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Criminal Justice Models:
Canadian Experience in European and Islamic Comparative Perspective

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Criminal Justice Models:
Canadian Experience in European and Islamic Comparative Perspective[i]

Key Words: Comparative Criminal Justice – Canada, Europe, Islam

Abstract

This paper examines Canadian models of criminal justice in a European and Islamic comparative perspective. The traditional model of Canadian criminal justice is a state centred adversarial one intended to punish, deter and/or rehabilitate offenders who are accorded formal due process protections embedded in a liberal constitutional and procedural rights. This model has been transformed recently into an ambiguously tripartite adversarial model through an overlay of victims' rights at all stages. However, Canadian law also recognizes alternative processes through various forms of problem solving courts and sometimes comprehensive restorative justice approaches, the latter rooted in relational notions of rights. Meanwhile, criminal models in Europe have been evolving as well. The British common law model of criminal justice has arguably been transformed by statute into a state-centred managerial approach which has shifted the balance from due process toward crime control in a somewhat continental manner, while tolerating restorative justice experimentation at its periphery. On continental Europe, traditional judge-centered investigatory/accusatorial models have been the subject of adversarial due process reforms in differing ways, while "penal mediation" has been introduced to enhance victim satisfaction beyond historically available civil party recovery procedures. In the Muslim world, there has been a revival of Shar'iah law to varying degrees in many states, centered upon Islamic jurisprudential sources based on the Qu'ran, and Sunnah or Hadith, and reasoning through qiyas (analogy) to achieve consensus (ijma) in relation to the three traditional forms of Islamic offences with their distinct procedural characteristics. The victim-centred nature of flexible aspects of Islamic criminal law has led some to characterize Shar'iah as being suffused with restorative justice principles, despite widespread views to the contrary. Examination of the differences and similarities among these various models of criminal justice from "pure" and "applied" perspectives, leads to reflection on the capacity for criminal justice systems to evolve and change, and to tolerate significant levels of internal diversity, while demonstrating a wide range of potential forms for the instantiation of plausibly common values.

Introduction:

1. Comparative criminal law scholarship round the world is demonstrating new prominence, strength and vitality. Previously the poor cousin of comparative civil law, comparative criminal law is coming of age. Classical texts like that of Rene David and John Brierly advanced the "grand systems" approach,[1] while grand masters of the law of obligations like Kotz and Zweigert put the core of private law in comparative perspective.[2] This mid-twentieth century private law view of comparative law was breaking down near the new millennium,[3] but in scholarly comparative law circles criminal law had hither to been largely ignored as crude, unprincipled and governed by local conditions whose peculiarities did not warrant scientific treatment. There were some exceptions, of course,[4] and

[1] R. David, *Les Grands Systèms de Droit Contemporain,* Dalloz, Paris, 1988, R. David and J.E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law,* (3rd ed.) Stevens, London, 1985
[2] K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd ed.) (translated by Tony Weir), Clarendon Press, Oxford, 1998. American "comparative law" often tended to be the study of foreign private law too.
[3] William Twining, "Globalization and Comparative Law", Chapter 7 in Globalization and Legal Theory, Butterworths, London, 2000
[4] Jean Pradel, *Droit pénal comparé*, Dalloz, Paris, 2003

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Damaska and his critics earlier began an important debate about the value of "models" in comparative criminal law.[5] But it seems that the European Court of Human Rights[6] and European standards for criminal law have given an impetus to an explosion of comparative criminal law scholarship in the twenty-first century.[7] The advent of the International Criminal Court with the Statute of Rome has presented an urgent practical need for comparative interpretation in an institutional framework operated by jurists from different legal traditions.[8] Moreover, the intensification of global media culture, and the sensationalization of cross-culturally "shocking" criminal law outcomes, has created an intense public interest in international differences in criminal law and procedure.[9] Since the Treaty of Lisbon, harmonization of criminal procedural mechanisms in the European Union has begun, and criminal law reform is now on the academic agenda in Europe.[10] This environment has even sparked controversial speculation about convergence of criminal procedure in many corners of the world.[11]

2. This is the exciting new context within which I now wish to embark upon a brief examination of models of criminal justice, starting with the common law tradition in its Canadian instantiation and moving to European/continental and Islamic traditions. Thus I boldly propose a three part plan.[12] Part One begins with an exploration of three models criminal justice in Canada, which capture the evolution of the criminal justice system with which I am most familiar. Part Two presents some comparative views on European and Islamic models of criminal justice, in a more tentative fashion. Part Three resurrects F.H. Lawson's deceptively simple but heuristically helpful, if venerable, distinction between "pure" and "applied" comparative law, to structure reflection on the origins and significance of both the similarities and differences in the models of criminal justice considered.[13] The purpose here is simply to advance what I hope will be a helpful discussion on multiple levels, rather than to posit definitive conclusions. However, it is possible to articulate some reflections on the diversely layered aspects of all the systems contemplated and ruminate on whether there are plausible grounds for articulating some common values and perspectives which may be inherent to all the systems discussed.

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[5] M. Damaska, *The Faces of Justice and State Authority,* Yale University Press, New Haven, 1986; but see I Markovits, "Playing the Opposites Game: On Mirjan Damaska's *The Faces of Justice and State Authority*" (1989) 41 *Stanford Law Review* 1313

[6] Paul Roberts, "Comparative Law for International Criminal Justice", in *Comparative Law: A Handbook,* Hart Publishing, Oxford, 2007

[7] See André Klip (ed.), *Substantive Criminal Law of the European Union,* Maklu Publishers, Antwerp, 2011; E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe,* Intersentia, Antwerp, 2010*;* and Valsamis Mitsilegas, *EU Criminal Law,* Hart Publishing , Oxford, 2009

[8] Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003

[9] The sight of European *juges d'instruction* indicting South American dictators or the purported invocation of Shari'ah law to justify what to many appears to be gendered violence against women are prominent examples.

[10] See Jacqueline Hodgson, "EU Criminal Justice: The Challenge of Due Process Rights within a Framework of Mutual Recognition" (2011), 35 *North Carolina J. of Int'l L. and Com. Reg.* 285*;* and in the same volume, T.N.B.M. Spronken and D.L.F. de Vocht, "EU Policy to Guarantee Procedural Rights in Criminal Proceedings 'Step by Step' " at p. 436; as well as L. van Puyenbroeck and G. Vermeulen, "Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU" (2011), 60 *International and Comparative Law Quarterly* 1017

[11] Gerald S. Reamey, "Innovation or Renovation in Criminal Procedure: Is the World Moving Toward A New Model of Adjudication?" (2010), 27 *Arizona J. of Int'l and Comp. L.* 693; *contra* Nicola Lacey, "Why globalization doesn't spell convergence: models of institutional variation and the comparative political economy of punishment" in Adam Crawford (ed.) *International and Comparative Criminal Justice and Urban Governance: Convergence and Divergence in Global, National and Local Settings,* Cambridge University Press, Cambridge, 2011, and Pierre Legrand, "European Legal Systems Are Not Converging," 45 *International and Comparative Law Quarterly* 52

[12] As a young law student in Paris, I was informed that in the Cartesian tradition, a French law review article or commentary is normally structured in two parts preceded by an introduction, since where clarity of exposition is achieved a conclusion is superfluous. On the other hand, a "grand jurist" or a "*franc tireur"* (in the Hegelian tradition?), might dare to write an article in three parts!

[13] F.H.Lawson, *A Common Lawyer Looks at the Civil Law,* University of Michigan Law School, Ann Arbor, 1953

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I. Models for Changing Canadian Criminal Justice: Traditional Liberal versus Relational Rights

3. When I look at criminal law and procedure in contemporary Canada, I see three models of criminal justice.[14] The traditional, and still influential, model of Canadian criminal justice, rooted in first conservative, then liberal, ideology and as well as the common law, is state-centered, adversarial justice, designed to punish, deter or rehabilitate, within a constitutional framework formally oriented to vindicating principles of formal due process. There then emerged in Canada, an inclusionary, but tri-partite, adversarial model, with diffuse substantive objectives, and with a due process emphasis oriented in principle to vindication of victims rights at virtually all stages of the process. Most recently, non-adversarial, informal and deliberative models have developed, represented by judge-centered problem-solving courts on the one hand (handling drug, mental disorder, aboriginal issues) and on the other hand, various forms of restorative justice (presenting the most promising forms of alternative measures in diverse, community-driven models). These models, which are rooted in reality but rarely separated in conceptual terms, exist simultaneously and pull observers and practitioners of Canadian criminal law and procedure in different directions. Moreover, they are set in a tension between overarching values of liberal individualist and more communitarian or relational values which diverge in important ways. The next three sections of this part provide details on these observations.

A. Adversarial State-Centred Criminal Law: Punish, Deter & Rehabilitate with Due Process

4. Despite Canada's federal constitution, there is one *Criminal Code* covering the whole country, first adopted in 1892, which is a federal statute,[15] (though provincial attorneys general authority to prosecute criminal offences). This statute is not a true codification in the continental sense, in that it is not a complete or comprehensive source of criminal law principles or rules. It is really a list of offences with corresponding punishments and a set of procedures applicable to indictable and summary conviction offences. It has a fragmentary grouping of sections which deal with some general defences and has a recently adopted statutory statement of sentencing principles. However, it has no general statement of the conceptual elements of offences, and thus relies on the common law inherited from England for notions of conduct and fault requirements – *actus reus* and *mens rea*. The Canadian *Criminal Code*, like that of New Zealand, is based on the Nineteenth Century English draft code prepared by the English judge, Sir James Fitzjames Stephen, who famously remarked in his influential treatise[16] that it is "right to hate criminals", and saw the goals of the criminal law as punishment and deterrence. In the early days, of course, capital punishment with its punitive finality existed in Canada, although it was (definitively?) abolished in the 1970's. These punitive views were influential in the interpretation and application of the Canadian *Criminal Code*, particularly in its first five decades or so of existence. In the current North American context of penal populism, with its "tough on crime" political agenda, these punitive views still have considerable resonance among the general public and conservative politicians.

5. In procedural terms, this punitive model of criminal justice was enforced through an adversarial court system, at the symbolic core of which was the trial by jury for all serious or indictable matters and an independent judiciary. While there was no "Bill of Rights" in Canada until the federal

[14] For a full discussion of these models, see Bruce P. Archibald, "Let My People Go: Human Capital Investment and Community Capacity Building via Meta/Regulation in a Deliberative Democracy – A Modest Contribution for Criminal Law and Restorative Justice," (2008) 16 *Cardozo Journal of International and Comparative Law 1-85*

[15] *Criminal Code,* R.S.C. 1985, c. C-46 [*Criminal Code*]

[16] Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1983), p. 81

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Parliament passed such a statute in 1960, and the constitutional Canadian *Charter of Rights and Freedoms* would not be adopted until 1982, the traditional rights of the defence in criminal matters were ensconced in common law rules of evidence which put the burden of proof "beyond a reasonable doubt" upon the prosecution (or as we would say "the Crown"), maintained adversarial balance and fairness through rigorous rights of cross-examination, the requirement that all confessions be proved to have been voluntarily given, and, in principle, the exclusion of most hearsay evidence or prosecution use of many forms of character and similar fact evidence (which may be admissible evidence in some other legal traditions). However, there was a tolerance in this period for the use in criminal courts of illegally obtained evidence, if relevant and probative, on the theory that police misconduct could be controlled by criminal prosecutions, civil actions or administrative discipline against such malefactors, such that the state should not be deprived of a conviction merely because of "unfortunate" police behaviour.[17]

6. By the 1950's and 1960's, the predominant professional orientation to criminal justice was the rejection of a punitive approach in favour of the principle of rehabilitation. Courts of appeal in Canada asserted that the purpose of sentencing was "the protection of the public" which was to be achieved by means of "deterrence, general or specific, and rehabilitation of offenders, or both".[18] Carceral institutions were presumed to be capable of accomplishing this mission, and to some degree they were as prison programming concentrated on skills training and trades upgrading. Juvenile delinquency legislation was predicated on a *parens patriae* principle, where judges were intended to treat the youth as would a wise father, and youth facilities were oriented to the education and moral improvement of their charges.[19] Capital punishment had been abolished not only by reason of the predominance of the rehabilitative paradigm, but also by concerns with wrongful convictions which emerged in the 1970's. By the 1980's, however, Canadian criminal justice was facing a crisis of confidence. North American faith in the potential of rehabilitation was waning as crime rates in general and recidivism rates in particular continued to rise, despite high levels of incarceration. Canada over-hauled its youth justice system, by abandoning its paternalistic solicitude for youth and replacing it with a justice model predicated on the principle of accountability, a strategy which led to ballooning youth incarceration rates. A federal sentencing commission was appointed to review problems of disparity and ineffectiveness in the exercise of judicial sentencing discretion. Victims' rights organizations were complaining that criminal justice was soft on crime and discriminated against women, particularly in the areas of sexual assault and domestic violence. The impact of the *Charter of Rights and Freedoms*[20] may have played into this unease about criminal justice. Heeding the blandishments of civil libertarians, the Supreme Court of Canada robustly interpreted the new constitutional remedies of Charter section 24 to exclude evidence where police misconduct breached constitutional standards.[21] This led one well known criminal justice jurist to assert that in the post-Charter era, criminals were "getting away with murder" and suggesting that police were being hamstrung by judicial interpretation of the *Charter's* exclusionary rule of evidence.[22] While it is questionable whether this was true, the political impact of the controversy was significant.

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[17] The high water mark of this doctrine was *R. v. Wray*, [1971] S.C.R. 565

[18] *R. v. Grady* (1973), 5 N.S.R. (2d) 264 (N.S.S.C., App. Div.)

[19] The legislative framework for youth justice at the time was found in the *Juvenile Delinquents Act*, R.S.C. 1970 c. J-3

[20] *Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*]

[21] For an excellent textbook on the *Charter*, see Don Stuart, *Charter Justice in Canadian Criminal Law, 5th ed.*, Carswell, Toronto, 2010

[22] David M. Paciocco, *Getting Away with Murder: The Canadian Justice System*, Irwin Law, Toronto, 1999

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7. Criminal law reform, of a sort, became the political order of the day in the 1990's.[23] The federal government ignored a decade or more of work from the Law Reform Commission of Canada, which had proposed codification of the general principles of criminal liability,[24] large areas of substantive law and most aspects of criminal procedure.[25] But the Government did add to the *Criminal Code* the statutory statement of the principles of sentencing referred to above,[26] rooted in *limiting* retributivism only, though it failed to take up the Sentencing Commission's presumptive sentencing guidelines or its call for a permanent sentencing commission with quasi-legislative regulatory power to adjust sentencing levels to changing conditions.[27] Parliament nevertheless commenced what appears to be a continuing trend to impose mandatory minimums for crimes committed with weapons and an ad hoc list of other offences, despite its simultaneous general commitment to the principle of proportionality in sentencing.[28] However, in a counter-balancing trend to this punitive stance, at both the adult and youth levels, the federal government introduced an option for the use of "alternative measures" which will be discussed below, and, perhaps spurred by the technological possibilities of electronic monitoring, gave sentencing judges the authority to order offenders to serve their sentences "in the community" for a fairly broad range of offences. It is clear that the mounting financial costs of increasing incarceration rates were behind this bifurcated strategy.

B. An Ambiguously Tri-Partite Adversarial Model: Victim Inclusive Criminal Justice

8. One of the most striking aspects of the criminal law reforms of the 1990's was the federal Parliament's transformation of the formal criminal justice system, at least in principle, to a three cornered process which includes a role for victims at virtually every phase of a criminal proceeding.[29] The impetus for this can be found in the political activities of victim's rights organizations of varying sorts: women's rights organizations and mothers against drunk drivers (MADD) being prominent among them. This system is also diffuse in its purposes, adding to the usual litany of utilitarian sentencing purposes the notion of "reparation to victims and community" as well as "promot[ing] a sense of responsibility on the part of offenders and an acknowledgement of the harm done to victims and the community."[30] The legislature was not clear on how "community" may differ from the general "public, [31] but the emphasis on reparation to victims is significant, since Canadian criminal courts have been reluctant to extend their powers of "restitution" to complainants beyond direct property losses. It is unlikely, however, that Canadian judges will move in the direction of "moral damages" to civil parties as can be assessed in some continental civilian jurisdictions, although victims' services surcharges can be levied which go to government coffers and are intended for use in providing general administrative assistance to victims of crime.[32]

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[23] The Canadian Government had optimistically set an agenda for criminal law reform in a policy document entitled *The Criminal Law in Canadian Society,* 1982

[24] Law Reform Commission of Canada, *Report 30: Recodifying Criminal Law (Revised and Enlarged Edition),* Ottawa, 1987

[25] Law Reform Commission of Canada, *Report 33: Recodifying Criminal Procedure,* Ottawa, 1993

[26] *Criminal Code,* s. 718

[27] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach,* Ottawa, 1989

[28] *Criminal Code,* s. 718 sets out the limiting principle of proportionality

[29] See Archibald, *supra,* footnote 11, for full sources and citations on the material in this and the next paragraph.

[30] *Ibid.*

[31] This is an issue worthy of serious consideration. See Mark Findley, "Locating Victim Communities within Global Justice and Governance" in Adam Crawford (ed.), *International and Comparative Criminal Justice and Urban Governance: Convergence and Divergence in Global, National and Local Settings,* Cambridge U. Press, Cambridge, 2011

[32] See Joan Barrett, *Balancing Charter Interests: Victims' Rights and Third Party Remedies,* Toronto, 2001

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9. The primary aspects of the new victim inclusive criminal justice process are thus procedural in nature. In Canada, it has always been possible for an individual, including a victims to lay criminal against those for whom there are reasonable grounds to believe they have committed criminal offences (subject to a Crown right to stay such proceedings). But police protocols now normally mandate police consultation with victims' of crime prior to laying charges, in order to take into account victims' wishes where not contrary to other public policies. Similarly, prosecutorial guidelines regularly require prosecutors to consult with victims in the exercise of prosecutorial discretion, rather than viewing victims simply as complainants or witnesses to be deployed, or not as the case may be, in the criminal proceeding. Victims' interests are to be taken into account at bail hearings, as well as in plea discussions with regard to Crown sentencing submissions. At trial, cross-examination of sexual assault victims is limited by "rape-shield" provisions, and there are provisions limiting access to the medical records of witnesses, all in the interests of not re-victimizing victims through needlessly unpleasant formal trials. These latter developments, in particular, were attacked by defence counsel who argued that such measures limit the rights of the defence, though modified versions of these rules have ultimately been upheld by the courts as constitutional. Victims also now have a statutory right to present victim impact statements at sentencing, either in person or in written form, and may do the same at parole hearings, including the so-called "faint-hope" judicial proceedings for homicide offenders seeking improved eligibility for parole in relation to life sentences. In addition, victims now have status in review board hearings making disposition decisions in relation to those found not criminally responsible by reason of mental disorder. Thus, while victims are not formal parties to criminal proceedings (which are still commenced in the name of the Queen against an accused), the new inclusionary process is tri-partite or triadic in many significant ways. However, it must be said that relatively few victims actually take systematic advantage of these options.

C. Non Adversarial, Deliberative Alternatives: Problem-Solving Courts and Restorative Justice

10. Most recently, non-adversarial, informal and deliberative criminal justice models have developed, represented by judge-centered problem-solving courts on the one hand (dealing with drugs, mental disorder, aboriginal offenders) and on the other hand, various forms of restorative justice (presenting the most promising forms of alternative measures in diverse, community-driven models). Both these sets of developments deserve comment, but it is particularly the latter which have the greatest transformative potential for Canadian criminal justice.

11. Problem solving courts have emerged in Canada not through legislative amendment to the *Criminal Code,* but rather by cooperative exercise of judicial and governmental discretion in the administration of criminal justice. Certain creative judges in different parts of the country began to take an active role in finding novel solutions to criminal behaviour arising from particularly acute social or individual problems. Faced with growing criminal dockets of persons accused with possession or use of illegal narcotics, as well as theft, break and enter or robbery connected to the need of such offenders to feed their drug habits, some judges began to use their discretionary authority to control their judicial procedures to get to the root of the problem. Similarly, some judges took similar action when faced with offenders whose criminal conduct had its genesis in their mental health problems, and indeed often in governmental health policies for de-institutionalization of mental health patients (sometimes in the guise of positive community living options, but often driving by perceived fiscal imperatives of politicians committed to "smaller government"). In each of these cases, frustrated criminal court judges began to work with sympathetic Crown counsel and farsighted defence lawyers, to take a more non-adversarial approach to resolving the issues, where the individual charge against the accused was obviously symptomatic of a larger, and clearly identifiable, problem. In some measure, this began as little more than purposive, focussed plea bargaining, where charges might be dropped or reduced, or

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sentences managed differently, where an offender agreed to seek treatment under judicial supervision. As these practices developed and demonstrated success, provincial governments who saw the value in investing resources in such procedures, began to assign mental health or drug treatment professionals to work with judges, counsel, and offenders in a team approach, elaborating inter-disciplinary protocols to smooth the way for such interactions. There have, of course, been similar developments in the United States.[33]

12. A parallel development has occurred in relation to the criminal justice issues arising from Canada's aboriginal communities. The rates of both crime and incarceration in such communities have recently produced a national soul searching exercise highlighted[34] by a royal commission of inquiry into the circumstances of Canada's First Nations Peoples and a resulting Truth and Reconciliation Commission. These institutions have traversed the country, exploring the legacy of colonialism in Canada, the effects of the failure to take aboriginal treaties with the British Crown seriously, and the devastating impact on aboriginal cultures of residential schools, among other things. Such religiously led schools were often intended to strip "Indian" children of their language and traditional ways of life in a process of Christian acculturation. This fact has been causally linked to the collapse of aboriginal cultures, increased social alienation and soaring rates of incarceration. In the midst of all this, Parliament introduced the statutory statement of sentencing principles referred to above, of which one provision mandated the general principle of restraint in the use of imprisonment, but "particularly in relation to aboriginal peoples". The Supreme Court of Canada had the occasion in 1999 to interpret this provision in a case entitled *R. v. Gladue*, where an aboriginal woman was charged with a homicide in relation to her husband.[35] The trial court judge failed to take into account the fact that the accused was aboriginal, perhaps because the place where she lived and where the offence occurred was not a traditional aboriginal community or reserve. The Supreme Court of Canada was critical of the failure of the judge to hear evidence about the conditions of the accused's aboriginal upbringing, not on a theory of affirmative action in sentencing (which was specifically eschewed), but rather by virtue of the fact that the trial judge had failed to consider all relevant circumstances in making his individual sentencing determination. The upshot of this case has been the institutionalization of procedures in the sentencing of aboriginal offenders, and in certain centres where the population of aboriginal offenders so warrant, the creation of what have come to be known as specialized "Gladue Courts". In such courts, judges, legal counsel and administrative personnel are knowledgeable about aboriginal culture and the needs of aboriginal communities, so that a problem solving approach is used which has certain parallels with what goes on in drug and mental health courts. All of this has flowed from the *Criminal Code* mandate to employ restraint in the use of imprisonment generally and "particularly in relation to aboriginal offenders".

13. The most startling change in Canadian criminal justice in the past two decades has been the introduction of various programs of restorative justice.[36] The roots of these experiments have been

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[33] This development sometimes goes under the rubric "therapeutic jurisprudence". See Arie Freiberg, "Post-adversarial and Post-inquisitorial Justice: Transcending Traditional Penological Paradigms" (2011), 8 *European Journal of Criminology* 82, and the following commentaries: Tom Daems, A H(e)art for European Penology: Commentary on Freiberg, (2011), 8 *European Journal of Criminology* 102 and The Perils of Non-Adversarialism" (2011), 8 *European Journal of Criminology* 108

[34] See Jonathan Rudin, "Aboriginal Self-Government and Justice", in Phil Fontaine (ed.), *Aboriginal Self-Government*, Purich, Saskatoon, 1999

[35] *R. v. Gladue*,[1999] 1 S.C.R. 688

[36] For a full discussion of the material in this paragraph, see B. Archibald and J. Llewellyn, "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia", (2006) 29 *Dalhousie Law Journal* 298-333

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diverse. Howard Zehr has written at length about restorative justice principles first developed in the Christian Mennonite communities of southern Ontario.[37] Judges in the Yukon Territories adapted traditional aboriginal healing circles for use by courts as sentencing circles run by the judge or as panels of elders to give the judge sentencing advice from the local community.[38] The provinces of Saskatchewan and Nova Scotia adopted variants of restorative justice in their administration of "alternative measures" for the general population under the federal *Youth Criminal Justice Act* and the *Criminal Code* in the 1990's. The Nova Scotia restorative justice program is the most comprehensive and well entrenched in Canada in that it applies to a wide range of offences and acts as both a pre-trial diversion mechanism and post-trial or post-incarceration process.[39] Police or prosecutors can refer an offender to community agencies who will conduct restorative conferences which ideally involve offenders and victims with their respective families or supporters, along with resource persons from the community or local government under direction from a trained restorative justice facilitator. All participants in a restorative conference or circle will have an opportunity to explain what happened from their perspective, how they felt at the time and what ought to be done to make things right. The group will come up with a restorative agreement which sets out what the offender must do to make amends to victim and community, and how others in the community may provide the assistance to support these actions. Compliance with the agreement will be monitored by the community agency with the help of those at the conference. Failure to comply will lead to the matter being referred back to court. At the post-conviction stage a judge may request assistance from a community agency in the facilitation of a sentencing circle, or more likely will refer the matter to the community agency to conduct a restorative conference on its own and report back to the court on the agreement reached and sentence thus proposed. At the post-sentence stage, correctional authorities may conduct, or ask a community agency facilitator to conduct, a sentencing circle as a part of a pre-release process from a residential youth facility or an aspect of probation.

14. An interesting aspect of restorative justice in Canada is that it is sponsored by the state through the *Youth Criminal Justice Act*[40] or the *Criminal Code* but carried out, at least in Nova Scotia, through community agencies which have service contracts with the provincial Department of Justice. There are minimum statutory standards for referral to restorative justice, an interdepartmental protocol sets out the roles of police, prosecutors and correctional officials (while proposing support for judges who may wish to exercise their independent sentencing discretion to engage with the program), and there are guidelines for the use of all these players as well as the community agencies. Thus, the rule of law is respected while structuring real community involvement in the criminal justice system.[41] The deliberative processes of a restorative conference are arguably far more democratic and egalitarian than the participation by jurors in a standard criminal trial. Well practiced restorative justice is therefore built on the understanding that society is composed of individuals who have relationships with others, and that criminal conduct is best addressed through processes which involve the people in the relevant relationships, based on values of equality, human dignity, mutual respect and an ethic of care and

[37] See H. Zehr, *Changing Lenses: A New Focus for Criminal Justice* (1995). See also his recent *Little Book of Restorative Justice*, Good Books, Intercourse PA,, 2002

[38] See Barry Stuart, "Circle Sentencing in Canada: A Partnership of the Community and The Criminal Justice System", (1996), 20 *International Journal of Comparative and Applied Criminal Justice* 291

[39] See Nova Scotia Department of Justice , *Restorative Justice Program Authorization*, (Jan. 3, 2003) on line: Province of Nova Scotia ,http://gov.ns.ca

[40] The *Youth Criminal Justice Act*, Stats. Can. 2003, c. 1 was the second attempt in the course of two decades by the Canadian Parliament to reform youth justice. It replaced the problematic *Young Offenders Act*, 1984.

[41] See Bruce P. Archibald, "Relational Rights and Due Process: Re-Shaping the Rule of Law as Restorative Justice Comes of Age", forthcoming, in the Dalhousie Law Journal

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concern.[42] This is not to say that the rights of the participants are not to be respected, but these rights are best understood in relational terms. Such a relational theory of rights, of course, does not preclude the assertion of individual judgement about basic questions of participation.[43] While victims do not have a veto over whether restorative processes will occur, victim participation in restorative justice must always be voluntary. Similarly, an accused has a right to his or her day in court, and if at any time an accused wants out of the restorative conference process, the option is always there to have the matter adjudicated by a judge in court in the usual manner. But this is a relational understanding of autonomy, rather than a liberal individualist one, as explained by Canadian feminist colleagues Jennifer Llewellyn and Jennifer Nedelsky.[44] An important observation from a comparative perspective is that those familiar with restorative justice, unlike distant sceptics, agree that it is not "soft on crime", and that facing one's victim in this sort of intimate setting can be both challenging and transformative for offenders and victims alike.

II. Comparative Views on European & Islamic Criminal Justice Models: Fears, Rights & Duties

15. In the European context, adversarial common law criminal justice in Britain appears remarkably altered through constitutional, institutional, procedural changes, driven, on one side by human rights concerns and on the other by penal populism and concerns about terrorism, toward a more professionalised, judge-centred and prosecution friendly model. By contrast, several traditionally judge-centred criminal justice systems of continental Europe have adopted adversarial elements under pressure from various internal and external sources, sparking talk of convergence of common law and continental models of justice. Both in Britain and continental Europe, restorative justice (or at least penal mediation) has garnered some credence, but is developing to differing degrees under state, rather than community, control. In the Islamic context, the resurgence of interest in *Shari'ah* criminal justice has attracted world-wide attention. However, the *Qu'ranic* huddud crimes, with their substantive sophistication and formal rigidity, yet procedural flexibility, are not generally understood in the non-Muslim world. There is also developing a strain of commentary promoting *Qisas* offence procedures as a variant of victim centred restorative justice, despite their potential for corporal punishment. These features, as well as the religious sources and the discretionary authority of its judges, make for fascinating comparative reflections. The next three sections of this Part sketch out some details of these observations.

A. Getting Tough with the Common Law: The Recent Evolution of British Criminal Justice

16. Canadian lawyers trained in the early 1970's lived at the tail end of a long period of relatively pure British influence over teaching and learning about criminal law. While Canadian criminal procedure was then taught from the *Criminal Code* with its domestic particularities relating to the idiosyncrasies of court jurisdiction in a federal country, substantive criminal law was taught with the use of British textbooks (there being no Canadian ones) and evidence law was rooted in English common law concepts with Canadian evidence statutes patterned after British models. *Woolmington's Case* from the House of Lords was parsed with care to ferret out the subtleties of the presumption of innocence and its statutory deviations, the Hart-Devlin debate over the propriety of the enforcement of morality through the criminal law was taken seriously, British and Commonwealth cases were cited for

[42] See Jennifer Llewellyn, "Restorative Justice: Thinking Relationally about Justice" in J. Downie and J. Llewellyn, *Being Relational: Reflections on Relational Theory and Health Law,* UBC Press, Vancouver, 2011
[43] On relational autonomy, see Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law,* Oxford University Press, New York, 2011
[44] Supra, footnotes 4 and 5

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purposes of distinguishing objective verses subjective standards of fault, and there was considerable intellectual agony emanating from these sources about the virtues or vices of strict or absolute liability in relation to public welfare offences in what in retrospect must be seen as the final heyday of the welfare state. British criminal law was seen as the primary source of formal criminal rules and deep notions of fairness in criminal justice. However, in the late 1970's and early 1980's, there was a subtle shift in thinking among Canadian criminal law specialists. Canadian criminal law, criminal procedure and evidence textbooks began to emerge, and the Canadian government developed a blueprint, called *Criminal Law in Canadian Society* for a wholesale, codification of Canadian criminal law and procedure – a task assigned the Law Reform Commission of Canada, which was operating in parallel to the English Law Commission in this effort. Furthermore, after 1982, Canadian courts began to put the whole of Canadian criminal law, criminal procedure and evidence through the sieve of constitutional review to adjudicate on the question of whether various rules from these domains were "in accordance with fundamental principles" failing which no one could be "deprived of life, liberty or security of the person" in accordance with section 7 of the *Charter of Rights and Freedoms.* In this regard, the Canadian criminal justice system was set upon an independent path which almost imperceptibly, but implacably, separated Canadian conceptual thinking from its British roots. Under section 1 of the *Charter*, courts and text writers began to think in conceptual terms through the lens of a constitutional rights document, with its directions that the rights and freedoms set out in it were subject to "limitations demonstrably justifiable in a free and democratic society". In the early days of the *Charter*, this constitutional injunction forced Canadian jurists to be explicitly comparative in their approach, looking to American Bill of Rights and the European Convention on Civil and Political Rights, in addition to the usual British and Commonwealth sources, in order to interpret the Charter and divine its impact on Canadian criminal justice. Sadly, but perhaps inevitably, as Canadian judicial precedents began to build up in virtually all areas of criminal law, procedure and evidence, Canadian students and legal commentators began to turn inward, applying Canadian jurisprudence in a mechanistic manner and largely ignoring the insights of foreign and comparative law.

17. The foregoing observations on a kind of Canadian isolationism set the context for my Canadian comparative perspective on developments in British criminal justice since the 1980's. One can hardly recognize the current British criminal justice system as the descendant of idealized vision English criminal justice taught to Canadian students in the 1970's. Jacqueline Hodgeson suggests with considerable justification that "[i]n England and Wales, the Police and Criminal Evidence Act 1984 (PACE) was perhaps the legislative high point of modern adversarial criminal procedure," with its rights to meet with counsel in person for suspects in custody, mandated access to tape-recorded versions of police interrogations of those in custody, a clear separation between an autonomous police investigation and an independent new Crown Prosecution Service (CPS), as well as robust duties of disclosure of evidence on the prosecution mandated by courts of appeal.[45] Hodgson then describes a series of dramatic changes which led her to conclude that the UK now has "a mixed system with adversarial roots" which shares many characteristics in common with continental investigative/accusatorial systems of criminal justice. The British Royal Commission on Criminal Justice, investigating the series of wrongful convictions of suspected IRA terrorists, which reported in 1993, was asked to "examine the effectiveness of the criminal justice system" in relation to "securing the conviction of the guilty…and the acquittal of those who are innocent, having regard to the efficient use of resources…" This equal emphasis on both prosecution and defence led the Commission to advocate the reduction of the duty of disclosure on the prosecution and for the first time recommended the imposition of a duty of disclosure on the defence. The latter was coupled with a recommendation

[45] Jacqueline S. Hodgson, "The Future of Adversarial Justice in 21st Century Britain," (2009-2010) 35 N.C.J. Int'l L. & Com. Reg. 319-362

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that an adverse inference could be drawn against the defence for failure to disclose information, and also a proposed sentencing discount for those who admit their offences early and plead guilty. These recommendations were all implemented legislatively in 1994 and 1996. For a Canadian criminal lawyer steeped in the older English tradition and under the sway of recent *Charter* jurisprudence these developments all seem a surprising British break with the principle of the presumption of innocence.

18. The above legislative changes, when combined with other institutional developments in the criminal justice arena appear to have led to profound alterations in British criminal justice. A combination of the recommendations of the Narey Report on acquittals in Crown Courts (1997)[46] and the Glidewell Report on the CPS (1998)[47] appears to have precipitated the 'co-location' of police and prosecution service personnel, which has led to cooperative arrangements for investigative and prosecutorial decision-making and a concomitant reduction in the checks and balances of functional independence of the two organizations, even if that still remains the formal principle. This has been combined with cautioning procedures which allow the CPS to impose dispositions in exchange for stays of proceedings, which amount in the minds of many to administrative punishment by a corps of prosecutors, who unlike their European counterparts, do not have judicial training. Moreover, there is now a degree of judicial supervision of investigation and prosecution in the name of efficient case management. Like Hodgeson, Jenny MacEwan sees in these developments a shift from adversarialism to a new model of "managerialism" in British criminal justice which may put in danger the rights of the defence from a curious, or even frightening, new perspective.[48] This new British approach, while sharing some characteristics with continental systems, explicitly rejects suggestions that it is based on a continental model and it lacks certain of the safeguards of the latter. The whole result looks peculiar to a Canadian criminal law specialist, who might be forgiven for feeling that he is living in a *Charter* induced, due process time-warp. As to restorative justice, it seemed to be gaining currency in the UK prior to 19/11 under the Labour government of Tony Blair, but has become lost in the post 9/11 turn to intelligence-based policing and the Cameron government's "tough on crime" agenda. Is justice simply being sacrificed to efficiency in Britain as some suggest? Is this a shift in British criminal justice from due process values to crime control values, to use the famous 1960's language of Herbert Packer?

B. Adversarial and Restorative Turns in Continental Europe: Rethinking Judge Centred Process

19. Anyone who has seriously studied criminal justice systems on continental Europe knows that the common law lawyer's common stereotypes about "inquisitorial justice", often associated with stereotypical extremes of the "Spanish Inquisition" or the "Ancien Regime" in France, bear little or no resemblance to resemblance modern criminal justice in these continental jurisdictions.[49] So while French jurists, for example, have long spoken of France's "accusatorial" system with a presumption of innocence and rights of the defence at the hearing stage of the criminal process and reject the adjective "inquisitorial" when applied to their system, it cannot be denied that traditional continental criminal procedure is heavily judge-centred in terms of both pre-hearing procedure and the conduct of the formal trial.[50] The contrast with traditional common law procedure, where the prosecution and defence

[46] Home Office, *Report on Delay in the Criminal Justice System*, London, 1997

[47] House of Commons (U.K.) Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System(2008-2009 Report), H.C., London*

[48] Jenny McEwan, "From Adversarialism to Managerialism: Criminal Justice in Transition," (2011) 31 *Legal Studies* 519-546

[49] See A. Esmein, *A History of Continental Criminal Procedure with Special Reference to France,* (translated by John Simpson), Little & Co, Boston, 1913

[50] On the French criminal Justice in general, see Catherine Elliott, *French Criminal Law*, Willan Publishing, Cullompton, 2001 and Jacqueline Hodgson, *French Criminal Justice, 2005*.

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counsel prepare and present the evidence to a relatively passive judge, is stark.[51] On the other hand, the substantive criminal law principles which animate continental criminal law are surprisingly similar to those which underlie the common law. Principles of individual responsibility which require the prosecution to prove both material and mental or fault elements of offences beyond a reasonable doubt in order to obtain a conviction are shared between common law and continental criminal justice systems.[52] This can be seen as the common legacy of the Judeo-Christian notions of individual responsibility for both sin and crime, separated as to whether just deserts are to be imposed in this world or in the hereafter. So too, basic notions of defences are very similar. Justifications such as self-defence, and defence of property are roughly equivalent, and excuses related to mental disorder have striking parallels. There are interesting debates as to how one may classify certain defences such as necessity or automatism. In general one may say that the continental tradition, with its intellectual roots in university scholarship and formal codes with a formal rejection of the notion of binding precedent, expresses its principles and rules at a higher level of abstraction than does the common law tradition with its principles which emerged slowly from the decisions of courts with their attention to factual detail and their strong precedential value.[53] But in this regard, the common law jurists are emulating continental colleagues as law reformers and text writers in the common law world have in the past couple of decades systematized judicial decisions under the categories of elements of offences, justifications, excuses and non-exculpatory or procedural defences in ways which resonate comfortably with their continental cousins.[54] Thus the search for contrasts between common law and continental European criminal justice lies mainly within the realm of criminal procedure, including evidence law.

20. A most basic difference between common law and continental procedure, such as that in France for example, is that in the former, there is a bifurcation of the criminal proceeding between the trial stage which deals with guilt or innocence and the sentencing is done at a separate hearing, while in the latter the criminal process forms a seamless whole which deals with matters of both guilt or innocence and sentence. Roles and rules in the two contexts thus differ. So in the French context, the jury sits and deliberates with the judges on both guilt and innocence, and if necessary, sentence, at the same sitting of the court after the public hearing is completed. In the common law, jurors are the triers of fact who are instructed on the law and its potential relation to the facts, and then deliberate on guilt or innocence by themselves without benefit of the counsel of the presiding judge during their discussions. Jurors will not be told of the principles of sentence or thus the practical impact of their verdict, since in the common law tradition sentencing is a matter solely within the province of the judge and will be dealt with later. These differences in structure mean a great deal for rules of evidence. The basic notion of relevance, the tendency of a fact to be logically probative of a fact in issue, as the first principle of admissibility of evidence, is common to both traditions. However, strict rules surround the admissibility of character and similar fact evidence (including previous convictions) at a common law trial, since this sort of evidence is often deemed too prejudicial to be introduced at the trial, while it will be essential evidence at the sentencing hearing. On the other hand, such evidence is regularly heard in the unified continental process, and often comes out at the beginning in the initial period of questioning of the accused by the presiding judge. It is difficult to over-stress the significance of this distinction between the two traditions.

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[51] Bron McKillop, *Anatomy of a French Murder Case*, (Sydney: Hawkins Press, 1997)

[52] For a fascinating, if dated, comparative review of the principles of the general part of criminal law, see George Fletcher, *Rethinking Criminal Law*, Ocean Press, Dobbs Ferry, 1978

[53] Joseph Dainow,"The Civil Law and the Common Law: Some Points of Comparison" (1967), 15 *Am. J. Comp. Law* 419

[54] See the work of Paul H. Robinson, *Criminal Defences*, and for a brief Canadian example, Bruce P. Archibald, "The Constitutionalization of the General Part of Canadian Criminal Law" (1986) *Can. Bar. Rev*

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21 The most interesting recent developments in continental criminal procedure are thus some significant shifts in the "judge-centered" nature of the process.[55] Under pressure from rulings of the European Court of Human Rights (ECtHR), even France has made fundamental changes to the role of a central figure in French criminal justice, the "examining magistrate" or *juge d'instruction*. This judge used to be in charge of not only the investigation of the offence and questioning of witnesses (including the accused), as well as direction of the judicial police in this regard, but also in charge of the question of pre-trial detention of the accused. There was concern at both the level of principle and practicality that there was a conflict between these two roles as the judge as investigator might find it convenient to have an accused available for questioning for considerable periods, even if there was no likelihood that the accused would not appear for trial if released by him or her in the role of adjudicator on pre-trial detention. Thus the separate position of a pre-trial detention judge or *juges des libertés et de la detention* was created to deal with both the issues of "bail", to use the common law phrase, and the lawfulness or propriety of the conditions of an accused pre-trial detention. In the latter regard, there are new rules in France since 2011 as to rights to counsel for accused persons at the detention phase – developments which are also the result of challenges to French procedure in the ECtHR.[56] The smooth and efficient French model of earlier times is being made more complicated by the task of having to coordinate horizontal judicial authority in the pre-hearing process. Is this a French move from crime control values to due process values?

22. The second area of comparative procedural interest is in those jurisdictions such as Italy, Spain and Portugal where there has been a significant attempt to introduce more adversarial processes and reduce the overwhelmingly dominant role for the judge in the conduct of criminal proceedings. There is not space to fully canvass the nature of these changes. However, the attempt was made to put gathering and presentation of evidence in the hands of prosecutors and defence counsel, rather than having judges in control of these functions. What is of interest here is the role of legal culture and of habit in the process of law reform. In Italy, at least, it has been acknowledged that the reforms have only been partially successful.[57] It has been very difficult to train and persuade lawyers, who heretofore saw their role as commenting on evidence obtained by police and judges and then making legal argument, to adopt the role of directing criminal investigations for either the prosecution or defence and presenting it in court, rather than relying on the dossier of the evidence prepared by purportedly neutral police under judicial direction. Similarly, some Italian judges initially demonstrated reluctance in abandoned their courtroom role of questioning the witness and controlling the pace of the proceeding rather than leaving this to the parties. Changing legal culture revealed itself to be far more difficult than legislating new rules – coordinating theory and practice, of course, is a tough job in many situations.

23. The final continental development which needs attention is that of "penal mediation". In 1999 the Council of Europe promulgated guidelines to encourage penal mediation, or victim-offender mediation, as much of the common law world was being taken by the interest in restorative justice. There are several observations of a comparative nature about how restorative justice or penal

[55] Jacqueline S. Hodgson, "Safeguarding Suspects' Rights in Europe: A Comparative Perspective", (2011) 14 *New Criminal Law Review* 611-665

[56] Aude Dorange and Stewart Field, "Reforming Defence Rights in French Police Custody: A Coming Together in Europe?" (2012) 16 *International Journal of Evidence and Proof* 153-174

[57] Luca Marafioti, "Italian Criminal Procedure: A System Caught Between Two Traditions" in Jackson, Langer & Tillers, (ed.) *Crime, Procedure and Evidence in a Comparative and International Context*, Oxford, Hart Publishing, 2008

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mediation has been introduced in Europe.[58] Firstly, while not in the hands of judges, penal mediation has been state centered, rather than community centered. The idea of "community" as opposed to the equality of all citizens of the republic has, in France for example, been controversial. Thus the "*maisons de justice et de droit,"* which now dot cities in an effort by the French state to provide a neighbourhood justice or *justice de proximité,* are indeed state-provided services, not community centred and controlled instantiations of local deliberative justice. Secondly, the emphasis on what John Braithwaite[59] would call "dyadic victim-offender mediation," similar to such phenomena in the United States, is very different from the kind of restorative conferencing which is promoted in Nova Scotia, New Zealand[60] or parts of Australia where it is thought that having participation of the family or supporters of victims and offender, as well as members of the community with views or resources to share, is a critical aspect of success for full restorative justice. Similar observations have been made about restorative justice or VOM programs in parts of Germany and Belgium which seem to be in the mould of penal mediation rather than full restorative conferencing,[61]although national practices in relation to restorative justice in Europe are quite variable.[62]

C. Beyond Western Stereotypes of Islamic Law: Flexibility in Formality and Restoring Victims

24. The Islamic tradition of *Shar'iah* based criminal law has received harsh reviews in the Western popular press since the events of 9-11 and the situations in Iraq and Afghanistan, as well as events in Nigeria and the Southern Sahara. On the other hand, there has been more considered and careful scholarly commentary in law reviews and recent textbooks on Islamic law published in the English common law world.[63] Western observers with any degree of sophistication in this domain, of whom there are growing numbers, are familiar with the basic outlines of the sources of Islamic jurisprudence, and the structure of traditional *huddud, quisas* and *tazir* offences, but the Islamic world is huge and diverse, and the various instantiations of Islamic criminal law present quite varying characteristics.[64] As someone who is making these remarks at a comparative law conference in Doha, with a primary personal objective of learning more about Islamic criminal law from my hosts and other participants, I advance the following observations with some trepidation (and I trust with some care and circumspection), in order to advance dialogue and mutual understanding which I take to be the purposes of this event. Several areas of debate in recent western commentary on Islamic law catch my attention.

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[58] For an interesting take on this topic, see Johanna Shapland, "Restorative Justice and States' Uneasy Relationship with their Publics" in Adam Crawford (ed.), *International and Comparative Criminal Justice and Urban Governance: Convergence and Divergencein Global, National and Local Settings,* Cambridge University Press, Cambridge, 2011

[59] John Braithwaite, *Crime, Shame and Reintegration,* Cambridge University Press, Cambridge, 1989

[60] Allison Morris and Gabrielle Maxwell, "Restorative Justice in New Zealand," (1998) 2 Western Criminology Review 1

[61] Shapland, *supra,* footnote 51

[62] For a relatively comprehensive survey of European and other views on restorative justice, see Estelle Zinsstag, Marlies Teunkens and Brunilda Pali, *Conferencing: A Way Forward for Restorative Justice in Europe*, European Forum on Restorative Justice, Leuven, 2011

[63] Some standard English language sources would include: Rudolf Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twentieth Centuries,* Cambridge U. Press, Cambridge, 2006; F. Vogel, *Islamic Law and Legal Systems: Studies of Saudi Arabia,* Brill, 1993; Matthew Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law" (1989), 12 *Boston College Int. and Comp. L. Rev.* 29; Matthew Lippman, Sean McConville and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction*, Kruger, New York, 1988

[64] For example, compare Ali Wardak, "Crime and Social Control in Saudi Arabia", in Sheptycki, James and Wardak, Ali (eds.), *Transnational and Comparative Criminology*, Glass House Press, New York, 2005 with Richter H. Moore, "Islamic Legal Systems: Traditional (Saudi Arabia), Contemporary (Bahrain), and Evolving (Pakistan)" in C.H. Fields & R.H. Moore (eds.) *Comparative Criminal Justice,* Illinois: Waveland Press, 1996, and Silvia Tellenbach, "Aspects of the Iranian Code of Islamic Punishment: The Principle of Legality and the Temporal, Spatial and Personal Applicability of the Law" (2009), 9 *International Criminal Law Review,* pp. 689-705.

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25. The first is the matter of sources of law and the question of flexibility of interpretation of Islamic criminal law sometimes referred to under the rubric of the 10th century "closure of the door of *ijtihad*": the purported essential consensus on virtually all important doctrinal questions, obviating the need for further jurisprudential development. This is not a simple question since it relates to the basic nature of the fourfold sources of *Shari'ah* law, that is, the primary religious and practical revelations of the Prophet in the *Qu'ran* and *Sunnah* and/or *hadith*, as well as the subsequent centuries of scholarly reasoning and consensus (the *qiyas* and *ijma*). It is clear that what is broadly described as "criminal law" is, in the Islamic context, necessarily infused with a religious and cultural understanding of the universe, which applies not only to *huddud* crimes against G-d, but the others as well. And this appears to be the case, notwithstanding the adoption at various times of Ottoman and European codes, as well the current mixture of purportedly secular, moderate and revivalist strains, in many Muslim nations. Despite a complex and changing world, it is clear that essential elements of Islamic criminal law must always be consistent with Islamic religious doctrine. It is difficult to conceive of a "separation of church and state" in the Islamic world like that which gradually occurred in European culture following the Renaissance and Enlightenment.[65] However, Western lawyers who often describe one of the key aspects of law as the function of balancing "continuity and change," cannot help but wonder whether *ijtihad* is really closed or can be opened or at least cracked ajar. Some have posed the question in religious terms by asking, if the G-d of Islam is a living G-d, has he stopped communicating with his people, such that previous revelations and understandings are now immutable?[66] For believers in the "one true G-d", a belief which should unite Jews, Muslims and Christians alike as followers of the Book, this is a serious theological and legal question, and not merely some casual blasphemy as it might be thought in the mind an atheist or agnostic!

26. The second observation is the apparent startling similarity between civilian, common law and Islamic jurisprudence when it comes to the general principles of substantive criminal law.[67] Notions of individual responsibility for one's behaviour and its consequences infuse all three systems with a similar approach to accountability. My admittedly limited perusal of Islamic texts dealing with elements of offences leads to the observation that all three systems are concerned with conduct elements and causation, as well as fault elements that concentrate largely on the subjective state of mind of the alleged perpetrator of offences. In addition there are justifications and excuses which take remarkably similar forms, with of course some notable differences. For example, in accordance with Islamic jurisprudence, the common law's ambivalence about whether alcohol and its criminal consequences should be regarded as an aggravating or mitigating circumstance seems definitively resolved in the direction of the former. The point is that Islamic, Civil and Common Law traditions are far more closely aligned with respect to substantive principles than is evident to many casual observers.

27. The third area of fascination in Islamic law is the apparent harshness and rigidity of substantive *huddud* crimes as contrasted with the potential for flexibility in the complexity of the procedural and evidential rules which are mandated in order to successfully prosecute those crimes. Death by stoning for the crime of *zina* has received considerable recent attention among both feminist and non-feminist

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[65] See Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition,* Harvard U. Press, Cambridge, Mass., 1983

[66] Ilias Bantekas, "The Disunity of Islamic Criminal Law and the Modern Role of *Ijtihad*", (2009) 9 *International Criminal Law Review* 651-665

[67] For examples of this phenomenon, see Kevin John Heller and Markus D. Dubber, *The Handbook of Comparative Criminal Law,* Standord U. Press, Standord, 2011, or Richard J. Terrill, *World Criminal Justice Systems: A Comparative Survey (8th ed.),* Elsevier Science and Technology, 2012

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legal scholars in the West, as has the death penalty for apostasy famously authorized by *fatwa* in relation to Salmon Rushdie. Some Islamic commentators have been heard to suggest that the harshness of these Qu'ranic offences is mitigated by the unlikelihood of widespread convictions due to the necessity, for example, of having at least four male (or twice the number of female witnesses?) to actual sexual penetration in order to justify a conviction for adultery. Added to this are references to the importance of the Islamic tradition of repentance, expiation and forgiveness which in the hands of an enlightened *qadi* or judge can alleviate the harshness of the formal punishment.[68] From the Western perspective, such arguments give rise to concerns about the breadth of discretion in the enforcement of the law and problems of equality - gender or otherwise. These are classic western concerns, going back to the time of English constitutional and administrative lawyer, A.V. Dicey, about the rule of law and the potential for injustice in circumstances where there is broadly unfettered or unstructured discretion in the hands of decision makers.[69] In the predominant Western legal view, these concerns are made more acute by one of the most important, and indeed positive and egalitarian, aspects of Islam. That is the fact that *Shari'ah* imposes religious and moral obligations on everyone alike – whether offender, common believer, law-maker or judge. The role of the state in such questions is not necessarily essential or critical: hence the problematic possibility of *fatwas* from *imams* and direct action by communities of believers, without the necessity for state intervention or supervision over due process.

28. The final area of interest in current literature on comparative criminal justice is the identification of restorative justice principles in the basic tenets of *Shari'ah* law. Here there may be some conceptual confusion based on comparative misconceptions on the part of some jurists. Mutaz M. Qafisheh of Hebron University has very recently published an interesting article called "Restorative Justice in the Islamic Penal Law: A Contribution to the Global System"[70]. This article acknowledges that while there is a retributive paradigm which animates certain aspects of Islamic penal justice, it nonetheless suggests that a restorative paradigm co-exists with the punitive one and that the restorative approach is predominant throughout. While victims may originate the penal process by complaint and require proportionate systematic retaliation, or *kasas*, within relevant Islamic jurisprudence, there are three other options. There first is money compensation or *diya,* which can be paid with the assistance of family in the process of *akila,* or through a wider circle of work or local friends and associates, called *diwan.* The second victim option is conciliation, or *sulh*, which judges are required to explore with the complainant before entering into the merits of a case. There appears to be a lack of consensus as to whether this process is appropriate for *huddud* offences. But at any rate it involves seeking peaceful settlement of the dispute by agreement of the parties, in a jurisprudential construct which emerged by analogy to tort and contract. The obligation may be discharged by services in kind, but in such event the victim loses the right to financial compensation. The third victim option is pardon, or *afou,* which, in offences open to *kasas* is said to be preferable, as long as all family members who might have a say in the retaliatory punishment attain consensus on pardoning the offence. Qafisheh then explores five groups of options open to the offender who seeks to avoid the possible retributive penalty. These include (1) repentance (*tawba)* or expiation through demonstration of repentance (*karafa*); (2) offender initiated restitution and/or apology; (3) invocation about doubts about guilt in the evidence, nonetheless combined with other measures of conciliation or even judicial warnings or fines; (4) efforts preserving privacy, or *satyr,* to save the public reputations of those involved, with or without efforts at intercession (*shafaa)* by third parties; and (5) isolation, or *hajr,* by banishment or

[68] See Mohsen Rahami, "Islamic Restorative Traditions and Their Reflections in the Post-Revolutionary Criminal Justice System of Iran" (2007) 15 *European Journal of Crime, Criminal Law and Criminal Justice* 2. More on this point below.
[69] Albert Venn Dicey, *Introduction to the Study of Law and the Constitution*, Macmillan, London, 1893. Lord Acton's adage, that "power corrupts and absolute power absolutely", comes to mind.
[70] Mutaz M. Qafisheh, "Restorative Justice in the Islamic Penal Law: A Contribution to the Global System", (2012) 7 *International Journal of Criminal Justice Sciences* 487-503

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house arrest, or conversely, the reintegration of offenders into the community on the principle that the wrongdoer who commits the wrong becomes "as one who did not commit the sin". These victim or offender initiated options for the avoidance of retributive penalty, are not held together by a coherent theory or set of practices known to restorative justice practitioners as it is emerging round the world and described above. Moreover, as advanced in this context, they seem to flow from an assumption that all forms of leniency can be labelled "restorative justice" – a serious misconception.[71] However, some of these sentiments find a sympathetic resonance in the work of the American legal scholar, Susan Hascall, who asserts that *Qisas* offences should be seen as a variant of restorative justice because of the role of victims and their families in initiating and facilitating compensatory options,[72] and who argues that such restorative approaches from Islamic jurisprudence should be considered in relation to death penalty cases in the United States.[73]

III. "Putatively Pure" and "Abstractly Applied" Reflections on Comparative Models

29. The venerable English pioneer of comparative law, F.H. Lawson, made a straight forward distinction in the purposes of comparative law, between what he called "pure comparative law" and "applied comparative law". The former may relate to what Daniel Jutras at this Doha conference called the "non-vocational" aspect of legal education and research; this surely means, the scholarly exploration of basic values, institutions, principles, histories and cultures in order to understand the deep structural similarities and differences among legal systems. Applied comparative law relates to the utilitarian purposes for which practitioners may wish to employ comparative legal insights and ensure their usefulness in terms of international treaties or commercial negotiations, harmonization of law among various nations or domestic law reform, etc. The two are obviously linked in a manner encapsulated in one of my favourite teaching mantras: "There is nothing so practical in law as good legal theory." That is, applied or practical legal reasoning should be infused with an awareness of legal theory. In that spirit, let me make some brief concluding comparative remarks, in an un-Cartesian manner, of a "franc-tireur" or "sniperish" sort, then speculate on what appears to be a heterogeneity of approaches which characterizes all of the criminal justice models just reviewed, and conclude with some reflections on Amartya Sens "idea of justice" as a possible way of pulling the analysis together .

A. Why the Differences? Hierarchy versus Coordination in Secular & Religious Political Cultures

30. In terms of purportedly "deep" understandings to be derived from comparative criminal law, one of the most influential approaches to this effort is to be found in the work of Mirjan Damaska, the Yugoslav émigré who found an intellectual home at Yale Law School. His book, *The Faces of Justice and State Authority*[74], which posited politico-historical distinctions between closed (pre-dominantly Roman Catholic?) continental European societies and the more open and pluralistic (Protestant?) Anglo-American traditions, Damaska suggests that each culture is associated with differently understood roles for the state, courts and criminal justice. He advanced heuristic models describing

[71] For a definition of restorative justice and my own views on the "restorative justice as leniency" argument, see Bruce Archibald , "Why Restorative Justice is Not Compulsory Compassion: Annalise Acorn's Labour of Love Lost" (2005) 42 *Alberta L. Rev.* 941

[72] Susan C. Hascall, "Restorative Justice in Islam: Should *Qisas* be Considered a Form of Restorative Justice?" *Berkeley Journal of Middle Eastern and Islamic Law,* accessed on line as Duquesne University School of Law Research Paper, No. 2012 - 11

[73] Susan C. Hascall, "Shari'ah Law and Choice: What the United States Should Learn from Islamic Law about the Role of Victims' Families in Death Penalty Cases", (2010-2011) 44 *John Marshall School of Law* 1-67

[74] M. Damaska, *The Faces of Justice and Authority,* Yale U. Press, New Haven, 1986, or see his

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hierarchical and judge driven characteristics of the continental civilian tradition, on the one hand, and a "coordinate" party driven model from the common law tradition on the other. Jeremy Gans makes a perceptive and persuasive argument that, despite the explanatory power of Damaska's ideal types in relation to the continental/hierarchical versus common law/coordinate dichotomy, the schema breaks down when applied to the Islamic criminal law tradition.[75] Under Islamic law the potentially limited role of the state in relation to law enforcement differs dramatically from that in the Western European tradition writ large, and seems to combine both hierarchical and coordinate elements in procedural terms, which breaks the Damaska mould. Islamic jurists acknowledge the strong hierarchical impact of the evolution of Islamic jurisprudence in substantive matters and its authoritative, religious status, while Islamic criminal procedure is heavily victim driven and its outcomes therefore aleatory. Moreover, individual *qadis* wield great discretion and are not beholden to precedent or to appellate courts, in the fashion of the coordinate model. Thus Islamic law evinces some, but not all, of the characteristics of each of Damaska's conceptual models.

B. Why the Similarities: Core Values, Diverse Procedural Principles and Pragmatic Pressures

31. One of the most interesting revelations of comparative scholarship in relation to common law, civilian and Islamic criminal law traditions is the relative uniformity in relation to principles of substantive criminal responsibility. The similar structure for elements of offences and the common constellation of defences (whether justifications, or excuses), among the three traditions, is remarkable. Can one attribute this to a common mono-theistic view in religion, and shared notions of individual moral responsibility for human action in the shadow of a personal and potentially retributive but also merciful God? Tracing the common roots of law and religion in the three legal traditions is a matter of deep cultural analysis with which Islamic jurists are comfortable in their own way, while civilian and common law jurists, who operate in today's predominantly secular Western societies, seem distinctly uncomfortable.

32. The commonality on defences breaks down in relation to non-exculpatory or procedural defences which are related to notions of due process versus crime control and the role of state authorities in criminal justice. The idea of depriving the state of a conviction for the misconduct of its agents plays out differently in the different contexts, and in different historical periods. Due process in Western societies, be they common law or civilian, is a relatively recent post-Enlightenment phenomenon wrought through revolution in France and the United States and gradual transition to constitutional monarchy in countries like the United Kingdom and those in Scandinavia. Even in these jurisdictions, exclusionary rules of evidence, based on judicial sanctioning of state misconduct, are a recent phenomenon. In many Islamic states, where the commitment to democracy in a liberal sense is ideologically problematic, due process based on individual rights (whether conceived in relational terms or not), is perceived in very different ways. Convergence may be a long way off in this context. However, one might posit approaches which highlight shared values across systems at a broad level of generality.

C. Applied Comparative Criminal Justice: Context, Delicacy & Hardiness in Legal Transplants

33. Alan Watson provides us with a useful horticultural analogy when it comes to applied comparative law.[76] In his book on "legal transplants", he analyzes in a systemic, comparative approach the issue of compatibility the institutional soil of one legal culture as an environment for introducing

[75] Jeremy Gans, "The Faces of Islamic Justice" (2009), 18 *Nottingham Law Journal* 1
[76] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, U. Georgia Press, Athens, 1993

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law reform transplants from another. In the criminal context, there are two examples which might be thought to illustrate his point among the three traditions we are examining. Both relate to the role that the public or community can play in the administration of criminal justice. Note the differences between the use and composition of juries in common law and civilian traditions and their absence in the Islamic tradition. In the two secular traditions, their forms alter in relation to hierarchical verses coordinate values in the Damaskan sense, while in the Islamic religious tradition there is perhaps understandably little role for the jury at all, where *qadis* interpret and apply the law. On the other hand, consider restorative justice. Is it possible that restorative processes, developed in civilian (mediation) and common law (restorative conferencing) contexts, might not be complementary transplants in the Islamic context? The Prophet is reported to have said that his community will not agree in error and the recognition of community participation in restorative justice could therefore be acceptable. Restorative conferencing, as understood in the Canadian context, where discretion is structured through statutory purposes and articulated standards, protocols and guidelines, might also be acceptable procedural ways to introduce greater fairness and predictability consistent with Islamic principles.[77] This, of course, would require action from the state, whereas traditional Islamic jurists are capable of asserting a cultural power and authority which can block such state-centered initiatives.[78]

35. The final controversial area which cannot escape comment is that of the evolution of gender roles and gendered criminal laws in the three legal traditions. Sexuality is undeniably at the core of human existence, but sexual relations, as we all know, are shaped by religion, social mores, and law in ways which are inter-twined in complex ways. The change in the "status of women" in Western culture over the 20th Century has in comparative terms been revolutionary. Political equality led to political action by women's organizations which bore tremendous fruit in the 1960's and 1970's. Now there is little serious challenge in the West to the notion that women's equality (to say nothing of equality based on sexual orientation), defined in liberal or relational terms, is a matter of basic human rights. Criminal law and procedure in relation to sexual assault and sexual harassment has undergone a fundamental change in both common law and continental civilian jurisdictions. Whether there is a role for women in reforming criminal law and procedure Islamic law is obviously a matter of tense debate in the Islamic world. However, in a world of personal communication devices and instant, virtually uncontrollable transmission of diverse images, messages and research, it is not inconceivable to think that the views of half the population in Islamic jurisdictions may have an impact. There is already much debate about contrasting Western and Islamic views on human rights from the Islamic side. No doubt there will be much tilling of the jurisprudential ground before legal transplants can find a fertile environment in this domain. In this area there are also huge differences of opinion in Western jurisdictions. Identifying and selecting appropriate transplants can be tricky. For example, women's organizations around the common law world are split over whether it is appropriate to use restorative justice processes in relation to intimate partner violence.[79]

Conclusion

35. The foregoing are but some examples about models of criminal justice which bear more thought and comparative introspection. However, they might be thought to illustrate the connections between pure and applied comparative law and the merits of thinking about certain similar concerns

[77] On the project of explicit linkages between restorative justice and the rule of law, see Bruce Archibald, "Relational Rights and Due Process", *supra.*

[78] Refer to the masterfully crafted and enlightening paper by Frank Vogel presented at this conference.

[79] The concerns are about how to assure that victims are not re-victimized in informal processes which could be characterized by power imbalances and re-establishment of relations of violence. This is a complex area requiring sophisticated training for restorative justice facilitators in order to ensure continuing safety of victims.

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underlying the models of criminal justice across the three traditions of criminal justice under consideration at this conference. What is less clear is the question of whether there are broad human values which can be thought to underpin the models from all three traditions. Perhaps one might start thinking about this by noting that in the Canadian "model" derived from the common law tradition, there are actually multiple paradigms operating simultaneously, whether punitive, rehabilitative, victim-compensatory or restorative, which are justified by different people to differing degrees in different contexts, and sometimes in over-lapping ways. Similarly in Europe, simple punitive or compensatory paradigms with varying degrees of adversarial or investigatory process co-exist with penal mediation and/or restorative justice experimentation, when many observers might think these paradigms to be contradictory or even mutually exclusive. And in like manner, Islamic criminal law is said to embody punitive or deterrent as well compensatory or restorative elements, not all of which can necessarily be reconciled by a consistent rational other than common origins in religious revelation and its intellectual aftermath. Amartya Sen's recent book, *The Idea of Justice,* may help us to come to grips with these problems of reconciliation co-existence and mutual toleance.[80]

36. Sen suggests, using a comparative approach to the idea of justice, that post-enlightenment European and classical South Asian thinking both exhibit two very differing paradigms of justice. The first approach he calls "transcendental institutionalism", in relation to which he locates Hobbes , Locke, Rousseau, Kant and, latterly, John Rawls, in their common desire to work out the principled or theoretical institutional bases for the establishment of societies which can or could be called just. He contrasts this with approaches to justice based on what calls "realization-focussed comparison", exemplars of which are Smith, Condorcet, Bentham, Wollstonecraft, Marx, J.S.Mill and, latterly, Kenneth Arrow, whom he describes as identifying, in relational terms, manifest injustices in the world which they observe around them, and making arguments for their amelioration or elimination in concrete terms, without the necessity for describing the institutional conditions for a perfect society. Sen finds transcendental institutionalism in the classical Sanskrit literature on ethics and jurisprudence associated with the word *niti,* which sees justice in organizational propriety and behavioural correctness, and he finds realization-focussed comparison in the associated with the word *nyaya,* which sees justice emerging in relational and contextual terms. Sen argues that much global injustice is tolerated by the transcendent institutionalism which dominates political and legal discourse in the western world, and ientifies possibilities for greater global justice from basing struggles for justice on realization-based comparisons. The point for Sen is that one can forge progress in response to manifest injustices, such as starvation or ethnic cleansing, where those working to rectify the injustice need not agree on the details underlying theoretical and institutional issues. This is not to say Sen rejects the notion that there are underlying principles for the advancement of the flourishing of the human condition in global terms. Quite the contrary, in his earlier *Development as Freedom,* he identifies conditions for the development of individual human capabilities which will enable them to function in a manner allowing them to choose to live a life "which they have reason to value".[81] Sen argues that there can be plural cultural vantage points for agreement on such values as equality, discursive deliberation and treating others with dignity, concern, care and respect, without reaching agreement on transcendental institutional principles which underlie these ideas of justice. The point for this current discussion on models of justice is that there are plural approaches to justifying the various instantiations of criminal justice in common law, European and Islamic traditions, just as there are may

[80] Amartya Sen, *The Idea of Justice,* Harvard U. Press (Belknap Press), Cambridge (Mass.), 2009

[81] Amartya Sen, *Development as Freedom,* Knopf, New York, 1999. See also the parallel but compatible approach developed in Martha Nussbaum, *Creating Capabilities: The Human Development Approach,* Harvard U. Press (Belknap Press) Cambridge (Mass.), 2011, albeit a more culturally bound, prescriptive orientation. There is now, of course, a burgeoning human capability development literature interpreting and applying these and cognate principles in a variety of contexts.

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be competing rationales for agreeing on common approaches to substantive law, as observed above. Whether there are "manifest injustices" in the procedural, gender, restorative justice or other contexts in relation to which realization-focussed comparison could lead to common or parallel developments is a matter for further comparative study and reflection on the models under consideration here.

37. This first comparative law conference in Qatar has opened frank and constructive discussion on multiple levels. This has had the salutary effect of breaking down some negative stereotypes on all sides, and encouraging mutual respect and understanding. One hopes that this may be the first of a continuing series of such useful events which may lead to the flowering of beautiful and hardy flora in the garden of comparative law and perhaps even some healthy human capability enhancing transplants flourishing in the practical soil of realization-focussed comparison.

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