example of this was how the police were authorized to handle the Gezi Park demonstrations in 2013. While condemnation was expected from Human Rights Watch, it was also noted as a serious problem in the Progress Reports of Turkey to join the European Union (European Union, 2013; European Union, 2014; Human Rights Watch, 2014b). One scholar stated ". . .policing in Turkey can be described as policing by coercion. Policing by coercion is policing without consent and with the hostility of the community" (Aydin, 1997). It was further pointed out that coercion is a characteristic of any authoritarian regime and over time had become an accepted feature of the state. In recent years, attempts have been made to introduce community policing, that is, inviting the support and participation of the community in reducing crime and maintaining order within their community.

While these efforts at community policing remain a work in progress, two other forms of coercion are in need of solutions. For years, Turkish detectives relied more on informers and rough-handed tactics on an initial suspect to solve crimes rather than a careful attempt to collect evidence to establish a case. The harsh tactics often led to various forms of brutality. Article 94 of the Criminal Law states: "Any public officer who causes severe bodily or mental pain, or loss of conscious or ability to act, or dishonors a person, is sentenced to imprisonment from three years to twelve years." In spite of this provision in the law against torture, prosecutors and judges have looked the other way. This type of abuse continued until human rights groups, both domestic and international, began to complain about the matter. While it remains a problem, it has subsided to some extent. Another example of coercion is associated with problems of police corruption. One survey conducted in 2001 attempted to capture the public's perception of corruption and found the citizenry suspecting the police, in particular, of the practice. According to one commentator, "Official figures confirm the findings: nearly 40,000 policemen were disciplined and nearly 1,000 expelled from the force in the two and a half years to July 2003. These figures show also that action is being taken to improve the service and re-establish public trust" (Mango, 2004).

In spite of the criticisms directed at the police for human rights violations, a recent Pew poll found that police, along with the military, had a favorable rating compared to other national organizations. The poll was conducted in July 2014, just before the presidential election. Among the institutions addressed in the survey were the military, police, courts, and media. The military and police both had the highest favorable rating, both at 55 percent. The police rating had declined from 68 percent in a poll conducted in 2010. In the 2014 poll, respondents were asked to reveal their level of religiousness when rating the aforementioned national organizations. Religiousness was placed in a Muslim context; that is, respondents were asked how often do you pray (five times a day or more, less than five times, or hardly ever). Police received a favorable rating of 72 percent by those praying at least five times a day, 59 percent by those praying less than five times a day, and 33 percent by those who seldom prayed (Pew Research Center, 2014).

Coercive tactics with prisoners have not been limited to police, however. The Turkish Human Rights Association has identified the brutal treatment of people detained in both police stations and jails. One study of human rights in Turkey concluded: "Due process rights have been frequently violated in Turkey, and abuse in detention or prison, including torture, have been endemic" (Arat, 2007; see also Bargu, in Khalili and Schwedler; and Micallef, in Khalili and Schwedler, 2010). In addition to the poor treatment, another problem associated with Turkish prisons is the degree of overcrowding. This has been attributed to the lengthy sentences handed out and by the fact that half the prison population often consists of people awaiting a final judgment in their case (Mango, 2004). Approximately one-fifth of the prison population consists of detainees awaiting trial. Many of these people have been held for more than one year and some for more than three years (European Union, 2013; Human Rights Watch, 2014).

It is unlikely that some or all of these problems will be addressed soon. This is based on the view that there is a tendency for governments to address problems associated with human rights and policing before they even consider strategies for greater accountability

and transparency in the prison system. While this is common in many countries, it should be noted that the government has directed some resources to its correctional system. For example, 10 new prisons were recently constructed. Moreover, issues associated with the prison staff have begun to be addressed by offering training in European and international standards and by recruiting more prison guards (European Union, 2014).

The judiciary, that is, judges and prosecutors, has also been the subject of a good deal of criticism. They have been part of the problem associated with the other components of the criminal justice system, and many commentators suggest that they are central to the solution of abuses throughout it. To illustrate, Human Rights Watch has accused prosecutors of not conducting effective investigations into allegations of human rights abuses. Moreover, it is claimed that they often do not even initiate a preliminary investigation into a complaint (Human Rights Watch, 2007). To resolve problems like this, one commentator has pointed out that "[j]udges and prosecutors need to become more independent from the state apparatus and, like newspaper editors, begin to think of themselves as servants of the nation rather than of the state" (Kinzer, 2001).

A telling research study on the judiciary from 2007 to mid-2009 was published in 2011 by the Turkish Economic and Social Studied Foundation (Aydin et al., 2011). The authors selected this topic because of the paucity of research on the judiciary and the acknowledgement that the judiciary was an essential feature in the country's efforts at democratization and establishing the rule of law. Both judges and prosecutors were interviewed and asked perceptions of the judiciary. A number of them indicated that they joined the judiciary because it provided a good salary with decent benefits and a guaranteed retirement plan. They perceived themselves as civil servants of the state, and they considered the administration of justice as politicized. Furthermore, they acknowledged that judicial impartiality did not exist, as the state is favored in judicial decisions.

The subject of judicial independence was also explored and defined as independent from the other branches of government and security of tenure in office. The participants indicated that the judiciary was very weak, in particular with regard to the executive branch. To illustrate, courts did not have their own budget, and were thus dependent on the executive branch. Moreover, they were critical of the High Council of Judges and Public Prosecutors, which is essentially controlled by the minister of justice, a member of the executive branch. Judges have been dismissed, relocated, or assigned to another position because of decisions they have made. A transfer of a judge or prosecutor to a new location can mean either a punishment or a reward based on political reasons. There appears to be no respect for the rule of law.

Like the members of the judiciary, the public also associated the judiciary with the state. They either did not understand the concept of the separation of powers, or they did not consider it a credible feature of their political system. Moreover, participants did not see the courts as providing a service, but saw the justice system as designed to favor the powerful, in particular those with money. The researchers found that most participants were generally ignorant of the legal system.

As a result of these impressions of the public, it should come as no surprise that the courts did not fare very well in the Pew research poll alluded to earlier. In rating four

of Turkey's national institutions (military, police, courts, and the media), the courts were viewed as good by 37 percent of the respondents and bad by 58 percent. Only the media had lower scores (32 percent and 65 percent, respectively). When the respondents were asked about their religiousness, again as alluded to earlier, those who prayed five times a day or more had a 60 percent favorable rating of the courts; those who prayed less than five times a day had a 38 percent favorable rating; and of those who seldom prayed, only 20 percent offered a favorable rating (Pew Research Center, 2014).

In its investigation on judicial corruption, Transparency International indicated that there is too much political interference by the Turkish Ministry of Justice in filling judicial positions, especially in its control of appointments to the Supreme Council of Judges and Public Prosecutors. Other concerns include the lack of open information about court proceedings and the disciplining of members of the judiciary. It was noted in their report that a number of judges and prosecutors had been found guilty of accepting bribes and trying to influence other courts. This is in part attributed to the inadequate salaries provided to members of the judiciary. Finally, questions were raised about the accuracy of reports submitted by technical experts. Transparency International offered a number of recommendations to address these issues. They included removing the minister of justice and his deputy from the Supreme Council of Judges and Public Prosecutors; providing the Supreme Council with its own budget and offices separate from the Ministry of Justice; creating more training programs for judges, prosecutors, and lawyers; drafting a code of ethics for judges and prosecutors; and abolishing the private expert pool and establishing a pool of public experts for case analysis (Transparency International, 2007). Finally, it should be noted that in 2006 the High University Board increased the years of study in law school from four to five.

Two recent reports by international organizations remain highly critical on the lack of progress toward Turkey establishing an independent judiciary. Human Rights Watch argues that the political influence over the police and judiciary is a principal reason why the rule of law is ignored and human rights are placed in jeopardy. With specific reference to an independent judiciary, the report calls on the executive branch of government to cease all political interference. There is particular concern about the obstructions related to criminal investigations of corruption within the government. Singled out again for condemnation is the rotation and demotion of prosecutors and judges involved with cases of corruption involving government officials. Other concerns noted were limiting the time people could be held in pretrial detention, speeding up the trial process, and ending the lack of impartiality among prosecutors and judges when the defendants are Kurds (Human Rights Watch, 2014b).

The European Union's Progress Report on Turkey for 2014 echoed many of the concerns from previous years. They identified no real improvements in the lack of impartiality of judges and prosecutors in trials. Progress toward an independent judiciary, embracing the concepts of the separation of power, and the rule of law were deemed noticeably absent. As has happened in the past, a good deal of criticism was directed at the High Council of Judges and Public Prosecutors, especially the role played by the minister of justice. In some cases where prosecutors and judges were investigating corruption, it

was noted that they themselves became the focus of disciplinary or criminal investigations. Moreover, in some of these corruption cases, the police officers were removed, reassigned, and even detained.

The report did acknowledge that Turkey is in a "challenging environment." It praised the country for its humanitarian efforts, in particular with aiding the influx of refugees from Syria and Iraq, of which many are Kurds. Nevertheless, the report noted little progress in establishing an independent judiciary and highlighted concerns already expressed in such reports as the Commissioner for Human Rights for the Council of Europe in 2011 and the European Union's Turkey Progress Report for 2012 (European Union, 2014).

It is also important to note that some of the heavy-handed tactics of the agents of the justice system can be attributed to issues associated with terrorism. For many people in the West, terrorism did not become an issue until September 11, 2001 ("9/11"). From the perspective of the Turks, they have been confronting terrorists for a considerably longer period of time (Mango, 2005). Of course, the old adage that one man's freedom fighter is another man's terrorist comes into play here. Nevertheless, two groups from the Turkish perspective are a threat to the country maintaining the Kemalist goal of a nation state based on democratic and secular principles. Those groups are the Kurdish nationalists and the Islamic revivalists.

The Kurdish people number between 15 and 20 million and are largely Sunni Muslims. They were essentially a nomadic people who lived in the mountainous regions of what is today Turkey, Iran, Iraq, and Syria. After World War I, the aforementioned countries were created into new nation states. Although the Kurds were promised a similar arrangement, it never materialized. Thus, they became a minority group within each of these new countries. Throughout much of the twentieth century, the Kurds have maintained that they should also be given a separate nation state. This would require altering the boundaries of the states of Turkey, Iran, Iraq, and Syria. Because the largest group of Kurds lives within the modern boundaries of Turkey, they have often been the most vocal for the establishment of their own nation. Over the years they have employed a number of tactics to voice their plight, and this has included terrorist incidents. The Turkish military and agents of its justice system have responded in kind. Kurdish nationalism remains a concern for Turkey.

Clashes continue to erupt among the Kurdish population of Turkey and the police. Various peaceful demonstrations and riots have led to death, mass arrests, and the destruction of property. What follows for the demonstrators are often lengthy periods of incarceration without a trial date and allegations that they are terrorists. Recently, the government of President Erdogan introduced a new police bill that will enhance the powers of the police when dealing, in particular, with protestors. This legislation is not only directed at the Kurds, but also other groups, for example the Gezi Park demonstrators of 2013, who were critical of the government. Human Rights Watch has identified five major concerns in this legislation: increasing the power of the police to carry out searches based on reasonable suspicion; broadening the power of courts to seize assets of individuals who are perceived to be attempting to overthrow the government; enhancing the court's authority to authorize wiretaps; restricting defense lawyers' access to evidence; and establishing a new crime, that is, making threats against government officials. Furthermore, the legislation would permit the police to detain people for between 24 and 48 hours, depending on the

alleged criminal offense, without prosecutorial or judicial approval. The sanctions for violent protest that appear to aid a terrorist organization would increase to a three- to five-year prison sentence. Finally, the right of police to use firearms in certain situations has been expanded. None of the enhanced powers delegated to the police will ingratiate them to their critics (Human Rights Watch, 2014a).

Critics of this legislation consist of domestic groups as well as the traditional international organizations, like the European Union and Human Rights Watch. All view this as the latest illustration of Erdogan's authoritarian style of leadership, which will have an adverse impact on the country's commitment to democratic ideals and the rule of law. In spite of the increased criticisms, it is important to point out that thousands of Syrian Kurds have been permitted to flee the onslaught of the jihadist Islamic State and enter Turkey as refugees. Thus, while Kurdish nationalism remains a concern for Turkey, it has not prevented the government from offering humanitarian aid to Kurdish refugees.

Islamic revivalists are those members of the faith that wish to turn the clock back to the Middle Ages, with the reintroduction of Sharia as essentially the only law that governs the region. Ottoman rulers rejected such a position long ago. Part of Ataturk's agenda was to control the role that Islam would play in his secular state. With the success of that strategy, other Islamic activists complained that Islam had been eclipsed and isolated from the lives of Muslims. It has been limited to the basic tenets of prayer, fasting, pilgrimage, and alms-giving (Al-Azam, in Ozdalga and Persson, 1997). In the view of the revivalists, Islam can offer much more for the betterment of the umma, community of believers. This kind of tension is why the headscarf issue mentioned earlier in this chapter created such a stir, and explains in part why the Constitutional Court temporarily resolved the matter.

As noted earlier, when Ataturk assumed the mantle of leadership of the Republic of Turkey, he introduced an assertive style of secularism. The state excluded religion from the public sphere and confined it to the private domain. This was clearly an example of the state undertaking a social engineering project. Since the Justice and Development Party assumed control of the executive and legislative branches of government, they have begun to introduce a more passive approach to secularism; that is, religion should be allowed to have greater public visibility. They maintain that Islam has always been an important feature of the country, irrespective of Ataturk's and the Kemalists' secular agenda. The Justice and Development Party suggests that religion in the public sphere has a social value, but it is not the basis for the political system.

Turkey is the only Muslim country that has engaged in representative government and embraced secular values for such a long period. Gradually, over the course of the past half century, an "Islamic tone" has emerged in society. Proponents claim it is not designed to threaten the secular state. Erdogan has spoken of his desire to see a more pious generation, suggesting that Islam might provide a moral compass for people who are adrift. From this perspective, that "Islamic tone" illustrates the value religion may have to improve social values as a whole (Ayoob, 2008; Kuru and Stepan, 2012; Ozbudun in Grote and Roder, 2012).

In October 2013, the ban on headscarves was lifted in state institutions. The government considered this an illustration of the country's efforts at democratization, but some critics feared this could become an initial step in the subjugation of women. On the subject of

female dress, Turkey is clearly not Saudi Arabia or Iran. In Saudi Arabia, the hijab style clothing dates back centuries, even before the emergence of Islam as a religion. While it may have religious overtones today, it has long been part of the cultural tradition. As mentioned earlier, the House of Pahlavi in Iran had introduced a more equitable treatment of women and did not subject them to a mandatory dress code. That changed with the 1979 Revolution, which initially required women to wear the hijab. Since the initial requirement was introduced, the enforcement has fluctuated with the political climate of opinion. In Turkey, the headscarf issue is viewed by many as a political matter. For many, it is a political statement of choice, not an imposition. The argument presented is that while women wearing the headscarf may not look Western, they are modern women who happen to take their religion, Islam, seriously.

In the 2014 Pew poll mentioned earlier, a clear majority of the respondents (69 percent) indicated that Islam plays a large role in political life, while only 26 percent suggested it plays a small role. In 2002, before the Justice and Development Party assumed power, the two groups were much closer in agreement, with 45 percent of the respondents claiming it played a large role and 43 percent indicating a small role. The 2014 poll also noted that those who perceived Islam playing a significant role in politics tended to be male, young, and have completed post-secondary education. Finally, 47 percent of the respondents think it is a good thing that Islam plays a larger role in politics, while 40 percent consider it a bad thing (Pew Research Center, 2014).

Today, some Kemalists fear that radical Islamic groups outside the country might enhance the efforts of the revivalists through various methods of social conflict, which could include violence. Admittedly, this has not been as pressing a concern as the issues associated with the Kurds. Nevertheless, as long as various radical groups that claim allegiance to Islam attempt to wreak havoc in various Muslim countries throughout the world, the agenda of Islamic revivalists will remain a concern for Turkey. Obviously, the emergence of the Islamic State in Syria and Iraq, countries that share a border with Turkey, is a totally new feature in this discussion.

Among the countries in the region that have overwhelming Muslim majorities, Turkey is unique. Its government continues to harbor efforts at democratization, and its policies are modern. It can serve as a model for those who wish to embrace a Western style of governance, while accommodating the faithful of Islam and the role Islam can play in society. The process of achieving such a goal will take some time to implement, as is the case with Turkey. Like all emerging democratic countries, Turkey is and will remain a work in progress.

SUMMARY

This chapter has offered an introduction to Islamic law, specifically as it relates to criminal justice. Some countries view the purpose and function of law in a different context from that which emerged in the West, and Islamic law is an example of that difference. Because Islam is primarily a religion, which espouses a specific moral code, it was important to sketch out some of the basic characteristics of the religion. As such, the principal sources of the faith, the Quran and Sunna, were explained. Moreover, the Pillars of Islam, the basic

tenets of the faith, were described. The difference between Sunni and Shia Muslims was also summarized. Finally, the development of Islam was outlined in the regions called the Arabian Peninsula, Persia, and the Ottoman Empire.

A large section of the chapter was devoted to explaining Sharia or Islamic law. The section began with the historical development of Sharia, noting that religion and law were interrelated in the Middle East, which was a common feature among societies at that time. An outline was provided of the different madhahib or legal schools that emerged, especially those associated with Sunni Islam. Islamic law is characterized as a series of standards that are religious and moral in nature and that are designed to establish and to explain appropriate conduct of the believers of Islam. The sources for those standards were examined next, and they included the Quran, Sunna, ijma, and ijtihad.

The three principles that highlight how justice is pursued within the realm of Islamic criminal justice were also identified. These included criminal responsibility and the degrees of accountability, legality related to crime and punishment, and the nonretroactivity of the criminal law. Sharia recognizes two categories of crime and punishment. Determined crimes and the corresponding sanctions refer to those offenses and punishments that have been specified either by God in the Quran or by the Prophet Muhammad in the Sunna. Determined crimes are further subdivided between hudud and quesas offenses. The other category of crime and punishment is discretionary, and these are referred to as tazir offenses. Because Sharia did not provide a detailed method of criminal procedure, this process was left to the delegated authority of the sovereign or ruler. The nature of the process that emerged is also explained, and the treatment touches on such issues as the presumption of innocence, criminal responsibility, the investigation and nature of evidence, the trial process, and what today is referred to as the courtroom workgroup.

The third and final section of the chapter returns to the regions where Islam developed but as contemporary case studies. Thus, attention focuses on the Kingdom of Saudi Arabia, the Islamic Republic of Iran, and the Republic of Turkey. These countries were selected in part because each views Islam and the role of Sharia in a different historical and contemporary context. The Kingdom of Saudi Arabia has long been noted for its embrace of a very conservative interpretation of Sunni Islam. The Islamic Republic of Iran is an example of a country that fairly recently established a curious republican theocratic form of government that is based on principles of Shia Islam. What is also unique about Iran is that for much of the twentieth century it had established a secular legal system that reduced significantly the role of Islamic law. Finally, the Republic of Turkey is an example of a country in which the overwhelming majority of the population is Muslim, but Islamic law no longer influences the justice system of the country. The Turks are an example of a people who have largely sought to establish a secular and democratic system of governance while remaining devout members to their Islamic faith.

By way of backdrop to the examination of these three countries, it was pointed out that a good deal of tension exists throughout the region. Part of that tension has been caused by the economic and military interests of the West that have existed since the eighteenth century. Throughout the twentieth century, generations of people living in the Middle East were exposed to Western popular culture. For some of the older generations, that Western culture has often been characterized as decadent, and this belief has been another factor

causing tension in the region. The principal concern has been that the Middle East, like Europe, would forsake its religious roots and embrace a more secular society.

Another factor that has created tension in some circles within the Middle East is the extent to which the countries in the region have borrowed ideas and whole codes from the Western legal tradition of Europe. Although there was opposition by Islamic jurists to this reception of European law, some rulers introduced Western ideas in order to address practical pragmatic policies for the administration of justice in areas for which the Sharia did not provide specific guidance. In spite of this justification to borrow from the Western legal tradition, the legal reception was cause for tension, for the Sharia had long been viewed as the only law necessary to guide Muslims because it represented the will of God.

A final factor creating tension in the region is an all-encompassing issue that is associated with the concept of the secular nation state. The nation state did not emerge in the Middle East until the twentieth century. As a result, the countries in the region are only now grappling with a host of issues associated with this newfound independence as a nation state. A central issue confronting each of them is the ongoing debate over where their allegiance lies. Is their allegiance to an Islamic society? From the inception of Islam, the most important group associated with it was the umma, the community of believers. Today, because Islam is a worldwide religion, the umma extends beyond the borders of any and all nation states. In countries that have embraced all aspects of Islam, the state is often considered subordinate to Islam. This kind of state is often described as a theocratic state. The purpose of such a state is to secure the maintenance and enforcement of God's will or law. This is designed to prepare the believers for life in the hereafter. To assist in that preparation, the state seeks to purge society of all sources that create a decadent secular society.

In this aforementioned debate over allegiance, an alternative lies with a secular democratic society. While not precisely mimicking what happened in eighteenth-century Europe, some within the Islamic Middle East want to replace their age of faith with an age of reason. Social scientists have long noted and cautioned that political democracy is impossible without social democracy. The proponents of a secular democratic society see the Muslim world's failure to modernize as the cause for both economic and social poverty among the people and often political tyranny in the governance of the states in the region.

Whether allegiance is to an Islamic society or to a secular society depends on different views of society. By describing the political and legal system of Saudi Arabia, Iran, and Turkey, an attempt was made to show how three countries in the region are grappling with this significant debate and the other tensions associated with it, especially within the context of criminal justice.