

# Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?

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## INTRODUCTION

The development of criminal punishments in the West is a subject of interest for scholars in various fields.<sup>1</sup> One of the foundational ideas has been that the movement away from corporal punishment to other forms of punishment, such as imprisonment, has been an improvement. But, such ideas have not gone unquestioned. In *Discipline and Punish: the Birth of the Prison*, Michel Foucault asserts that the movement away from the punishment of the body and towards the imprisonment of the body through the widespread institution of the prison has resulted in an even more heinous form of punishment: the punishment of the soul.<sup>2</sup> In addition, Foucault contends that the focus on rehabilitation in prisons encourages criminality.<sup>3</sup> Although he does not directly advocate restorative justice ideas, his criticism of the prison system has given rise

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1. When this article refers to the term “the West” what is meant is historically Christian majority countries such as those in Western Europe and the United Kingdom and their former colonies that were populated by immigrants from Europe including the United States, Canada, New Zealand and Australia. These common law countries and their civil law cousins are the inheritors of a tradition that has officially excluded from their histories and intellectual discourses the contributions of the Muslim world.

2. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 3-8 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

3. *Id.* In addition, since the rate of recidivism is famously high in the United States, Foucault may have had a point. But this is not the focus of this article.

to new ways of thinking in penology – at least at the academic level.<sup>4</sup> For Foucault, the constant monitoring of the prisoners' every movement by prison officials abolishes their very humanity. Foucault's ideas are compatible with both restorative justice ideals and the ideals of Islamic criminal jurisprudence in general, and in particular, the law of *qisas* (a category of crime that includes intentional homicide and wounding).<sup>5</sup> Coming from different traditions, both restorative justice and Islamic criminal jurisprudence emphasize the dignity of the individual and support opportunities for rehabilitation and healing for all parties affected by the crime.

In common and civil law traditions, involvement of the community and victims in sentencing has been minimal for hundreds of years, but the restorative justice movement is questioning this well-established practice. The restorative justice movement criticizes the lack of direct involvement by the community and the victims in sentencing and the modes of punishment utilized by criminal justice systems. More direct involvement by the stakeholders is thought to advance one of the goals of this movement, which is to humanize both the victims and the perpetrators of the crime.

In seeking models of reform for the criminal justice system, the restorative justice movement looks beyond contemporary state level societies in the West. Western scholars, colonial administrators, and others have long denounced customary legal practice, characterizing them as primitive and inhumane. However, those in the restorative

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4. Foucault did, however, observe that individuals maintain a certain amount of autonomy and choice beyond that which is claimed by the government; and therefore, they control their own actions to a certain extent. ANDREW WOOLFORD & R.S. RATNER, *INFORMAL RECKONINGS: CONFLICT RESOLUTION IN MEDIATION, RESTORATIVE JUSTICE AND REPARATIONS* 21 (Routledge-Cavendish 2008).

5. A word about the taxonomy of crimes in Islamic law is necessary for the reader who is not familiar with Islamic criminal law. There are three main types of crimes in Islamic law, the *hudud*, *qisas* and *tazeer*. The *hudud* crimes are those with a "fixed" penalty. They are considered crimes against God, and their punishments are proscribed in the Qur'an, and sometimes in the *Hadith*. Although there is some disagreement as to the crimes that are considered *hudud*, they generally include theft, *zina* (fornication and adultery), false accusation of *zina*, apostasy, drinking alcohol and highway robbery. Each of these crimes is punishable by some form or corporal punishment. The *qisas* crimes include intentional wounding and intentional homicide. The *tazeer* (or *tazir*) crimes are other wrongs against persons or the state but for which the punishment is not proscribed in the Qur'an, and the punishment is left to the state or the discretion of the judge. The focus of this article is on the *qisas* crimes, as the victims play a central role in the prosecution and punishment for these crimes. They are considered crimes against an individual. These crimes are discussed in more detail in section III A of this paper.

justice movement are now drawing inspiration from customary practices that involve the community, families, perpetrators and victims in sentencing decisions. They are also devising new types of consequences for criminal activities that are designed to not only deter crime but also to restore the harmony of society. The movement has not, however, looked to Islamic criminal law for inspiration or for models of restorative justice practices. This oversight is unfortunate. Modern states that employ the victim-centered law of *qisas* have much more in common with modern Western states than do indigenous groups living within modern state level societies or their predecessors, who are only known by historical accounts.

The focus of this article is two-fold: (1) it addresses the question of the extent to which the law of *qisas* can be considered a form of restorative justice, even though it allows for corporal punishment, and (2) it explores what the law of *qisas*, both as described by the notable scholars of the classical and contemporary periods, can offer the continuing discourse on reforming the Western penal systems in accordance with ideals of restorative justice.<sup>6</sup> The penal codes of Northern Nigeria will be examined as an illustration of an attempt by a modern state to codify and implement the law of *qisas*. I hope that this article will lead to further research on the restorative justice aspects of the law of *qisas* and the practice of forgiveness in states that include *qisas* in their criminal codes.

Islamic criminal law divides crimes into categories that are distinct from those employed in most common law and civil law countries. The *qisas* crimes are particularly interesting for restorative justice studies because the victims retain a central role in the prosecution and sentencing of defendants. In most versions of classical Islamic jurisprudence, the prosecution of the *qisas* crimes must be instigated by the victim. The victims of *qisas* crimes are given a choice as to the punishment that will be imposed. They may choose to forgive the defendant and demand no punishment at all, or they may demand a payment, known as “*diyya*,” as compensation for the crime. In this sense, the law of *qisas* has something in common with the small-scale societies

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6. There are two types of *qisas* crimes. The first is the penalty inflicted for intentional homicide, while the second refers to the penalty for inflicting intentional personal injury. The later form is sometimes referred to as *qawad*. See MOHAMED S. EL AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 71 (American Trust Publications 1982). However, for the purposes of this paper, which focuses mainly on the penalties available for intentional wounding, the term *qisas* will be used to refer to both types of crimes and their respective punishments.

that advocates of restorative justice study to find inspiration for their practices. Furthermore, the law of *qisas* fulfills some of the objectives of the restorative justice movement by allowing victims to participate in sentencing and encouraging forgiveness and reconciliation. There is, however, one glaring difference between the law of *qisas* and restorative justice; the victims of the crimes may also demand retaliation in kind: an eye for an eye, a life for a life. Nevertheless, *qisas*' emphasis on forgiveness and inclusion of the victims and the community in the prosecution and sentencing of perpetrators are significant characteristics which warrant an examination of the law of *qisas* as a form of restorative justice.

In Part I of this article, I describe the restorative justice movement. In Part II, I discuss the importance of the Islamic ideals of justice and their relation to Islamic law in general and Islamic criminal law in particular. The ideals of justice in Islam are fundamental to the aspect of forgiveness in the law of *qisas*, which forms the basis of the analogy between *qisas* and the values of the restorative justice movement. In Part III, I delve into the details of *qisas* in classical Islamic law.<sup>7</sup> In Part IV, I discuss the law of *qisas* as it has been interpreted and implemented by contemporary societies. I use the codes of the states of Northern Nigeria to illustrate the attempts made by contemporary societies to incorporate the classical theory of *qisas* into modern penal codes. Although these codes are influenced by Western legal concepts that include a focus on codification, they reflect serious and ambitious attempts to infuse the codified law with the values of *qisas* as set forth in the Qur'an. In Part V, I compare the attributes of the modern restorative justice movement with the law of *qisas*. I conclude that the values and goals of both *qisas* and restorative justice are compatible, and that the law of *qisas* should be considered a form of restorative justice. In Part VI, I discuss whether the concepts of *qisas* can contribute to the rich and evolving discourse on restorative justice. In the conclusion, I argue that the law of *qisas* should be considered as another source of inspiration and information for the restorative justice movement. *Qisas* is both an example of a fully developed body of law and jurisprudence that is compatible with the values and goals of the restorative justice movement and an example of an alternative viewpoint regarding the competing forces in human nature – the thirst for revenge and the benefits of forgiveness.

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7. By classical Islamic law, I mean the jurisprudence developed by scholars between the seventh and eleventh centuries, C.E.

## I. THE RESTORATIVE JUSTICE MOVEMENT: THEORIES AND PRACTICE

The restorative justice movement is not unvaried; there are a number of strains of restorative justice theories and many different techniques that are used to achieve the goals of restorative justice. Thus, it is difficult to find a single definition of restorative justice that encompasses all the aspects of restorative justice theory and practice. However, leading scholars of the movement have attempted to summarize the principal aspects of restorative justice, as explained below. Clifford Dorn has defined restorative justice as “a philosophy of justice emphasizing the importance and interrelations of offender, victim, community, and government in cases of crime and delinquency.”<sup>8</sup> Howard Zehr, one of the founders of the movement, describes restorative justice as an attempt to “provide an alternative framework or lens for thinking about crime and justice.”<sup>9</sup>

Although there is some disagreement about the details of restorative justice,<sup>10</sup> there are certain underlying principles or values that permeate the discourse and are alternatives to the mainstream discourse of criminal punishment. These principles include an emphasis on the interconnectedness of individuals and the community and respect for all those affected by crime.<sup>11</sup> Persons are shown respect by including all relevant stakeholders in the decision-making and restorative process. The values of interconnectedness grow out of an underlying belief that all the stakeholders live in one community and are interconnected to one another through their membership in the community. What binds all

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8. CLIFFORD K. DORNE, *RESTORATIVE JUSTICE IN THE UNITED STATES: AN INTRODUCTION* 3-4 (Pearson Prentice Hall 2008). For other definitions of restorative justice, see *id.* at 9-10. See also, Allison Morris & Warren Young, *Reforming Criminal Justice: The Potential of Restorative Justice*, in *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* 15 (Heather Strang & John Braithwaite, eds., 2000) (“[I]n a restorative justice process, the parties with a stake in a particular offense – victims, offenders and their ‘communities of interest’ – come together and, with the aid of a facilitator, resolve how to deal with the offence, its consequences and its implications for the future. Generally, restorative justice offers a more informal and private process over which the parties most directly affected by the offence have more control.”).

9. DORNE at 8.

10. There is no unanimously recognized definition of restorative justice, because the model has many aspects and adherents that range from academics to victims’ rights advocates to those working in the prison system.

11. DORNE at 8. See also KIMMETT EDGAR & TIM NEWELL, *RESTORATIVE JUSTICE IN PRISONS: A GUIDE TO MAKING IT HAPPEN* 11-14 (Waterside Press 2006) (describing the values methodologies of restorative justice).

restorative justice advocates is the underlying belief that the criminal justice system in the status quo fails to respect the human dignity of the perpetrator, the victim, and the larger community. Restorative justice is, therefore, occasionally referred to as “balanced justice” or balanced restorative justice.<sup>12</sup>

#### A. *Theories of Restorative Justice*

Restorative justice is a radical concept that criticizes the monopoly of the state in managing criminal prosecution and punishment. It is also a long-delayed reaction to the current criminal system that arose without consensus of the governed during the Middle Ages, when the “state stole crime.”<sup>13</sup> Restorative justice advocates emphasize that the damage caused by a crime is not simply a remote and slightly fictionalized harm “to society” as represented by the state. They focus instead on those individuals most directly harmed by the crime: the victim, the victim’s family, and the local community.<sup>14</sup>

The state is seen as dealing with crime as though there were no connections between the perpetrator, the victim, and the community beyond the negative occurrence of the crime itself. However, according to the restorative justice theory, a crime is a “breach of relationship within the community.”<sup>15</sup> For this reason, restorative justice advocates insist that the local community, and not exclusively the state, should hold the perpetrator accountable.<sup>16</sup> In short, restorative justice rejects the narrative that crime is a crime against the state, and that state officials are satisfactory representatives of the community affected by the crime.

Restorative justice is also critical of the current emphasis on incarceration. Even though some prisons provide “rehabilitative services,” many offenders commit crimes after leaving prison. Restorative justice advocates maintain that the community never regains any sense of safety or wellbeing after an offender completes his or her

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12. *Id.* at 6. The term “balance” as used in restorative justice circles can also refer to balancing the goals of accountability, competency development, community safety, and the goals of both conservative and liberal ideology.

13. *Id.* at 7.

14. *Id.*

15. *Id.* See also, ANDREW VON HIRSCH, PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 167 (Andrew von Hirsch et al. eds., Hart Publishing 3d ed. 2009) (1992) (observing that community restoration, as unclear as that term might be, is a goal of restorative justice).

16. DORNE, *supra* note 8, at 4.

sentence and returns to the community. Furthermore, the offender must live with the stigma of having been incarcerated upon returning to the community.<sup>17</sup> Thus, under the conventional system, the victim, community, and offender are never reconciled, the rift in the social fabric of the community is never healed, and the state fails to protect its citizens from further crime. Restorative justice advocates, therefore, call for a re-examination of traditional punishment and a shift of existing sentencing decision-making structures to include the victim, the offender, and the community.<sup>18</sup> According to restorative justice principles, allowing the community to hold the offender accountable offers the perpetrator the chance to repair the harm caused by the crime.<sup>19</sup>

Proponents of the restorative justice movement argue that when a crime occurs, the interconnectivity of the victims, the perpetrators, and others in the community become particularly manifest.<sup>20</sup> At that point, actors who might never come into actual contact with one another as members of the same community are thrown together. Under the current system, their interactions are stressful and negative, as they grind their way through the official legal system that pays only lip service to the crime's disruption of community and relationships therein.<sup>21</sup> Restorative justice practices following a criminal event are meant to offer an opportunity to integrate dysfunctional and less connected communities. Thus, it is posited that the crime itself, if handled correctly, can have a positive effect on community building.<sup>22</sup>

Proponents of the restorative justice movement attempt to place the victim at the center of the process in order to recognize the victim's special status as the party most directly harmed by the crime. In addition, restorative justice theorists contend that both the offender and the victim

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17. *Id.*

18. DORNE, *supra* note 8, at 4.

19. *Id.*

20. *Id.* at 8-9 (citing HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (Good Books 2002)).

21. The term community as used in the context of restorative justice can mean either a small, close-knit community of persons who share services, family connections, etc., or it can mean, in the broader sense, the community of people who might never have met but for the crime having been committed. In both cases, the parties are members of the same community, which has an interest in restoring to the victim his or her dignity and peace of mind and restoring to the offender a role in the community after giving some form of punishment. *See id.*; *see also* EDGAR & NEWELL, *supra* note 11, at 12 (discussing the groups represented at restorative conferences).

22. DORNE, *supra* note 8, at 15.

are members of the community that is harmed by the crime. They also consider punishment as a means to empower and unite a community. However, they acknowledge that punishment can also lead to further disruption of the community. The offender is required to work to earn back a place in society. Simple incarceration is seen as counterproductive to this process.<sup>23</sup> Similarly, under the law of *qisas*, the victims, offenders and their communities and families are involved in the prosecution and sentencing of the offender. In fact, victims have the ultimate power to decide whether the offender will be given the *qisas* penalty.

### B. Contemporary Restorative Justice Practices and Policies

Communities have attempted to integrate restorative justice ideas into the practice of criminal sentencing in a number of ways. Advocates of restorative justice have had the greatest success when they have combined various techniques and practices within the existing criminal justice system. Sentencing circles, victim-offender reconciliation programs, family group conferencing and community reparative boards have become accepted parts of the sentencing procedures in a number of jurisdictions.<sup>24</sup>

These methodologies are seen as a reaction against the state monopoly on crime and the common law notion of the state as a victim.<sup>25</sup> Proponents of restorative justice often point out that until the eleventh century in England, the state was not the ultimate arbitrator in all instances of injustices or wrongs committed against individuals.<sup>26</sup> Rather, victims played an active role in both the prosecution of offenders and the imposition of sentences.

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23. *Id.* at 7. As will be seen in Part V, many of the goals of restorative justice are identical to the goals of the law of *qisas*. For example, both the classical Islamic law of *qisas* and restorative justice theory oppose the view that a crime is to be viewed as involving primarily the offender and the victim, and that the state as proxy for the community should have full control over the prosecution sentencing and punishment of the offender.

24. See generally MARGARITA ZERNOVA, RESTORATIVE JUSTICE: IDEALS AND REALITIES 7-30 (Ashgate 2007) (describing several methods used by various jurisdictions to integrate restorative justice principles into their criminal process).

25. See DORNE, *supra* note 8, at 7.

26. See, e.g., Reginald A. Wilkinson, *A Shifting Paradigm: Modern Restorative Justice Principles Have Their Roots in Ancient Cultures*, CORRECTIONS TODAY (December 1997), available at <http://www.drc.ohio.gov/web/Articles/A%20Shifting%20Paradigm.pdf> (discussing the centralization of power that followed the Norman Conquest and included monopolization of the criminal justice system by the Crown).



In addition to the reactionary aspects of restorative justice, proponents often look to indigenous populations and their customary methods of conflict resolution. The practice of restorative justice in contemporary, Western, non-indigenous settings can be traced to a Canadian case in which a Mennonite parole officer and a Mennonite volunteer orchestrated a meeting between an offender and a victim.<sup>27</sup> Nevertheless, proponents of restorative justice link many of the restorative justice practices to non-Western or tribal customary methods for dealing with conflict. Many in the movement argue that small-scale societies – both historically and in the modern era – have relied upon techniques to resolve disputes that are in line with the theories of restorative justice.<sup>28</sup> While there may be some truth to the narrative of tribal peoples engaging in victim-centered, community and family based justice strategies,<sup>29</sup> there are, of course alternative examples of conflict resolution that do not involve peaceful discourse amongst the stakeholders. Nevertheless, while the ideal of a peaceful primitive paradise may be a bit off the mark, it is without a doubt that in less socially integrated societies the victims, their families, and the offenders are not

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27. *See id.* (observing that “[t]he roots of the modern restorative justice movement can be traced to Kitchener, Ontario. In 1974, a Mennonite probation officer and a volunteer service director organized a discussion group to develop a more humane and efficient criminal justice system.”).

28. *See ZERNOVA, supra* note 24, at 7-8, 19-20 (describing traditional Navajo peacemaking and noting that many of the methods used to carry out restorative justice programs are based on indigenous practices, and citing numerous works.)

29. A number of anthropologists were fascinated by the “law ways” of the peoples they studied, and tended to focus on conflict resolution. *See* MAX GLUCKMAN, *THE IDEAS IN BAROTSE JURISPRUDENCE* (Manchester University Press, 1st ed. 1972) (1965), *LAW IN CULTURE AND SOCIETY* (Laura Nader, ed., University of California Press 1969), & KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1st ed. William S. Hein & Co. 2002). Inasmuch as small groups of people living together have little choice but to structure dispute resolution in order to maintain relationships as a practical matter, there are, however, alternative methods of dispute resolution. Some small-scale societies rely almost exclusively on individual retaliation or family group retaliation through violence. *See* NAPOLEON A. CHAGNON, *YANOMAMO: THE FIERCE PEOPLE* (Holt Reinhart & Wilson, 1968) (describing warfare among the Yanomamo). *See also* Maritti Gronfors, *Institutional Non-Marriage in the Finnish Roma Community and Its Relationship to Rom Traditional Law* 149, 154-56 in *GYPSY LAW: ROMANI LEGAL TRADITIONS AND CULTURE* (Walter O. Weyrauch, ed., University of California Press 2001) (describing the Finnish Roma who employ individual revenge-taking, dueling, avoidance and blood feuding as a method to deal with interpersonal conflict). This technique also works, as blood revenge is a powerful disincentive to create conflict in the first place. Many scholars have described the pre-Islamic period in Arabia as being infused with on-going blood feuds among the various Arab tribes.

cut out of the official criminal justice system as they are in modern Western state level societies. But even in the discussion of non-Western peacemaking methods and alternate conflict resolution mechanisms, never is Islamic law mentioned in the discourses surrounding the implementation of restorative justice ideals into criminal sanctioning procedures.

There are also examples of contemporary restorative justice techniques being employed in the context of indigenous societies within the larger, non-indigenous social frameworks of complex Western states. In two famous cases, the official state apparatus recognized and approved indigenous methods of dispute resolution in cases involving First Nations people.<sup>30</sup> These cases have served as a model for further restorative justice advocacy in the non-indigenous context.

Sentencing circles are one of the more prominent and controversial features of the restorative justice process. Sentencing circles are small forums where the victim, offender, and others directly affected by the crime meet with a mediator to decide upon an appropriate course of action following the offender's conviction.<sup>31</sup> Often ritualized based on a loose interpretation of First Nations' and Native Americans' ceremonies, the sentencing circle is meant to create a spiritual atmosphere that builds a sense of community.<sup>32</sup> Each person in the circle may talk about the crime, possible sanctions for the crime and any other slightly related topic. The "keepers," or mediators, enforce the guidelines for the circle and build a plan of action based on the discussion.<sup>33</sup> In Canada, both indigenous and non-indigenous communities have used sentencing circles. Additionally, non-indigenous communities from as far away as the United Kingdom have adopted the technique.<sup>34</sup>

Victim-offender reconciliation programs are "based on the idea that following a criminal offense, the victim and the offender have a shared interest in righting the wrong."<sup>35</sup> Part of "righting the wrong" involves reconciling the victim and the offender. This reconciliation is to be

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30. See Anthony Mason, *Restorative Justice: Courts and Civil Society*, in STRANG & BRAITHWAITE, *supra* note 8, at 1-9 (discussing Clotworthy and Gladue).

31. DORNE, *supra* note 8, at 16.

32. *Id.* at 16-17.

33. *Id.*

34. See Lynette Parker, *Minnesota State Supreme Court Upholds Use of Sentencing Circles*, RESTORATIVE JUSTICE ONLINE (February 2002), available at <http://www.restorativejustice.org/editions/2002/Feb02/mnstatesupremecourtup>.

35. ZERNOVA, *supra* note 24, at 8.

accomplished, at least partially, through a face-to-face meeting between the offender and the victim.<sup>36</sup> At the meeting, a third-party mediator facilitates the discussion, and the victim and the offender are given an opportunity to discuss how the crime has affected their lives. They are given an opportunity to devise a plan or agreement designed to promote reconciliation.<sup>37</sup> For example, the parties might agree to financial restitution for the victim and alcohol and drug rehabilitative services or anger management classes for the offender.<sup>38</sup> Such practices have been employed on the Isle of Man.<sup>39</sup>

Family-group conferencing is another technique used by restorative justice proponents. This technique is related to sentencing circles, but is usually only applied to juvenile offenders. The groups present during the conference are limited to the juvenile's family and the victim's family. Additionally, like sentencing circles, the parties negotiate an agreement that is supposed to satisfy the needs of the victim as well as help the juvenile offender.<sup>40</sup>

Community reparative boards have become accepted parts of the sentencing procedures in a number of U.S. jurisdictions. In Vermont, for example, after the offender has been convicted, he or she is required to meet with a community-based board of volunteers who devise a plan with the offender "to develop a constructive outcome in the case."<sup>41</sup> The victim is also invited to attend and participate in the process.

Because restorative justice practices are comprised of a mix of approaches, not every restorative justice practice can be considered fully restorative.<sup>42</sup> For example, forced compensation for crime, without any negotiation between parties most affected by the crime, is a restorative justice practice that is only partially restorative. Sometimes referred to as "forced reparation," the practice is only partially restorative, because it does nothing to empower either the victim or the offender.<sup>43</sup> However,

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36. *Id.* See also DORNE, *supra* note 8, at 39.

37. ZERNOVA, *supra* note 24, at 8.

38. *Id.*

39. See *Progress on Restorative Justice for the Isle of Man*, (October 8, 2009), <http://www.gov.im/lib/news/dha/progressonrestor.xml>.

40. DORNE, *supra* note 8, at 40.

41. *Id.*

42. See EDGAR & NEWELL, *supra* note 11, at 16 (describing and diagramming restorative approaches with reference to the overlapping spheres of fully restorative, mostly restorative, and partially restorative practices).

43. *Id.*

reparations may have a restorative effect if they are “offered as an expression of regret and an acknowledgement of responsibility for wrongs done, [and] accepted as a sincere and adequate response to the harms caused . . .”<sup>44</sup> As we shall see in the following sections, this purpose and effect is similar to that of the *diyya* (restitution) payment in a *qisas* crime.

## II. ISLAMIC LAW AND CRIMINAL JUSTICE

### A. *The Concept of Justice in Islam*

Malise Ruthven once said that the central theme of Christianity is love and the central theme of Islam is justice.<sup>45</sup> When viewed from a Western/Christian vantage point, this dichotomy seems to be quite distinct. Both concepts are hard to define, even with reference to only one cultural matrix.<sup>46</sup> Just as the concept of love in Christianity is pervasive and filled with multifarious meanings and mystery, so is the concept of justice in Islam.

Justice is mentioned in the Qur’an on numerous occasions. Historically, the concept of a just person has been integral to legal determinations in Islamic law, including an individual’s qualification for giving court testimony. Justice is the goal of Islamic law, as it is the goal for Islamic society in general. But Islamic justice, as envisioned by Islamic legal scholars and the Prophet Muhammad, is a broader concept than justice articulated in the English language.<sup>47</sup> As one scholar summarized:

Justice is Allah’s attribute, and to stand firm for justice, even if it is detrimental to our own interests as we conceive them, or the interests of

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44. WESLEY CRAGG, *THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE* 171 (Routledge 1992) (also noting on page 172, that crimes that involve personal injury, rather than loss of property, are more difficult to redress through a strict calculation of reparations).

45. LAWRENCE ROSEN, *THE JUSTICE OF ISLAM: COMPARATIVE PERSPECTIVES ON ISLAMIC LAW AND SOCIETY* 154 (Oxford University Press 2000) (quoting MALISE RUTHVEN: *ISLAM IN THE WORLD* (Penguin 1984)).

46. As Lawrence Rosen stated, “Justice (to soften a borrowed phrase) is a veritable courtesan among words: Its connections are always subject to alteration, the consequences of its involvements always open to contention.” *Id.* at 153.

47. See ANWAR AHMAD QADRI, *JUSTICE IN HISTORICAL ISLAM* 1 (Sh. Muhammad Ashraf Kashmiri Bazar 1968) (discussing the distinction between the concept of justice in western philosophy and jurisprudence and in classical Islamic jurisprudence).

those who are near and dear to us, is to be a witness to Allah. According to the Latin saying, "Let justice be done though heaven should fall."

However, Islamic justice is something higher than the formal justice of Roman law or any other human law. It is even more penetrating than the subtler justice found in the speculations of the Greek philosophers. It searches out the innermost motives, because we are to act as in the presence of Allah to Whom all things, acts and motives are known.<sup>48</sup>

Among the Qur'an's references to justice are the following:

- (1) G-d commands justice and good-doing . . . and He forbids indecency, dishonor and insolence.<sup>49</sup>
- (2) G-d commands you to deliver trusts back to their owners, and when you judge among men, you should judge with justice.<sup>50</sup>
- (3) Of those We created are a people who guide by the truth, and by it act with justice.<sup>51</sup>
- (4) We sent our Messengers with the Clear Signs and sent down the Book and the Balance with them so that mankind might establish justice. And we sent down iron in which there lies great force and which has many uses for mankind.<sup>52</sup>
- (5) We have sent down the Book to you with the truth so that you can judge between people according to what Allah has shown to you. But do not be an advocate for the treacherous.<sup>53</sup>

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48. ABD AR-RAHMAN I. DOI, *SHARI'AH: THE ISLAMIC LAW* 26 (Ta-Ha Publishers 2008) (also noting on page 24 that although "[j]ustice is a comprehensive term, and may include all the virtues of good behavior . . . Islam asks for something warmer and more human, namely the doing of good deeds even where perhaps they are not strictly demanded by justice, such as returning good for ill, or obliging those who 'have no claim' on you; and of course the fulfilling of the claims of those whose claims are recognized in social life.").

49. THE QUR'AN 16:90 (Abdullah Yusuf Ali trans., 2004). "Justice is a comprehensive term, and may include all the virtues of cold philosophy. But religion asks for something warmer and more human, the doing of good deeds even where perhaps they are not strictly demanded by justice, such as returning good for ill, or obliging those who in worldly language 'have no claim' on you; and of course *a fortiori* the fulfilling of claims of those whose claims are recognised in social life. Similarly, the opposites are to be avoided; everything that is recognised as shameful, and everything that is unjust, and any inward rebellion against Allah's Law or our own conscience in its most sensitive form." THE HOLY QUR-AN: ENGLISH TRANSLATION OF THE MEANINGS AND COMMENTARY 760 (Mushaf Al-Madinah An-Nabawiyah trans. 1410) (commentary on 16:90).

50. THE QUR'AN 4:58.

51. THE QUR'AN 7:181.

52. THE QUR'AN 57:25; DOI, *supra* note 48, at 24.

53. THE QUR'AN 17:105; DOI, *supra* note 48, at 25.

Justice is mentioned in a number of additional *aya* (verses) as well.<sup>54</sup>

Thus, these verses that describe justice help us understand the Islamic concept of justice by reference to those concepts that are diametrically opposed to justice. In the *hadith*, specific examples of justice are described, which further help to solidify the concept.<sup>55</sup> In both the Qur'an and *Sunnah*,<sup>56</sup> justice requires the offender to take personal responsibility for his or her actions. A person's actions should be just, or "good", in the sense that they are in line with G-d's will as revealed in the Qur'an and *Sunnah*. For example, one is commanded to deal fairly with others, pay debts, and "temper retribution with mercy."<sup>57</sup> Additionally, the concept of justice extends to interior motivations, which must also be pure in order for an action to be considered just; indeed, external actions are often viewed as an indication of the interior state.<sup>58</sup> As Lawrence Rosen stated, "A person who is just therefore engages in acts that are framed by an awareness, born of the pursuit of reason over passion, of the harm that may be done to the community of believers by action otherwise."<sup>59</sup>

### *B. Justice in Islamic Criminal Law*

Although justice in Islamic rhetoric is referenced in a number of contexts, such as political justice, theological justice, ethical justice, social justice, and the justice among nations,<sup>60</sup> the focus of this article is

54. See also, MAJID KHADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* 10 (The John Hopkins University Press 1984) (listing the above sura and noting the following sura also refer to the concept of justice: Q. III, 100, 106, 110; IX, 72, 113; XXII, 42; XXXI, 16).

55. See *id.* (But noting that "[n]either in the Qur'an nor in the Traditions are there specific measures to indicate what are the constituent elements of justice or how justice can be realized on Earth. Thus the task of working out what the standard of justice ought to be fell upon the scholars who sought to draw its elements from the diverse authoritative sources and the rulings and acts embodied in the works of commentators."). The term "hadith" refers to the traditions of the Prophet Muhammad, specifically, the words of the Prophet as passed down from the ones who heard him speak to subsequent generations.

56. The *Sunnah* also refers to the traditions of the Prophet as handed down through the generations but also includes examples from his life that are not limited to the spoken word, such as how the Prophet washed before prayer.

57. ROSEN, *supra* note 45, at 154.

58. *Id.* at 155.

59. *Id.* at 153.

60. See KHADDURI, *supra* note 54 (devoting a chapter to each form of justice in Islam).

on legal justice in general and criminal justice in particular. Legal justice in Islam is tightly intertwined with religion, as both are expressions of G-d's will.<sup>61</sup> The ultimate purpose of law is to fulfill justice. Thus, in classical Islamic legal theory, law and justice, while not being the one in the same, can and should overlap to the greatest extent possible.<sup>62</sup> And, the Sharia is considered to be the part of the law completely contiguous with justice, as the Qur'an represents G-d's divine justice.<sup>63</sup> On the other hand, positive laws that are created by legislators or other humans – even if based on or inspired by the Sharia – may or may not contain elements of justice.

Procedural protections are also extremely important to the concept of legal justice in Islam. After all, any written code or constitution may express wonderful ideals of justice, but such ideals can become lost in reality if the methods of enforcement, interpretation, and protection of individuals subject to those laws are not clearly identified and based on just principles. If this is not the case, such laws that may appear to coincide with ideals of justice become mere words on a page. Therefore, Islamic criminal law places great importance on just procedures.<sup>64</sup>

### *C. The Dignity of the Human Being and the Importance of the Community in Islamic Justice Jurisprudence*

Two more concepts in Islamic jurisprudence relate to the overarching theme of Islamic justice: the concept of human dignity and the concept of the community of believers, or the *ummah*. Like justice, these concepts are central to Islamic law in general and Islamic criminal law in particular. Both of these concepts are also values emphasized in restorative justice.

First, human dignity is a value that is pervasive in Islamic jurisprudence. It has sometimes been used in Islamic discourse as analogous to the Western concept of human rights.<sup>65</sup> Sometimes referred

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61. *Id.* at 135.

62. *Id.*

63. *Id.* at 136.

64. *Id.* at 144-160.

65. See MOHAMMED HASHIM KAMALI, *SHARI'AH LAW: AN INTRODUCTION* 126, 201, 291 (2008). Kamali discusses at length the concepts of rights, duties, justice and human dignity in Islam. While recognizing that "Islam's commitment to justice and its advocacy of human dignity could not be sustained without the recognition of rights," Kamali explains the differences between the conception of rights and liberties that are drawn from "constitutional law and democracy and their underlying Western postulates," and

to as respect for persons, human dignity is the outcome of a just society and just law. Respect for one another is a vital theme of justice in the Sharia.<sup>66</sup> A human being is to be treated with the respect due to G-d's greatest creation and the viceroy of G-d himself on Earth.<sup>67</sup> Thus, the

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those concepts that arise from Islam. *Id.* at 201. Kamali argues that the differences are based secular versus religious perspectives. For example, he states that as a religion, Islam is primarily concerned with the relationships between people; "people do not live primarily in terms of rights against others but in terms of mutual relationships including love, compassion, self-preservation and self-sacrifice . . ." He then describes the differences between Islamic and Western ideas of rights and duties, "rights and duties in Islam are reciprocal and there is a greater emphasis on obligation that is indicative of the moralist leanings of *Shari'ah*." *Id.* at 202. Nevertheless, Islam recognizes specific rights that are due to all, such as the right to life, equality, freedom, expression and justice. RUQAIYYAH WARIS MAQSOOD, ISLAM, 129 (2006). The controversy about the difference between rights in Islam and human rights as defined by the U.N. Charter of Human Rights has been largely a controversy springing from the colonization of the Muslim world by Western powers. The details of the debate regarding human rights in Islam and the compatibility of those rights with the standards set forth in the U.N. Charter and in the Cairo Declaration of Rights in Islam is beyond the scope of this article. As one scholar summarized the debate, "Notwithstanding the near-universal acceptance of the International Bill of Human Rights, some Muslim critics argue it reflects a non-Muslim Western conception of human rights that only recently, since the end of the second World War, has been established. Yet, other Muslim commentators argue Islam always has had a G-d-given guide to human rights, namely, the *Shari'ah*." BHALA, *supra* note 68, at 1271. For those interested in a full discussion of these issues, the Lawyers Committee for Human Rights has published a collection of debates in a book entitled, Islam and Justice." ISLAM AND JUSTICE: DEBATING THE FUTURE OF HUMAN RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA (1997). See also M. Fathi Osman, *Human Rights in the Contemporary World: Problems for Muslims and Others*, available at [http://www.usc.edu/schools/crcc/private/cmje/issues/Human\\_Rights\\_in\\_the\\_Contemporary.pdf](http://www.usc.edu/schools/crcc/private/cmje/issues/Human_Rights_in_the_Contemporary.pdf) (discussing the historical and linguistic challenges of the human rights dialogue between Western secularists and Muslim scholars) (last visited October 19, 2012); Fathi Osman, *Human Rights in Islam*, available at <http://www.hrusa.org/advocacy/community-faith/islam1.shtm> (last visited October 19, 2012) (discussing the concept of dignity in Islam and its inclusion of the categories of human rights expressed by international human rights advocates); M. CHERIF BASSIOUNI, THE ISLAMIC CRIMINAL JUSTICE SYSTEM, 37-40 (1982) (discussing the history and development of the Islamic law of nations and recognizing that the rights characterized as human rights in the present international discourse were recognized by Islamic scholars more than thirteen hundred years ago).

66. DOI, *supra* note 48, at 30-34 According to Doi, "The just society in Islam means the society that secures and maintains respect for persons through various social arrangements that are in the common interest of all members." This includes but is not limited to the administration of criminal justice. However, criminal law must ultimately work towards promoting a just society.

67. *Id.* See also NAGATY SANAD, THE THEORY OF CRIME AND CRIMINAL RESPONSIBILITY IN ISLAMIC LAW: SHARI'A 35 (1991) ("In Islam, the individual is regarded as the most important unit of the cosmos because humans are the only creatures on earth



principle of equality – that all should be treated with equal respect, despite differences such as race, wealth, class, and gender – emerges under the concept of dignity. One of the purposes of Sharia is to protect human dignity, and thereby, provide for a just society. The balance between protecting an individual's dignity and protecting society as a whole is played out in Islamic criminal law through the differentiation among crimes more harmful to individuals and those more disruptive to society, as will be discussed below. As discussed previously, the emphasis on human dignity is a value also emphasized in restorative justice, through the concept of “respect.”

Second, the importance of the community cannot be overemphasized in any discussion of Islam in general or of Islamic law in particular. While in the West, jurists occasionally discuss protection of the community as the purpose of criminal law and punishment, that discussion usually does not question the legal fiction that the state represents the community. The victims' rights and restorative justice movements are notable exceptions to the ordinary discourse. In Islamic law, however, the community's stake in a dispute involving crime has always been an important part of the discussion. The state is distinguished from the community, although it maintains a responsibility to facilitate a just and peaceful society. In fact, the community's interest in the wrong that has occurred is central to the alternate taxonomy of crimes in Islamic jurisprudence.<sup>68</sup> As stated by one scholar:

The theory behind the administration of justice in Islam is based on unique principles, and the fountain-head of the same is the Qur'an and the legislative sovereignty or the Muslim community – the Ummah. Under these principles, the Caliph, the Emperor, or the Sultan is not the fountain-head of justice . . . [T]he ruler substitutes the Lawgiver [G-d], so long as it serves . . . in the preservation of religion and the exercise of

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that G-d endowed with a mind and therefore the only creatures susceptible to the choice of Islam. Mankind is G-d's deputy on earth.”).

68. As explained in the Introduction to this article, crimes in Islamic criminal law can be divided between *hadd*, *qisas* and *tazeer*. Crimes can also be distinguished as either *haqq Allah* or *haqq adami*. The former refers to those crimes that are considered crimes against G-d, the later those crimes considered against humans. The *hadd* crimes belong to the *haqq Allah*, and the *qisas* crimes to *haqq adami*. See RAJ BHALA, UNDERSTANDING ISLAMIC LAW (*SHARI'A*), 1171-1172 (2011 LexisNexis). Although the community is thought to suffer from the commission of both types of crimes, either the community through the vehicle of its state representatives or the individuals directly harmed devise the penalty. However, unlike Western nations, the ultimate law giver in Islamic jurisprudence is G-d. This is one of the difficulties encountered when attempting to draw comparisons and distinctions between Islamic law and non-religiously based law.

political leadership in the world. In other words, he only represents the Prophet of Islam.<sup>69</sup>

Thus, it is the community that is central to the administration of justice. Even though the state enforces justice, it is not the final and absolute arbiter of justice. Indeed, its power may be limited when the people withdraw their consent. It is the *ummah* that is ultimately collectively responsible for creating a just society based on the Qur'an.<sup>70</sup>

#### D. Forgiveness, Mercy, and Repentance in Islamic Law

In Islamic criminal law, mercy and forgiveness are strongly emphasized and recommended. Even though neither the victim nor the state is empowered to pardon perpetrators of *hadd* crimes, which are seen as crimes primarily against G-d and the community rather than against a particular individual, it is clear that G-d may forgive the offenders.<sup>71</sup> Not only may G-d forgive the repentant offender in the case of *hadd* crimes, but the individuals and communities harmed are also encouraged to forgive the offender and exercise mercy in the context of *qisas* crimes.<sup>72</sup>

69. QADRI, *supra* note 47, at 2.

70. *Id.* Although the theory that the power to prosecute criminals stems from the consent of the governed is also embraced in common-law countries, this has not always been the case. In fact, the power to prosecute criminals was stripped from direct control of the people and local administrators by the early sovereigns of England. The power of the State is now so closely intertwined with the power to prosecute criminals that the state has in fact obtained a monopoly in the area in the United States. The difference between this approach and that outlined in classical Islamic jurisprudence is a matter of degree and theoretical orientation. See KEVIN JOHN HELLER AND MARKUS D. DUBBER, *THE HANDBOOK OF COMPARATIVE CRIMINAL LAW*, 1 (2010 Stanford University Press) (discussing the utility of comparative criminal law and noting that "In fact, if not in theory, Anglo-American criminal law continues to be regarded as an exercise of the police power of the state, where the power to police is thought to be closely related, even essential, to the very idea of sovereignty. More particularly, the police power is the modern manifestation at the state level of the deeply rooted power of the householder (*oikonomos*, *paterfamilias*) over his household (*oikos*, *familia*), See also Susan C. Hascall, *Shari'ah and Choice: What the United States Should Learn From Islamic Law About the Role of Victims' Families in Death Penalty Cases*, 44 *JMLR* 18-19 (2011) (discussing the evolution of crime in England and the rise of the power of the Kings).

71. This does not mean that G-d will not forgive the offenders; it simply means that the victims or the state cannot pardon the offenders.

72. The community in Islamic law is not necessarily contiguous with the state. In the early days of Islam, the community of believers, the *ummah* was synonymous with the proto-Islamic state of Medina. However, as Islam spread and encompassed vast territories across the globe, the *ummah* has come to be associated with the wider community of believers throughout the world. Nevertheless, the concept of community, and the importance placed on the community in the Muslim world today, as in the days of the

As in Western penology, one of the purposes of punishment in Islamic law is the rehabilitation of the offender.<sup>73</sup> The punishment should serve to “cure” the offender and make him or her a useful and productive member of society once again.<sup>74</sup> Rehabilitation is also a goal of restorative justice. However, under Islamic law, the project of rehabilitation is linked not only to the offender’s ability to become a productive member of society but also to the offender’s ability to repair his or her relationship with G-d. This rectification is demonstrated through repentance and expiation (*kaffara*).<sup>75</sup> Thus, although punishment alone may serve to reform an offender, the following verses from the Qur’an demonstrate that repentance and subsequent good conduct are also important ingredients in rehabilitation:

1. Unless they repent thereafter and amend their conduct, for Allah is oft-forgiving, most merciful.<sup>76</sup>
2. Except for those who repent before they fall into your power: in that case know that Allah is oft-forgiving and most merciful.<sup>77</sup>
3. But if the thief repents after his crime, and amends his conduct, Allah turneth to him in forgiveness; for Allah is oft-forgiving and Most Merciful.<sup>78</sup>
4. If two men among you are guilty of lewdness, punish them both. If they repent and amend, leave them alone; for Allah is oft-forgiving, Most Merciful.<sup>79</sup>
5. Allah accepts the repentance of those who evil in ignorance and repent soon afterwards, to them will Allah turn in Mercy; for Allah is full of knowledge and wisdom.<sup>80</sup>
6. Of no effect is the repentance of those who continue to do evil until Death faces one of them, and he says, “Now have I repented indeed,” nor of those who die rejecting the faith: for them have we prepared a punishment most grievous.<sup>81</sup>

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Prophet, became central to Islamic law. There are a number of Qur’anic verses and *hadith* that deal with the community itself.

73. YAHAYA YUNUSA BAMBALE, *CRIMES AND PUNISHMENTS UNDER ISLAMIC LAW* 110 (Malthouse Press Limited 2d ed. 2003).

74. *Id.* at 110. *See also* EL AWA, *supra* note 6, at 34-35 (discussing the theory of rehabilitation and noting that most scholars do not view the *Hadd* punishments as having rehabilitative functions, in the strictly sociological sense).

75. BHALA, *supra*, note 68, at 1188 (discussing confession, repentance and expiation in Islamic criminal law).

76. THE QUR’AN 24:5.

77. THE QUR’AN 5:34.

78. THE QUR’AN 5:39.

79. THE QUR’AN 4:16.

80. THE QUR’AN 4:17.

81. BAMBALE, *supra* note 73, at 110; THE QUR’AN 4:18.

The important concepts of repentance and expiation in Islamic criminal jurisprudence, as described above, have their analogies in restorative justice. As discussed previously, restorative justice also places a high value on the repentance of the offender even though the term repentance, with its obvious religious overtones, is not used in the restorative justice discourse. Repentance is a form of taking responsibility for one's own actions after realizing the harm that they have caused. Most restorative justice practices encourage repentance as a method of rehabilitation for the offender and a way to heal the wounds of the victim. In restorative justice, repentance takes the form of "personal responsibility" which requires the offender to realize the effect of the harm caused and to come to regret his or her actions.

### III. QISAS IN CLASSICAL ISLAMIC LAW

#### A. *Classification of Crimes*

Under classical Islamic law, crimes can be divided into a number of categories based on a variety of criteria. Crimes are commonly classified based on the available punishments for the crime. The three broad categories of crime according to their respective available punishments are: the *hudud*, *qisas*, and *tazeer* crimes.

The *hadd* are those crimes for which the punishment is fixed in either the Qur'an or *Sunnah*. As such, the punishment cannot be altered and the perpetrator may not be forgiven or pardoned. These crimes are more than crimes against an individual or the community. Since they offend God, the punishment of these crimes is "the right of Allah," or *haqq Allah*.<sup>82</sup> The *hadd* crimes include adultery, false accusation of adultery, drinking, bloodshed and plunder, theft, apostasy, and rebellion.<sup>83</sup> *Hadd* crimes are considered to be the most serious of the three categories.<sup>84</sup> The punishments for these crimes are almost all

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82. A.Q. OUDAH SHAHEED, CRIMINAL LAW OF ISLAM 86 (S. Zakir Aijaz trans., Adam Publishers & Distributors 2010).

83. MATTHEW LIPPMAN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE 39-41 (Praeger 1988); see also SANAD, *supra* note 67, at 50. Scholars disagree as to whether drinking alcohol and apostasy are *hadd* crimes. *Id.* See also KAMALI, *supra* note 65, at 191, 220 (noting that the punishments for drinking alcohol and apostasy are not set forth in the Qur'an, but are found in the books of *fiqh*, and arguing that apostasy should not be considered a *hadd* crime because the Qur'an specifically provides for freedom of choice in religion). However all agree that *zina*, theft, highway robbery, and false accusation of *zina* are *hadd* crimes. *Id.*

84. SANAD, *supra* note 67, at 50.

corporal, and they range from applying lashes to amputation to execution.<sup>85</sup>

The *tazeer* crimes are those transgressions that are described in the Qur'an or *Sunnah*, for which no punishment is specified.<sup>86</sup> Among the *tazeer* crimes are embezzlement, perjury, sodomy,<sup>87</sup> usury, breach of trust, abuse, and bribery.<sup>88</sup> These crimes are generally considered sins as well, because they are prohibited in the Qur'an.<sup>89</sup> *Tazeer* crimes may also include wrongs that are not mentioned in the Qur'an but are severe enough to disrupt society or have serious consequences. *Tazeer* crimes do not include intentional murder or bodily injury, as these are classified as *qisas* crimes. However, if the crime does not meet the elements of a *qisas* crime, as described below, or if the procedural protections in a *qisas* trial are not met, the crime may then be considered a *tazeer* crime. The punishment for a *tazeer* crime is at the discretion of the authorities.<sup>90</sup> Although the death penalty is not usually imposed for *tazeer* crimes, it can be meted out in exceptional circumstances.<sup>91</sup> However, the victims

85. *Id.* at 51-56. See also SANAD, *supra* note 67, at 56. All are corporal except for banishment as a possible punishment for the crime of banditry. Professor Sanad argues that "corporal punishments in Islamic law are carried out in a swift manner and are effective in deterring the individual from committing that crime once again. In addition, the individual (male) is not separated from his family, as he would be if imprisoned, and thereby prevented from supporting them and controlling them. This method is therefore preferable to incarceration in prison, which is a drain on public resources and a training school for further criminal activity." *Id.*

86. *Id.* at 63. See also KAMALI, *supra* note 65, at 188-89.

87. SANAD, *supra* note 67, at 64. See also SHAHEED, *supra* note 82, at 85. According to Shaheed, the *tazeer* crimes includes those wrongs against individuals or society for which no penalty is set, and therefore the penalty, or correction, can range from light to harsh depending on the circumstances of each case. He also mentions the following factors that must be taken into account before the punishment is set: 1) intention, 2) degree of certainty, 3) manner of commission, and 4) specific nature of the crime. These crimes can include both individual crimes such as bribery, and also professional and political crimes. *Id.*

88. SHAHEED, *supra* note 82, at 85.

89. *Id.* See also BHALA, *supra* note 68, at 1171-1172 (explaining that the *hadd* crimes are crimes that involve committing acts that G-d has specifically forbidden in the Qur'an. It is for this reason that the *hadd* crimes are considered to be deserving of the harshest, inflexible penalties).

90. This does not mean that judges have unfettered discretion to impose whatever penalty they wish. See ROSEN, *supra* note 45, at 3 (discussing the limits on a *Qadi's* discretion). See also *infra* page 3 discussing the codification of penalties for crimes in modern nation-states.

91. EL-AWA, *supra* note 6, at 109. According to El-Awa, there is a split between the schools of thought as to which *Ta'zir* crime merits the death penalty. *Id.* According to the

of these crimes may request that the state pardon the defendant and the judge has the discretion to do so.<sup>92</sup>

The crimes punishable by *qisas* and *diya* generally include homicide and wounding. The word *qisas* has come to mean “retaliation in kind.”<sup>93</sup> As discussed above, in a *qisas* crime, the victims have the option of whether to impose the *qisas* penalty, insist on payment, or forgive the offender. However, it is also important to note that the classification of crimes based on their punishment is not the only method of classification employed in Islamic criminal law. Also of note to the restorative justice model are classification schemes based on the impact of the harm on the immediate victim or society.

The classification of crimes based on the available penalty is only superficially accurate. The reason behind the inflexibility of the penalties for the *hadd* crimes is that they are perceived to be crimes that not only harm the individuals involved, but are more importantly, crimes against G-d and the social order. As such, the individual characteristics of the offender are not to be taken into account, and the judge is cautioned against showing any pity on those who have been properly convicted. *Qisas* crimes, on the other hand, are recognized as harms primarily against the individual. Thus, the individual circumstances of both the victim(s) and the offender can be taken into consideration in the punishment imposed. One of the purposes of punishment is to deter crime and make others in the society feel secure. For example, illicit sexual relations have the potential for the destruction of a family, and the family is one of the important building blocks of society. Thus, the harm to the individuals involved is subsumed by the harm to society. On the other hand, although murder is a harm that creates a rift in the social fabric, it is usually personal in nature. In other words, members of society who are not directly connected to the murdered individual are not going to be directly affected by the murder, usually the result of personal disputes between the victim and the offender. Thus, the victims can be permitted to control the outcome of the sentencing, including allowing

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Hanfi school “the habitual homosexual, the murderer on whom *qiyas* cannot be imposed because of the means used in the crime (*al-gatl bil-mutgil*), and the habitual thief who attacks a man’s house and who is not to be prevented from doing harm by means of other punishments” are to be executed. *Id.* Under the Maliki school, the death penalty will be imposed in cases of serious nature or where the defendant is beyond reform. *Id.*

92. LIPPMAN, *supra* note 83, at 41.

93. BAMBALE, *supra* note 73, at 87 (stating that the term *qisas* comes from the Arabic word *assa*, which can mean either “he cut it,” or “he followed his track in pursuit.”). See also EL-AWA, *supra* note 6, at 90 n.1.

them to forgive the offender and not extract either the *qisas* or the *diya* penalties.

The following verses describe the purpose and penalties available in the case of a murder or physical injury:

1. O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. 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.<sup>94</sup>
2. In the Law of Equality there is (saving of) Life to you, o ye men of understanding; that ye may restrain yourselves.<sup>95</sup>
3. We ordained therein for them: "life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal." But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (no better than) wrongdoers.<sup>96</sup>
4. Never should a believer kill a believer; but by mistake. If one (so) kills a Believer, It is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely.<sup>97</sup>

The following discussion will describe the circumstances under which each of these options may be exercised.

### *B. Imposing the Qisas Penalty*

Whether the *qisas* penalty will actually be imposed in a case where the victim is injured or killed depends on a number of factors. First, there are rules that affect whether the *qisas* penalty will be applied. For instance, the prosecution must prove that the wounding was purposeful.<sup>98</sup> Islamic law also recognizes varying degrees of homicide

94. THE QUR'AN 2:178.

95. THE QUR'AN 2:179.

96. THE QUR'AN 5:45.

97. THE QUR'AN 4:92.

98. See SHAHEED, *supra* note 82, at 87 (listing the crimes involving *Qiyas* and *Diyat*). See also SANAD, *supra* note 67, at 61-63. According to Sanad, *qisas* punishments are also limited in the following manner: 1) The accused must be an adult who is of sound mind and understanding at the time of the act, and the act must have been done intentionally; 2) The victim must be a Muslim or *Zimmi* (Christian or Jew) or, according to the majority of writers, a *musta'min* (a non-Christian or non-Jew who has entered the land of Islam pursuant to a peace treaty); 3) Only the male blood relatives (father or

based on the intent of the perpetrator and the manner of the killing. Only some degrees of homicide are subject to the *qisas* penalty.<sup>99</sup> However, even if the perpetrator did not intend to kill the victim, he or she may face the *qisas* penalty for intentional murder if the wounding was intentional. Wrongs other than murder that may qualify for the *qisas* penalty include “an offensive act that does not result in death such as causing injury to a person or subjecting him to violence.”<sup>100</sup>

Additionally, if there is less than conclusive proof of the defendant’s guilt, physical punishment will not be extracted.<sup>101</sup> In cases of doubt, *diyya*, or monetary payment to the victim’s family, will be required.<sup>102</sup> Due to the severe nature of the potential penalties in *hadd* and *qisas* crimes, both categories of crimes require eyewitnesses. In the case of *zina*, there must be four eyewitnesses; for the other *hadd* or *qisas* crimes, there must be two eyewitnesses.<sup>103</sup> Both substantive and procedural protections are so strict for the prosecution of these crimes that the

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grandfather) in a line of ascendancy can claim *qiyas* in the case of the death of the victim: only the victim can claim it in the case of injury or maiming; 4) A Muslim or *Zimmi* cannot be executed or maimed for the killing of someone not a *musta'min* (i.e. pagan and apostates); 5) The infliction of the *qiyas* must be in the least painful manner; 6) The person who inflicts the *qiyas* must have the knowledge and competence which enable(s) him to inflict it. Otherwise, a professional executioner is assigned to carry out the sentence on behalf of the victim or his family; 7) The person shall not inflict a greater degree of harm than that which has been inflicted; and 8) *Talion* (physical punishment) should not be applied unless conclusive evidence exists. Doubtful evidence is valid to sustain *diyya* (monetary payment) only. *Id.*

99. LIPPMAN, *supra* note 83, at 51. Intentional killing with an instrument that is recognized as a deadly weapon is called *qatl al'amd*, and is punishable by retaliation. *Id.* at 50. The intent to kill is ascertained by the type of weapon used. If an instrument is used which is recognized as potentially deadly, the intent to kill is inferred. *Id.* When a killing occurs that is done with an instrument that is not one which is widely accepted as having deadly potential, it is called *qatl shibhy'l-and*. *Id.* at 51. The punishment for this type of homicide is the payment of *diyya* and religious atonement and the relinquishment of inheritance from the victim. *Id.* Third, the inadvertent killing of another is called *gatl al-khata'* and is punishable by requiring the freeing of a Muslim slave, or paying compensation to the victim’s family and fasting. *Oatl al-khata'* homicides are those which result from an error in act or an error in intention. *Id.* Finally, *gatl bi-sabab* is a killing that is the result of a chain of events which the defendant sets in motion. *Id.* It is punished by requiring the defendant to pay monetary compensation, and he will lose the right to inherit. *Id.*

100. BAMBALÉ, *supra* note 73, at 87.

101. SHAHEED, *supra* note 82, at 243-44.

102. *Id.*

103. BAMBALÉ, *supra* note 73, at 30, 120.



penalties are rarely, if ever, imposed.<sup>104</sup> Islam abhors the punishment of the innocent to such an extent that it is preferable to let a guilty person go unpunished than to wrongly punish the innocent. In other words, it is better to err in forgiving than in punishing.<sup>105</sup>

Scholars often disagree as to how a penalty should be executed, even when all of the above-mentioned elements are satisfied.<sup>106</sup> However, if a victim insists upon the penalty, all the scholars agree that the penalty should be performed in the most humane manner possible<sup>107</sup> and, in the case of wounding, it should not be performed if there is a chance that the offender might die. In addition, certain groups (such as pregnant women, children, and those who lack mental or physical capacity) are exempt from the penalty.<sup>108</sup> Furthermore, it must be ensured that the penalty is not in any way more extreme or painful than the original wounding.<sup>109</sup>

### C. *Diyya/Restitution*

As discussed above, *diyya* is the payment of money to the victim of a violent crime. The payment can be made in substitution for the *qisas* penalty at the request of the victim(s) or it can be imposed if any of the procedural or substantive requirements for the imposition of *qisas* have failed.<sup>110</sup> The following from the Qur'an verse deals with the payment of restitution:

Never should a believer kill a believer; but by mistake. If one (so) kills a Believer, It is ordained that he should free a believing slave, and pay

104. BHALA, *supra* note 68, at 1168.

105. SHAHEED, *supra* note 82, at 254 (citing the Qur'an: "It is better if the Imam errs in forgiving than if he errs in punishing.").

106. For example, some schools of thought insist on the exact same type of wounding to be imposed, if it is possible. Other schools of thought, in the case of a murder, require that the offender be executed by decapitation regardless of the manner in which the murder was committed. Some scholars have left it to the victim or his or her family to carry out the penalty. Others require a professional employed by the state to carry out the penalty.

107. M. Cherif Bassiouni, *Death as a Penalty in the Shari'a*, in THE DEATH PENALTY: CONDEMNED 209 (International Commission of Jurists, 2000).

108. *Id.*

109. EL AWA, *supra* note 6, at 72.

110. *Diyya* payment may be required for the following wrongs: intentional or felonious homicide, quasi-intentional murder, unintentional homicide, intentional infliction of wound, and/or unintentional infliction of wound. SHAHEED, *supra* note 82, at 58.

compensation to the deceased's family, unless they remit it freely.<sup>111</sup>

The following hadith also addresses restitution:

Whoever is killed inadvertently as by flogging or beating with a stick or being hit by a stone, his blood-price is a hundred camels.<sup>112</sup>

It is important to note that the victim or the victim's family must insist that the *qisas* penalty be carried out. If any of these standards are not met, the *qisas* penalty will not be applied; in many instances the penalty will consist of *diyya* payment. It is also important to note that the amount of the payment is fixed according to the circumstances of the wound and the person wounded.

Although *diyya* is often translated to mean "blood money," it can also be seen as restitution. The term "blood money" carries with it a negative connotation. It conjures up images of gangsters, contract killers, and those who betray the lives of others for money. It is perhaps for these reasons that *diyya* has been overlooked in the restorative justice discourse. However, the payment of money to the innocent victims or their families has nothing in common with paying the guilty parties for the murder or injury.

#### D. Forgiveness and Mercy

The final option victims have in a case of intentional homicide or wounding is to forgo both the *qisas* penalty and *diyya*. As seen above, many of the verses in the Qur'an dealing with *qisas* encourage family members to show mercy by forgoing the *qisas* penalty, and make clear that they also have the choice of not requiring the payment of *qisas*. This expression of forgiveness is praised in both the Qur'an and in several *hadith*. Forgiveness is not only an aspect of reconciliation between the parties most directly involved in the wrongful act recognized by the Sharia but also a goal of restorative justice.<sup>113</sup>

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111. THE QUR'AN 4:92.

112. Narrated by Abu Dawud, book 39, Hadith no. 4531.

113. Contemporary states that incorporate versions of Islamic criminal law include: Saudi Arabia, Yemen, the U.A.E., Afghanistan (at least until recently), Libya, Sudan, Pakistan, Iran, Qatar, Somalia, and Northern Nigeria. PETERS, *supra* note 115, at ix-x. See also BHALA, *supra* note 68, at 1168, 1191 (noting that the vast majority of the states that make up the Organization of Islamic Conference have not incorporated Islamic criminal law into the law of the state, and also noting that most contemporary Muslim-majority states have mixed legal systems whose criminal codes rely on criminal codes that do not

#### IV. QISAS IN CONTEMPORARY STATES

There are very few Muslim majority states that formally incorporate criminal law derived from *Sharia* into their legal systems. Most states that incorporate *Sharia* into their state law do so only with respect to personal status matters. The balance of the state law in these countries is usually derived from European law codes even though the post-colonial states have adopted language in their constitutions to the effect that no law shall be constitutional if it is contrary to *Sharia*, or that *Sharia* is “a” source of law or “the” source of law. In addition, with the exception of Saudi Arabia, the states that incorporate *Sharia* criminal law do so by use of a criminal code. However, the mere act of codifying *Sharia* changes its essential nature. Thus, when we discuss Islamic criminal law in modern nation states, it is not the classical form of Islamic criminal law, even if it is inspired by interpretation of the Qur’an, the *Sunnah*, and the writings of the classical era scholars.<sup>114</sup>

Neither can the role of politics be disregarded. There is no perfect state, society, or human being. Thus, as a human institution, courts of law are often subject to human pressures and temptations. While valid interpretations of the Qur’an, *Sunnah*, and the writings of the early scholars may legitimately vary, sometimes the actual implementation of the *Sharia*-derived punishments are the result of corruption, ignorance, and the wish to appeal to certain ultra-fundamentalist sectors of society. Nevertheless, like the restorative justice movement, there is a reactionary aspect to the ever-increasing call to “Islamacize” societies. Part of that call sometimes includes a demand to return to *Sharia* law, including *Sharia* criminal law. This call is partially a reaction to colonization and the imposition of European codes of law.<sup>115</sup> The call to Islamacize society was famously answered in Iran in the 1980s and more recently in the states of Northern Nigeria.

The discussion below analyzes the states of Northern Nigeria that have incorporated *Sharia* criminal law principles into their written codes. The law of *qisas* is alive and well in Northern Nigeria. If the trend

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incorporate *hudud* punishments, which would horrify the majority of the citizens of those countries).

114. In addition, the modern state apparatus of crime detection, prevention, adjudication, and prosecution may also affect the form of criminal penalties imposed.

115. See RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY* 142-169 (Cambridge 2005) (discussing at length the political, social and historical forces leading to the reimplementation of *Sharia* law in contemporary states).

towards increasing demands for *Sharia* law continues in other Muslim majority nations, an examination of the struggles and strategies employed in Northern Nigeria with the implementation of *Sharia* is useful not only because other countries might learn from this experience, but also because while it is one thing to talk about the law of *qisas* in an abstract way, it is often quite another to talk about it in practice.

#### A. Northern Nigeria: Pre-Colonial Islam and Sharia

The twelve states of Northern Nigeria have made headlines in the past decade for their incorporation of *Sharia* criminal law into their official penal codes. The headlines have dealt with human rights concerns regarding harsh penalties that may be imposed. Most of the articles published in the popular Western presses have dealt with penalties imposed for the *hadd* offenses. The case of Amina Lowall garnered substantial attention and engendered widespread public criticism in the West and stern reprimands from international organizations.<sup>116</sup> This sensational case, however, did not deal with the *qisas* penalties; rather, it dealt with the imposition of the punishment for *zina*, the *hadd* crime of sex outside of marriage. In other countries that impose *Sharia*-based criminal law, there have occasionally been reports of cases involving wounding where a victim demands the *qisas* penalty. These publicized cases almost invariably involve a *qisas* penalty that appears to Western sensibilities – and to most Muslims – as primitive and egregious.<sup>117</sup> Instances where the victims forgo the *qisas* penalty in favor of *diyya*, or forgo both the *qisas* penalty and *diyya* are rarely, if ever, reported.<sup>118</sup>

This lack of reporting cases involving *qisas* creates difficulties for

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116. Jeff Koinange, *Woman Sentenced to Stoning Freed*, CNN (February 23, 2004) <http://www.cnn.com/2003/WORLD/africa/09/25/nigeria.stoning/index.html?iref=allsearch>. The Shari'ah Court of Appeals later reversed her sentence.

117. In 2008, CNN reported the following:

An Iranian woman, blinded by a jilted stalker who threw acid in her face, has persuaded a court to sentence him to be blinded with acid himself under Islamic law demanding an eye for an eye. Ameneh Bahrami refused to accept "blood money." She insisted instead that her attacker suffer a fate similar to her own "so people like him would realize they do not have the right to throw acid in girls' faces," she told the Tehran Provincial Court.

*Iranian to be blinded with Acid for doing same to Woman*, CNN WORLD (December 14, 2008) [http://articles.cnn.com/2008-12-14/world/iran.acid.justice\\_1\\_acid-blood-money-attacker?\\_s=PM:WORLD](http://articles.cnn.com/2008-12-14/world/iran.acid.justice_1_acid-blood-money-attacker?_s=PM:WORLD).

118. See BHALA, *supra* note 68, at 1168.

the scholars interested in the restorative options available in *qisas* crimes. This author has found no studies regarding the percentage of *qisas* crimes that are pardoned by the victims. Nor has this author discovered any studies regarding the actual procedures in cases where the victim or his or her families have chosen between the *qisas* penalty, *diyya* or forgiveness. What is left, therefore, are the legal codes in countries that implement *Sharia* law, the anecdotal reports of Western media that search for sensational cases to sell papers, and the condemnations of international organizations that have much to say about the *hadd* penalties, and sometimes mention retaliation in kind, but never discuss instances of forgiveness by the victims.

Nevertheless, the states of Northern Nigeria offer a fascinating case study of democracy emerging from colonialism, neo-colonialism, and military dictatorship in a very pluralistic society. *Sharia* law has been and still is an integral part of the negotiations between the different ethnic and religious groups in Nigeria, especially in Northern Nigeria. The following discussion will trace the role of *Sharia* in the nation-building of Nigeria, and will conclude with a survey of the codification of the law of *qisas* in the various Northern Nigerian states that have adopted their versions of criminal law based on *Sharia*.

*Sharia* has a long history in Northern Nigeria. Islam was introduced into the region in the ninth century.<sup>119</sup> It was brought by traders from the Maghreb who visited western Africa and the kingdoms and empires that had emerged there in the sixth through ninth centuries. By the 15<sup>th</sup> century, Islam was firmly rooted in western Africa.<sup>120</sup> In addition, Islam and Islamic institutions had become a formal part of the Kingdom of Kano under the leadership of Muhammad Rumfa, the first Emir of Kano.<sup>121</sup> Western Africa soon emerged as a center of Islamic scholarship, rivaled only by the great centers of Islamic scholarship in Spain and the Middle East.

The study and development of Islamic legal concepts and jurisprudence was integral to the Islamic societies in Western Africa. As

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119. Rasheed Olaniyi, *Hisba and the Shari'ah Law Enforcement in Metropolitan Kano*, available at [http://www.ifra-nigeria.org/IMG/pdf/Rasheed\\_Olaniyi\\_-\\_Hisba\\_and\\_the\\_Sharia\\_Law\\_Enforcement\\_in\\_Metropolitan\\_Kano.pdf](http://www.ifra-nigeria.org/IMG/pdf/Rasheed_Olaniyi_-_Hisba_and_the_Sharia_Law_Enforcement_in_Metropolitan_Kano.pdf) (October 19, 2012).

120. Ogechi E. Anyanwu, *Crime and Justice in Postcolonial Nigeria: The Justifications and Challenges of Islamic Law of Shari'ah*, 21 J.L. & RELIGION 315 (2005-2006).

121. Olaniyi, *supra* note 119, at 1-2.

the original bearers of Islam had come from North Africa, the roots of Islamic jurisprudence in western Africa were from the Maliki school of thought.<sup>122</sup> Thus prior to colonization, Islamic law had existed in western Africa for hundreds of years, and was a deeply rooted aspect of the lives of the Muslims living in the Muslim empires and kingdoms in what later became Nigeria. This situation persisted until the disintegration of the indigenous kingdoms and the imposition of British colonial rule in the 19<sup>th</sup> century.

In the early 19<sup>th</sup> century, a new Caliphate, the Sokoto Caliphate, was established in what later became Nigeria.<sup>123</sup> Islamic law became integral to the management of the affairs of the Caliphate, and the monopolization of the criminal justice system was a part of the consolidation of its power. In 1804, an Islamic revivalist movement in western Africa culminated in the Uthman Dan Fodio Jihad.<sup>124</sup>

In the late 1800's, the British began trying to colonize the area. The Sokoto Caliphate resisted. By 1900, the Sokoto resistance, which was based in part on a deep desire to maintain the Islamic character of the Caliphate, was crushed, and the British claimed a monopoly over the law.<sup>125</sup> Under the auspices of the "native rule" policy, the British left the Sharia courts with jurisdiction over civil disputes and personal status

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122. There are four main schools of thought in contemporary Sunni Islam. One of these schools is the Maliki school, named for its founder Malik Ibn Anas al-Asbahi. KAMALI, *supra* note 65, at 73. However, there was also dialogue with scholars from other schools of thought who traveled to Western Africa both to teach and to study at the schools of law established in the Islamic kingdoms. *Id.*

123. Anyanwu, *supra* note 120, at 324.

124. *Id.* at 324. This was nothing less than an Islamic revolution influenced by Fodio. Two years prior to the revolution, Fodio had moved to Gudu and composed two works that emphasized the importance of Islamic practices as outlined in the Sharia. *Id.* at 324. The Sokoto Caliphate accorded high status to Sharia law based upon Fodio's leadership and writings. The Sokoto Caliphate became the largest in western Africa, and led to the ingrained use of Sharia as the basis for the legal systems in northern Nigeria. As one author expressed: "The Sokoto caliphate became seen as part of a sacred history, 'G-d's act.' The Sharia was presented as a solution to misfortune, upheavals and injustice." *Id.* (quoting PETER B. CLARK & IAN LINDEN, *ISLAM IN MODERN NIGERIA: A STUDY OF A MUSLIM COMMUNITY IN A POST-INDEPENDENCE STATE 1960-1983* (Kaiser 1984) (further quotation marks omitted)). Thus, the Sharia penetrated every aspect of Muslims' lives in the Caliphate, and became a part of the "collective conscience" of the people living there. *Id.* at 324. The ability of the political leaders to punish wrongdoing was an important aspect of their consolidation of political power in the far-flung pluralistic Caliphate. Their power ended, however, when the better-armed and equipped British won decisive victories over the Sokoto army. *Id.* at 325.

125. *Id.*

cases, and limited their power to resolve criminal disputes and apply traditional or Sharia based punishments.<sup>126</sup> They also enacted the Native Courts Proclamation of 1900, which declared that Sharia courts would:

administer the native law and custom prevailing in the area of jurisdiction, and might award any type of punishment recognised thereby except mutilation, torture, or any other which was repugnant to natural justice and humanity.<sup>127</sup>

Whether any punishment was “recognized” as “repugnant to natural justice and humanity,” was to be determined from the British point-of-view. Interestingly, at that time, the British employed a number of corporal punishments for crimes. These punishments included lashing and execution.<sup>128</sup> Nevertheless, the Native Courts Proclamation relegated Sharia to a second-class status as a source of law. The colonizers limited the application of Sharia law in criminal cases.<sup>129</sup> Since Sharia law was so ingrained in the cultural identity of the people of the former Sokoto Caliphate, including the criminal law of Sharia, the dilution of Sharia law created resentment that lasted over one hundred years.<sup>130</sup> This resentment has fueled the current debates (and violence) about the proper place of Islamic criminal law in Nigeria in the post-colonial period and the re-adoption of Sharia-based criminal law today.<sup>131</sup>

When the British formally withdrew from Nigeria in 1960, a new era of unrest and political uncertainty began. The British left the nation deeply divided by ethnic, religious, regional, class, and educational differences.<sup>132</sup> One of the battlegrounds upon which these conflicts were to be fought was the place of Sharia in Nigerian law. In 1960, delegates

126. See KAMARI MAXINE CLARKE, *FICCTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* 192 (Cambridge Studies in Law and Society 2009).

127. Anyanwu, *supra* note 120, at 325. (citing E.A. KEAY & S.S. RICHARDSON, *THE NATIVE AND CUSTOMARY COURTS OF NIGERIA* 22 (Sweet & Maxwell Ltd. 1966).

128. See Hascall, *supra* note 70, at 13 (stating that the death penalty was not abolished in the United Kingdom until 1965).

129. C.N. Ubah, *Islamic Legal System and the Westernization Process in the Nigerian Emirates*, 20 *J. LEGAL PLURALISM* 69, 71-73 (1982). See also Auwalu H. Yadadu, *Colonialism and the Transformation of Islamic Law*, 32 *J. LEGAL PLURALISM & UNOFFICIAL L.* 103, 114-115 (1992). See also Anyanwu, *supra* note 120, at 325.

130. See Anyanwu, *supra* note 120, at 328-333 (discussing the history of the gradual reestablishment of Sharia in Northern Nigeria).

131. See *id.*

132. Andrew Ubaka Iwobi, *Tiptoeing Through A constitutional Minefield: The Great Sharia Controversy in Nigeria*, 48 *J. AFR. L.* 111, 113-114 (2004).

met to determine the future of the Nigerian penal code.<sup>133</sup> Two different codes were established: one for the North, and one for the predominantly Christian South. However, neither code provided for Sharia as a source of criminal law. Those in the North who supported the integration of Sharia into the criminal code were convinced that its neglect was a vestige of colonialism. Those who opposed Sharia in any form were convinced of its primitive and inhuman nature. The conflict was so intense that the Muslims finally conceded and accepted a penal code that was not based on Sharia in order to prevent severe civil unrest.<sup>134</sup> But the issue never went away.<sup>135</sup>

After the British left in 1960, Nigeria suffered civil war and was under military rule. After a brief period of democracy in the 1970s, the military regimes that lasted from 1983-1998 once again halted serious discussion about the placement of Sharia law on the same level as English-derived law in Nigeria.<sup>136</sup> The moment the military dictatorships ended, however, the debate about the role of Sharia in Nigerian law began once again with full vigor. In 1999, the states in Northern Nigeria began to test the limits of the federal government's power by adopting penal codes that incorporated Sharia-based crimes, procedures, and punishments.<sup>137</sup>

Zamfara was the first state to draft a penal code based on the

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133. *Id.* at 112.

134. Anyanwu, *supra* note 120, at 328.

135. The Sharia debate was not on the national forefront during the 1967-70 civil war, nor during the years of military rule from 1966-78, but the debate began in earnest in 1978, when democracy was once again a possibility in Nigeria. *Id.* at 328. The first serious debate about the second-class status of Sharia centered on a move to establish a federal Sharia appellate court. *Id.* at 328-329. Previously, appeals from the Sharia courts of first instance went to the federal courts. *Id.* at 329. The federal courts of appeals did not maintain judges or staff who were well-versed in Sharia law, and thus could overturn the decisions of the *qadis* (judges) without any sound legal basis arising from the Sharia. *Id.* A compromise was formed that would require a few members of the Supreme Court to have training in Sharia law, and that court would then hear appeals from the *Shari'ah* courts. No federal Sharia courts of appeals were created. *Id.* at 331. After this brief period of democratic possibilities, the military regimes that lasted from 1983-1998 once again halted serious discussion about the placement of Sharia law on the same level as English-derived law in Nigeria. *Id.* at 332. The moment the military dictatorships ended, however, the debate about the role of Sharia in Nigerian law began once again with full vigor. In 1999, the states in Northern Nigeria began to test the limits of the federal government's power by adopting penal codes that incorporated Sharia-based crimes, procedures, and punishments. *Id.*

136. *Id.* at 332.

137. *Id.*



*Sharia*.<sup>138</sup> In campaigning for the governorship of Zamfara, Ahmed Sani Yerima promised that he would introduce the *Sharia* in its entirety into the laws of the state. This promise attracted enough support for him to win the election. The federal constitution had been amended to give more power to the state assemblies to “make laws with respect to any matter within [their] legislative competence and correct any defects in existing laws . . .”<sup>139</sup> As a result, Yerima was able to make good on his campaign promise. The result was a redrafted version of the old penal code of the northern states that included the *hadd*, *qisas* and *tazeer* crimes and their recommended penalties. This move was so popular in the North that eleven other governors soon followed suit, bowing to popular pressure and political ambitions.<sup>140</sup> When these states first began to adopt their own codes based on *Sharia* criminal law, the codes tended to be quite long and were difficult to compare to one another.<sup>141</sup>

Recognizing the advantage of having the codes of the states more uniform and user-friendly, the faculty of the Centre for Islamic Legal Studies, Ahmed Bello University, sought to create a common code of *Sharia* penal law. In 2002, it drafted the “Harmonized *Sharia* Penal Code Law” (HSPC).<sup>142</sup> The Code has been adopted in its entirety by the state of Zamfara with only minor changes. This code will be examined in the subsequent portion of this article, with careful attention paid to the variations amongst the state code portions that deal with the law of *qisas*.

### 1. *The Harmonized Sharia Penal Code Law*

As is any modern code, the HSPC is divided into several major sections that are further divided among discreet topics. The style of the code would be very familiar to any law student from a common law state. The content, however, is clearly based on classical *Sharia* categories and concepts. Chapter I contains general explanations and definitions, some of the words defined are Arabic terms of art that would be familiar only to one who has studied Islamic law.<sup>143</sup> The terms *qisas*

138. *Id.*

139. *Id.* at 333 (internal quotation marks and citation omitted).

140. *Id.* at 333-334.

141. CENTRE, 4 *SHARIA IMPLEMENTATION IN NORTHERN NIGERIA 1999-2006: A SOURCEBOOK* 7. (Philip Ostein ed., 2007), available at [http://www.sharia-in-africa.net/media/publications/sharia-implementation-in-northern-nigeria/vol\\_4\\_4\\_chapter\\_4\\_part\\_III.pdf](http://www.sharia-in-africa.net/media/publications/sharia-implementation-in-northern-nigeria/vol_4_4_chapter_4_part_III.pdf).

142. *Id.*

143. *See id.* at 37.

and *diyya* are among those terms. *Qisas* is defined as “punishments inflicted upon offenders by way of retaliation for causing death/injuries to a person.”<sup>144</sup> Thus, as discussed above, the definition of *qisas* aligns with its most common uses in both classical and contemporary Islamic jurisprudence. The HSPC also defines the word *diyya*. *Diyah* is defined “a fixed amount of money paid to a victim of bodily hurt or to the deceased’s legal heirs in homicide cases.”<sup>145</sup>

Chapter II is entitled “Criminal Responsibility” and includes a section on *qisas*.<sup>146</sup> Overall, the chapter gives general and specific definitions and explanations of the scope of criminal responsibility under the code. Of interest to the discussion of *qisas* is Section 83, which provides for the “Presumption of right to *diyah*, damages, etc.”<sup>147</sup> While the preceding sections list possible criminal defenses, Section 83 limits their application to *qisas* crimes: “Nothing contained in the provisions of sections 66-81 shall prejudice the right of *diyah* of damages in appropriate cases.”<sup>148</sup> The preceding sections deal with defenses to crimes such as mistake of fact or law, acts done in official capacity as a judge or when in good faith the person believes he has the power to act by law, when the offender lacks criminal intent or is coerced, when the person is acting in a lawful manner and the harm is caused by mistake, or when the person accused lacks criminal capacity due to age.<sup>149</sup> It should be noted, however, that the *qisas* penalty would not be imposed under any of these circumstances. Only the possibility of the payment of *diyya* is exempted from being negated under these circumstances.

Chapter III lists all the punishments and compensations that might be imposed upon an offender. Among these are: “death (*qatl*); . . .

144. *Id.* at 54. It is also noted in footnote 82, that, “PC Gombe, Jigawa, Kano, Katsina, Kebbi, Sokoto, Zamfara omit this section. Bauchi: ‘the body of Islamic laws relevant to retaliation.’” *Id.* at n. 82.

145. *Id.* at 54 (footnotes omitted). Footnote 86 to section 60 states the following: “All SPCs except Kaduna and Sokoto have ‘murder cases’ instead of ‘homicide cases.’ Bauchi adds: ‘applying to both *qisas* [retaliatory] cases as well as non-*qisas* cases.’ All SPCs except Bauchi and Kaduna add at the end: ‘the quantum of which is one thousand dinar, or twelve thousand dirham or 100 camels.’ Bauchi adds further: ‘or two hundred heads of cattle, or two thousand heads sheep.’” *Id.* at n.86. Section 61 also defines the word “*hukumah*” as “the amount of compensation short of *arsh* payable to a victim of bodily injuries of unspecified quantum based on the discretion of the court.” *Id.* at section 61 (footnotes omitted).

146. *Id.* at 37.

147. *Id.*

148. *Id.* at 58.

149. *Id.* at 55-57.

retaliation (*qisas*); blood-wit (*diyah*); restitution (*radd*); . . . [and] compensation (*hukuma*) . . .”<sup>150</sup> Chapters IV through VII deal with joint responsibility for crimes, abetment, and the law of attempts and conspiracy.<sup>151</sup> Chapter VIII covers the *hadd* (*hudud*) and “*Hudud-Related Offenses*.”<sup>152</sup> The crimes that are denoted “*Qisas and Qisas-Related Offenses*” are dealt with in Chapter IX, and will be discussed below.

## 2. Chapter IX: *Qisas and Qisas-Related Offenses*

Chapter IX clearly deals with the *qisas* crimes, but several states have not replicated the HSPC. The HSPC categorizes *qisas* crimes as “Offenses Affecting the Human Body.” However, the codes of Kano and Katsina categorize the *qisas* crimes under a chapter entitled “Retaliatory Offenses,” and the Gombe code includes the *qisas* crimes in the section dealing with *hadd* offenses.<sup>153</sup>

These variations reflect the uncertainty that arises when the *qisas* crimes are defined either solely according to the available punishments, which in the case of homicide can include the death penalty, or defined in terms of the harm inflicted. This problem was alluded to earlier, and it is interesting to note that it has resulted in a variety of methods of categorization that may involve retaliation in the codes of the states of Northern Nigeria, the HSPC, and the former SPC. Nevertheless, the clear cases of *qisas*, namely intentional homicide and direct bodily injury not involving sexual contact, are described in the HSPC in terms that would be quite familiar to one who has studied the classical *fiqh* – the jurisprudence of Islamic law.<sup>154</sup>

The categories of crimes listed under Chapter IX are as follows: Homicide, Causing Miscarriage, etc., Hurt, Criminal Force and Assault, Kidnapping, and Abduction and Forced Labour.<sup>155</sup> Homicide is given a historically consistent definition:

Except in the circumstances mentioned in section 203, whoever being *mukallaf*<sup>156</sup> causes the death of a human being by an act:

150. *Id.* at 60.

151. *Id.* at 63-67.

152. *Id.* at 68-84.

153. *Id.*

154. *Fiqh* means Islamic jurisprudence.

155. *Id.* at 40.

156. The term “*mukallaf*” is defined in the Code as “a person possessed of full legal and religious capacity.” *Id.* at 52.

- (a) With the intention of causing death or such bodily injury as is probable or likely to cause death; or
- (b) In a state of fight, combat, strife or aggression, which is not intrinsically likely or probable to cause death; or

If the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of bodily injury which the act was intended to cause, commits the offence of homicide (*qatl al-'amd*).<sup>157</sup>

The crime of *qatl al-amd* is punishable by the *qisas* penalty (retaliation in kind), but the code also provides that the victim's relatives may remit the *qisas* penalty in favor of *diyya*, and may also remit the *diyya* payment. The HPMC provides:

Whoever commits the offense of homicide shall be punished:

- (a) with death; or
- (b) where the relatives of the victim remit the punishment in (a) above, with the payment of *diyyah*; or
- (c) where the relatives of the victim remit the punishment in (a) and (b) above, with caning or one hundred lashes and with imprisonment for a term of one year.

Provided that in cases of intentional homicide by way of *gheelah* or *haraba*<sup>158</sup> the punishment shall be with death only.<sup>159</sup>

The only variations on the language of the HSPC are found in the written codes of Kano, Katsina, and Kaduna. The states of Kano and Katsina provide in their codes: “[W]here the relatives of the victim remit the punishment in paragraph (a) and (b) above, the convict shall, in addition to the payment of *diyyah* be imprisoned for a period not exceeding 10 years.”<sup>160</sup> Only the state of Kano provides no punishment by the state if the relatives of the victim remit both the *qisas* and *diyya* payment.<sup>161</sup>

Unintentional homicide is defined in the subsequent sections. The homicide is unintentional if it is committed by a *mukallaf* who causes the death “by mistake or accident, or by doing a rash act.”<sup>162</sup> If the death is caused by a mistake or an accident, then it is punishable by “payment of *diyyah*.”<sup>163</sup> If it is caused “by a rash, or negligent act,” the death is

157. *Id.* at 84-85 (section 198 of the penal code).

158. The term “*haraba*”(*hiraba*) refers to the *hadd* crime of brigandage or highway robbery. *See* Bambale, *supra* note 73, at 69.

159. *See* CENTRE, *supra* note 142, at section 199. .

160. *Id.* at 85, Section 199 of the HSPC, n. 270.

161. *Id.* *See also id.* at Chapter 5 Part V, p. 323.

162. *See* CENTRE, *supra* note 142, at section 200.

163. *Id.* (section 201).

punishable by “payment of *diyah*, a term of imprisonment which may extend to six months and [the *mukallaf*] shall also be liable to caning which may extend to fifty lashes.”<sup>164</sup>

The crime of “hurt” is defined as causing “bodily pain, disease or infirmity to any person.”<sup>165</sup> Certain injuries are then listed and described as “grievous.”<sup>166</sup> The punishment for voluntarily causing hurt is “imprisonment for a term which may extend to six months or with caning which may extend to twenty lashes and [the perpetrator] shall also be liable to pay compensation.”<sup>167</sup> Section 219 describes the punishments that are more closely aligned to the classical works describing the punishments for bodily injury by including the right of the victims to either insist upon or forgo *qisas* and *diyya*. Section 219 states:

Whoever voluntarily causes grievous hurt to any person shall be punished:

- (a) with *qisas*; or
- (b) where the *qisas* is remitted or not applicable, with the payment of *diyah* as provided under Schedule B of this law and shall also be liable to imprisonment for a term which may extend to six months; or with caning which may extend to twenty lashes or with both.<sup>168</sup>

Unintentionally causing grievous harm is not cause for the infliction of *qisas*. Rather, those offenders are required to pay *diyya* under Schedule B.<sup>169</sup>

Schedule B sets forth the payment scale for injuries and divides them into parts based upon the type of injury inflicted. Part A sets forth a schedule of “cases” that warrant the *qisas* penalty. These cases include:

- (1) The intentional causing of death
- (2) The intentional severing or dismembering of joints or limbs such as:
  - (a) the arm or any joint thereof even the phalanges of fingers;
  - (b) the leg from the pelvis even the phalanges of the toes;
  - (c) the eye that is possessed of the power of sight;
  - (d) the part of the nose formed of cartilage . . . .<sup>170</sup>

The next part of Schedule B sets forth cases “that warrant the full

164. *Id.* at 85 (sections 200, 201).

165. *Id.* at 89 (214).

166. *Id.* at 89 (215).

167. *Id.* at 89 (218) (also noting numerous variations among the state codes).

168. *Id.* at 89-90 (219).

169. *Id.* at 90 (220).

170. *Id.* at 137 (2).

amount of *diyah*.”<sup>171</sup> The Code then sets forth special cases that warrant the triple payment of *diyya*, half the payment of *diyya*, and smaller fractions of the payment of *diyya*.<sup>172</sup> It also lists instances of wounding that do not warrant the payment of *diyya*, but instead only require payment for damages (*hukuma*).<sup>173</sup>

As seen above, most of the discussion surrounding the law of *qisas* in the codes of Northern Nigeria focuses not on the minutia of rules regarding forgiveness for wounding or intentional homicide, but rather on the range and methods of imposing either *diyya* or *qisas*, and the permissible state-inflicted punishments should the victims forgo *qisas* and *diyya*. Nevertheless, the basic principles of Islamic law that encourage the victims to forgo the punishments are enshrined in the codes. Unlike Western law, under these codes the authority of the victims has not been usurped by the state. Furthermore, the codes tend to follow the general precepts of classical Islamic jurisprudence in their divisions of the crimes and the punishments prescribed. Thus, although examining the language of a code is no substitute for gathering data on the law in action, it seems as if the law of *qisas*, which allows for restorative justice ideals to exist within the mainstream of the official legal system, has been maintained in the codes of the states of Northern Nigeria.

As discussed above, *Sharia* law has raised concerns, because it allows victims to retaliate against their offenders. However, as illustrated by Northern Nigeria’s criminal codes, it offers and encourages alternative actions. As indicated by the political tensions surrounding adoption of *Sharia* criminal law in Northern Nigeria, the fusion of Islamic belief and of conservative *Sharia* interpretations and orthopraxy has long prevailed in the region. While many, including the author of this article, may balk at the imposition of the death penalty under any circumstance, it is part and parcel of a conservative interpretation of the *hadd*, and in the case of *qisas*, intentional murder. Quite as horrifying from this point of view is the imposition of *qisas* penalties. However, it would be hypocritical to deny that under the right circumstances, any one of us might want whatever harm was done to ourselves or loved ones to be inflicted upon the offender. The law of *qisas* offers the victims of crime the opportunity to express their retaliatory impulses. But *Sharia*’s most important characteristic, and the characteristic that is most ignored

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171. *Id.* at 137 (Part B, 1).

172. *Id.*

173. *Id.* at 138-139.

by the restorative justice community and the world in general, is its ability to clearly offer and encourage victims to take the high road.

Both in classical interpretations of Sharia and in the codes of Northern Nigeria, the victim has a central place in the prosecution and sentencing of offenders in *qisas* crimes. The victim is encouraged to reach beyond his arguably natural impulse to extract revenge and retribution and to grant forgiveness. Furthermore, unlike the West, when the victim affirmatively chooses to forgive the offender, the state respects that claim.<sup>174</sup> As the imposition of penalties in Islamic criminal jurisprudence is not as inextricably tied to the sovereignty and legitimacy of the power of the state, the justice of Islam allows the victims to express mercy and forgiveness, while recognizing that not all victims are able to bring themselves to do so. By allowing the victims to choose to accept payment rather than to inflict the *qisas* penalty, the law of *qisas*, both under classical Islamic jurisprudence and as reflected in the codes of Northern Nigeria, allows the offender the opportunity to make right, to some extent, the harm he or she has caused. The state, however, is still allowed to punish the offender to protect the larger population and to discourage future lawlessness. It is an intriguing mixture of values, and balancing of interests that deserves further investigation. The states of Northern Nigeria would provide an excellent setting to investigate the actual functioning of such a system, which includes elements of restorative justice so lauded by intellectuals in the West who are so fascinated with the conflict resolution strategies of indigenous populations but neglect to consider the restorative justice aspects of Sharia criminal law.

#### V. IS QISAS A FORM OF RESTORATIVE JUSTICE?

Howard Zehr developed a typology of criminal justice systems based on a continuum from purely retributive systems to those imbued with restorative justice characteristics. Zehr asserts that an underlying retributive philosophy of punishment is the primary philosophy of the criminal justice system and penological thought in the United States. He compared seventeen attributes of the retributive justice theory to seventeen attributes of restorative-oriented theory. Most of the seventeen attributes of restorative theory are compatible with the Islamic jurisprudence regarding *qisas* crimes and punishments. The attribute that does not fit is the one that is the most controversial aspect of the

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174. See generally, Hascall, *supra* note 70.

restorative justice theory: that punishment of crime has no utility. According to proponents of this version of restorative justice, the vengeful impulse should be negated because punishment is not useful.<sup>175</sup> By contrast, under the law of *qisas*, the vengeful impulse is recognized. However, even though the law of *qisas* permits retribution through punishment by inflicting pain under certain circumstances, it also discourages the vengeful impulse.

As discussed in the previous sections, one of the main attributes of restorative justice is the broadening of the definition of justice in criminal law and penology. The concept of justice is seen as more than simply devising the appropriate punishment for the offender. Justice has to do with repairing the rift in social relationships that is created by the crime. For those in the restorative justice movement, incarceration has failed to accomplish justice in the broader sense. While the punishment imposed by the state may “fit the crime,” something is lost when the punishment meted out by the state is the only focus of criminal justice. Victims are only marginally involved, even when they are given a voice in sentencing or have victims’ rights representatives working with the prosecutors. The outcome is still the same: punishment at the discretion of the state. Additionally, the community is only represented by proxy in the legal fiction of the state representing the community’s interests at trial. True restorative justice takes into consideration the effect of the punishment on the victim and his or her family, the offender and his or her family, and the local community. Thus, alternative methods of determining punishment have been devised that allow all or some of these groups to participate in the sentencing process. Restorative justice provides alternatives to incarceration. It recommends additional programs that enable the offender to realize on a personal level the harm he or she has done, to express true regret for that harm, and to attempt to repair the harm in ways other than incarceration. Thus, restorative justice values the human dignity of all those individuals who are most affected by the crime.

Similarly, the concept of justice in Islamic criminal law is broader than the concept of justice normally employed in Western criminal justice systems. This broad concept of justice in Islamic law is demonstrated through a number of themes that emerge in the Qur’an and

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175. “Restorative Justice in the area of criminal justice is based on the idea that the response to crime should be to put right the harm, as far as possible, and not, as hitherto, to inflict harm on the offender.” EDGAR & NEWELL, *supra* note 11, at 9 (internal citations omitted).



the *Sunnah*. One of the most important similarities between the notions of justice underlying Islamic criminal law and restorative justice is the requirement that individuals take personal responsibility for their actions. In Islamic criminal law, where *qisas* crimes are involved, this concept applies to both the offender and the victims, as well as their families and the larger community. The offender is encouraged to repent, which is not only the first step in healing the rupture between the offender and G-d, but also the first step toward forgiveness by the victims and the community. Although victims of *qisas* crimes may be allowed to demand retaliation, they are commanded to “temper retribution with mercy.”<sup>176</sup>

The values placed on human dignity, respect, and community are shared by both the restorative justice movement and the law of *qisas*. However, the sources for human dignity differ. In Islam, human dignity is derived from a person’s status as G-d’s creation and the representative of G-d on earth. In restorative justice, the source of human dignity derives from Western notions of human rights and the right of individuals to be treated with respect. The emphasis on community involvement in restorative justice does not derive from the concept of a community of believers, but rather from the idea of a community borrowed from small-scale societies (a partial reaction to the impersonal mass societies of the West) where the state has obtained a monopoly over criminal punishment and procedure. It is an attempt to recapture the sense of community that many feel has been lost. Nevertheless, the goals of the restorative justice movement and Islamic criminal law in general, and *qisas* in particular, are the same: to create a just society that respects the dignity of individuals and empowers victims, offenders, and the community as a whole.

As explained above, the concept of justice in Islamic criminal jurisprudence and in restorative justice has much in common. The goals are similar and the values overlap. Nevertheless, there is one aspect of Islamic criminal law that does not fit easily into the restorative justice conversation. Islamic criminal law does not discount the retributive aspects of punishment. In fact, the foregoing discussion has little to contribute to the controversy surrounding the *hadd* crimes. Because those crimes are seen to be against G-d and more detrimental to society as a whole than to the individuals involved, no restorative justice techniques regarding alternative punishments or restoration of relationships between the persons involved are applicable under a strict interpretation. As to the

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176. ROSEN, *supra* note 45, at 154. See also PETERS, *supra* note 115, at 27-28 (discussing the role of repentance in mitigating the *hadd* penalties).

punishments that are imposed for the *hadd* crimes, as mentioned before, most involve corporal punishment. Corporal punishment in any form is anathema to restorative justice. The infliction of pain is viewed to have no value whatsoever. Some might even argue that the infliction of psychological pain through imprisonment is counter-productive. Curiously, those who defend the use of corporal punishment in Islamic criminal law make a similar argument regarding long prison sentences, which are considered to be of little use in reforming the offender and are a waste of resources as they disrupt and punish familial relationships. Nevertheless, the infliction of wounds for wounds, or a life for a life, is an option in *qisas* crimes. The recognition of the vengeful impulse, as primitive as it might seem to the intellectuals advocating for restorative justice, is an important part of the law of *qisas*, even though vengeance is discouraged. This piece of the puzzle does not fit. However, it is only one piece of the law of *qisas*, and both those in the restorative justice movement and jurists and scholars in the states that presently employ criminal law based on the Sharia would do well to learn to listen to one another's' points-of-view on the subject.

#### VI. WHAT CAN THE LAW OF QISAS ADD TO THE DIALOGUE?

One of the goals of this article is to examine whether those in the restorative justice movement could benefit from the study of the law of *qisas* in both classical jurisprudence and also as it is practiced in modern nation-states such as Nigeria. Having established that the principles of restorative justice share many of the goals and attributes of Islamic criminal law in general, and *qisas* in particular, we must now examine how these theoretical and practical approaches to criminal punishment can benefit from the examination of each other's' perspectives.

As described *infra*, the restorative justice movement relies upon indigenous groups and small-scale societies for inspiration and mines them for techniques to implement the goals of restorative justice. Although techniques such as sentencing circles are utilized with success among the indigenous populations living in Western states, they may not always be successful without serious modification when applied to non-indigenous groups. It is also questionable whether the methods used in the non-indigenous contexts are actually based on any particular culture's conflict resolution system. Nevertheless, according to a number of scholars these methods have been successful. They have filled a void left by the conventional sentencing procedures that are not oriented towards the goals of restorative justice. However, the theories and goals

of restorative justice are not necessarily tied to anthropological data regarding the theories and goals of conflict resolution within indigenous and small-scale societies.

Scholars within the restorative justice movement can enrich their own theoretical perspectives on restorative justice by studying the Islamic criminal justice system. The law of *qisas* would be an obvious place to begin this study, as there are so many parallels between the goals of *qisas* and the goals of restorative justice. Conducting studies regarding the actual techniques used in cases of *qisas* to reach agreement amongst the victims would also be helpful.

Since the goals of restorative justice and Islamic criminal law overlap, states that apply the law of *qisas* would do well to consider some of the restorative techniques currently being utilized in the West. Some of these techniques could be used during the sentencing phase to encourage and facilitate the victims to forgo retaliation in favor of accepting *diyya* or forgoing both *diyya* and retaliation. Actual dialogue between the offender and the victim would also facilitate remorse, acceptance of personal responsibility by the offender, and empowerment of the victim. Meeting the offender face-to-face would also encourage the victims to consider the consequences of their decision to inflict retaliation on the offender and on his or her family. The techniques and goals of restorative justice are in line with those of Islamic law and the Qur'an. Therefore, states such as those in Northern Nigeria that implement the law of *qisas* in their penal codes should consider additional options that the methods of restorative justice would provide to bring about reconciliation and forgiveness.

## CONCLUSION

Criminal punishment is in a period of re-examination in the West. The ideas of restorative justice are being adopted in many jurisdictions in the form of innovative sentencing methods and increased involvement by victims. Both the victims' rights movement and the restorative justice movement seek to empower victims, but the restorative justice movement looks not only at the victim's rights but also at the effect of the crime on the families of both the victim and the offender as well as the community as a whole. Restorative justice is not a monolithic theory, as there are a number of variations in the theoretical orientations of those involved in restorative justice; however certain overarching themes are common. These themes seek to humanize both the victims and the offenders and offer alternatives to prison sentences that would allow the

rift that is created in the social fabric to be healed. The primary goals include having the perpetrator take responsibility for his or her crime, as well as reconciliation with the victim in particular and the community as a whole. Restorative justice thus broadens the definition of justice in criminal law. Because these goals are shared by Islamic criminal jurisprudence and are enshrined in the Revelation, the law of *qisas* should be considered as a source of inspiration for restorative justice.

As advocates for the model readily admit, restorative justice ideals and techniques are not new but have been around for thousands of years. However, the communities that are used for inspiration for restorative justice methodology tend to be small-scale societies without written law. Although much can be learned about alternative methods of conflict resolution from such societies, Islamic criminal jurisprudence can also be particularly enlightening through the writings of scholars and the Qur'an itself. The fact that the law of *qisas* allows for retribution in kind as an option of punishment does not foreclose its ability to aid the restorative justice movement. After all, even when restorative techniques are employed in sentencing, the state will nevertheless extract some form of pure punishment in addition to the restorative requirements that are agreed upon (especially if a violent crime has been committed).

In Muslim majority states, there is a growing movement that calls for the Islamization of society, including application to some extent of Sharia law. Although most states that incorporate Sharia into their state law do so only in regards to the law of personal status, this incorporation may not be ubiquitous. Islamic movements such as the revolution in Iran and the democratization of the Nigerian states have opened the door to the inclusion of criminal law based on the Sharia. And, following the recent revolutions in North Africa and the Middle East, Sharia may be incorporated to a greater extent in the official codes of these states. Because the Qur'an encourages forgiveness and mercy with respect to the *qisas* crimes and the Islamic concept of justice is broad and shares many of the goals of restorative justice, the states that incorporate Sharia-based criminal codes should consider the restorative techniques that are beginning to be employed in the West. Such techniques are compatible with Islam in general and with the law of *qisas* in particular.

Further study of the implementation of *qisas* in states that incorporate Sharia-based criminal codes is needed. I hope that this article will begin a dialogue between western proponents of restorative justice and the judges, legislators, and scholars from states with Sharia-based criminal law. There is much both groups can learn from one another, and such a collaboration would surely be mutually beneficial.