


The General Principles of the Somali Penal Code in the Light of the Islamic Sharia

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Abstract

The Somali Penal Code in its Book One, contains a number of general principles that guide the court when applying and interpreting the Law. The article closely examines the following four principles; “The Presumption of Innocence” which considers that the accused person is innocent until proven guilty of a criminal offense, the second principle is “Legality Principle” which means that only the law can define a crime and prescribe a penalty, the third principle is “The Retrospectivity Principle”, it means that laws should not have retrospective effects, the last principle the study examines is “The Double Jeopardy Principle” which prohibits trying a person twice for the same crime.

This article examines whether the general principles of the Somali Penal Code are compatible with the Islamic Sharia since the constitution binds compliance of the laws of the state with the general principles and objectives of Islamic Sharia.

Keywords: Islamic Sharia, law and Sharia, Somali penal code, Somalia.

1. Introduction

The Somali Penal Code, promulgated in early 1962, became effective on April 3, 1964. The basis of the code was the Constitutional premise that the law has supremacy over the state and its citizens. The code placed responsibility for determining offenses and punishments on the written law and the judicial system. The penal laws applied to all nationals, foreigners, and stateless persons living in territorial borders of Somalia. The population of the Federal Republic of Somalia is 100% Muslim. Its Provisional Constitution states that Islam is the religion of the State (Article 2(1)), and binds that the laws of the country must comply with the general principles and objectives of Islamic law (article 2 (3)), and above that, affirms the supremacy of the Sharia before the supremacy of the constitution (article 4 (1)).¹ In this regard, it is important to examine whether the general principles enshrined in the Penal Code are compatible with the Islamic Sharia.

The article describes and critically analyses the general principles of the Somali Penal Code and its adherence to Islamic Sharia. The Somali Penal Code accepts *inter alia* the following principles as general principles guiding the judge when applying and interpreting the Code; (1) The Presumption of Innocence principle, (2) Legality Principle, (3) Retrospectivity Principle and, (4) Double Jeopardy Principle. I will discuss each principle in detail and see how compatible these principles are with the Islamic Sharia.

2. The Presumption of Innocence

The presumption of innocence has long been regarded as fundamental to protecting accused persons from wrongful conviction. The basic principle is that the accused is to be considered innocent until proven guilty of a criminal offence. The reason why this principle is considered fundamental

is that it is generally seen as better for the guilty to go free than the innocent be convicted.² The presumption of innocence is the legal principle that one is considered “innocent until proven guilty”. Many countries including Somalia, the presumption of innocence is a legal right of the accused in a criminal trial, Article 35 (1) of the Federal Constitution provides that: “*The accused is presumed innocent until proven guilty in a final manner by a court of law*”. The principle also enshrined in the International Human Right Laws under the Universal Declaration of Human Rights (UDHR)³, Convention on the Rights of the Child (CRC)⁴, International Covenant on Civil and Political Rights (ICCPR)⁵, Cairo Declaration on Human Rights in Islam⁶, and The African Charter on Human and Peoples' Rights⁷.

Under the presumption of innocence, the legal burden of proof is thus on the prosecution, which must present compelling evidence to the trier of fact (a judge). The prosecution must in all cases prove that the accused is guilty beyond a reasonable doubt. If there is an iota of reasonable doubt, the court must acquit the accused. Under the Somali criminal proceedings the accused is presumed innocent unless the prosecution presents concrete evidence. In civil proceedings (like breach of contract) the defendant is initially presumed correct unless the plaintiff presents a moderate level of evidence and thus switches the burden of proof to the defendant on a balance of probability.

2.1 The Presumption of Innocence in Islamic Sharia

One of the basic presumptions in the Islamic criminal law is that the accused is presumed innocent unless proven guilty. This maxim is deduced from the original maxim⁸ "الأصل براءة الذمة" that is, ‘*The basic presumption is innocence*’. A person is born pure and innocent and he has to guard his innocence and purity. Unless a person is proved guilty by a competent court, in accordance with the strict rules of evidence and due

process of Islamic criminal law, he is innocent. The concept of (الاستصحاب), that is, presumption of continuity is a corollary of this maxim. Under 'Istishab' "a situation existing previously is presumed to be continuing at present until the contrary is proven." The Prophet ﷺ has laid the foundation of this maxim by his saying:

"البينة على المدعي واليمين على من أنكر"⁹

"The onus of proof lies with the claimant and denial shall be supported by oath".¹⁰

The famous letter of 'Umar b. Al-khattab to Abu Musa Al- Ash'ari (R.A.) has referred to this *Hadith*. It says,

كتب عمر بن الخطاب إلى أبي موسى الأشعري رضي الله عنهما:

"البينة على من ادعى، واليمين على من أنكر."

"The burden of proof is on the accuser, and he who negates should be asked to take the oath."

If the claimant is unable to prove his claim against someone, his claim is defeated and the respondent's innocence continues as before. As a matter of fact, it is a presumption and could be rebutted. For example, there could be a situation in which a man comes out of a building with blood on his body or a weapon in his hand. He may be arrested and investigated for the murder of a freshly murdered person inside the same building. In this case, circumstantial evidence will be against the accused and the presumption of innocence might not save him.

The presumption of innocence has many aspects. First, fixed penalty offences (*hudud*) cannot be implemented in case of any doubt. This is based on the saying of the Prophet Muhammad ﷺ,¹¹ (ادرعوا الحدود بالشبهات)¹¹,
"Repeal the hudud punishments from Muslims as far as you can, so if

there is a way out, leave him alone, for it is better for a ruler to make a mistake in forgiving someone rather than in punishing him". Muslim jurists have written in minute details of repealing *hudud* punishments in case of the slightest of doubt and suspicion. Any doubt in the criminality or the evidence produced in the court will benefit the accused. Shawkani has put this concept in a maxim: "It is better for an *Imam* (Head of a Muslim State) to err in pardoning (the accused) than to err in punishing (him)".¹²

Muslim jurists argue that this doctrine is not confined to *hudud* offences only, rather it covers all other types of litigation including "the rights of citizens, القصاص (retribution), الحدود, التعازير *Hudud* and *ta'azir* offences, all types of assertions, and all types of acts."

Another aspect of the presumption of innocence maxim is that it is better to pardon the accused erroneously rather than to punish him erroneously. We have just quoted the saying of the Prophet ﷺ above while discussing the first aspect of this maxim. One more aspect of this maxim is that a very strict evidentiary criterion must be met for proving a *hadd*. Moreover, the principle of legality and the due process of law must be adhered to in letter and spirit. The evidentiary criteria for certain *huduud* offences are so strict that it is virtually impossible to prove them through evidence, for instance, to prove the offence of adultery or fornication four eye witnesses must have seen the act of penetration themselves failing which they will be charged with *qadhf* (accusing a chaste person of *zina*). Thus, the idea is not to punish but to guard the principle of innocence unless proven guilty. Should the slightest of doubts arise during the investigation, trial, examination or cross-examination, the charge of *hadd* shall not be implemented. Doubts could arise about the validity, soundness, credibility or conclusiveness of the evidence. In such a case the accused is to be declared innocent. In the case of confession to *zina*, if

the accused runs away during the execution, it is presumed as retraction of his confession and he or she is not chased.¹³

As a consequence of the presumption of innocence unless and until a definitive judgment is given by a competent court the accused is considered innocent. He cannot be called guilty or convicted till a final decision of his guilt is given. Moreover, the principle of legality and the procedural requirements of Islamic criminal justice system must be fully observed. In addition, the accused has the right to use all the technical as well as legal means available to him to refute the charges and the evidence against him. Finally, the accused must be given the benefit of any doubt if it exists, in the evidence. Thus, it should not be considered a foregone conclusion that once a person is charged he must definitely be guilty as charged.

3. Legality Principle

The principle of legality is one of the most fundamental concepts related to the criminal law. It's enshrined in the Provisional Federal Constitution¹⁴ and in the Penal Code¹⁵. The principle is also embodied in the International Human Rights Law and in particular UDHR¹⁶, ICCPR¹⁷ and Cairo Declaration on Human Rights in Islam¹⁸. The law offers protection of the legal rights of a person who faces a criminal charge. The main purpose of the principle of legality is to prevent a person from being wrongly charged with a crime. It ensures that the state does not violate the basic tenets of human rights. No person no matter what is his or her nationality, race, age, gender, or class can be convicted of a crime without a fair trial. Another connotation of the principle of legality is that a person cannot be charged with a crime if it does not constitute a criminal offense at the time the crime was being committed. Also, a heavier penalty may not be imposed on a person than the one that was in force at the time the crime was committed. The principle of legality implies that

the judge cannot issue a verdict against a person if the action was not prohibited when the crime was committed. Also, it disallows a judge to lean in favor of any verdict that has been given without any reasonable or clear justification that is not anchored in law.

3.1 The Principle of Legality within the Islamic Criminal Justice System

The principle of legality also known as the ‘Rule of Law’ is to protect the interest of the individual by restricting the authority of the state. The principle is stated in the two postulates: *nullum crimen sine lege*, or no crime without law, and *nulla poena sine lege*, or no punishment without law. Another postulate that is the natural outcome of the above two is ‘no retroactive application of criminal law’. These three postulates are inseparable and their fundamental objective is to protect an individual’s liberty, dignity, life and property from any abuse or loss by state’s authorities. Thus, the individual cannot be charged if the alleged act was not a crime when committed nor will he be punished for that act. According to the principle of legality, ‘the judge may not punish anyone on the basis of his own wishes and whims without lawful evidence and proof. Even then, the legal text that is applied must have been in existence and promulgated at the time the offence was committed.’ The principle of legality is recognized as one of the most basic principles of human rights law, international conventions, and states’ constitutions of all countries of the world. However, we have to focus on the role of this principle in Islamic Sharia and whether and how it is rooted in the primary sources of Islamic Sharia, especially the Qur’an and the Sunnah of the Prophet. The majority of jurists agree that prohibitions in Qur’anic verses and Prophetic sayings, acts or confirmation are prospective. The general arguments in support of this view are mentioned here.¹⁹

3.1.1 The Principle of Legality in the Qur’an

Allah says in the Qur'an,

” وَمَا كُنَّا مُعَذِّبِينَ حَتَّى نَبْعَثَ رَسُولًا²⁰ ”

“*And never do we punish any people until we send a Messenger (to make the Truth distinct from falsehood).*”

According to Muhammad b. Ahmad al-Qurtubi, it means that the rules cannot be proven except on (the basis of) law.”²¹ Rules include obligations, prohibitions, and punishments. Muhammad Abu Zahra argues that it is against “the blessing of God to punish people without sending a messenger who teaches and explains the right path.” The majority of Muslim jurists argue that the punishment mentioned in the above verse is the punishment in this world and not in the hereafter. The Qur'an also says,

” وما كان ربك مهلك القرى حتى يبعث في أمها رسولا يتلو عليهم آياتنا وما كنا مهلكي القرى إلا وأهلها ظالمون²² ”

"Your Lord would not destroy a town until He had sent to its center a Messenger who would recite to them our verses. Nor would we destroy any town unless its inhabitants were iniquitous."

In addition, the Qur'an says,

(وَمَا أَهْلَكْنَا مِنْ قَرْيَةٍ إِلَّا لَهَا مُنذِرُونَ , ذِكْرَى وَمَا كُنَّا ظَالِمِينَ)²³

“*We never destroyed any habitation but that it had warners to admonish them. We have never been unjust.* ” Allah states in the Qur'an:

(ولو أنا أهلكتناهم بعداب من قبله لقالوا ربنا لولا أرسلنا إلينا رسولا فنتبع آياتك من قبل أن نذل ونخزي²⁴)

“*Had we destroyed them through some calamity before his coming, they would have said: "Our Lord! Why did you not send any Messenger to us*

that we might have followed your signs before being humbled and disgraced?”.

The above verses are quite clear that Allah never punishes people unless He had warned them earlier. Thus, there can be no crime without law, no punishment without law, and no retroactive application of criminal law in the Qur'anic scheme in general.

3.1.2 The Principle of Legality and the Sunnah of the Prophet ﷺ

The Sunnah which is the second source of the Islamic sharia has many incidents showing the existence of the Principle of Legality in Islam. The Prophet ﷺ is reported to have said in his last sermon:

" وربا الجاهلية موضوع، وإن أول ربا أضع ربانا ربا عباس بن عبد المطلب فإنه موضوع كله"²⁵

"Beware! All riba (usury) of jahili (ignorance) era is annulled, and the first claim of riba which I annul is that of my uncle 'Abbas.»

In another hadith the Prophet ﷺ says, ²⁶الإسلام يهدم ماكان قبله

"Islam destroys whatever has been before it." Upon conversion from infidelity to Islam all the previous sins are washed away. The Prophet had therefore pardoned his enemies such as Abu Sufyan and his wife Hind for the crimes in the past. It is reported in another hadith that when 'Amr b. al-'Aas came to embrace Islam, the Prophet ﷺ while shaking his hand, asked him the reason for his decision. 'Amr said he wanted the Prophet ﷺ to pardon him. The Prophet ﷺ replied that he should know that Islam washes away all the sins of the past, and that migration to Madina washes all the sins before it, and that hajj (pilgrimage) washes all sins before it.²⁷ Thus, the Sunnah of the Prophet ﷺ endorses the Qur'anic injunctions that there shall be no retroactive application of the law.²⁸

4.0 Retrospectivity Principle

One of the general principles recognized and respected by the Somali Penal Code is the principle that law should not have retrospective effect.²⁹ This principle has another derivative namely *nulla poena sine lege* (there shall be no punishment without law) that is similarly respected by nations. Most Constitutions of sovereign states have incorporated these two principles as the fundamental rights of citizens. Legal systems always try to effect a compromise between the rights of a citizen and that of the society. On the one hand, individual interest is protected and guaranteed, and on the other, the interest of the community is protected and preserved. In the event of a clash between the two, it is the interest of the community that prevails over that of an individual. The interests of the community as a whole take priority over the interests of the individual and various groups when these cannot be reconciled³⁰. Similarly, among the juristic principles of Islamic Sharia we find: "priority should be accorded to preserving the universal weal over particular interests," and "the general welfare takes priority over individual welfare". From this is derived the principle that "a private injury is tolerated to avert a general injury to the public." It is because of these principles of Islamic Sharia that the general principle that 'law should not operate retrospectively' is not regarded as absolute and has some exceptions. Making a certain action criminal only after it has been carried out, means that law is made after the event and is given effect from a back date to cover that event.

Article 11 (2) of the Universal Declaration of Human Rights and Article 7 of the European Convention on Human Rights, which are in identical forms, provide that "no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed"³¹. In Somalia, Article 15 (13) of the

Federal Constitution of 2012 provides protection against retrospective laws although it provides some exceptions.³²

4.1 The Position of Islamic Sharia Regarding Retrospective Laws

The classical books on Islamic jurisprudence are silent about retrospective laws. This is not astonishing because the basic sources of Islamic Sharia viz. the Qur'an and the Sunnah sometimes mention general principles that can be easily applied to specific cases. The question of retrospective law and the principle of *nulla poena sine lege* can, therefore, easily be deduced from the general provisions of laws laid down in the Qur'an and Sunnah. The governing principle in Islamic Sharia, as deduced by the contemporary Muslim jurists on the basis of their *ijtihad*³³ that criminal law does not operate retrospectively.³⁴ However, there are some exceptions. In the following sections, we will discuss the evidence available in the Qur'an and the Sunnah regarding this general legal principle as well as the cases of exception. We will first look into the Qur'an and then to the Sunnah.

4.1.1 Qur'anic Verses and Retrospective Law

The Qur'anic rule seems to be that no one can be said to have violated any law as long as that law does not exist. Once the law is there, then someone could be said to have violated it. If anything was made illegal, then it means that it was legal before that specific time, and no one could be blamed for its violation before it was prescribed. Thus, prohibitions do not have retrospective effect. This is a special blessing of Allah the Almighty on his servants. The Qur'anic verse goes thus:

{وَمَا كُنَّا مُعَذِّبِينَ حَتَّىٰ نَبْعَثَ رَسُولًا³⁵}

"and We never punish until We have sent a Messenger (to give warning)."

It is argued that Allah the Almighty does not punish people until they are guided first, because of his mercy on them. This is clear evidence which establishes the rule that if anyone does not know Allah's guidance and commands revealed to his prophet, then there is no punishment for him. On the other hand, there are so many verses in the Qur'an expressly stating that Allah has forgiven whatever happened in the past as long as a person has mended his ways. The Qur'an says:

{قُلْ لِلَّذِينَ كَفَرُوا إِنْ يَنْتَهُوا يُغْفَرْ لَهُمْ مَا قَدْ سَلَفَ وَإِنْ يَعُودُوا فَقَدْ مَضَتْ سُنَّتُ الْأَوَّلِينَ³⁶}

“O Prophet! Tell the unbelievers that if they desist from evil, their past shall be forgiven and if they revert to their past ways, then it is well known what happened with the people of the past”.

Similarly, Allah says in the Qur'an:

{وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ إِلَّا مَا قَدْ سَلَفَ إِنَّهُ كَانَ فَاحِشَةً وَمَقْتًا وَسَاءَ سَبِيلًا³⁷}

“Do not marry the women whom your fathers married, although what is past is past. This indeed was a shameful deed, a hateful thing, and an evil way”

Allah repeats the same in the next verse which goes thus:

{حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ وَأُمَّهَاتُكُمْ اللَّاتِي أَرْضَعْنَكُمْ وَأَخَوَاتُكُمْ مِنَ الرَّضَاعَةِ وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِبُكُمُ اللَّاتِي فِي حُجُورِكُمْ مِنْ نِسَائِكُمُ اللَّاتِي دَخَلْتُمْ بِهِنَّ فَإِنْ لَمْ تَكُونُوا دَخَلْتُمْ بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ³⁸ إِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا (23)}

“... It is also forbidden for you to take the wives of the sons who have sprung from your loins and to take two sisters together in marriage, although what is past is past.”

In addition, the Qur'an prohibits *riba`* (usury) and allows business transactions and forgives what has already passed. Allah says in the Qur'an,

{وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ مِنْ رَبِّهِ فَانْتَهَى فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ³⁹}

"Even though Allah has made buying and selling lawful, and interest unlawful. Hence, he who receives admonition from his Lord, and then gives up (dealing in interest), may keep his previous gains, and it will be for Allah to judge him.

There is a third set of verses in the Qur'an that prohibit most of the criminal offences, regarded as such in Islamic Sharia, but do not give the law any retrospective effect. The Qur'an says:

{ليس على الذين آمنوا و عملوا الصالحات جناح فيما طعموا إذا ما اتقوا و آمنوا و عملوا الصالحات ثم اتقوا و آمنوا ثم اتقوا و أحسنوا والله يحب المحسنين⁴⁰}

"No blame shall be attached to those that have embraced the faith and done good works in regard to any food they may have eaten, so long as they fear Allah and believe in Him and do good works".

Jalaluddin Al-Suyuti while commenting on this verse, mentions that the Prophet Muhammad ﷺ was asked about those who got killed for the cause of Islam in the early days, and they used to drink alcohol and gamble (as drinking alcohol and gambling were not yet prohibited). In order to answer this question, Allah revealed this verse and stated that they are forgiven for what had passed. This means that they did not commit any offence before drinking and gambling were declared illegal.

What is clear in the Quranic verses, is that the command was not applicable retrospectively. The Qur'anic verses cited above, show that

Allah punishes people only when He had warned them earlier, and that once something is prohibited by Allah, then He has forgiven what happened in the past (that is before that specific revelation). Moreover, from the Qur'anic verses regarding criminal offences, such as fornication/adultery, drinking, gambling, theft, and prohibition of killing games in pilgrimage, it is crystal clear that all these prohibitions had no retrospective effect. Instead, they became operative only after they were made known to the Muslims.⁴¹

4.1.2 Sunnah of the Prophet and the Conduct of *Sahabah* Regarding Retrospective law

The Prophet Muhammad ﷺ as we already mentioned in above is reported to have said in his last *haj* Sermon (the farewell *hajj*): "Beware! All *riba* (usury) of *jahili* era is annulled, and the first claim of *riba* which I cancel is that of my uncle Abbas". This shows that warning precedes punishment in Islam, and that a person cannot be punished for something that is not prohibited by an express rule. In another *hadith*, the Prophet ﷺ says, "*Islam destroys whatever has been before it*"⁴². In other words, if someone embraces Islam, his previous sins are washed away, and he will not be answerable for them. The Prophet ﷺ had, therefore, forgiven his enemies such as Abu Sufyan and his wife Hind for what they had done when they were non-Muslims. He had also forgiven the killer of his uncle (Hamzah), during the battle of *Uhud*, in which infidels had mutilated the body of Hamzah, which had shocked the Prophet ﷺ so much. There is one more *hadith* that shows that laws do not operate retrospectively. One of the leading companions of the Prophet ﷺ was 'Amr Ibn al-'Ais (the commander who subsequently conquered Egypt and remained its governor for some time). It is reported that he narrated the story of his conversion to Islam at the time of his death. He says that he came to the Prophet ﷺ and asked him to shake hand with him as a mark of his accepting Islam. The Prophet ﷺ, while shaking his hand, asked him the

reason for his decision. 'Amr said that he wanted the Prophet ﷺ to pardon him. The Prophet ﷺ replied that he should know that Islam washes away all the sins of the past, and that migration to Madinah (along with the Prophet ﷺ) washes all the sins before it, and that *hajj* (pilgrimage) washes all sins before it". All these examples show that rules in Islamic Sharia do not operate retrospectively, as people could only be punished once rules are prescribed and not before it.⁴³

From the above Quranic verses and Ahadith, Muslim Jurists have derived the general principle that there shall be no punishment before the promulgation of law. This principle is similar to *nulla poena sine lege*. There is an important maxim of Islamic Sharia as well which guides us in this matter. According to this maxim, everything (act) shall be deemed as permissible until it is specifically prohibited.

4.1.3 The Juristic Opinion Regarding Retrospective Law

According to some eminent Muslim jurists of our time, such as Prof. Muhammad Salliim Madkur and 'Abd al-Qadir Awdah, the governing principle in Islamic Sharia is that criminal law does not operate retrospectively except in two situations. First, offences that endanger the peace of land or law and order, or when giving retrospective effect would be necessitated by the interest of the community rather than the individual, for instance, in cases of *القذف, واللعان والظهار*. In all such cases, criminal law has a retrospective effect. Second, if the application of the criminal law is beneficial for the accused. If the new law allowed an act that was prohibited before, and the accused was punished under it, the punishment shall not be carried out. However, if the new law is not beneficial for the accused, it shall not apply to his case retrospectively. If the new law enhances the punishment of the accused, then it shall not be applicable to him because the accused should be punished according to the law in force at the time when the crime was committed.

a. Accusing Innocent Woman of Adultery - القذف

The punishment of defaming innocent woman is prescribed in the Qur'an in the following words:

{وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ (4) إِلَّا الَّذِينَ تَابُوا مِنْ بَعْدِ ذَلِكَ وَأَصْلَحُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ (5) 44}

“Those that defame honorable women and cannot produce four witnesses shall be given eighty lashes and do not accept their testimony ever after, for they are great transgressors- except those among them that afterwards repent and mend their ways. Allah is Forgiving, Merciful.”

As a matter of fact, “Aishah (May Allah be pleased with her) was accused by some of adultery. The accusation was such that the Muslim community was shaken, as the Prophet ﷺ himself was saddened and deeply disturbed. The Muslim community was confused and some people verged on a clash with each other over this issue. Thereupon, ten verses of the Qur'an were revealed stating that A'ishah was totally innocent and that this was a false accusation.) The Prophet ﷺ, thereafter, punished two men and one woman for the said offence. Abdi al-Qadir Awdah argues that since the Prophet ﷺ punished the accusers of Aishah after the verses were revealed, therefore, they were given retrospective effect, as the issue was very serious and endangered peace and security of the community. However, opinion varies about the revelation of these verses. Tabari, while commenting on these verses, argues that there is a difference of opinion regarding the exact time of the revelation of the verses about defamation. It is said that the verses of defamation were revealed before the incident. While others contend that they were revealed after the said incident.) 'A'ishah reports herself that when Allah revealed her innocence to the Prophet ﷺ, he stood on the pulpit, announced it to the companions, and punished two men and one woman after coming down from the

pulpit." According to the latter view, therefore, this verse has had a retrospective effect. However, according to 'Abd al-Qadir Awdah, the verses of defamation and the innocence of 'A'ishah was revealed at the same time, that is after she was accused. This may not be the case, as there could be an interval between the two. This is the view of another contemporary scholar, Salim 'Awwa who argues that defamation might have been prohibited first, while Aishah was accused later, and when she was proved innocent, the slanderers were punished. In this case, the verses will have no retrospective effect.

b. *Endangering the Public Peace and Security (Robbery) - تخريب وإفساد الأرض*

The Qur'an strictly prohibits endangering the public peace and security. It says,

{إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ۚ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ ۚ إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ تَقْدِرُوا عَلَيْهِمْ فَاعْلَمُوا أَنَّ اللَّهَ غَفُورٌ رَحِيمٌ⁴⁵}

"Those that make war against Allah and His Apostle and spread disorder in the land shall be put to death or crucified or have their hands and feet cut off on alternate sides, or be banished from the land. They shall be held in shame in this world and sternly punished in the next, except for those who (having fled away and then) came back with repentance before they fall into your power; in that case, know that Allah is Oft-Forgiving, Most Merciful".

Some commentators of the Qur'an argue that these verses were revealed after a particular incident when the Prophet ﷺ sent a group of people to a place outside Madinah where they used to drink milk from the 'camels of charity' and stayed there for some time.⁴⁶

c. Zihar (Pre-Islamic Form of Divorce) - الظهار

Zihar had been a pre-Islamic form of divorce and consisted of certain words of repudiation, such as: “you are to me like my mother's back”.⁴⁷ In the pre-Islamic era, *zihar* meant that neither the same man could re-marry her, nor could she be married to anyone else. This was too harsh for the woman. The Qur'an abolished this form of divorce. A man upon divorcing his wife by *zihar*, was required to do *kafara*⁴⁸ to expiate his sin which is one of the three things; (a) "should free a slave before they touch each other again, or (b) if he does not have (a slave), should fast for two successive months, or (c) if he cannot do this, should feed sixty poor people."⁴⁹

The Occasion of the revelation of this verse was an incident relating to Aws bin Samit. Relying on this fact, Abdi al-Qadir Awdah argues that the punishment of *zihar* was applied to the case of Aws bin Samit, which arose before the verse was revealed and, therefore, it had a retrospective effect.

The Prophet ﷺ is reported to have asked Aws bin Samit, "Can you afford to set a slave free"? "No" he replied. The Prophet ﷺ asked him, "Can you fast for two months in a row"? He replied, "O! Prophet of Allah, if I do not eat three times a day, I am afraid my eye sight will be lost". The Prophet then asked him, "Can you feed sixty poor people"? He said, "O! Prophet of Allah yes, provided you help -me in this regard". The Prophet ﷺ helped him to feed sixty poor people and, thereafter, he started living with his wife. It is very clear that this verse was applied to the case that had already arisen, and thus it had a retrospective effect. This is, therefore, an exception to the general principle that law does not operate retrospectively.

d. Li'an (Sworn allegation of adultery committed by either husband or wife) - اللعان

It is reported that a man came to the Prophet ﷺ and said, "O Prophet of Allah if a man finds another man with his wife and kills him (the adulterer), he (the killer) may be killed in retribution, and if he talked about it (that is he accused his wife of adultery), he is punished (for accusation), and if he kept quiet, he will be unable to control his anger!" Saying this, he urged the Prophet to solve this problem. Thereupon, Allah revealed the following verse regarding *li'an*:

{وَالَّذِينَ يَزْمُونَ أَرْوَاجَهُمْ وَلَمْ يَكُنْ لَهُمْ شُهَدَاءُ إِلَّا أَنْفُسُهُمْ فَشَهَادَةُ أَحَدِهِمْ أَرْبَعُ شَهَادَاتٍ بِاللَّهِ إِنَّهُ لَمِنَ الصَّادِقِينَ ﴿٥٠﴾ وَالْخَامِسَةَ أَنَّ لَعْنَةَ اللَّهِ عَلَيْهِ إِنْ كَانَ مِنَ الْكَاذِبِينَ ﴿٥١﴾ وَيَذْرَأُ عَنْهَا الْعَذَابَ أَنْ تَشْهَدَ أَرْبَعُ شَهَادَاتٍ بِاللَّهِ إِنَّهُ لَمِنَ الْكَاذِبِينَ ﴿٥٢﴾ وَالْخَامِسَةَ أَنَّ غَضَبَ اللَّهِ عَلَيْهَا إِنْ كَانَ مِنَ الصَّادِقِينَ ﴿٥٣﴾ وَلَوْلَا فَضْلُ اللَّهِ عَلَيْكُمْ وَرَحْمَتُهُ وَأَنَّ اللَّهَ تَوَّابٌ حَكِيمٌ ﴿٥٤﴾ }

"And those who accuse their wives (of adultery) and have no witnesses except themselves, let each of them testify by swearing four times by Allah that his charge is true, calling down in the fifth time upon himself the curse of Allah if he is lying. But they shall spare her the punishment if she swears four times by Allah that his charge is false and calls down Allah's wrath upon herself if it be true".

5.0 Double Jeopardy Principle

The rule against double jeopardy is an important part of the Somali Criminal Procedure Code⁵¹. It means that a person cannot be tried twice for the same crime. Once they have been acquitted (found not guilty), they cannot be prosecuted again even if new evidence emerges or they later confess. The double jeopardy rule is an important protection for individuals against the abuse of state power and it has been embedded in ICCPR⁵². It stops police and prosecutors from repeatedly investigating

and prosecuting the same individual for the same crime without very good reason. The rule encourages them to prepare the case properly on the first occasion, and to accept the court's verdict. Equally, when a person is found not guilty in court, they know that the case is really over. Being the subject of a criminal accusation can be a difficult and distressing experience, with significant consequences for the accused who may be innocent.

5.1 Islam and Double Jeopardy Principle

There are in every judicial dispute at least two litigating parties, the plaintiff and the defendant. The first claims what is contrary to the apparent fact; the second holds to the apparent fact and denies the claim. In Islam, the burden of proof is upon the claimant and the taking of an oath is upon the one who denies (the allegation). The Prophet ﷺ Mohammed said:

عن ابن عباس رضي الله عنهما أن رسول الله صلى الله عليه وسلم قال : { لو يعطى الناس بدعواهم ، لادعى رجال أموال قوم ودماءهم لكن البينة على المدعي واليمين على من أنكر. }⁵³

“Were people to be given according to their claims, some would claim the wealth and blood of others. But the burden of proof is upon the claimant and the taking of an oath is upon the one who denies (the allegation).”

This *hadith* forms an important maxim. The text of the *hadith* has been expressed in the following way: “Evidence is for the person who claims; the oath is for the person who denies.” The *hadith* also shows the supreme importance of proof to the administration of justice. If the claimant has no proof for his allegation, then the defendant has to swear an oath that the allegation is not true as per the *hadith*. If the defendant refuses to take the oath, then the *Hanafis* and *Hanbalis* say the judge takes the claimant's claim forward, but the *Shafi'ees* and *Malikis* say if he refuses, then the

claimant has to make an oath that he is telling the truth, and if he refuses, then it is ruled in favour of the defendant. Once the defendant swear, the judge releases him. If the plaintiff finds after a time evidence for his claim, then the judge will consider such evidence because the oath in Islam removes the litigation and does not eliminate the right.⁵⁴

6.0 Conclusion

From the elaborate discussion above, I conclude that the general principles enshrined in the Somali Penal Code are almost in conformity with the Islamic Sharia. The first principle examined was “The Presumption of Innocence”, which means the accused is to be considered innocent until proven guilty of a criminal offence. The Islamic sharia has accepted this principle and later developed into a maxim. The second principle examined was “The Legality Principle”, which means that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). According to that principle, an offence must be clearly defined in the law. In the Islamic Sharia, Allah says in many Quranic verses that he will never punish a people until he sends a messenger. This shows how Islam promotes this principle. The third principle we have taken was “The Retrospectivity Principle”, this means that law should not have retrospective effect. Islam has forgiven whatever happened in the past. Muslim jurists of our time, such as Prof. Muhammad Salliim Madkur and 'Abd al-Qadir Awdah, the governing principle in Islamic Sharia is that criminal law does not operate retrospectively except in two situations. First, offences that endanger the public peace and security or law and order, or when giving retrospective effect would be necessitated by the interest of the community rather than the individual, for instance, in cases of القذف, واللعان والظهار. In all such cases, criminal law has a retrospective effect. Second, if the application of the criminal law is beneficial for the accused. If the new law allowed an act that was prohibited before, and the accused was punished under it, the punishment

shall not be carried out. The last principle we have examined was “The Double Jeopardy Principle”. This principle means that a person cannot be tried twice for the same crime. In this regard, Islam does not recognize this principle as it is considered against justice. If the claimant fails to prove his case the defendant will swear and be acquitted. If the claimant finds evidence supporting his case he has the right to bring such evidence to the judge and the judge considers because the oath in Islam removes the litigation and does not eliminate the right.

Notes

- ¹ See articles 2 and 4 of the Provisional Constitution adopted in 2012.
- ² Victor Tadros and Stephen Tierney, “The Presumption of Innocence and the Human Rights Act” Published by Wiley on behalf of the Modern Law Review, p.403.
- ³ Article 11(1): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”.
- ⁴ Article 40 (2) (i): To be presumed innocent until proven guilty according to law;
- ⁵ Article 14 (2): Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
- ⁶ Article 19 (e): A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.
- ⁷ Article 7(1)(b): Every individual shall have the right to have his cause heard. This comprises: The right to be presumed innocent until proved guilty by a competent court or tribunal;
- ⁸ 142 ص - المكتبة - المحامي الزحيلي - محمد مصطفى الزحيلي - المذاهب الأربعة - كتاب القواعد الفقهية وتطبيقاتها في المذاهب الأربعة - محمد مصطفى الزحيلي - المكتبة ص - 142 الشاملة الحديثة

- ⁹ Muhammad Munir, “Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice System”, *Hamdard Islamicus Journal*, Vol. XL, No. 4, p.46.
- ¹⁰ Quran English Translation by Talal Itani, Published by Clear Quran Dallas, Beirut. It is the main reference on which I relied in the translation of the Qur’anic verses in this article.
- ¹¹ كتاب الدراية في تخريج أحاديث الهداية، ج:2 ، ص:94
- ¹² نيل الأوطار شرح منتقى الأخبار من أحاديث سيد الأخيار للإمام الشوكاني – بيروت، ص: 188
- ¹³ Ibid
- ¹⁴ Article 35 (13): No person may be convicted of a crime for committing an act that was not an offence at the time it was committed, unless it is a crime against humanity under international law.
- ¹⁵ Article 1: No one shall be punished for an act which is not expressly made an offence by law, nor with a punishment which is not prescribed therefore.
- ¹⁶ Article 11 (2): No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.
- ¹⁷ Article 15 (1): No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
- ¹⁸ Article 19 (d): There shall be no crime or punishment except as provided for in the Shari’ah.
- ¹⁹ Muhammad Munir, “The Principle of Legality in Islamic Criminal Justice system” Article in *SSRN Electronic Journal* · January 2015, p.108.
- ²⁰ سورة الإسراء - الآية 15

- ²¹ الجامع لأحكام القرآن للقرطبي, م 15, ص: 52
- ²² سورة القصص - الآية 59
- ²³ سورة الشعراء - آية 208-209
- ²⁴ سورة طه - الآية 134
- ²⁵ كتاب المسند الجامع , محمود محمد خليل، ج: 18، ص: 586
- ²⁶ صحيح مسلم, كتاب الإيمان, ج: 1, ص: 112
- ²⁷ The text of this hadith is mentioned in several places in this article.
- ²⁸ Muhammad Munir, “The Principle of Legality in Islamic Criminal Justice system” Article in SSRN Electronic Journal · January 2015, p.109.
- ²⁹ Article 2 (1): No one shall be punished for an act which, in accordance with the law in force at the time when it was committed, did not constitute an offence.
- ³⁰ Muhammad Munir, “The Principle of Legality in Islamic Criminal Justice system” Article in SSRN Electronic Journal · January 2015, p.109.
- ³¹ J. T. Woodhouse, “The Principle of Retroactivity in International Law”, Transactions of the Grotius Society, Vol. 41, Problems of Public and Private International Law, Transactions for the Year 1955 (1955), pp. 69-89.
- ³² Article 15 (13): No person may be convicted of a crime for committing an act that was not an offence at the time it was committed, unless it is a crime against humanity under international law.
- ³³ *Ijtihad* (Arabic اجتهاد) is a technical term of Islamic law that describes the process of making a legal decision by independent interpretation of the legal sources, the Qur'an and the Sunnah.
- ³⁴ Muhammad Munir, “The Principle of *Nulh Poem Sine Lege* in Islamic Law and Contemporary Western Jurisprudence”, International Islamic University. Islamabad. p. 40.
- ³⁵ سورة الإسراء - الآية 15
- ³⁶ سورة الأنفال - الآية 38
- ³⁷ سورة النساء - الآية 22

- ³⁸ سورة النساء – الآية 23
- ³⁹ سورة البقرة، الآية 275
- ⁴⁰ سورة المائدة – الآية 93
- ⁴¹ Muhammad Munir, “The Principle of *Nulh Poem SineLege* in Islamic Law and Contemporary Western Jurisprudence”, International Islamic University. Islamabad. p. 40.
- ⁴² صحيح مسلم, كتاب الإيمان, ج:1, ص: 112
- ⁴³ Mohamed Munir, Ibid.
- ⁴⁴ سورة النور – الآية 4
- ⁴⁵ سورة المائدة – الآية رقم 33
- ⁴⁶ تفسير الطبري, ص:113
- ⁴⁷ The Five Schools of Islamic Law” by Muhammad Jawad Mughniyya, Ansariyan Publications. <http://ijtihadnet.com/wp-content/uploads/The-Five-Schools-of-Islamic-Law-2.pdf>
- ⁴⁸ Kafara is a general term which means “what is paid to redress an imbalance or to compensate for commissioning a sinful act, i.e. a kind of punishment or penalty”.
- ⁴⁹ Mohamed Munir, Ibid.
- ⁵⁰ سورة النور – الآية 6-10
- ⁵¹ Article 13 (3): An accused, after having been finally convicted or acquitted or after orders not to proceed with the case have been lawfully given, cannot be charged again on the same facts, even if those acts may be regarded as constituting a different offence, except under the provisions of the following paragraph of this Article or under the provisions of paragraph 2 of Article 77.
- ⁵² Article 14 (7): No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.
- ⁵³ السنن الكبير للبيهقي، ط: 1 ، ج: 11 ، ص: 42
- ⁵⁴ مختصر الفقه الإسلامي في ضوء القرآن والسنة، للشيخ محمد بن إبراهيم بن عبد الله التوجري، ط: 12 ، ص: 1014

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