Crime and Punishment in a Modern Muslim State: A Pragmatic Approach

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Abstract

By and large, contemporary Muslims enjoy all the facilities and comforts of modern life. However, in relation to a governing legal system, they still wish to live according to the laws promulgated through the Qur'an and Sunnah (the Shari'ah) without any alteration and addition. Yet such an approach does not provide a solution for all existing and emerging offences. An acceptable solution is possible if, as proposed by Muhammad Iqbal, the great philosopher of the East, we reinterpret Islam's foundational legal principles in light of our own experiences and conditions. I hold that the foundational legal principles regarding crime and punishment are *ḥadd* (a fixed punishment mandated by the Qur'an and Sunnah), *qiṣāṣ* (equal retaliation [an eye for an eye]), *dīyah* (blood money, ransom), and *ta'zīr* (punishment, usually corporal).

Keywords: foundational legal principles, *hadd*, *qisas*, *diyah*, *tazir*, Muslim legislative assembly, ulema

Introduction

By and large, contemporary Muslims enjoy all the facilities and comforts of modern life. However, in relation to a governing legal system, they still wish to live according to the laws promulgated through the Qur'an and Sunnah (the Shari'ah) without any alteration and addition. Such an approach, however, ignores the fact that "time constantly travels forward, making it impossible for situations or events to recur in exactly the same way."[1] Besides, Islam stands for justice and this concept, like our understanding of the revealed texts, is

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contingent upon the knowledge around us and is shaped by extra-religious forces.[2] In fact, some scholars contend that "justice as a value cannot be religious; it is religion that has to be just."[3] Earlier Muslim jurists who held this view have helped shape the jurisprudential literature that has been passed from generation to generation. As Abdulaziz Sachedina opines,

> The Muslim jurists, by exercise of their rational faculty to its utmost degree, recorded their reactions to the experiences of the community: they created, rather than discovered, God's law. What they created was a literary expression of their aspirations, their consensual interests, and their achievements; what they provided for Islamic society was an ideal, a symbol, a conscience, and a principle of order and identity.[4]

These words suggest that the reforms introduced by the Qur'an and Sunnah cannot be appreciated unless we relate them to the social context in which they were introduced.[5] Given that our social context has immeasurably changed over time, we need to revisit the Shari'ah in a new social context. But the issue is how to proceed. An acceptable solution is possible if, as proposed by Muhammad Iqbal (1877-1938), the great philosopher of the East, we reinterpret Islam's foundational legal principles in light of our own experiences and conditions of life. Needless to say, "reinterpretation" is not the "replacement" of a legal principle but rather its retention with some modification, if dictated by contemporary conditions. For example, classical jurists ruled that a divorced Muslim woman must be taken care of until her *'iddah* (a period of waiting observed by a newly divorced or widowed woman) had passed. However, current law in India extends this maintenance until she remarries or dies if she is unable to maintain herself after the divorce.[6]

Against this background, this paper seeks to identify Islam's foundational legal principles in relation to crime and punishment and to highlight the new legal dimensions that reinterpreting identified principles can offer contemporary Muslims.

The Present Scenario

Today, Muslims and non-Muslims live together. However, in some Muslim-majority countries Muslims are still ruled in accordance with Shari'ah rules deduced and devised by our great jurists during the last fourteen centuries. But our present reality is different now, for we are confronted by technological advancements so exceptional that they have left even their inventors and innovators dazed and dazzled.

Such real-life developments have opened challenges for Muslims in all disciplines of life, including the law. The format and content of future Islamic criminal law is one of these challenges. As Muslims, we still like to rely on inherited penal laws and punishments. But does this approach really help us meet the challenges of the modern era in relation to criminal law simply by focusing on the literal meaning of Qur'anic verses and relevant hadiths coupled with their interpretations by classical jurists? Do these commandments, in their natural form, have the ability to address the multi-dimensional social, political, economic, and other issues of contemporary times? We cannot afford to forget that "the state from the Islamic standpoint is an endeavor to transform ideal principles of equality, solidarity and freedom into space-time forces, an aspiration to realize them in a definite human organization."[7]

The response to this question becomes more demanding, for several Muslim countries are moving toward introducing Islamic criminal law, though it is already administered in few Muslim countries, notably Saudi Arabia. For example, on October 21, 2013, Brunei announced the introduction of Syariah Criminal Penal Code Order 2013. This legislation will be gazetted during April 2014 and implemented in phases within two years after the gazetting date. It incorporates the offences of *ḥadd*, *dīyah*, *qiṣāṣ*, and *ta'zīr* according to the Shafi'i school.[8] Such a position by the governing body of any Muslim country is supportable, because as Muslims we have a firm belief that Islam does not guide us only in relation to religious affairs, but that it is a complete code of life designed to guide us in all spheres, be they legal, economic, commercial, social, governmental, political, or otherwise.

The question is what format crime and punishment should assume in a twenty-first-century Muslim state. The rigid and uncritical reliance on our inherited legal understandings have led us nowhere; rather, our relations with other religious, cultural, and linguistic groups continue to weaken. The possible reason for this is our failure to comprehend the principles of Islamic law in light of contemporary conditions and circumstances. For example, while talking about *qiṣāṣ* the Qur'an states "a slave for a slave" (Q. 2:178). But slavery is no longer a legally recognized institution in any country; even Saudi Arabia officially abolished it in 1962. So, any Muslim's insistence on treating slavery as part of today's recognized legal institution makes no sense. In other words, any contemporary Muslim legislature has to ignore this concept, as well as its attributes and effects, while enacting laws designed to resolve modern legal problems.

In relation to crime, Muslims have so far utilized their energy to classify offences mainly under *ta'zīr*, although these have been very serious in com-

parison to *ḥadd* offences. Reason demands that Muslim rulers should have legislated more serious punishments for such crimes. Muslims have so far failed to provide adequate punishments for new emerging offences, punishments specifically designed to meet the standards of contemporary legal systems and at the same time be considered Islamic. The main reason for this is our inability to differentiate between the essential and the changeable rules that form our legal system. To solve this problem, Muhammad Iqbal attempted to provide an acceptable solution.

Iqbal's Formulations

In order to see that Islam and its laws would remain relevant, Iqbal made following observations in his *The Reconstruction of Religious Thought in Islam*:

> The ultimate spiritual basis of all life, as conceived by Islam, is eternal and reveals itself in variety and change. A society based on such a conception of Reality must reconcile, in its life, the categories of permanence and change. It must possess eternal principles to regulate its collective life; for the eternal gives us a foothold in the world of perpetual change. But eternal principles when they are understood to exclude all possibilities of change which, according to the Qur'an, is one of the greatest "signs" of God, tend to immobilize what is essentially mobile in its nature.[9]
>
> *The claim of the present generation of Muslim liberals to reinterpret the foundational legal principles, in the light of their own experience and the altered conditions of modern life, is, in my opinion, perfectly justified.*[10]
>
> Since things have changed and the world of Islam is today confronted and affected by new forces set free by the extraordinary development of human thought in all directions, I see no reason why this attitude [of] recognising the finality of scholars should be maintained any longer. Did the founders of our schools claim finality for their reasonings and interpretations? Never... The teaching of the Qur'an that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems.[11]

The message conveyed by the above extracts can be summarized as:

1. The legal schools' notion of finality cannot be maintained in view of the development of human thought in all disciplines of life during last fourteen centuries.
2. Each generation should be permitted to solve its own problems in the light of Islam's foundational legal principles. For Iqbal, only those legal

verses in the Qur'an are of a permanent nature which are foundational. Needless to say, a foundational legal principle is that principle upon which a superstructure of legal rules can be constructed.

3. Our predecessors' work is supposed to guide – not to hamper – us in solving our problems. In other words, Iqbal does not treat any past interpretation of foundational legal principles in Qur'an and Sunnah as final.[12]

Foundational Legal Principles regarding Crime and Punishment

What, one may ask, are Islam's foundational legal principles in relation to crime and punishment?[13] Based on my research, these are the concepts of *ḥadd*, *qiṣāṣ*, *ta'zīr*, and *dīyah*. Given this, we need to reinterpret them in light of our own experiences and conditions of life. This paper will highlight the new legal dimensions that a reinterpretation of these concepts can offer us.

Reinterpretation of Ḥadd

In relation to crime and punishment, *ḥadd* (boundary, limit, barrier, and obstacle) means those offences for which the punishment is fixed. In other words, once a Muslim commits a *ḥadd* crime the prescribed punishment cannot be altered either by increasing or decreasing the punishment or pardoning the guilty person. Islam treats adultery (*zinā*), the false accusation of adultery (*qazf*), theft (*sariqah*), armed robbery (*ḥarābah*), intoxicating drink (*shurb al-khamar*), rebellion (*baghīy*), and apostasy (*iritidād*) as *ḥadd* crimes. Thus their respective punishments are unchangeable, are considered as "rights of Allah" (*ḥuqūq Allāh*), and cannot be compromised, withdrawn, or pardoned even by the state or a court.[14] As a result, the term *ḥadd* is applied only to those crimes for which God has fixed the punishment.

But is this list final? Can additions be made? According to the great Andalusian jurist Imam Shatibi (d. 1388), the Shari'ah seeks to protect five things: religion (*dīn*), self (*nafs*), intellect (*'aql*), property (*māl*), and *nasl* (lineage, honor). The above-mentioned offences do, in essence, protect these five goals. Although all of them are really serious, they only affect an individual or a limited number of people. But at this point in time we have to deal with those that affect thousands of people in a country and millions globally, such as terrorism, arson, drug trafficking, women trafficking, smuggling, counterfeiting, and gang rape. In relation to the Internet, cybercrimes like hacking, piracy, illegal trading, fraud, scams, money laundering, stalking, terrorism,

and defamation have major negative implications for individuals, societies, and nations. The irony here is that Muslim scholars generally categorize such offences as *ta'zīr*, thereby allowing a judge or a ruler to exercise his/her discretion in determining the punishment. But how can it be just to allow such personal discretion in regard to those involved in such crimes, especially since such criminals erode a nation's healthy social, economic, political, and other fundamental pillars?

The question is under what heading should Muslim legislators place the punishments for such crimes? In my opinion, the concept of *ḥadd* has the potential to accommodate such offences, for it provides us with a basis upon which we should be able to develop a set of rules for those new situations that demand a fixed punishment. Presently, the laws of Brunei and Malaysia specify a mandatory death sentence for drug traffickers. This is in spirit a *ḥadd* crime, although this particular *ḥadd* (limit) has been fixed generally by a body of Muslim legislators. Islamically, there is nothing wrong with accepting such a formula if we dispassionately think over the following conversation between the Prophet and Mu'adh ibn Jabal when the latter was appointed ruler of Yemen. The Prophet is reported to have asked him how he would decide matters coming before him, to which he replied: "I will judge matters according to the Book of God." And when the Prophet asked, "But if the Book of God contains nothing to guide you?" he replied, "Then I will act on the precedents of the Prophet of God." "But if the precedents fail?" the Prophet persisted, to which Mu'adh replied, "Then I will exert to form my own judgment."[15]

Thus, I posit that a reinterpretation of *ḥadd* means the retention of the ordained *ḥadd* crimes and sufficient liberty for contemporary Muslim legislators to provide fixed punishments for newly emerging serious crimes. In practice, countries like Malaysia and Brunei simultaneously recognize offences falling under *ḥadd* but do not legislatively provide the punishments prescribed in the Qur'an and Sunnah. For example, the Shari'ah decrees that a person proven guilty of theft must have his/her hand and foot amputated; however, Brunei punishes this crime by means of a three-year prison sentence, a fine, or both.[16] Likewise, it recognizes the offence of adultery although the Religious Council and Kadis Court Act (Cap. 77) provides no definite punishment for it. Instead, the law imposes a varying term of imprisonment depending on whether the offender is a man (up to five years) or a woman (one year).[17]

Besides, imposing *ḥadd* punishments has often proven impossible due to the difficulty of meeting the high standards of proof,[18] the presence of doubt,[19] and the retraction of one's confession. Recently, Brunei's state mufti declared

in a lecture that one had to consider many factors in relation to imposing such a punishment on a guilty person.[20] Such approach to laws and their interpretations justify the formula advocated by Iqbal: The present generation must be allowed to interpret foundational legal principles deduced from Qur'an in the light of its own experiences and the conditions of modern life.

Reinterpretation of Qiṣāṣ

Qiṣāṣ (retaliation or making one thing equal to another thing) is an Arabic term understood to mean "the return of life for life."[21] Strictly speaking, however, it deals neither with crime nor with punishment, but reiterates the basic principle of criminal law: There has to be a proportionate punishment for every crime. Its meaning, therefore, varies in relation to death, bodily injury, and property damage.

***Qiṣāṣ* for Intentional Death.** The Qur'an prescribes *qiṣāṣ* for the offence of murder:

> O you who have believed, prescribed for you is legal retribution for those murdered – the free for the free, the slave for the slave, and the female for the female. (Q. 2:178)
>
> We ordained therein for them: "Life for life…" (Q. 5:45)
>
> And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly – We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law]. (Q. 17:33)

These verses have been interpreted to mean that Almighty Allah bestows upon the deceased's heirs the authority to take the offender's life by applying *qiṣāṣ*. The legal systems of contemporary Muslim countries, however, in general have not adopted this interpretation because modern states do not want to transfer the power of retaliation to the deceased's kith and kin. Rather, they want this power to remain in their own hands. A modern Muslim state definitely retaliates on behalf of the victim, but its method is to do so by prescribing the death sentence.

Thus reinterpreting *qiṣāṣ* in relation to intentional death must mean the mandatory imposition of the death sentence. A legal provision on this pattern exists in Pakistan under Section 302(a) of the Pakistan Penal Code, according to which "whoever commits *qatl-i-amd* [intentional murder] shall, subject to

the provisions of this Chapter, be punished with death as *qiṣāṣ*." Paying *dīyah* to the victim's heirs should only allowed if the court deems it appropriate.[22]

***Qiṣāṣ* for Quasi-intentional Murder.** Quasi-intentional murder refers to a death that occurs when one person intends to cause bodily injury to another and the victim dies as a result. It must be proved, however, that the weapon used is unlikely to cause death under ordinary circumstances.[23] A person who dies due to being whipped or hit with a small stone does fall under this category of murder.

Classical jurists recommend only *dīyah* for such killings, due to the hadith wherein the Prophet is reported to have said that "if a person kills another by throwing stone, by a whip, or by a staff, its *dīyah* will be one hundred camels."[24] But how can it be right in today's world to allow a person to move about freely after having intentionally killed someone? Monetary compensation to the victim's heir does not seem to do justice in accordance with the Qur'anic verse "the law of equality is prescribed to you in cases of murder" (Q. 2:178). As the offender intended to cause grievous injury, if not murder, how can we accommodate the "*dīyah* only" remedy when the Qur'an specifically advocates the "eye for an eye" rule?

Modern criminal law classifies such killings as "culpable homicide not amounting to murder"[25] or "involuntary manslaughter."[26] Thus the offender should be subjected to any type of punishment, except the death penalty, up to and including life imprisonment by way of *ta'zīr*.[27] Abdul Qadir Audah, who supports this view, writes that one who has been convicted of quasi-intentional murder may, in addition to the punishment of *dīyah*, also be punished with *ta'zīr* if doing so is in the public interest or justified by the circumstances.[28] If we think over the issue dispassionately, then the appropriate punishment could range from imprisonment for the minimum prescribed period to life imprisonment. While paying *dīyah* to the heir should not be mandatory, it may be allowed if the court deems it appropriate. Besides, jurists recognize the principle that the heir may pardon the offender without compensation.[29] This principle needs to be rethought because at the present time, quasi-intentional murder is considered a crime against the state as opposed to a crime against the deceased's heir. A Muslim state cannot allow two sets of authorities to deal with the same issue. The truth is that even the state does not have the general power to pardon the guilty party in such cases.

***Qiṣāṣ* for Death due to a Rash or Negligent Act.** A person may also die due to a rash or negligent act on the part of the offender. Rashness involves

conduct that shows an utter disregard for the life and safety of others. The test for determining negligence is whether a reasonable person in such circumstances would have realized the potential for injury and stopped or changed his/her course of action in order to avoid it. If a reasonable person would have done so but the offender did not, then the victim's death was the result of negligence. This offence is less severe than intentional death or quasi-intentional death because there is neither intention nor knowledge that this act would, in all probability, result in death.

The issue here is how the Shari'ah deals with this situation. The Qur'an states: "He who has killed a believer by mistake must set free a believing slave and pay *dīyah* to the deceased's family, unless they remit it freely" (Q. 4:92). Based on this verse, classical jurists recognized the payment of *dīyah* as the punishment for such a crime. But the fact is that the person's death was not caused by pure mistake, but rather by the offender's rash or negligent act. Thus the proper *qiṣāṣ* should be a *ta'zīr* punishment, possibly imprisonment, but something that is definitely less than the punishment prescribed for intentional murder and quasi-intentional murder. Anwarullah suggests a *ta'zīr* punishment in addition to *dīyah* for death resulting from rash driving.[30] The Brunei Penal Code stipulates a punishment of at least two years imprisonment, a fine, or both.[31]

Thus *qiṣāṣ* for such a death may mean any period of imprisonment determined by a *ta'zīr* punishment that is less than the period provided for quasi-intentional murder. *Dīyah* should be allowed if the state rules it appropriate.

***Qiṣāṣ* for Intentional Injury.** The Qur'an prescribes *qiṣāṣ* for all offences that cause bodily injury: "We ordained therein for them … eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal" (Q. 5:45). This verse has been interpreted to mean that the authority of taking *qiṣāṣ* in a case of injury is bestowed upon the living victim. However, Imam al-Shafi'i (d. 820) does not recognize *qiṣāṣ* in relation to any injury suffered by non-Muslims[32] and thus allows them only the remedy of compensation. Imam Abu Hanifah (d. 767) views the injury of Muslim or non-Muslim as equal and rules that a Muslim who causes injury liable to *qiṣāṣ* to a non-Muslim will be punished with *qiṣāṣ*.

But as mentioned above, such interpretations can hardly find a place in contemporary legal systems. Modern Muslim states in general do not believe in the literal implementation of the "an eye for an eye" rule. Rather, they punish on the victim's behalf via their own mechanisms of retaliation: prescribing imprisonment for a definite period and a fine for intentional injury. Such an

approach ensures that the prescribed punishment is proportionate to the gravity of the unjustifiably inflicted injury. Thus reinterpreting *qiṣāṣ* in relation to intentional injury would mean imposing any sentence, barring death, by the state that is truly proportionate to the committed crime and the payment of *dīyah* to the victim (if the state deems it appropriate).

Reinterpreting Dīyah

For legal purposes, *dīyah* (blood money and ransom) is the financial compensation paid to the victim or his/her heirs. In essence, in the case of death it is the fine paid by the killer or his/her family or clan to the victim's family or clan; in case of injury or grievous injury, it is paid to the victim.

***Dīyah* in the Case of Death.** The Qur'an allows *dīyah* in cases of accidental and intentional killing.

> Whoever kills a believer by mistake, it is ordained that he should free a believing slave and pay blood-money to the deceased's family unless they remit it freely … If the deceased belonged to a people with whom you have treaty of mutual alliance, blood-money should be paid to his family. (Q. 4:92-93)

> O ye who believe! The law of equality is prescribed to you in cases of murder…. But if any remission is made by the brother of the slain then grant any reasonable demand and compensate him with handsome gratitude; this is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty. (Q. 2:178)

Thus the Qur'an allows *dīyah* in cases of both intentional and accidental killing. Many Muslim jurists opine that the rationale behind making it part of the Islamic model of justice was to end a cycle of violence and vendetta that could be perpetuated by the retributive model of justice. Therefore, the practice of compensatory payment was enshrined to establish reconciliation between the families of the victim and the offender. Additionally, the voluntary nature of reconciliation served another purpose: the offender might atone for his/her sins.[33]

Presently, accidental killing includes death in a fire, an industrial mishap, or a road accident. In the whole process of intentional and accidental killings, the "brother" of the deceased is treated as an essential party. The word "brother" is not interpreted literally, but rather includes the deceased's heirs. The Qur'an leaves the quantity, nature, and other matters related to *dīyah* open

to the society's customs and traditions. However, the four Sunni legal schools of thought do not provide uniform rate of *dīyah* for Jewish and Christian heirs. The Shafi'is prescribe one third of the amount paid for a Muslim, the Malikis prescribe one half, and the Hanafis do not differentiate between Muslims and non-Muslims. Such a practice is still followed in Arab countries. For example, in Saudi Arabia the victim's heirs have the right to settle for *dīyah* instead of the death sentence. The prescribed blood money rates are:

- 300,000 riyals [US$ 79,985] if the victim is a Muslim man
- 150,000 riyals [US$ 39,992.50] if a Muslim woman
- 150,000 riyals [US$ 39,992.50] if a Christian or Jewish man
- 75,000 riyals [US$ 19,996.25] if a Christian or Jewish woman
- 6,666 riyals [US$ 1,776] if a man of any other religion
- 3,333 riyals [US$ 888] if a woman of any other religion.[34]

Iran has also developed a hierarchy of rates. Initially, the rates for crimes involving death or bodily injury to Iranian non-Muslims used to be half the rate prescribed for Muslim victims. This was changed in 2004 by the Expediency Discernment Council, which authorized the collection of equal *dīyah* for the death of Muslims and non-Muslims. The rates for female victims is half that for male victims in murder cases, but equal in cases of insurance and accidental death. However, as Baha'is are excluded from the provisions of the equalization legislation, no blood money is paid to their families.[35]

The question here for the contemporary state is to what extent the concept of "brother" or other legal heirs, as an essential party to a compensation claim, is acceptable in relation to intentional death? At present, in general terms these states would hardly appreciate these people's involvement in cases of *dīyah* claims related to intentional killing. Besides, in this day and age a legal claim to compensation can hardly be legislatively increased or decreased on the basis of the claimant's religion or sect. Thus the claim for *dīyah* as a matter of right needs to be confined to accidental death. In relation to intentional death, as contended earlier, the state should have the option of either allowing or disallowing a *dīyah* claim.

***Dīyah* in the Case of Injury.** Islam allows *dīyah* in the case of intentional and accidental injury, although there is also an option of *qiṣāṣ* for intentional injury. Classical jurists have identified the amount of *dīyah* in proportion to the severity of the injury. For example, a full *dīyah* is recognized in the case of amputation or destruction of any bodily member or joint, and a half *dīyah*

in the case of permanently impairing the powers of a bodily member or joint. Likewise, 5 percent of the *dīyah* is prescribed for the loss of a tooth.

Clearly, the amount depends upon the gravity of the injury. If it is serious, the amount will be accordingly high. Thus a fraction of the full *dīyah* can be paid for a minor injury. Classical jurists deserve all praise for meticulously identifying the payable fraction in relation to nature of the injury. This procedure of compensation operates in the United Kingdom as well, where guidelines have been prepared for judges who are responsible for assessing general damages for all types of personal injuries. For example, in the case of very severe brain damage the damages range from £180,000 (US$ 286,200) to £257,750 (US$ 409,822), for moderately severe brain damage from £140,000 (US$ 222,600) to £180,000 (US$ 286,200), and for damage to a tooth from £700 (US$ 1,113) to £7,250 (US$ 11,527).[36]

In addition to injury-related damages, the law in most countries allows damages to be paid based on the amount of lost earnings. Here, modern law considers the injured person's annual income before injury, age at the time of injury, prospects for promotion if employed, loss of earnings from the date of injury to the date of trial, and the future loss of earnings.[37] In relation to personal injuries as developed by classical jurists, Islamic law does not take this aspect into consideration. Instead, it simply focuses on the nature of injury irrespective of the injured person's status and earnings. Possible reasons for this oversight may include the absence of employment, business, commercial activities, and means of communication in the modern sense.

But with the passage of time, our interpretation of *dīyah* also has to change in order to fulfill its stated function: to compensate the victim in accordance with the financial and other losses caused by the injury. But such losses cannot be calculated the same way they were fourteen centuries ago. For example, we cannot place a laborer and a specialist doctor on the same level while assessing their rate of compensation for personal injury. Thus any reinterpretation of the word *dīyah* in relation to non-intentional injury should include both injury-related compensation and the loss of earnings.

Reinterpreting Ta'zīr

In relation to criminal law, *ta'zīr* (to prevent, honor, correct, moderate, avoid, and assist) signifies the punishment for a crime that has not been fixed in either the Qur'an or the Sunnah. In other words, it has been left to the discretion of the ruler or the judge to fix it in accordance with the prevailing circumstances in order to reform the offender and restrain him/her or others from committing

the same crime. Among the recognized punishments are whipping, imprisonment, banishment, fine, execution, counseling, public or private censure, family and clan pressure and support, seizure of property, and confinement at home or in a place of detention. Other *ta'zīr*-derived punishments include dismissing an employee and transferring him/her to another place for crimes like bribery, embezzlement, and the misuse of official powers. Humiliation, when employed as a *ta'zīr* punishment, involved placing the offenders upon animals, blackening their faces, and parading them in public places.

Ta'zīr punishments are still carried out in many Muslim countries. No rational person can be expected to oppose them because the modern criminal justice system actually contains all of the ingredients present in such punishments. Therefore retaining them is highly recommended, although the concept itself needs to be reinterpreted along the following lines.

***TA'ZĪR* PUNISHMENT AND OFFICIAL DISCRETION.** *Ta'zīr* punishments are applied to those offences left to the judge's or ruler's discretion. So long as the offence does not fall within the range of *ḥadd*, *dīyah*, and *qiṣāṣ*, in general terms a judge has the full discretion to hand down any punishment, for example, a simple warning or censure for a serious offence. But the question is whether a responsible Muslim state can afford to provide such latitude in the contemporary legal setting. The proper alternative is to empower only the ruler to provide the appropriate machinery for enacting laws for all offences. In today's world, this power can be vested *only* in a country's legislative branch.

***TA'ZĪR* MAY IMPOSE TWO OR MORE PUNISHMENTS.** Modern legal systems provide a term of imprisonment and a fine for many offences. In such situations, a judge has no option but to impose both punishments; however, he/she may stipulate the minimum and maximum periods of imprisonment and amounts of fine. The absence of "or" in relation to prescribed punishments deprives a judge of using his/her personal discretion. A Muslim state may also authorize a judge to impose both punishments if the gravity of the offence warrants it. However, it can fall within a *ta'zīr* punishment if the law prescribes the minimum and maximum periods of imprisonment and amounts of fine.

***TA'ZĪR* CAN BE WITHIN ONE PUNISHMENT.** An Islamic state can legislate either a term of imprisonment or a fine. However, the legal provisions may state that a judge has the discretion to impose the maximum and minimum periods of imprisonment *or* the minimum or maximum amounts of fine. Such an ap-

proach does not oblige a judge to impose two punishments, whereas it does allow discretion in relation to the period of imprisonment.

***Ta'zīr* punishment to be based on extraneous factors.** Contemporary legal systems often provide punishment for an offence irrespective of the circumstances under which the offender committed it. The thrust of the law is on punishing the offenders with the least concern for the social, economic, and other reasons of why the crime was committed. The legislation of an Islamic state must vest a judge with discretion so that he/she can impose nominal punishments (e.g., counseling, warning, or censure) in cases where the crime is proven to have been the result of social or economic hardship.

***Ta'zīr* punishments may not be universal.** Customs and cultures vary from country to country and from community to community. Even among various tribal groups in Muslim countries we find a gap in thinking and approaches to day-to-day life. Given this reality, how can a uniform *ta'zīr* punishment code be formulated for the global Muslim community? The point I am trying to make is that while Shari'ah law and its principles are universal for Muslims, the same cannot be said of *ta'zīr* punishments. Each nation should be allowed to enact those punishments that reflect the expectations and aspirations of its society, which may contain people of multi-religious, multi-cultural, and multi-lingual backgrounds.

A Mechanism for Reinterpretation

The other related issue is who should have the power to reinterpret the concepts of *ḥadd*, *qiṣāṣ*, *dīyah* and *ta'zīr*. In the absence of guidance from the Qur'an and Sunnah, Muslim religious scholars have authorized the use of *ijmā'* and *qiyās* to solve problems. But what does *ijmā'* mean in the present circumstances, and who is qualified to undertake it? Iqbal answers these questions in his *Reconstruction*:

> The transfer of the power of *Ijtihad* from individual representatives of schools to a Muslim legislative assembly, which in view of the growth of opposing sects, is the only form *Ijma'* can take in modern times, will secure contributions to legal discussions from laymen who happen to possess a keen insight into affairs. In this way alone we can stir into activity the dormant spirit of life in our legal system, and give it an evolutionary outlook.[38]

These lines suggest that legislation in an Islamic country can no longer be entrusted exclusively to an individual jurist representing a particular school

of thought. Such an approach, according to Iqbal, would simply lead to the growth of opposing sects, thereby dividing the ummah even further. In order to add a unifying element to *ijmā'*, Iqbal considers the rulings of the legislative assembly as the only possible answer. He opines that such an approach would allow Muslims *to stir into activity the dormant spirit in our legal system and give it an evolutionary outlook*. It implies that the collective deliberations on an issue can result in the best formulations and prescriptions for the ummah.[39]

With regard to membership in the legislative assembly, he insists on laymen who happen to possess a keen insight into affairs. We contend that Iqbal used *laymen* in the sense of those Muslims who may not be conversant with the intricacies of Islamic jurisprudence but do possess an in-depth and profound understanding of other disciplines of life.[40] This approach has implicitly found favor with AbdulHamid AbuSulayman:

> We must realize, however, that modern knowledge has expanded immensely and has become so complex that *it is impossible for a single person to acquire a command of the multiple aspects of even one branch of knowledge.* This means that the ability necessary for *Ijtihad* in any one of the various branches of knowledge requires specialization in and absolute mastery of that branch. In view of this multifariousness of knowledge, and the multifariousness of the fields of specialization, it is clear that *Ijtihad*, insights, solutions and alternatives, in the domain of social and scientific knowledge cannot be provided by the specialists in legal studies alone. But the task and the expectation are impossible.
>
> This is most noticeable in the case of legislators who formulate and categorize the laws and regulations covering economics, politics, information, industry and scientific research or transformation. It cannot be assumed that they are the masterminds of the knowledge from which the laws and regulation have been derived. In view of the achievements and progress made in the modern fields of knowledge, we need to bring to bear the expertise of economists, politicians, administrators and others who are well-versed in the various affairs of social life. Such specialists should at the same time have first-hand knowledge of the Qur'an and the Sunnah, which give them proper insight into the morals, values and purpose of existence as understood in Islam and validate their activities and contributions.[41]

Even the Pakistani judiciary has endorsed Iqbal's legislative assembly theory as the best form of *ijmā'*. In *Khurshid Jan*,[42] Justice Muhammad Yaqub Ali of Lahore High Court made the following observation[43]:

> With due respect to them, the members of our Legislative Assemblies, at present, are not sufficiently learned so as to be considered fit for *Ijtihad* or *Qiyas*, the two essential conditions for participating in an *Ijma*. This, however, is not a counsel of despair. A remedy against it has been suggested by Dr. Iqbal and we may add that the pre-requisite for every member of a Legislative Assembly in Pakistan should be a fair amount of knowledge of law-making in Islam. *We do not mean that each one of them should be Faqih or a Mujtahid. But at the same time he should not be wholly unfamiliar with the primary duty of a legislator in an Islamic country*.[44]

His "layman … into affairs" theory raises the question of the ulama's role in the future legislative process. Iqbal did not exclude them, but rather assigned them a definite role and called for their involvement during the initial period of any proposed legislation: "*The ulama should form a vital part of a Muslim legislative assembly helping and guiding free discussion on questions relating to law."*[45]

However, he does not want the legislative assembly's sovereignty to be impaired by any other institution. Furthermore, he expects those who dominate this future legislative assembly to possess the amount of knowledge required to fully understand the subtleties of Islamic law. We find support for our argument in *Khurshid Jan*,[46] where the learned judge observed:

> Two distinct thoughts are visible in these observations. One that the legislative assemblies of the modern state may assume the role of Ijma' and the other that the sovereignty of the legislature should not be impaired by subjecting it to the authority of an external organ.[47]

Besides, Muslims should not believe that Iqbal includes general ordinary mosque imams in the category of "ulama," for he defines the latter as those people who are *conversant with the affairs of the world*.[48] Maulana Abul A'la Maududi (d. 1979) gives a vivid depiction of these persons' qualifications: "Our law-makers should, inter alia, have acquaintance with the problems and conditions of our times – the new problems of life to which an answer is sought and the new conditions in which the principles and injunctions of the Shari'ah are to be applied."[49]

Conclusion

From the above discussion it is clear that Islamic criminal law is relevant for all times, provided that the foundational legal principles of *ḥadd*, *qiṣāṣ*, *dīyah*, and *ta'zīr* are interpreted in the light of our times through legislative assem-

blies. This approach would enable us, as Muslims, to deal with contemporary penal problems without compromising on the fundamentals of the divinely ordained law. The future penal code of a Muslim nation should classify crimes in accordance with the *ḥadd*, *qiṣāṣ*, *dīyah*, and *ta'zīr* punishments rather than on the basis of the crime's subject matter. This responsibility must be discharged through the legislative assembly, which should be comprised of "laymen" who have insight of the affairs of the present world as well as those ulama who have a profound understanding of today's penal realities.

Endnotes

1. Taha Jabir al Alwani, *Ijtihad* (Herndon, VA: IIIT, 1993), 24-25. It is not possible today to impose the proposals and ideas put forward in Madinah by Imam Malik (d. 795) and his contemporaries, just as it is not possible to ignore or discount all of the developments made after his death in the field of human sciences.
2. Ziba Mir-Hosseini, "Towards Gender Equality: Muslim Family Laws and the Shariah" in *Wanted: Equality and Justice in the Muslim Family*, ed. Zainah Anwar (Petaling Jaya, Malaysia: Musawah, 2009), 26.
3. See Mahmoud Sadri and Ahmed Sadri (trans. and ed.), "Islamic Revival and Reform: The Theological Approaches," in *Reason, Freedom, and Democracy in Islam: Essential Writings of Abdelkarim Sorush* (New York: Oxford University Press, 2000), 131-33.
4. Abdulaziz Sachedina, "The Ideal and Real in Islamic Law," in *Perspectives on Islamic Law, Justice, and Society*, ed. R. S. Khare (New York: Rowman and Littlefield, 1999), 29.
5. Muhammad Khalid Masud, "*Ikhtilaf al-Fuqaha'*: Diversity in *Fiqh* as a Social Construction," in *Wanted*, 85.
6. Danial Latifi v Union Of India (2001) 7 SCC 740.
7. Mohammad Iqbal, *Reconstruction of Religious Thought in Islam* (Delhi: Kitab Publishing House, 1974), 147-48. The words *equality*, *solidarity* and *freedom* have replaced the word *these* in this paragraph.
8. See *Brunei Times*, November 17, 2013, 2.
9. S. M. Iqbal, *Reconstruction of Religious Thought in Islam*, 2d ed. (Lahore: Institute of Islamic Culture, 1989), 117. Hereinafter referred to as *Reconstruction*.
10. Ibid., 134 (my emphasis).
11. Ibid., 133-34.
12. Mohd Altaf Hussain Ahangar, "Jurisprudential Basis for Islam Hadhari," *Shariah Law Reports* 4 (2005): 26-27.
13. Iqbal does not identify any foundational Islamic legal principle in relation to crime and punishment. Rather, he tries to identify one foundational legal principle in the Qur'an when he writes:

> The new culture finds the foundation of world-unity in the principle of Tawhid. The essence of "Tauhid" as a working idea is equality, solidarity and freedom. The state, from the Islamic standpoint, is an endeavor to transform these ideal principles into space-time forces, as aspiration to realize them in a definite human organization. Islam as a polity is only a practical means of making this principle a living factor in the intellectual and emotional life of mankind.

For further details, see Muhammad Altaf Hussain Ahangar, "Iqbal and Qur'an: A Legal Perspective," *Iqbal Review* 35, no. 3 (October 1994): 1-22.

14. Ghulam Muhammad v Mst. Murad Bakhta PLD 1991 Federal Shairat Court 78.
15. *Sunan Abī Dāwūd*, hadith book 24, "Kitāb al-Aqdīyah," hadith no. 3585; *Sunan al-Dārimī* (Damsacus: I'tidal, 1349 AH), 1:60.
16. See Brunei Darussalam Penal Code [chap. 22], section 379.
17. Section 178(3).
18. Sanaullah v State, PLD 1991, Federal Shariat Court 186.
19. Atta Muhammad v The State, PLD 2010, Pakistan Shariat Court.
20. *Borneo Bulletin*, February 16, 2013, 3.
21. Muhammad Iqbal Siddiqui, *The Penal Law of Islam*, 2d ed. (New Delhi: Ada Publishers & Distributors, 2003).
22. The reinterpretation of *dīyah* is discussed below at proper place.
23. Anwarullah, *The Criminal Law of Islam* (Kuala Lumpur: A. S. Nordeen, 1997), 63.
24. Abu Dawud al-Sijistani, *Al-Sunan* (Cairo: Dar Ihya' al-Sunnah al-Nabawiyyah, 1975), 2:492.
25. Brunei Darussalam Penal Code [Chap. 22], Section 299.
26. Both British and American law recognize this expression. See Michael Jefferson, *Criminal Law*, 10th ed. (England: Pearson Education Ltd., 2011), 470-505.
27. *Ta'zīr* signifies the punishment that has not been fixed by the Qur'an or the Sunnah.
28. Abd al-Qadir Awdah, *Al-Tashrī' al-Jinā'ī al-Islāmī* (Beirut: Dar al-Kutub al-'Arabiyyah, 1978), 2:200.
29. Anwarullah, *Criminal Law*, 64, 85-86.
30 Ibid., 87.
31. See Section 304 A.
32. Anwarullah, *Criminal Law*, 104.
33. http://www.dailytimes.com.pk/default.asp?page=2013%5C02%5C25%5Cstory_25-2-2013_pg3_6.
34. http://en.wikipedia.org/wiki/Diyya. The US$ equivalents are based on the official currency exchange rates as of November 14, 2013.
35. Ibid.
36. Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 9th ed. (USA: Oxford University Press, 2008). The US$

equivalents are based on the official currency exchange rates as of November 14, 2013.

37. For further details, see Mohd Altaf Hussain Ahangar, "Recoverability of Illegal Earnings in Tort: Need for Legislative Intervention," *IIUM Law Journal* 8, no. 1 (2000): 41-64; Mohd Altaf Hussain Ahangar, "Damages for Loss of Earnings in Malaysia: The Need for Just Multiplier," *Malayan Law Journal* 3 (2003): xlix-xcvi; Mohd Altaf Hussain Ahangar, "Assessment of Damages for Loss of Future Earnings in Malaysia: An Appraisal of Judicial Ethics," *Vindobono Journal of International Commercial Law and Arbitration* (Australia) 8, (2004): 131-44; Mohd Altaf Hussain Ahangar, "Dependability of Dependency Claims: The Malaysian Perspective, *Malayan Law Journal* 3 (2004): xxii –xxxiii.
38. Iqbal, *Reconstruction*, 138
39. Italics provided by the author. For further details, see Mohd Altaf Hussain Ahangar, "Iqbal's Approach to Legislation in Islam: An Analysis" *Insight Islamicus*, 2 (2002): 45-66, 2002; Mohd Altaf Hussain Ahangar, "Iqbal's Theory of Ijma: Perspectives and Prospects," *Iqbal Review* 38, no. 1 (April 1997): 17-38; Mohd Altaf Hussain Ahangar, "Iqbal's Views on Ijma: Legislative and Judicial Trends," *Islamic and Comparative Law Review* 15 and 16 (1995-1996): 95-110.
40. Ahangar, "Iqbal's Theory of Ijma," 24.
41. AbdulHamid A. AbuSulayman, "Islamization of Knowledge: A New Approach toward Reform of Contemporary Knowledge," in *Islam: Source and Purpose of Knowledge* (Herndon, VA: IIIT, 1988), 93-118 at 102 (italics provided by the author).
42. Khurshid Jan v. Fazal Dad, PLD 1964 (W.P.) Lahore 558.
43. Ibid., 578-79 (italics provided by the author).
44. IIbid., 579 (italics provided by the author).
45. Iqbal, *Reconstruction*, 139-40 (italics provided by the author).
46. Khurshid Jan v. Fazal Dad, PLD 1964 (W.P.) Lahore 558.
47. Ibid., 577.
48. Iqbal, *Reconstruction*, 139-40.
49. Sayyid Abul A'la Maududi, *The Islamic Law and Constitution*, 7th ed. (Lahore: Islamic Publications, 1980), 77. He lists other qualifications, such as faith in the Shari'ah, a proper knowledge of Arabic, knowledge of and insight into the teachings of the Qur'an and Sunnah, acquaintance with the contributions of earlier jurists, and commendable character and conduct.