

A Comparative Review of Criminal Justice Models: Islamic vs Secular Perspective

Abubakar Bukar Kagu Ph.D*

ABSTRACT

In critical legal scholarship, criminal justice is often regarded as mainly a formidable instrument of control. This has led to the argument that the whole notion of criminal justice's capacity to control crime and adjudicate with fairness are only rhetoric. In the general sense however, criminal justice, whether Islamic or secular, is considered as set of rules and processes modelled to contain and remedy against violation or infractions. Because it is a phenomenon that responds mainly to social incidents and dynamics, it has become susceptible to constant modification and reviews. This is particularly common with man-made laws as priorities shift and in many cases, a response to the disappointment, which scholars associate with the seeming exaggerated demand for efficiency in a system that is incapable of providing one. For Islamic model, the idea of constant changes and reforms is far-fetched as rules and procedures are defined based on standard religious texts and juristic opinions. This paper intends to discuss the development and characteristics of both Islamic and secular models of criminal justice, drawing inference from the orientation that shaped these models and compare the ideas and practices that define them. The paper take particular interest in the key aspects of crime control and due process models.

Keywords: *Crime, Justice, Model, Islam, Jurisprudence.*

Introduction

Historically, the institution of criminal justice is explained by numerous notions that include spiritualism, theology and demonology that are based on various religious and cultural explanations practiced in early centuries across societies the world over.¹ This include the practice of retribution, sorcery, cast, excommunication etc. The institution later developed into a body of bureaucratic agencies that make decisions and take actions on crime prevention, law

* Lecturer, Faculty of Law, Yobe State University, Damaturu.

¹ Zedner, L. (2004). Criminal Justice. Oxford: Oxford University Press.

enforcement and punishment.² These agencies have in most contemporary societies, been structured in a systematic operational way through which some sort of definite rules and principles were exercised to govern the conducts of individuals and respond to perceived infractions of the law.³ Yet, it is evident that before what is seen as the present egalitarian system, most of the aspects that define criminal justice including pre-modern Europe for instance, were characterised by few codified laws and the justice system worked mainly on the erratic application of the punitive and arbitrary discretion of the dominant elites.⁴

Akin to those values that were later developed by secular regimes across the world, the Islamic model of criminal justice is one that has, for centuries recognized and upheld the fundamental guarantees and legitimacy of the rights of the accused, the victim and the community. It is also one that recognizes the extents and limits of the state when it comes to questions of human rights and due process. While the history of legal development across the world is filled with complex and conflicting trajectories, it is a paradox that some of the most debated applications of law today occur in Islamic criminal law as punishments under Shari'ah often attract attention and controversy, most especially among non-Muslims.⁵ What is evident however is that criminal justice model that shaped the practice of Islamic criminal law has its source from Quran, Sunnah and standard jurisprudential models and opinions of scholars most of which date back over a thousand years.

Islamic Criminal Justice Model

Highlighting what justice connotes under Islam, Kamali parallel the concept to the esteemed values of human dignity, stating that justice represents the inviolability of the dignity of the human person, while recognising a set of rights and obligations along the guarantees of safe conduct by others, including the society and state.⁶ These principles and guarantees have formed an integral part of jurisprudence for over a thousand years.⁷ While similarities exist between Islamic and contemporary secular systems, Islamic criminal justice system is one that attaches great deal of emphasis on the substance of justice as against secular models emphasis

² Davis, A., Maxwell, S. and, Director, M., and Kingdom, U. (1971). Sentences for Sale-A New Look at Plea Bargaining in England and America, Part 1. *Criminal Law Review*, 1971(1), 150–161.

³ Zedner, L. (2004). *Criminal Justice*. Oxford: Oxford University Press.

⁴ Foucault, M. (1977). *Discipline and Punish*. London: Allen Lane.

⁵ Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int'l L. Rev.*, 46, 1.

⁶ Kamali, M. H. (2004). *Dignity of Man*. Islamic Texts Society.

⁷ Abdal-Haqq, I. (2002). Islamic law-an overview of its origin and elements. *J. Islamic L. & Culture*, 7, 27.

on the concept of crime control. Furthermore, Islamic orientation of justice is generally towards the uncompromising quest fairness, due process and the guarantee of human dignity. Hence, Islamic strictly prohibits arbitrary arrest, self-incrimination, spying on others, unlawful interference in the private life of other individuals and coercion.⁸ It is also an integral part of Islamic justice system that all matters be tried speedily before and impartial judge and with the guarantee for judicial review i.e., judicial appeal.⁹ The justice to which Islam invites its followers argued Maudoodi:

“...is not limited only to the community as a whole, but it is meant for all the human beings of the world. Muslims, therefore, cannot be unjust to anyone. Their permanent habit and character should be such that no man should ever fear injustice at their hands, and they should treat every human being everywhere with justice and fairness.”¹⁰

On the development of Islamic criminal justice model, early scholars were able to identify and set out models from what they consider positions in consonant with the standard rules of procedure based on Quran and Sunnah. The specifics as well as the general issues around rights, violations and infringements, while the specifics include issues of arrest, search, detention, proof, qualification of witnesses, nature of sentence and other ancillary procedural requirements.¹¹

In the quest for a comprehensive criminal justice framework, Muslim jurists have proceeded to articulate a theory of laws and p[rocedure that reflect the provisions of the Quran and Sunnah as the principal sources of law and the embodiments of how the believer should conduct himself or herself.¹² These extents and limits of human conduct are within the domain of what is contained in the Quran and the legal literature of Sunna i.e., what the Prophet had done or said, or even tacitly approved that took the form of specific narratives and became known as Hadith. Suffice to say that some wordings of the Quran and Hadith have not always been clear and unequivocal, that they sometimes lend themselves to multiple interpretations. Jurists have often taken these general wordings and given them better clarity and specific meanings that usher in rules and legal norms.

⁸ Munir, M. (2017). Fundamental Guarantees of the Rights of the Accused in Islamic Criminal Justice System. <http://ssrn.co/abstract=3093026> Accessed 31 January 2018

⁹ *ibid*

¹⁰ ‘Ala Maudoodi, S. A. (1976). *Human rights in Islam*. Islamic Publications Limited.

¹¹ Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int'l L. Rev.*, 46, 1.

¹² Hallaq, W. B. (2009). *An introduction to Islamic law*. Cambridge University Press.

The outcome of the several work done by scholars on the principles of Islamic jurisprudence was a model of criminal law that is mainly based on the primary sources of Sharia i.e., the Quran and Sunnah. Apart from Quran and Sunnah, this jurisprudence also evolved to include secondary sources of Islamic law such as the consensus of jurists living in a particular age or generation;¹³ an agreement that bestows on those rulings or opinions subject to it a conclusive, certain knowledge.¹⁴ It is however important to stress that the universal validity of consensus could not be justified by reason alone; it has to be grounded in the Quran and/or the Sunna. It is important to note that even where the Quran or Sunnah are not clear about a subject matter, a consensus of jurists and the community becomes relevant and in line with Sunnah since the prophet said in a Hadith, “My community shall never agree on error or falsehood”.¹⁵ Therefore a consensus ratifies any particular rule that may have been based on probable textual evidence.¹⁶ Hence, the development of Islamic legal theory is an aspect that encompasses both Quran and Sunnah as well as opinions of jurist based on reasoning.¹⁷ This is by all standards a comprehensive development that emerged to contain rules and principles that address criminal justice and procedure on ways that the system handles, administers and treat offenders, victims and everyone that is either a party or has a stake in the process and outcome of the system.¹⁸

Principally, Muslim jurists since the earliest time have made reference to the tradition of Prophet on *hudud* and a host of procedural principles including the rules of evidence and testimonial hurdles.¹⁹ On the due process of trials and evidence, the Prophet clearly cautioned that the *hudud* punishments should be avoided whenever there is doubt or ambiguity.²⁰ Islamic model of criminal justice puts a great deal of burden on the judge that when adjudicating, the judge has a duty to scrutinize the case for any factual or legal doubt and avoid mistakes that will render the defendant guilty without clear proof.²¹ These rules governing adjudication, especially *hadd* crimes, also cautions prudence on the notion that “it is better for the ruler to

¹³ Makdisi, J., & Makdisi, M. (1995). Islamic law bibliography: revised and updated list of secondary sources. *Law. Libr. J.*, 87, 69.

¹⁴ Hallaq, W. B. (2009). *An introduction to Islamic law*. Cambridge University Press.

¹⁵ See Eliash, J. (1969). The Ithnā'asharī-Shī'ī juristic theory of political and legal authority. *Studia islamica*, 17-30.

¹⁶ Hallaq, W. B. (2009). *An introduction to Islamic law*. Cambridge University Press.

¹⁷ Coulson, N. J. (2011). *A history of Islamic law*. AldineTransaction.

¹⁸ Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int'l L. Rev.*, 46, 1.

¹⁹ *ibid*

²⁰ Rabb, I. A. (2010). Islamic Legal Maxims as Substantive Canons of Construction: Hudūd-Avoidance in Cases of Doubt. *Islamic Law and Society*, 17(1), 63-125; See also Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int'l L. Rev.*, 46, 1.

²¹ *ibid*

err in pardon than to err in punishment.”²² Islamic jurisprudence therefore prefers mistaken acquittal than mistaken conviction.²³

Scholars maintain that scope of Islamic criminal justice system is substantially covered under three distinct categories of crimes that include the "fixed" crimes (*hudud*), which attract harsh physical punishments for which Islamic criminal law contains.²⁴ The second category is what is referred to as '*Jinayat*', which involves offences of harm or injury to the body and attracts penal retribution, while the last category is '*Qisas*' i.e., offences that often attract compensation.²⁵ The interesting aspect of *Qisas* is as some modern scholars put it, a system that relates so closely to the idea of restorative justice, which is a system of justice that was adopted and revered by later western legal systems, until it was again pushed to the background by the rise of punitivism. In most versions of classical Islamic jurisprudence for instance, the prosecution of the *Qisas* crimes must be instigated by the victim, who is given a choice as to the punishment that will be imposed or may choose to forgive the defendant and demand no punishment at all, or they may demand a payment, known as "*Diyya*," as compensation for the crime.²⁶ Although the victim may, in some instances demand to retaliate, the law of *Qisas* fulfills some of the objectives of the restorative justice by allowing victims not only to participate in sentencing, but because Islam encourages forgiveness and reconciliation in this circumstances.²⁷ Islamic jurisprudence also has another form of justice called *Ta'zir* which can be meted *based on* the ruler's discretion and depending on the crime e.g., contempt of court.²⁸

In relation to Islamic perspective of due process, justice is viewed through a prism that dignifies human privacy and dignity while defining the principles of prosecution and adjudication. In many ways, the determination of guilt under Islamic jurisprudence is akin to what was later developed by the West, especially in areas regarding the burden of prove, which in both models must be beyond doubt, avoiding ambiguity or doubt about the commission of a crime. Overtime and in reference to Quran and Sunnah, Muslim thinkers have developed criminal justice models from Islamic jurisprudential context that takes into account relatable and pertinent Islamic

²² Vogel, F. E. (1994). Islamic law and legal system studies of Saudi Arabia; See also Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int'l L. Rev.*, 46, 1.

²³ *ibid*

²⁴ *ibid*

²⁵ *ibid*

²⁶ Hascall, S. C. (2011). Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice. *Berkeley J. Middle E. & Islamic L.*, 4, 35.

²⁷ *ibid*

²⁸ Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int'l L. Rev.*, 46, 1.

principles.²⁹ These include early conduct of Muslim judges (*adab al-qadz*) and collections of legal opinions by leading Islamic scholars in form of fatwa.³⁰ To understand the Islamic model, four general principles were identified by scholars that include investigation, prosecution, adjudication and sentence.

Secular Criminal Justice Models

Before the advent of what is today seen as a system based on egalitarian rules and processes, criminal justice in most western societies was a punitive adventure as the justice system continued to be indiscriminately practiced, until countries like England first redefined its approach to include the need for a special warrant by the crown before anyone was subjected to torture.³¹ These limits that appeared first in English courts were said to be the result of subsequent changes in the laws of evidence and standard of proof that came about in the seventeenth century, bringing with them a formal system of official investigation, which made torture an unnecessary tool.³² Despite these developments, the interest of the aristocrats to protect their wealth through criminal justice resulted in the series of punitive provisions of 'The Bloody Code' in the era between the seventeenth and the nineteenth centuries; a code which increased the number of offences punishable by death.³³ This era was however brought under strong scrutiny as a result of the explosion of critical scholarship that ushered in a new ideological paradigm embedded in the classical theories of 'social contract', insisting that moral assent of the community is necessary for the legitimacy of the State.³⁴ While there are precursors to these theories in ancient Greek philosophy for instance, the most influential writings were considered to begin with the *Leviathan* by Thomas Hobbes in 1651 of ideas and philosophy that saw the rise of a new debate built around the insistence that the power of the State has to be legitimised by the consent and freewill of the citizens; a discourse that provided the social and political framework upon which the bases of previous legal and political processes were challenged, and subsequently restructured.³⁵

Inspired by these compelling debates and political the enlightenment that challenged the status quo of authoritarian aristocracy, revolutionaries took up to the state the American colonies and

²⁹ Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int'l L. Rev.*, 46, 1.

³⁰ *ibid*

³¹ Burke, R. H. (2011). *Criminal Justice Theory: An Introduction*. Routledge.

³² Langbein, J. H. (1992). On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial. *Harvard Journal of Law and Public Policy*, 15, pp. 119-127.

³³ Burke, R. H. (2011). *Criminal Justice Theory: An Introduction*. Routledge.

³⁴ Locke 1689; Kant 1724-1804; Beccaria, 1738-1794.

³⁵ Burke, R. H. (2011). *Criminal Justice Theory: An Introduction*. Routledge.

in France which culminated in a new definition of the concept of 'rights' and the nature of governments and of criminal justice.³⁶ This political reorientation also affected most of Europe, prompting a new kind of political bureaucracy in public administration which dislodged previous legal and political processes by giving emphasis to democracy through the increasing influence of 'modernist intellectual tradition'.³⁷

The major outcome of these political and intellectual forces was the way the role of the state reinforced the institution of criminal justice to become a part of a network of governance, political consensus and democracy. Similarly, it was this development that shaped what was later to become an organised institution of criminal justice that involved the triad of the police, the courts and prisons, seen today as a reflection of the tendencies that led to 'rationalisation' and 'civilisation'; the same optimistic view of the system that was later to be found in other criminal justice ideas such as restorative and rehabilitative justice.³⁸

Scholars were however wary that these ideals are fast diminishing and once again, the justice system is returning to punitivism, often against the poor who were once at the receiving end of penal justice.³⁹ Yet, these changes become a little complex and complicated when one tries to reconcile the debate on the return of punitivism and the rise and expansion of other processes of justice administration like 'plea bargaining' and 'suspended sentence' which are both characterised trajectories that redefine the entire concept of penology as they present a process of justice defined by inconsistent leniency and differential sentencing. This begs the question whether the different models of criminal justice that have been designed to coordinate crime control and to ensure due process have been reconfigured. There is also a complexity brought in by the question on whether the drifting in the direction of punitivism or is becoming a mixed process guided by punitivism and yet characterised by other forms of justice process that respond to the kind of economic way of thinking that dominates policies of late modernity; most of which is driven by the quest for organisational convenience, financial self-interest and

³⁶ *ibid*

³⁷ Harvey, D. (1989). *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change*. Wiley.

³⁸ Braithwaite, J. (1989). *Crime, Shame, and Reintegration*. Cambridge: Cambridge University Press; Wright, M. (1996). *Justice for Victims and Offenders: A Restorative Response to Crime*. Winchester: Waterside Press.

³⁹ Wacquant, L. (2000). The New 'Peculiar Institution': On the Prison as Surrogate Ghetto. *Theoretical Criminology*, 4(3), 377–389; Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press; Foucault, M. (1977). *Discipline and Punish*. London: Allen Lane; Shapiro, M. (1986). *Courts: A Comparative and Political Analysis*. University of Chicago Press; Samaha, J. (2005). *Criminal Justice with Infotrac*. Cengage Learning; Ashworth, A. (2010). *Sentencing and Criminal Justice*. Cambridge: Cambridge University Press; Garland, D. (1996). The Limits of the Sovereign State Strategies of Crime Control in Contemporary Society. *British Journal of Criminology*, 36 (4), 445–471.

the desire to maintain a working legal system as against the moral responsibility to ensure justice.⁴⁰

In the midst of these complex transformations, the institution of criminal justice continued to be challenged by the practical need for efficiency and the social demand for due process. These dynamics are captured in theoretical perspectives modelled as ‘crime control’, which proposes an aggressive and belligerent policing model, and ‘due process’ which emphasises the protection of civil liberties through restraint and also on checks over the excesses of officials towards individual rights, privacy and liberty. Although later models of criminal justice process have emerged, such as the “liberal bureaucratic model” that insists on the overriding function of criminal justice as not the repression of criminal behaviour, but the protection of individual liberty as well as the rights of the defendant.⁴¹ For that system to work, such protections must have limits and should not be allowed to be used frivolously.⁴² Nonetheless, this propositions have continuously been referred to by scholars as a strong analytical tool. Other scholars opined that the theory is non-comparative and unsupported by evidence.⁴³ There is also a strong criticism of the models on the ground that they both have failed to take into account the role of the victim and that the question of management of resources in criminal justice administration was underestimated.⁴⁴ Yet, it is through these models that scholars are able to categorise the working of the criminal justice in controlling crime and maintaining social order, as well as ensuring due process in both the process of crime control and in adjudication.

The crime control model in secular criminal justice system is mainly based on the notion that society must take stringent measures to protect the community from crime. Although this model tends to be characterised by some elements of repressiveness, the arguments for it are compelling. What has become concerning for scholars, however, is the way this model has steadily become synonymous with aggressive crime control strategies that may often become despotic. In many instances, it has culminated in a relaxed concern for civil liberties and the rights of offenders.⁴⁵ This model also considers punishment as a form of crime control measure, leading to a steadily decline of the legendary idea that in the 1970s ushered in a new liberal

⁴⁰ Feeley, M. (1982). Plea Bargaining and the Structure of the Criminal Process. *Justice System Journal*, 338-354.

⁴¹ Baldwin J., and Bottomley, A. K. (1978). *Criminal Justice - Selected Readings*. London: Martin Robertson.

⁴² Baldwin J., and Bottomley, A. K. (1978). *Criminal Justice - Selected Readings*. London: Martin Robertson.

⁴³ Vogler, R. K. (2005). *A World View of Criminal Justice*. Ashgate Publishing.

⁴⁴ Ashworth, A. (1998). *The Criminal process: an evaluative study*. Oxford: Oxford University Press.

⁴⁵ Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

alternative in the form ‘rehabilitative justice’ as against what has always been a retributive justice.⁴⁶ This degeneration has led to a paradoxical explosion in the use of imprisonment as a form of crime control.⁴⁷ Paradoxically, a number of research in the west has shown empirical and scientific evidence that imprisonment does not reduce crime.⁴⁸ Instead, evidence shows that prison and congestion in detentions actually leads to recidivism.⁴⁹

A closer study of contemporary criminal justice strategies developed and adopted mainly through western oriented dogma reveals a crime control phenomenon towards what Norris and Armstrong said is an ‘actuarial’ approach that is characterised by interventions based on risk sentiment.⁵⁰ This fast phased approach is often motivated and achieved through practices such as preventive detention, mass surveillance and offender profiling.⁵¹ There is also the increasing emphasises on identifying, classifying and managing individuals or groups on the perception that they pose a threat to the society.⁵² Some scholars view these structural transformations in crime control strategies not only as a case of concern for crime, but also because of other elements such as the abundant and compelling evidence that suggests the inability of every known criminal justice strategy to control crime and recidivism.⁵³

Evident that all strategies developed through governmental policies have failed to deter crime and recidivism, authorities have resorted to a “reworked pattern of cognitive assumptions, normative commitments and emotional sensibilities” that now motivates the actions of crime control agencies, resulting in new forms of practice and procedure that increased and emboldens the use of new methods that compromise privacy and dignity by continually placing

⁴⁶ *ibid*

⁴⁷ *ibid*

⁴⁸ Foucault, M. (1977). *Discipline and Punish*. London: Allen Lane; Wacquant, L. (2000). The New ‘Peculiar Institution’: On the Prison as Surrogate Ghetto. *Theoretical Criminology*, 4(3), 377–389; Farrington, D. P., MacKenzie, D. L., Sherman, L. W., & Welsh, B. C. (Eds.). (2003). *Evidence-based crime prevention*. Routledge.

⁴⁹ Cullen, F. T., Jonson, C. L., & Nagin, D. S. (2011). Prisons do not reduce recidivism: The high cost of ignoring science. *The Prison Journal*, 91(3_suppl), 48S-65S; Levitt, S. D. (1996). The effect of prison population size on crime rates: Evidence from prison overcrowding litigation. *The quarterly journal of economics*, 111(2), 319-351; Makarios, M., Steiner, B., & Travis III, L. F. (2010). Examining the predictors of recidivism among men and women released from prison in Ohio. *Criminal Justice and Behaviour*, 37(12), 1377-1391; Nilsson, A. (2003). Living conditions, social exclusion and recidivism among prison inmates. *Journal of Scandinavian studies in criminology and crime prevention*, 4(1), 57-83.

⁵⁰ Burke, R. H. (2011). *Criminal Justice Theory: An Introduction*. Routledge.

⁵¹ *ibid*

⁵² Feeley, M., and Simmons, J. (1994). Actuarial Justice: The emerging New Criminal Law, in Nelken, D., (Ed.) *Futures of Criminology*. London: Sage.

⁵³ Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

greater significance on incivility.⁵⁴ Proponents of this model argue that the public is always outraged by crime, and therefore demand efficient and aggressive policing as well as punitive sanctions on criminals.⁵⁵ They also maintain that in the course of crime prevention, it is justifiable to sacrifice certain individual rights for the collective good of all.⁵⁶ For example, they demand that crime control agencies be granted wide powers to embark upon relatively unhindered patrols, surveillance, search and seizure, without the fear of any consequence of liability or charge.⁵⁷ Supporting this proposition, Wilson further argues:

“Wicked people exist; nothing avails except to set them apart from the innocent people. And many people, neither wicked nor innocent, but watchful, dissembling, and calculating of their chances, ponder our reaction to wickedness as a clue to what they might profitably do.”⁵⁸

These ‘crime control’ propositions further resonate with the current highly charged political rhetoric that emphasises penal punitivism, which according to Garland has turned government policy on crime more ‘populist’ and sentimental rather than basing it on rational opinions.⁵⁹ In order to assuage public concerns and gain political leverage, politicians make constant reference to the ‘victim’, the ‘weak’ and the ‘vulnerable’.⁶⁰ The effect of this has been the politicisation of crime control policies, which have affected the structure of the relationship between policy decisions and the justice system, making legislation and judicial reforms prone to policies that promote punitive dogma.⁶¹

Another aspect that is of great concern to scholars is that the ‘crime control model’ tends to challenge the values of ‘process rights’, as it rejects judicial technicalities associated with adversarial processes, on the bases that they accord the guilty an unwarranted opportunity to escape liability, thereby undermining the criminal justice system and making it appear unreliable.⁶² As McBarnet claims:

“A wide range of prosecution evidence can be legally produced and presented, despite the rhetoric of a system geared overwhelmingly to safeguards for the accused, precisely because

⁵⁴ Burke, R. H. (2011). *Criminal Justice Theory: An Introduction*. Routledge.

⁵⁵ Siegel, L. J. (2009). *Introduction to Criminal Justice*. Cengage Learning.

⁵⁶ *ibid*

⁵⁷ *ibid*

⁵⁸ Siegel, L. J. (2009). *Introduction to Criminal Justice*. Cengage Learning.

⁵⁹ Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

⁶⁰ *ibid*

⁶¹ *ibid*

⁶² Sanders, A., and Young, R. P. (1994). *Criminal Justice*. Butterworths.

legal structure, legal procedure, legal rulings, not legal rhetoric, govern the legitimate practice of criminal justice, and there is quite simply a distinct gap between the substance and the ideology of the law.”⁶³

On whether crime control model really work, scholars, especially in the West are acutely divided. While some claim that the augmentation of policing institutions and an intensified surveillance strategy play a significant role in crime prevention,⁶⁴ others are wary that these claims emanating from modern crime control research is dominated by the ‘random tactics’ through which policy decisions are made and target groups chosen.⁶⁵ It has often ended up prompting a generalised judgement beyond the population upon which the research was carried out.⁶⁶ Islam on the other hand does not see punishment as a central part of crime control strategy. Instead, it is regarded more as a deterrence measure. It also discourages surveillance and spying on people in the name of crime control.

The Due Process model on the other hand is an orientation firmly rooted within the broader conceptual framework of theories of normative compliance, or ‘compliance theories’, which can be traced to the roots of social order. Referring to the works of other scholars, Hough *et al.*, argued on the increasing interest in the relationship between ‘political economy’ and “the connections between the social distribution of wealth and attachment to – or detachment from – social norms”.⁶⁷ In this complex transition that leads all the way to the socio-political and economic trajectories of late modernity, the due process model is still held as the philosophy that gives primacy to the rights of the individual and the limit of official powers.⁶⁸ This proposition is in contrast the crime control model which emphasises on a robust and unhindered apprehension and conviction of offenders as the most effective way to ensure efficient control of crime.

⁶³ McBarnet, D. J. (1985). Conviction: Law, the State and the Construction of Justice. London: Macmillan Publishers.

⁶⁴ Klockars, C. B., and Mastrofski, S. (1991). Thinking about Police. New York: McGraw-Hill; McCormick, N., and Garland, D. (1998). Sovereign States and Vengeful Victims. Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch.

⁶⁵ Sherman, L. W. (1992). Attacking Crime: Police and Crime Control. Crime and Justice, 15, 159–230.

⁶⁶ *ibid*

⁶⁷ Hough, M., Radford, B., Jackson, J., and Roberts, J. R. (2013). Attitudes to sentencing and trust in justice: exploring trends from the crime survey for England and Wales. Ministry of Justice analytical series, Ministry of Justice, London, UK.

⁶⁸ Sanders, A., and Young, R. P. (1994). Criminal Justice. Butterworths.

Proponents of this model argue that, law enforcement agents cannot be exonerated from responsibility.⁶⁹ Other scholars pointed out that, due to the enormous powers of agencies of the State, the process of law enforcement must be cautious and considerate of the rights of individuals, and must avoid indiscriminate arrests, coerciveness and any error that will result in violation of rights, civil liberties or the conviction of the innocent.⁷⁰ These scholars do not agree that individuals are innately inclined to commit crime. Rather, they consider the individual as a victim of a dynamic social structure and his criminal behaviour may be the result of social and political problems and, despite his alleged crime, he or she must be accorded certain rights. Their opinion is that society will be more protected from crime if the State gives emphasis to the provision of social service. They further argue that even the record rate of recidivism can be reduced through restorative justice.⁷¹ Yet, critics emphasis that that this proposition is simply a way of giving preference to the interests of the accused as against those of the victim.⁷²

Comparison of the Two Models

In general, criminal justice entails punishment of offenders through different patterns that are familiar to almost all criminal justice systems across the world. This idea, which sometimes includes the capital punishment is also recognised under Islam. It is however important to state that instead of punitivism, Islam insist on a manifestation that does not always lean towards punitive sentence.⁷³ Instead, Islamic legal history holds the capital punishment as more of God's way of deterring, hence the enormous standard of proof for most *hudud* cases.⁷⁴

Unlike most secular models and orientations that seeks to use punishment in criminal justice as a mechanism to control crime, the main purpose in Islamic jurisprudential model is to seek rules that foster living in peace, first with oneself, and second with and in the society.⁷⁵ This indeed is because the conventional state is mainly concerned with imposing rules and laws whose infraction attract punishment, while Islamic law is deemed a system that has an all-encompassing interest in human acts. Hence, it seldom makes distinction between the moral

⁶⁹ McConville, M., and Wilson, G. (2002). *The Handbook of the Criminal Justice Process*. Oxford: Oxford University Press.

⁷⁰ Sanders, A., and Young, R. P. (1994). *Criminal Justice*. Butterworths.

⁷¹ Siegel, L. J. (2009). *Introduction to Criminal Justice*. Cengage Learning.

⁷² McBarnet, D. J. (1985). *Conviction: Law, the State and the Construction of Justice*. London: Macmillan Publishers.

⁷³ Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int'l L. Rev.*, 46, 1.

⁷⁴ *ibid*

⁷⁵ Hallaq, W. B. (2009). *An introduction to Islamic law*. Cambridge University Press.

and the legal. As Hallaq states, there are, in fact no words in Arabic for the different notions of moral/legal.⁷⁶ He went further to give categories of Islamic law in five contexts i.e., the forbidden, which entails punishment upon commission of an act considered prohibited; the obligatory, which demands punishment upon omission of any act whose performance is regarded as necessary.⁷⁷ The remaining are those that are either recommended or disapproved. Performing the disapproved or failing to perform the recommended entail no punishment. Example of this is a simple divorce. Hence, Islamic model is based on the reasoning that places violations or offences within these categories.

In contrast to most secular orientations, especially what has today become a common strategy in the West through surveillance, offender profiling, censoring etc.,⁷⁸ the idea of criminal justice in Islam is not about pursuing the accused until he or she is found and punished. Principally, Islam puts personal privacy at the centre of human rights and human dignity and also a factor in the circumstance of arrest and investigation of crime suspects. This principle according to Reza, restrains private citizens as well as the state from spying, indiscriminate arrests and abuse or breach of individual freedom and privacy.⁷⁹ This follows that Quranic principle that ordains, “Enter not houses other than your own, until you have asked permission and saluted those in them, and “spy not on each other.”⁸⁰ Hence, the violation of privacy is in itself is seen as an offence in Islam, so also is eavesdropping and spying into others correspondences.⁸¹ During the time of Umar bin Khattab for instance, the best known of these reports involve Umar ibn al- Khattab while he was the Caliph. Reza mentioned in his work where Umar declined to act on wrongdoing; specifically, wine drinking and accompanying revelry he witnesses by entering the wrongdoers' homes without permission as that violates the provision of the Quran.⁸²

Similarly, Ibn Mas'ud, who is among the most revered companions of the Prophet, when told that a certain person's beard was "dripping with wine," reportedly said: “We have been prohibited from seeking out [others' faults]; but if something becomes manifest to us, we can seize it.”⁸³ These principles have also been espoused comprehensively by two leading scholars

⁷⁶ *ibid*

⁷⁷ *ibid*

⁷⁸ Garland, D. (2001). *The culture of control* (Vol. 367). Oxford: Oxford University Press.

⁷⁹ Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int'l L. Rev.*, 46, 1.

⁸⁰ Qur'an 24:27, 49:12.

⁸¹ Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int'l L. Rev.*, 46, 1.

⁸² *ibid*

⁸³ *ibid*

of Islamic jurisprudence i.e., Imam Al-Ghazzali and Al-Mawardi. Reza has further elaborated on these rules where he says he highlighted certain exceptions from Imam Al Ghazali's opinion where he states that a suspected wrongdoer may not be searched without a specified quantum of individualized suspicion, i.e., a clear sign of guilt (*alamah khassah*).⁸⁴ Similarly, even homes where wrong is suspected may not be entered as long as evidence of the wrongdoing-the sounds of drunken revelry, for instance-does not travel outside of the home. An exception to this rule is according to Al-Mawardi is that the *muhtasib*⁸⁵ may enter a home if there is indicative evidence that a serious crime such as adultery or homicide is underway.⁸⁶

Furthermore, unlike the entrenched culture in most secular systems where imprisonment is considered a vital strategy to isolate, punish and control crime,⁸⁷ Islamic jurisprudence does not consider imprisonment as a form of crime control measure. It is not even part of *Hadd*.⁸⁸ Instead, prison sentence is seen as a form of *Ta'zir*,⁸⁹ left to the discretion of the leader.⁹⁰ This perhaps does not mean that a person cannot be detained pending his trial if there is sufficient reason to do so.⁹¹ Although crime control is not the main focus in Islamic jurisprudence, it is important to state jurists are of the opinion that Islamic jurisprudence gives preference to deterrence and that *hudud*⁹² itself is not only as a form of punishment but also as a deterrence measure.

Because pursuing sentence at all cost is not the key priority of Islamic justice system, Prophet Muhammad s.a.w was described as labouring to avoid hearing a confession of adultery by a young man named Ma'iz, and even after punishment was served on Ma'iz, the Prophet was said to have chastised those that sent Ma'iz to him in the first place.⁹³ The traditions went further to state that the Prophet repeatedly turns away from Ma'iz when he came to confess. After his sentence, the Prophet was said to have turned to the person who urged Ma'iz to come to him

⁸⁴ *ibid*

⁸⁵ A supervisor in an Islamic regime whose role is to ensure business are conducted in accordance with the law of Sharia

⁸⁶ Al-Mawardi, A. (2000). *The Ordinances of Government: Al-Ahkam as-Sultaniyyah w'al-Wilayat al-Diniyya*. Reading: Garnet Publishing; See also See Reza, S. (2013). *Due Process in Islamic Criminal Law*. *Geo. Wash. Int'l L. Rev.*, 46, 1.

⁸⁷ Wacquant, L. (2000). *The new peculiar institution': On the prison as surrogate ghetto*. *Theoretical criminology*, 4(3), 377-389.

⁸⁸ Hadd is the refers to the kind of punishment mandated and fixed by Allah.

⁸⁹ Ta'azir is the kind of punishment imposed at the discretion of the judge or ruler of the state. It is one of three major types of punishments or sanctions under Sharia Islamic law

⁹⁰ Reza, S. (2013). *Due Process in Islamic Criminal Law*. *Geo. Wash. Int'l L. Rev.*, 46, 1.

⁹¹ *ibid*

⁹² Hadd is the refers to the kind of punishment mandated and fixed by Allah.

⁹³ Hallaq, W. B. (2009). *An introduction to Islamic law*. Cambridge University Press.

saying “if you had covered him with your garment, it would have been better for you.”⁹⁴ In another tradition, Safwan ibn Umayyah, brought a man to the Prophet for adjudication and punishment for stealing and after being convicted and before sentence, Safwan implored the Prophet to remit the punishment and the Prophet responded, “Why did you not do this intercession before bringing him to me?”⁹⁵ Among the companions, Uqba ibn Amir Al-Juhani, who served as a governor in Egypt urged his secretary to counsel and threaten neighbours who drank wine and not to summon police to arrest them.⁹⁶ This happened again and the secretary wanted to ensure an arrest the Uqba quoted to him the Prophet’s hadith, “He who sees something which should be kept hidden and conceals it will be like one who has brought to life a girl buried alive.”⁹⁷

In the context of *hudud* offences, they are clearly and unequivocally contained in Shariah. Yet, scholars opined that God announced the *hudud* as mainly a deterrent, but wanted convictions and punishment to be few and far between, given the severity of the penalties and the ever-present possibility of erroneous conviction.⁹⁸ He gave a second opinion on the stiff nature of proof over *hudud* cases saying the procedural rules, whose standard of proof a very high is a purposive measure to protect other values that might too easily be forsaken in the zeal to prosecute and punish such as the values of privacy, human dignity, and even the moral culture of resolving disputes privately or among the community rather than the adversariality of courts or heated contentions before authorities.⁹⁹ In this regard, the Prophet was reported to have said, “Forgive the hudud in what is your affair; for whatever hadd reaches me is obligatory.”¹⁰⁰ Essentially, when hudud reaches the one in authority then it will be sentenced accordingly, but it is better to forgive and not take matters further to the authorities. The Prophet said let whoever attempts any of the prohibited acts hide himself from view as God admonished as “for those who reveal themselves to us will have God’s penalties enforced against them.”¹⁰¹

⁹⁴ *ibid*

⁹⁵ AL-TIRMIDHI, HADITH 1020; See also Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int’l L. Rev.*, 46, 1.

⁹⁶ ABU DAWUD, KITAB AL-ADAB; See also Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int’l L. Rev.*, 46, 1.

⁹⁷ *ibid*

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ Vogel, F. E. (1994). *Islamic law and legal system studies of Saudi Arabia*.

¹⁰¹ Reza, S. (2013). Due Process in Islamic Criminal Law. *Geo. Wash. Int’l L. Rev.*, 46, 1; Al-Mawardi, A. (2000). *The Ordinances of Government: Al-Ahkam as-Sultaniyyah w’al-Wilayat al-Diniyya*. Reading: Garnet Publishing.

Conclusion

The notion of criminal justice in both Islamic and non-Islamic models are the general purposes arising from the principles of legality and proportionality. They also consist of categories of crimes protecting the principle of the inviolability of the rights of individuals. Within this systemic territory are ideas that were developed as either crime control or due process principles. Simultaneously, these models have proffered substantive and procedural routines that relate to the rights of victim, the offender as well as aspects that refer to witnesses and evidence, leading to procedural matters on custody, trial, conviction and sentence. While these similarities exist, the two models also have differences, especially when it comes to how these ideas are represented, processed and pursued. Essentially, Islamic criminal justice model has remained relatively unaffected for centuries. In contrast, man-made laws and jurisprudence that have continuously witnessed ground-breaking reconfiguration and overwhelming alterations since late modernity, often as a result of recurring socio-political trends that caused some far-reaching systemic modifications of the trails of crime control, due process and penal justice

The practical trajectories of these criminal justice policies of various states and governments around the world reveal numerous contours in orientation and reform that significantly redefined the nature and characteristic of crime control, due process and even penal justice. These alignments that are reshaping many legal regimes have also affected the relevance of other concepts such as rehabilitative and restorative justice leading to penal policies that are more focused on depicting the offender as a culpable individual who must be contained and punished for the safety of the society. This is however different from the Islamic orientation that sees penalty as a last option in keeping the society safe.

While Islamic law remains relatively static in approach and not susceptible to constant changes, it is safe to argue that secular institutions and models of criminal justice and what they intend to achieve will remain the one branch of scholarship that will continue its transition of far reaching changes and reforms. In the context of both Islamic and western models of criminal justice, the debate on legitimacy, suitability and applicability of the systems as an embodiment of fairness; their effects on the individual and their purpose as part of the broader political system will also remain under vehement scrutiny. Indeed, this is not far from the reflection of history that the role of penal justice and the strategies of enforcing law and order will continue in the realm of an unending debate in socio-legal literature. It is also an area of scholarship that is filled with complex and often controversial opinions on the nature of the relationship between the citizen, beliefs, ideas and the role of the leader and the state in relation to what defines the dynamics, priorities and genuine objectives of crime justice.