



# Restorative Justice in the Islamic Penal Law: A Contribution to the Global System

Mutaz M. Qafisheh<sup>1</sup>

Hebron University, Palestine

## Abstract

*Restorative justice is not the only paradigm in Islamic penal justice. It is just one model. The second is retributive system. Yet by looking at the philosophy of penalty as detailed by Islamic jurisprudence, plus carefully revising alternatives to original punishments proposed by scholarship, it can be safely concluded that restorative justice does exist. And it exists as the general rule. Retributive justice is the exception. The key point of these mechanisms is that penalty in Islam is not an end per se. If offenders could be rehabilitated by other measures rather than penalties, the goal would be achieved and punishment should be evaded. Yet victims should always have the possibility to restore their rights. It is found out that Islamic law embraced almost all forms of restorative mechanisms known today. Scholars knew the practices of compensation, conciliation, pardon, apology, community service, warning, fining, probation, and reintegration. They added unique mechanisms that can be regarded as restorative means, such as repentance, benefiting from the advantage of doubt, preserving offenders' privacy, intercession, surety, and expiation. This paper explores the extent to which certain theories in Islamic jurisprudence relating to criminal law are similar to contemporary restorative justice practices.*

Keywords: Restorative justice; Islamic jurisprudence; conciliation; pardon; community service; surety; privacy; intercession; expiation; probation; reintegration.

## Introduction

Restorative justice is a recent concept. Its exact characteristic is still evolving, even in the Anglo-Saxon countries, where the theory is borne over the past three decades (Doolin, 2007; Hill, 2008; Mousourakis, 2004; Roach, 2000; Schmid, 2003). The theory has started to take a global shape (Archibald & Llewellyn, 2006; Hudson, 2007), with the United Nations' attempt to adopt restorative standards as part of international human rights law (Braithwaite, 2002; United Nations, 2000; United Nations Office for Drugs and Crime, 2006). Yet the concept of restoration is rooted in many religions and indigenous cultures (Katz & Bonham, 2006; Sarre, 1999).

As opposed to traditional/retributive justice, restorative justice assumes that crime relates to private relations between people. It is not a public matter. Thus the state remains aside while victims and offenders resolving their disputes. It follows that victims or their smaller community, particularly families, reserve the final say in determining the offender's fate on a case-by-case basis. If victims give up their right to prosecute, the perpetrators

<sup>1</sup> Professor of International Law and Legal Clinic Supervisor, Hebron University, Hebron, West Bank, Palestine. E-mail: mmqafisheh@gmail.com / mutazq@hebron.edu

would ideally evade penalty. A whole process takes place in lieu of classical penalty, however. The purpose is to hold offenders accountable for the harm done, rehabilitate and reintegrate, or restore, them into the community (Consedine, 1999).

Restorative justice tends to be flexible. Its processes take various forms depending on the gravity of the crime, damage caused, personal and social status of the offender, his or her sex, age, family, education and victim's position. Such forms include, *inter alia*, compensation, conciliation and pardon. To these ends, the offender could be fined, asked to provide an apology and express regret, placed under probation or required to provide services to the victim or to the community. Restorative justice is viewed, theoretically and in practice, as one model in comparative criminal justice systems (Meier, 1998). It is not the alternative. Other models include 'retributive', 'deterrent' and 'rehabilitative' (Knox, 2001). Hence, restorative justice can work for certain crimes, not all in relation to all offences; for some victimizers or victims, not all persons; and in given communities, not everywhere.

This paper explores the extent to which certain approaches embedded in Islamic jurisprudence, *fikh*, relating to criminal law are similar to contemporary restorative justice practices. The paper relies on the understanding the concept of restorative justice, of restorative practices in a number of countries, mainly in the United States, Canada, Australia and England. It considers existing international standards as developed by the United Nations over the past few years. As to Islamic law, the paper relies on classical jurisprudence in order to assess whether a restorative theory has been known in the early centuries of Islamic legal scholarship. It does not depend on restorative-like practices in Islamic states at the present time (Rahami, 2007); because criminal law applicable in most of these countries is either Western-imported law or tribal law that does not necessarily relate to Islam.

Besides this introduction and the conclusion, the paper is divided into two parts. The first addresses the major, or macro, rules embedded in Islamic jurisprudence that might be considered as restorative practices: compensation, conciliation and pardon. The following part highlights a number of detailed, or micro, measures that had been set out by Muslim scholars that can be placed within the scope of restorative proper in one way or another. The conclusion would clarify where restorative justice theory stands within the Islamic penal law and assess the extent to which Islamic law differs or resembles modern restorative justice trends of various systems worldwide.

### **Macro Restorative Justice Techniques: The Victim's Options**

According to Islamic jurisprudence, victims can restore their rights by a variety of ways. They could insist on the prosecution of the offender and retain original penalty. Offender's henceforth face retribution. By this, victims can cause to victimizers the same harm they owe. This is called *kasas* or 'systematic retaliation'. Victims, however, are offered three extra options: compensation, conciliation, or pardon. Compensation is favored over a penalty. Conciliation is placed above compensation. Pardon stands on top (Benabdien 1836, 6: 548). All choices have technical characteristics. Yet the exercise of original penalty is beyond the scope of the current paper. We will then explore the Islamic restorative roster, starting by compensation.

### Compensation

Attackers who murder a human being or damage part of his body or disabling any of its organs or senses would get as a starting point the same penalty equal to the harm willfully done. That is *kasas*. *Kasas* had been referred to in Torah and confirmed by Kuran. Kuran stated: “A life for a life, an eye for an eye, a nose for a nose, an ear for an ear. . .” (5: 45). *Kasas*, notwithstanding its limitations as will appear shortly, is an established provision. Its existent cannot be questioned as a matter of principle.

However, *kasas* is not inevitable. It is a private right. Victims or their families could decide upon its administration. Jurisprudence developed techniques to replace *kasas*. One is that *kasas* is made the least desired option. Pardon and conciliation prevail over it. Religion as a spiritual driving force plays a critical role here as Kuran strongly urged victims to pardon or conciliate. Secondly, in order to impose *kasas* no doubt should exist on the willful intention of the attack. Doubts are many in all types of offences as it will be seen below. Third, in the case of victim’s death, all his or her family members should insist on *kasas* in order for it to be imposed, according to the most accepted jurisprudential positions. If any family member pardons, accepts conciliation or compensation, then *kasas* would be excluded (Mardawi, 1480, 10: 3; Saniani, 1768, 2: 284). Scholars have advanced various views on who form family members with the power to give up *kasas*. Most writers used a wider family definition for this purpose (Benabdien, 1836, 6: 528; Sarkhasi, 1096, 27: 2). In practice, it would be almost impossible to reach unanimity from all relatives. If contemporary positive law in any state intends to adopt a moratorium on death sentence or minimizing or even abolishing it, policy makers may just adopt a wider the ‘family’ definition. Legislators or judges would find myriad jurisprudential approaches to support such a choice (Balachi, 1626, 6: 2; Benhazm, 1002, 11: 5; Benkudama, 1223, 8: 207; Bentaimia, 1327, 3: 386; Hathali, 1277, 4: 180; Jasas, 980, 2: 315; Shawkani, 1834, 7: 70).

Compensation, *diya*, is an alternative to death penalty or other penalties over crimes against persons. *Diya* is a quite big amount of money by which victims or their families would be tempted to accept (Kasani, 1191, 7: 253–255). The decision on the acceptance of *diya* is the sole choice of the victim or his family with or without the offender’s consent to pay, able to pay or not. Scholars developed mechanisms for the community to administrate compensation through the systems of *akila* and *diwan*.

If rich, the offender should compensate from his own money. But if he proves to be financially unable or has committed the attack mistakenly, *akila* must pay. *Akila* is an institution invented to assist in compensating victims and to restrain conflicts. Scholars used a variety of definitions of *akila*. It could mean close nuclear family: parents, sons, daughters, brothers, and sisters. It may comprise extended family: uncles, cousins, entire tribe and in-laws. It could incorporate all of these starting as a priority by the closer to the offender by blood or by the rich. Family members pay according to their financial ability. *Akila* stems its roots from the pre-Islam Arabian traditions (Benabdien, 1836, 6: 641; Benhamam, 1456, 10: 394; Benhazm, 1002, 11: 258; Benkudama, 1223, 8: 306; Sarkhasi, 1096, 27: 124).

In later centuries when the tribal system has been weakened in certain parts of the ever-expanded Islamic region, scholars suggested invented a new community mechanism to replace the function of *akila*. This novel concept is called *diwan*. *Diwan* is an association among people who have a common interest: based on work, status like residency, minority membership, professionals or employees (Babarti, 1348, 10: 402; Baji, 1081, 7: 113; Zailai, 1342, 6: 179). For example, *diwan* for a soldier is the army; for a placeman, the

police; for a judge, the judiciary; for a farmer, the farmers union; for a worker, the labor union; and for a businessman, the chamber of commerce, etc. It could include close relatives, extended families, co-residents of a neighborhood, village or town, people of the offender's religion or race if he belongs to a minority, extended family-in-law, business partners, professional organizations or governmental institutions to which the offender belongs, close friends, and the like. *Diwan* embraces the sense of cooperation, solidarity, and/or allegiance (Balachi, 1626, 6: 83; Benfarmouza, 1480, 2: 124). *Diwan* as it can be concluded from historical practices is a call for each group of people with common interest to establish a fund for social solidarity system in order to help persons in need, including poor, ill, old, students, prisoners, disabled, the unemployed and, more significantly, those who commit offences (Askalani, 1477, 4: 58; Benjajim, 1562, 8: 455; Mawak, 1491, 8: 348).

There is consensus among jurists that compensation is payable by the offender's *akila* or *diwan*, if the offence is committed by mistake or by a minor or by a mentally-deficient person. Compensation may be paid for the crime whether being committed willfully or by mistake, murder or manslaughter, within three years. This time span is given in order for payees to plan and manage installments. Although it is a relatively big amount of money, *diya* is a fixed sum that should not be exceeded in order to be measured based on criteria and to make payment possible. For the sake of consistency and equality, scholars developed criteria for compensation, normally measured by grams of gold or specific number of livestock, for each part of the body affected by the attack: life, eye, nose, ear, brain, skin, tongue, hand, finger, tooth, hear, genitals, injuries, paralyzing, abortion, etc. It might be relevant to note that *diya* is estimated for human being's life, by various scholars, with a price of four kilograms of gold, one-hundred camels, two-hundred cows or one-thousand sheep. In today's money, it would be approximately 200,000 or 300,000 United States Dollars. Each part of the body is estimated by specific criteria. Compensation should be paid to the victim himself if he or she is alive or to victim's successors in case of death.

The system of *akila* or *diwan* can be compared to the community contribution to the settling of disputes between offenders and victims. By such mechanisms, offenders would feel indebted to their communities and might help them in the reintegration process. These are but instances on the fact that criminal justice in Islamic jurisprudence is not mere legal instructions. It is social justice system *par excellence* that can be compared with contemporary systems (*cf.* Braithwaite, 2000a; Damren, 2002). *Akila* and *Diwan* could be reassembled, modified, adapted according to the time and place. They extend messages on the necessity of community collaboration with regard to crime related matters. The systems are a call for the community to be effectively organized to support those in need. Other community systems could comprise syndicates, associations, unions, ombudsmen, religious organizations, specialized foundations, government-managed funds and other civil society forums.

If the offender has no money or has no *akila* or *diwan* or if the payment by either of them would be inadequate, the state should fill in the gap and compensate. It is to be noted that reparation by restitution or compensation is always required in cases of offences targeting property. Such attacks relate to the realm of civil wrongs or tort that is called *daman* (Benarabi, 1148, 3: 267; Benmurtada, 1436, 5: 173; Dosouki, 1814, 3: 330; Hathali, 1277, 2: 88). Moreover, attacks against property may include criminal dimension and would be punished by *taizier*, namely penalty based on the court's discretion (Benkudama, 1223, 9: 148; Makdisi, 1751, 6: 104; Yamari, 1396, 2: 288).

Compensation is a well-known alternative to criminal punishment in restorative justice processes in the present day. As the above summary shows, compensation is a system in Islamic law. It derives its general basis from Kuran and Prophet Mohammad's practices. It has been institutionalized by the jurisprudence. Victims or their families may accept a smaller amount of compensation in lieu of *diya* if they agree with offenders. This latter option is called conciliation, as we see next.

### **Conciliation**

Conciliation, or *sulh*, has been used thirteen times in Kuran (Abdelbaki, 1996, pp. 504–507). People in conflict are called upon to resolve their tensions, starting from problems between spouses all the way through bloody wars, by conciliation. Given this general guidance, coupled with myriad conciliation cases undertaken throughout the history, Islamic jurisprudence has thoroughly elaborated on the question of conciliation between offenders and victims to settle criminal cases, for the purpose of restoring peace and love (Benkudama, 1223, 4: 308; Jasas, 980, 2: 396; Mardawi, 1480, 5: 234; Saniani, 1768, 2: 70; Zailai, 1342, 5: 205).

Judges are required to consider conciliation before entering into the merits of any case whether civil or criminal (Ameli, 1519, 3: 75; Benmurtada, 1436, 6: 124; Mawak, 1491, 8: 134). But judges cannot impose conciliation. Parties should be given the choice and be encouraged to conciliate as the first option even when the solution is clear-cut (Hathali, 1277, 4: 72; Kasani, 1191, 7: 13). That is to say that conciliation is a right of the parties and not an obligation. Conciliation in this sense is a “contract based on the consent for the purpose of settling disputes pacifically” (Sarkhasi, 1096, 19: 143). Its objective, as Nasfi (1142, p. 144) put it, is to “end conflict and friction”. For this scholar, conciliation embraces the sense of “closing the eye; i.e. easement and forgiveness” (p. 145). Yamari (1396, 2: 49) believes that judges should always encourage parties to conciliate as “settlement of disputes through courts leads to hatred”. For Benhamam (1456, 7: 316), conciliation is synonymous to arbitration.

Conciliation on certain grave crimes is inconceivable according to a number of jurists. Shafei (819, 6: 165), for example, pointed out that conciliation is not permissible in cases involving crimes like *hiraba*, terrorism, that include murder. Baji (1081, 7: 136) presented a set of cases on which conciliation could not work, for instance with a man who rapes a close family member. The reason is that grave crimes are committed against the public order, i.e. the fundamental values of the community. They are not private matters. It is to be mentioned that Islamic jurisprudence uses the following synonymous terms as expression to mean public aspect of the offence: ‘right of God’, ‘right of the state’, ‘right of the ruler’, ‘right of the community’ and ‘right of the humanity’ (Makdisi, 1751, 6: 188).

Yet the gravity of the crime for some scholars is not the criterion for conciliation. The test is rather a question of characterization. Hence, before concluding whether conciliation is possible or not, one should make a distinction between public and private aspects of the offence. If the crime is characterized as public, it may not be subject to conciliation. Conciliation is possible in connection to the private aspect of the offence. Public crimes incorporate *hudoud* or crimes with fixed penalty, chiefly theft, terrorism, adultery outside marriage and *kathf*, i.e. baseless defamation against a person by accusing him/her of practicing illegal sex. If the crime is characterized as a private matter, conciliation is conditional by the approval of the victim, if he or she is alive or the consent of his or her

family in cases involving the victim's death (Babarti, 1348, 8: 405; Balachi, 1626, 4: 230; Jawzia, 1350a, 1: 85; Kasani, 1191, 6: 49).

Nonetheless, writers like Judge Izzdin Benabdelsalam argue that the door would still be open for conciliation even in relation to offences characterized as public. He, in his famous book's *Judicial Procedures for the People's Interests*, brought in a case of undiscovered theft. In answering the question whether the accused thief should confess to the authorities or the court that he committed the crime, Benabdelsalam (1261, 1: 189-190) stated that: "if one steals an object nobody is obliged to leak the theft's fact. The offender can inform the owner about his readiness to restore what he stole to compensate him or to ask for his forgiveness. The accused should not mention the theft as it is a public right which is better to be hidden. If the stolen object is still in the offender's possession, he must restore it. He may delegate a mediator to do so".

By this approach crime would remain outside the formal justice's boundaries as much as possible. Fixed penalties would be evaded. This technique is called *satr*, literally means 'hide' or 'do not tell' about the crime either by confessing or testifying. The issue of preserving privacy will be discussed in some detail below. For Benabdelsalam, however, witnesses should testify on crimes in three cases: (1) if the offence relates to private matters in order to assist victims to restore their rights, (2) if the offender is a repeating criminal, or (3) if the interest of the community requires publicizing the worst criminal acts as a preventive measure. If crimes are petty offences, committed for the first time, by mistake, by people who apologized, or unlikely to re-offend; witnesses should be advised to refrain from testifying.

Other scholars cited further cases involving public crimes for which parties may conciliate. It was noted that conciliation with regard to the offence of *kathf* is possible if the parties agree to settle the dispute before reaching the authorities (Abadi, 1397, 1: 220; Yamari, 1396, 2: 264; Zailai, 1342, 3: 163). For Mardawi (1480, 5: 248), *kathf* is "a right for the human being". It can be settled by conciliation, adds Ansari (1519, 4: 136). From his part Balachi (1626, 4: 244) said that after complaining to the court, although conciliation becomes late, the victim can still conciliate by claiming that in fact he granted the stolen objects to the accused person. Benmurtada (1436, 6: 182) reported cases in which judges encouraged offenders to refrain from confessing, adding that the penalty can be removed by the victim's pardon (see below) at the courts.

Asbahi (795, 3: 383) as other jurists referred to the conciliation's right-holder. Conciliation as an alternative to the original penalty could be primarily decided by the victim if the attack involves injuries. If the victim dies or became incompetent to decide (e.g. child, mentally-ill), conciliation can be decided by his or her legal representative or by his or her family. Family for the purpose of conciliation means the legal heirs of the victim or the extended family. The victim or his or her family may take such a decision by accepting the compensation from the offender, if alive, or his *akila/diwan*/the government, as discussed in regards to compensation above.

For most jurists, taking Sarkhasi (1096, 21: 9) as a case-in-point, the family of the murdered victim has two options. One is to insist on the offender's death penalty or *diya*. The other is to conciliate with the victimizer. Conciliation can be reached when the victim's family agrees to get a sum of money in lieu of penalty or *diya* (see above). Conciliation is also possible with regard to all types of assaults against persons, including offences involving cutting parts of the victim's body and injuries. If the victim lost his/her life and having no family, the government as the legal heir of those heirless, should accept

conciliation by getting a sum of money for the treasury. In such a circumstance, the offender would evade the penalty, including capital punishment. Here the conciliation/compensation would in effect turn into a fine (see below). Sarkhasi's justification of such an option is quite clear: "conciliation by getting money is more useful for the community than execution" (p. 16).

There is consensus amongst scholars on the possibility of conducting the conciliation by delegating it to someone on behalf of the victim, notably in relation to offences involving an attack on the individual's honor, such as assaults, verbal humiliation, injuries or killings. In this respect, the power of the representative should be restricted by the instructions of the offender or his legal guardian (Balachi, 1626, 3: 631; Benkudama, 1223, 4: 311). Such possibility opens the door for indirect contacts between offenders and victims and their families, especially in the cases in which direct interaction between rival parties poses an emotional difficulty. This way can be viewed as a form of systematic mediation upon parties' request. Mediation is a common process in contemporary criminal justice systems (Aertsen & Peters 1998).

More specifically, Bentaimia (1327, 3: 464-466) touched upon the process of conciliation by a mediator, or third party, in wide-scale conflicts. As this prominent scholar notes, the mediator or 'conciliator' should adhere to a set of rules in such instances. First and for most, the conciliator should seek the end of fighting before talking about rights or the law. Secondly, and here the mediator could turn into an arbitrator or a judge, he should establish his findings on a legal basis, the principles of justice and must accord each of the conflicting parties with their fundamental rights. Third, the conciliator should urge the parties for tolerance, compromise and to give up part of their rights for the sake of peace. The conciliator should finally be empowered to enforce conciliation verdict and even 'fight', as a last resort, those who reject the conciliation accord. In the latter case, the state must back the conciliator.

A number of scholars focused on the institutionalization of conciliation based on pre-Islam Arab tribal customs (Shalhoub & Abdelbaqi, 2003), through the tradition of *hamalah*. *Hamalah* is a group of community notables who dedicate themselves to the conciliation between offenders and victims on a voluntary basis. These notables, neutral third party, sometimes commit themselves to donate money to the victims on behalf of the offenders as an assurance for the settlement of disputes. Such notables may be assigned by charity or public money by the community to assist the fulfillment of their commitments. The state is obliged to assist these notables by money and power (Benhamam, 1456, 7: 166; Benkudama, 1223, 6: 332; Shawkani, 1834, 4: 199). One may compare the mission of *hamalah* with the programs of contemporary non-governmental organizations and activists who dedicate themselves to restorative justice actions (Bazemore & Stinchcomb, 2004; Chiste, 2008). Such institutions deserve the support of communities, governments and international donors.

Conciliation can be achieved by agreeing that the offender delivers certain services for the benefit of the victim or his family. Examples of such services include providing the victim with housing or domestic work for a specific period of time (Mardawi, 1480, 5: 240; Sarkhasi, 1096, 21: 12). Other forms of service could be performed by putting a worker under the disposal of the victim for an agreed-upon period of time at the offender's expense (Benkudama, 1223, 4: 314), or by irrigating the victims' field or water his guardian (Mardawi, 1480, 7: 248). Further types of service were mentioned by Zailai (1342, 5: 32), including the provision of transport, giving a piece of land for planting,

“hiring a maid” or coloring clothes. The criterion for such service is that it should be supplied for a specific and a proportionate period of time. Indeed, as Sarkhasi (1096, 21: 12) indicated, service is sometimes a better alternative than cash.

The foregoing reveals that conciliation in criminal matters has two meanings. One is general and embraces the sense of ending the conflict and reaching pacific settlement. The second is specific which entails, besides ending the conflict, an agreement between parties by which the offender partially compensates the victim or his or her family. In exchange, the victim gives up part of his financial rights. In this paper, conciliation is used in this latter specific definition. It is a pure jurisprudential creation, invented by analogy with civil law concepts: contract and tort.

To conclude, one may cite Kasani (1191, 7: 247). He stated that Islam brought in compensation and conciliation by striking a balance between Judaism and Christianity. In the Torah, the only punishment for the murderer is to be killed: a life for a life and an eye for an eye. For the New Testament, the only choice for the victim is forgiveness. Islam balanced the two approaches. It urged victims to accept a third choice which stands in a middle way between systematic retaliation and pardon.

### **Pardon**

Pardon, *afou*, has been used thirty-five times in Kuran in various contexts (Abdelbaki, 1996, pp. 572-573), with noticeable reference in relation to criminal offences (Benarabi, 1148, 4: 77; Sarkhasi, 1096, 26: 155). Pardon is similar to compensation, *diya*, and conciliation, *sulh*; the outcome is identical in the three instances, i.e. evading the original punishment. *Diya* practically means pardon with full compensation. Conciliation equals to pardon with partial compensation. But pardon refers to forgiveness without something in return. It may be called ‘full forgiveness’. One may notice consensus among Islamic jurists revealing that pardon comes over compensation and conciliation. Pardon relates to all types of offences against human beings punishable by *kasas*. As discussed above, some jurists believe that pardon, like conciliation, might be invoked concerning certain crimes characterized as public offences if the victim forgives the offender. In cases of victimless public offences, such as consuming drugs or consensual sexual relations, pardon come into play by judges or by the state (Shawkani, 1834, 7: 154; but see Benabdien, 1836, 4: 53).

Pardon is a right to the victim if he remains alive, as the case of compensation and conciliation. Such victim can forgive any offender who attacks, cuts or injures, parts of the body. By pardon, the offender would not receive original penalty (Haithami, 1566, 8: 445; Sarkhasi, 1096, 26: 156). Such offender, however, might get alternative penalty lighter than the original one as part of the public aspect of the crime according to some scholars (Baji, 1081, 7: 124; Yamari, 1396, 2: 323). Yet most jurists agree that in the case of pardon offender would not be punished at all (Benhazm, 1002, 11: 121; Makdisi, 1751, 6: 187). If the victim after being attacked and before his death pardons, the offender would also evade original penalty even if the victim’s family insists on penalty, most scholars believe (Benkudama, 1223, 8: 24). In one opinion, offenders may get alternative penalties to reduce chances of recidivism in cases of dangerous offenders (Benabdelsalam, 1261, 1: 167).

If the victim dies, or he is unable to decide for any reason such mental deficiency or young age, his family would have the power to pardon. Scholars expressed various views on the meaning of the family for the pardon’s purpose. Some consider the family as the victim’s legal heirs (Khatib, 1569, 5: 274; Mardawi, 1480, 9: 482), including adult children



and grandchildren, parents, grandparents (Asbahi, 795, 4: 644), husband or wife (Benkudama, 1223, 8: 279). Some scholars include minor successors who might exercise the power to pardon upon attaining the majority age; hence delaying the decision until such a time (Sarkhasi, 1096, 26: 161). Others argue that the family incorporates all those mentioned here plus brothers, sisters (Bentaimia, 1327, 5: 524), nephews, uncles and cousins. For Benhazm (1002, 11: 127), “there is no doubt . . . that cousins are part of the family”. Still a number of writers include the extended family or the leaders of the tribe. Pardon can be granted if any family member, even “if all but one” as Baji (1081, 7: 127) says, agrees to forgive (Ansari, 1519, 4: 42). In other words, “there must be consensus among family members for the original penalty including execution to be administrated” (Shafei, 819, 6: 13).

In the view of a number of scholars, the state represented by the judiciary or the head of the state, could exercise the power to pardon in certain cases (Haithami, 1566, 9: 181; but see Sarkhasi, 1096, 9: 197). Examples of such cases include: the existence of any doubt (see below) regarding the intention in murder cases (Hamawi, 1686, 1: 384), such as killing a murderer as revenge by a victim’s relative (Ansari, 1519, 4: 36; Khatib, 1569, 6: 276); in case of the insufficiency of the evidence (Benkudama, 1223, 8: 404); if the victim contributed to the provocation of the offender, as in the case in which the victim has been found with the offender’s wife in a sexual position (Hattab, 1547, 6: 323; Zilai, 1342, 3: 208); and if the victim has no family (Mardawi, 1480, 9: 483). Pardon in such cases would only lead to the exclusion of the original penalty. Victim’s successors may retain their right of full compensation (*diya*) or conciliation with partial compensation (*sulh*). The state could likewise pardon, for most jurisprudence, in relation to penalties of *taizier* (Mawak, 1491, 8: 436). But some scholars, such as Hamawi (1686, 1: 270), believe that the state cannot pardon.

The foregoing shows that pardon remains an inherit principle in Islam concerning various tensions and cases of injustice. Pardon has been widened by jurisprudence’s discretion. After surveying scholarly views, it can be concluded that almost all offences against human beings can be subject to pardon by one way or another. This discretion gives legislators basis for adopting pardon as a fundamental rule underlining all types of crimes and penalties. The pardon system as discussed above could contribute to scholarly and policy efforts in defining the question of amnesty in criminal and restorative justice régimes worldwide (McThenia, 2000; Dzur & Wertheimer, 2002; Fields, 2007; Bibas, 2007). It may pave the way for minimizing or abolishing capital punishment. For Benhazm (1002, 11: 125), the original penalty or *kasas* that include death penalty “is permissible”, not binding. “Pardon is preferable”. The preferable should prevail over the permissible whenever possible.

Be as it may, if none of the above three options (compensation, conciliation, pardon) works for one reason or another, evading original penalties would still get other chances by invoking further techniques. This is the subject of next section.

### **Micro Restorative Justice Techniques: the Offender’s Path**

The following techniques are known and have been practically tested in the Islamic justice system. They relate to restorative justice in a number of ways: evading severe punishment, supporting the settlement of disputes by providing alternatives to penalty, promoting the aforementioned macro techniques, and removing penalties entirely. These techniques work in five different ways: (1) offender’s self-curing, e.g. repentance and

expiation; (2) by mutual agreement between parties, e.g. restitution and apology; (3) through mediation or intervention by a third party, e.g. surety, intercession and preserving privacy; (4) by the judge *proprio motu*, e.g. advantage of doubt, warning and fining; and (5) by community actions, e.g. isolation and reintegration. A number of these micro means could be invoked simultaneously. They may overlap with each other and could operate along with the above macro techniques. For example, expiation and surety as well as restitution, could be required with conciliation. Fining and repentance sometimes go in parallel with compensation and pardon. In the final analysis, relations between victims and victimizers may be restored in one of the previous or the following methods and/or another.

### **Repentance**

Repentance, or *tawba*, is a fact of showing regret about sins. It is not a mere religious matter, although it has been referred to in Kuran in various grammatical tenses sixty-eight times (Abdelbaki, 1996, p. 192). *Tawba* might be measured by a variety of indicators and would lead to legal consequence, namely cleaning up sins, including crimes. If a person commits a non-discovered crime and needs to contrite, he or she should be encouraged to refrain from disclosing information about the crime, as discussed above. He should rather restore the rights to the victim in case of stealing or compensate him or her in case of injuries. By doing so, according to Kuran (39: 53), the offender becomes innocent: “God forgives all sins”; providing that the wrongdoer determines to refrain from reoffending. Repentance from crimes has its own requirements in Islamic jurisprudence, although it can be compared with similar practices in other jurisdictions (Dikotter, 2002; Tasiolas, 2007).

Repentance differs from pardon. The latter is grantable by the victim at will. Repentance is performed by the unilateral decision of the offender. Yet repentance forms a basis for forgiveness by God, i.e. penalty that most religions believe it would come upon the unjust people, normally after death. Repentance, as it would be apparent shortly, may prompt the state to remove or replace penalties.

According to most jurisprudence, repentance could remove public aspects of the crime if the offender decides to stop criminal acts and shows regret, publicly or in private, about the crime he commits. This is true in relation to variety of crimes. Kuran mentioned (5: 33-34) repentance from some serious crimes, such as terrorism and theft. The wholly book provided that if those commits the crime of terrorism, or *hiraba*, whose punishment could amount to death penalty, repent before being seized, they must be pardoned. Identical provision can be found with regard to the crime of theft. If the thief repents and restore stolen things or compensate the victim, he or she could be excused from the hand-cut (5: 37-38). As a result, most jurists believe that repentance prior to the execution of penalty freezes the public aspect of the crime even in cases in which the offender confesses, as Jawzia (1350b, p. 54) elaborated.

The very well respected scholar Benkaim Jawzia wrote that repentance removes original penalties over all crimes even those grave ones (pp. 52-54). He reported a number of cases at Prophet Mohammad’s time and the practices of his succeeding rulers whereby fixed penalties, *hudoud*, had not been implemented when offenders confessed, expressed regret, or apologized, including on serious offences such as theft, robbery and sex-relating offences. Based on these cases, Jawzia concluded that “there is no punishment against the repentant . . . . If God is forgiving them”, Jawzia noticed, “then, *hudoud* must not apply to

those repentant” (Jawzia, 1350a, 3: 7-11). He was general in his findings, incorporating all criminal types (but see Benhamam, 1456, 5: 428; Benarabi, 1148, 2: 115; Benhazm, 1002, 12: 15).

Benkudama (1223, 10: 190-195) had developed criteria for offender’s repentance. He said that repentance can be derived from a number of indicators: (1) apology to the victim; (2) commitment on non-recidivism; (3) restoring private rights to their legal owners, if the offender can do so financially, or promising to restore such rights as soon as possible, (4) wandering away from suspicious criminal places, and (5) behave morally. This scholar considered that one year is a sufficient period to prove such determination. Yamari (1396, 2: 165) went a step forward by adding that the state should release prisoners who prove to be rehabilitated, repented and who would unlikely pose a criminal risk for the community. The release would occur regardless of the gravity of charges. Such views go in line with one of the purposes of the restorative justice, namely to reduce the number of prisoners (Goulding, Hall & Steels, 2009).

In short, one may conclude that in the final analysis the public aspects of the crime are not unquestionable. Whereas compensation, conciliation and pardon are means to remove private rights, repentance would cure public rights. At the end of the day, no one would be harmed if regretting offenders, who prove determination to refrain from re-offending, would return to the community as clean members. By this, offenders would be encouraged to cease criminal actions and start anew (Benabdien, 1836, 6: 548; Benmurtada, 1436, 1: 149; Bentaimia, 1327, 3: 407; Hathali, 1277, 4: 164).

### ***Advantage of Doubt***

With regard to the most serious crimes on which jurisprudence considers as acts against the community, namely *hudoud*, there is still room for alternatives. The door has been opened through landmarked advice of Prophet Mohammad in which he stated: “Exclude *hudoud* by doubts” (Kasani, 1191, 7: 34). Based on this and the practices of Prophet’s succeeding rulers across history, jurisprudence offers myriad circumstances accompanying crimes that pose doubts that go in the offender’s favor. And the rule is: ‘with doubt, penalty is out’. If any of such doubting circumstances exist, a number of alternatives would be envisaged, including pardon, conciliation, compensation, fining, warning, etc. Hence, restorative processes would step in.

Kasani (7: 34-41) alone, as a typical example among most jurisprudence, had advanced fifty-six circumstances connected to the rape or adultery of married person, which he considered as doubts whereby the offender would evade severe original penalty like lashing or stoning. Such circumstances include: adultery abroad, adultery committed by non-citizens, adultery among people with different religions, by concluding a short-living marriage just for enjoyment (*mutaa*), by having sex based on informal or invalid contract in order to escape penalty, adultery with a clause relative such as the sister-in-law, adultery by a person with a his or her divorcee, sex without a full entrance of a man’s penis in a woman’s vulva, and sodomy.

Mardawi (1480, 10: 253-285), to give another example, detailed scholarly opinions on circumstances that pose doubts on the administration of the original punishment, hand-cut, over thieves. By conducting a survey in his 12-volume’s *Equity*, one can find seventy-five circumstances; each forms a doubt that leads to evading theft’s severe penalty. Instances of such circumstances include, *inter alia*, embezzlement, defalcating public funds, misappropriation, pilferage, bribery, picking pockets, swindle, dupe, deceit, stealing public

assets, stealing water, plants, salt, ice, birds, stealing from non-locked locations, stealing in the time of famine or during the state of war, stealing from parents, amongst spouses or close relatives. But, in such situations, stolen objects must be restored to their respective owners. And convicted offenders may get alternative penalties based on the crime's gravity and offender's character. Scholars brought in further situations by which offenders would evade original penalties for other serious crimes, including murder, armed robbery, terrorism, defamation, sexual assaults, alcoholism and drug-dealing (Askalani, 1477, 4: 104; Babarti, 1348, 5: 249; Makdisi, 1751, 6: 126).

Procedures to impose penalties of *hudoud*, notably the evidence requirements, are quite complicated and are unlikely to be practically realized (Benabdien, 1836, 4: 18; Benhamam, 1456, 5: 249; Shawkani, 1834, 7: 124). For example, adultery can only be proved by four eyewitnesses who saw the man's penis inside the female's vulva at the same moment. If one of the four witnesses fails to describe the event precisely, the evidence of all the four witnesses would be rejected. All of them would be punished. Witnesses are generally discouraged to testify crimes involving victimless public aspect. This point is dealt with under the system of 'preserving privacy', next.

### ***Preserving Privacy***

Privacy, or *satr*, is a technique to avoid penalty and to encourage offenders to halt criminal activity. People are obliged to refrain from spying or violating the privacy of others. For Haithami (1566, 2: 207), it is one of the worst crimes to pursue "private lives of others in order to uncover their mistakes and humiliate them publicly". Privacy should be respected by witnesses, police, judges, and even by offenders.

In case of committing a crime with a public aspect, the offender is discouraged to release information about it, even if wants to repent. If the crime involves private rights, offenders are advised to restore the rights to their legal owners, apologize or ask for forgiveness. This could be done directly by the offender or by a mediator. And even if the victim or others discovered the offender, parties should be encouraged, e.g. by the police, to conciliate instead of taking the case to the court.

Those who learn about crimes should try to help offenders to stop the wrongdoing without reporting the crime directly to authorities. Witnesses are discouraged, subject to legal accountability, to testify if they are unsure about the facts. In case of false testimony, witnesses might be convicted to the crime of perjury. Judges, likewise, may discourage offenders from telling unnecessary stories (Ansari, 1519, 4: 131; Askalani, 1477, 4: 106; Bentaimia, 1327, 3: 411; Kasani, 1191, 6: 515).

By this technique, penalties would be minimized. Offenders and their families could save their reputation and not be ashamed (Braithwaite, 2000b); providing that offenders express regret, apologize, and restore violated rights. *Satr* does not mean, however, harboring dangerous criminals. People are obliged to testify if they are requested by victims or whenever testimony would lead to confronting serious crimes. Privacy is rather a means to urge offenders to cease criminal acts by themselves or through the advice of others (Benjujaim, 1562, 7: 59; Yamari, 1396, 2: 264).

### ***Surety***

Surety, *kafala*, is a guarantee by someone to help the offender in demanding his or her release from detention or to stop legal action against the accused. The sponsor, *kafil*, carries out a legal responsibility if the offender escapes during specific period of time as the

court or police may fix. Surety could be personal or by providing financial guarantee. It is similar to *hamalah* (see above). But the difference is that surety is normally performed by one person and *hamalah* is administrated by a group of people or by an institution. Surety could be performed based on the offender's request or voluntarily by a sponsor. If performed upon request, the offender should pay back the surety's expenses. In case of volunteering, the sponsor would pay from his own money and cannot ask the offender for reimbursement. The state could, however, support those who provide such humanitarian service as the case of *hamalah* (Benabdien, 1836, 5: 282; Benfarmouza, 1480, 2: 295; Benmurtada, 1436, 6: 70; Hathali, 1277, 2: 96; Kasani, 1191, 6: 2; Zailai, 1342, 4: 146).

The financial surety is similar to the bail system known in comparative criminal justice systems (Friedland, 1970; Thompson, 1885). Personal bail is similar to probation by a private person (see below). It is normally performed by a family member, close friend, neighbor or a notable community leader. Bail can be considered as a restorative measure as it forms an alternative to custody (Pratt & Bray, 1985; Myers, 2010). It has been widened by Islamic jurists, borrowing from civil law concepts. Its goal is to release detainees or to stay the execution for a specific period in which the offender would get the frozen penalty if he reoffends (Benhazm, 1002, 6: 396; Benkudama, 1223, 4: 344; Mardawi, 1480, 5: 188; Sarkhasi, 1096, 19: 160).

### ***Intercession***

Intercession, or *shafaa*, is a call by a third party upon authorities (police, prosecution, courts) to declare the innocence of the offender. It takes place after the arrest and during investigations. Intercession might be undertaken by anyone who wishes to intervene on behalf of the offender. Interceders could ask the judge or the police to rule on the offender's innocence, to free him un-conditionality, to release him on bail, or to replace or reduce the punishment. Interceding actors are often family members, community notables, religious leaders, neighbors or friends. Interceders might intervene by testifying that the offender is of a good character, by giving guarantees that the accused would improve his conduct in the future, or assurance that they would assist in his reintegration in the community (Benmurtada, 1436, 1: 80; Hattab, 1547, 6: 320; Khatib, 1569, 5: 452; Mawak, 1491, 8: 436).

Intercession could be, according to a number of jurisprudential views, done through mediation with the victim in order to forgive and not to bring the case to the formal justice system, police or court. Baji (1081, 7: 165), for instance, reported a theft case that involved intercession, noting that intercession would have not been worked should a police officer has been notified. In this sense, intercession represents an alternative to trial (Ansari, 1519, 4: 162; Benkudama, 1223, 9: 120).

A number of jurists believe that intercession is possible prior to court proceedings. Others, however, think that it could be undertaken before pronouncing the judgment. A third group opened the door for intercession prior to the implementation of the final court verdict. Yet a group of scholars are of the opinion that intercession can be performed at any point, including after the judgment's execution, e.g. during imprisonment. Intercession is done, in all of these settings, quite informally (Benabdien, 1836, 4: 3; Benarabi, 1148, 1: 587; Zarkashi, 1391, 2: 249; Hamawi, 1686, 1: 387; Shawkani, 1834, 7: 129; Yamari, 1396, 2: 298).

Certain forms of intercession, notably before reaching the formal system, are similar to mediation between victims and victimizers known in contemporary restorative justice processes (Prenzler & Hayes, 1999; Bradshaw & Roseborough, 2005).

### **Expiation**

Expiation, *kafara*, as detailed by jurisprudence is a unique Islamic restorative method. It requires offenders to perform certain acts to prove regret. Some of these acts could have social influence while others take personal/spiritual/psychological shape.

People who kill unintentionally or by mistake could atone by liberating a slave. Those who kill intentionally and get pardoned should similarly make the same expiation. If the killer does not have financial ability to liberating a slave or if slaves do not exist anymore, he should alternatively feed sixty poor people (Abadi, 1397, 2: 121; Babarti, 1348, 10: 271; Kasani, 1191, 7: 252; Yamari, 1396, 2: 299). Freeing slaves or feeding people, as a means of holding offenders accountable, could be viewed as a form of community service, known in most restorative justice programs (Brennan & Mason, 1983; Skinns, 1990; Bazemore & Maloney, 1994; Walgrave & Geudens, 1996).

Expiation may similarly be undertaken by fasting. Obliging offenders to fast, in lieu of penalty, is a unique Islamic innovation. Murderers, if want to heal the guilt after being pardoned, along with liberating a slave or feeding poor people, should fast for two consecutive months. Fasting requires refraining from eating, drinking and practicing sex during daylight. It is a personal connection between the offender and his or her beliefs. It could not be monitored by law enforcement officials. Thus fasting can be regarded as a spiritual/psychological way of treatment. It is a self-healing process (Benkudama, 1223, 8: 400; Sarkhasi, 1096, 26: 66).

### **Warning**

Warning, as a penalty on petty crimes, is known in Islamic jurisprudence. It may differ from one person to another according to their social status. If a person insulted another by screaming at him or saying 'you are stupid', it would differ if he says it to a friend or to a notable person such as a teacher (Makdisi, 1751, 5: 347; Mawak, 1491, 8: 473). The purpose of warning is to express caution against reoffending.

Warning can be issued by a judge depending on crime's gravity, offender's personality, age, and family status, etc. Scholars put forward a variety of forms of warning orders: through sending a representative of the judiciary to inform the offender that 'the judge learned about your offence'; by giving official notice to refrain from committing certain acts, entering certain places; or calling the offender to attend a court hearing (Abadi, 1397, 2: 162; Benfarmouza, 1480, 2: 75; Kasani, 1191, 7: 64). Zailai (1342, 3: 207) added that warning may be achieved by frowning at the offender, talking to him toughly, screaming at him, 'nipping his ear', as the judge deems fit (Babarti, 1348, 5: 344; Benjujaim, 1562, 5: 44). Such flexible methods may best operate while dealing with those commuting contraventions or with children in conflict with the law (Mackay, 2003; Crawford, 2007; Hayes & Hayes, 2008).

Islamic jurisprudence views warning as a preventive measure. The system of settling disputes or ending petty offences in pre-court procedure is called in jurisprudence *hisba*. Scholars consider that preventing crimes or exercising the power over petty offences could be realized by ordering suspicious persons to refrain from committing certain contraventions; if the offence has been already committed, to warn against recidivism.

This can be done by advising offenders or providing counseling to them, using religious, ethical and educational means; or by a threat to punish. Jurisprudence made it possible for police to talk toughly to offenders or to verbally criticize them, saying ‘be afraid of God’, ‘this is foolish act’ and ‘be polite’! But, indeed, such harsh phrases should not be said except after trying softer words and advices, expressing anger or ridiculing the offender, on case-by-case basis (Ansari, 1519, 4: 162; Benkudama, 1223, 9: 149; Khatib, 1569, 5: 525).

### ***Fining***

Some writers referred to fining, calling it ‘financial sanctions’, as penalty over criminal offences (Babarti, 1348, 5: 345; Zailai, 1342, 3: 208). Jawzia in his *Judicial Approaches* gave many examples of crimes punishable by fining. These include punishing people who escape taxes, fining attacker who destroy trees or plants and fining those who hide stolen or lost objects. As another sort of financial sanctions, Jawzia included confiscation or destruction of objects used illegally, such as selling expired goods in a shop of swindler. He referred to the penalty of a businessman who sells fabric by using swindling methods. Penalty of such dishonest person would be the exclusion from the market (Jawzia, 1350b, p. 225; see also Benhamam, 1456, 5: 345; Benjujaim, 1562, 5: 44; Tarabulsi, 1440, p. 195). Mardawi (1480, 10: 250) mentioned the expulsion from public employment for corruption-related offences.

### ***Isolation***

Isolation, or *hajr*, offers a way of making the offenders feel accountable to the community, to their families and friends. It embraces the sense of removing shame and social forgetfulness (Benarabi, 1148, 1: 463). Isolation could vary depending on the offender, victim, gravity of the crime and social customs. Well-known criminals who work to influence others in their criminal behavior, especially youth, should be removed from youth forums (Bentaimia, 1327, 3: 412). Isolation could be used as a preventive measure as well. It may last for a few days, up to one year, depending on the gravity of the committed criminal acts (compare Walgrave, 2004).

There is no fixed means of isolation (Benabdien, 1836, 4: 14; Benkudama, 1223, 9: 46). It is rather a flexible measure. It could be administrated by ordering the offender to stay at his home, place him under curfew after certain hour of the night, to ask him to move to another village or town, or just for community members to avoid talking or dealing with him for the required period. However, jurisprudence stresses that isolation is prohibited should it pose a danger on the isolated person or if it proved to be counterproductive (Benhamam, 1456, 5: 242; Benmurtada, 1436, 5: 147; Karafi, 1285, 4: 206; Kasani, 1191, 7: 39). Certain disciplinary processes that exit in restorative systems today could be compared with isolation, including placing in rehabilitation institutions, house arrest, requesting the offender to regularly report to a police station and probation (Baer, 1991; Bazemore, Zaslaw & Riester, 2005).

Probation was referred to by jurisprudence under the question of isolation and house arrest. For scholars, imprisonment does not necessarily mean keeping the person in a locked location. It works by ordering the offender to stay at his home, to remain in certain areas of the town or preventing him from leaving a given area of the country for some time. Offender could be placed, for specific period of time, under the monitoring of a representative of the judiciary or a probation officer to prevent him from escaping, re-

offending, to protect him from revenge, or to join a good person who is able to look after him or her (Bentaimia, 1327, 3: 411; Yamari, 1396, 2: 309).

### **Reintegration**

In Islamic jurisprudence, the underlying principle for reintegration is that the wrongdoer who regrets what he committed becomes “as the one who did not commit the sin” (Bentaimia, 1327, 3: 155). Sins include crimes. For Ben Taimia, if the spouse commits a sexual conduct with another person, it is permissible for the partner to maintain the marriage. For Yamari (1396, 2: 306), although as a rule the perjurer should be prevented from testifying in the future, he might be allowed to testify again if he repents and behaves morally. This scholar thinks that minor crimes might be excused from punishment if committed for the first time (see also Mardawi, 1480, 10: 248). For Sarkhasi (1096, 24: 36), it is prohibited to remind people of offences they have committed in the past after getting their punishment. Thus if a person humiliates someone who committed a previous offence by depicting him to be a criminal, the depicter should be punished. Benkudama (1223, 9: 149) stated that if an offender after being punished expresses regrets and determines to refrain from reoffending, he should be viewed as innocent and treated as such. His case should not be considered as criminal precedent (Jasas, 980, 3: 403). These hints help in restoring the offenders to their communities, e.g. after being incarcerated, revealing that the reintegration is one of the restorative principles in Islam (*cf.* Bazemore, 2005; Rodriguez, 2005).

### **Conclusion**

The Islamic jurisprudence embraced almost all forms of alternatives to original punishments known in the modern restorative justice systems. Scholars knew the practices of compensation (*diya*), conciliation (*sulh*), pardon (*afou*), apology, community service, service for the benefit of the victim, warning, fining, probation, and reintegration. They added unique mechanisms derived from the wider principles of Islam that can be understood as restorative means, such as repentance (*tawba*), taking the advantage of the doubt, preserving privacy (*satr*), intercession (*shafaa*), surety (*kafala*), and expiation (*kafara*). These tools reveal that penalty is not meant *per se*. If offenders could be rehabilitated by other means than severe penalties, the goal would be achieved. Punishments should be removed. Yet victims should always have the possibility to get effective remedy. Relations would be restored, then.

Jurisprudence brought other alternative punishments that can be viewed as restorative methods. These include making the offender’s crime public in the community in order for the people to be careful when dealing with such a person (Mawardi, 1058, p. 297), especially in relation to the offences of mistrust, such as giving false evidence intentionally (Sarkhasi, 1096, 16: 145). For Babarti (1348, 7: 476), making the offence of perjurer known in his community would render him ashamed and would prevent him from testifying falsely again (see also Yamari, 1396, 2: 305).

Apology, for Islamic scholars, could form a means to remove the penalty. Apology before reaching the court is viewed as part of the pardon. Yet apology, for a number of writers, could be performed as part of the court’s hearing or after the judgment and before the execution of the decision (Mawak, 1491, 8: 436). Apology on public crimes could be found under the technique of repentance or ‘pardon by the judge’, a well known methods in modern systems (Taft, 2000; Eaton & Theuer, 2009).



Jurisprudence offer judges a menu of choices to pick from depending on the parties involved and on the seriousness of the crime. But, as Benabdelsalam (1261, 1: 187) stresses, judges should exercise conciliation and forgiveness in relation to petty crimes. Judges should be given a wide range of discretion to rule case by case based on community interest, offender's personality, mental health, age, education, family, friends, work, social status, etc. (Kurashi, 1328, p. 193). Indeed, judges should take local customs in deciding the penalty with regard to petty crimes. Penalties that could work in one country might not succeed in another (Yamari, 1396, 2: 291).

Restorative justice is not the only paradigm in Islamic penal justice system. It is just one model. Besides lays the retributive justice. Although the term 'restorative justice' has never been used as a technical term by Islamic jurisprudence, by looking at the philosophy and principles underlying penalties in Islam plus carefully revising alternatives to original punishments proposed by jurisprudence, it can be safely concluded that restorative justice does exist. It exists as *the* rule. Retributive justice is the exception. Indeed, as Rahami (2007, p. 241) correctly pointed out and as any survey in the Islamic juridical practices across the centuries-long history proves, severe punishments "are considered as just as preventive-deterrent instruments rather than being considered as an actual punishment for implementation".

Restorative justice system in Islam has been drawn from variety of sources. Kuran and Prophet Mohammad's practices are the primary references. However, local pre-Islam traditions contributed to the system, as Islam has adopted and encouraged certain tribal practices such as the system of *hamalah*, a sign that Islam is ready to accept any old or new measure that human wisdom may invent.

Today, the Islamic justice system could be part of the efforts towards developing common global restorative justice standards (Braithwaite, 2007). Muslim countries ought to integrate such standards in their domestic legislative and judicial systems without hesitation. The international community, represented by the United Nations as well as single countries, is called upon to learn from the Islamic jurisprudence while working on the advancement of restorative justice programs. Restorative justice practices existing in any culture or single state (Goodyer, 2003; Tshela, 2004), could benefit the entire world in this age of globalization (Bronitt, 2008).

The message of this paper is straightforward: Islamic law, as one major legal school of the world, can be part of and contribute to the international standards of restorative justice that may crystallize the restorative theory in the years to come.

### Acknowledgement

*The author sincerely thanks Professor John Braithwaite, currently Australian Research Council Federation Fellow, Australian National University, for his insightful comments on earlier draft of this paper.*

### References

- Abadi, A. (1397). *Al-Jawhara Al-Naira*. Cairo: Khairia Press.
- Abdelbaki, M. (1996). *The Kuran Words Index*. Cairo: Hadith Library.
- Aertsen, I., & Peters, T. (1998). Mediation for Reparation: The Victim's Perspective. *European Journal of Crime, Criminal Law and Criminal Justice*, 6(2), 106-124.
- Ameli, Z. (1519). *Al-Rawda Al-Bahia*. Beirut: Islamic World Publisher.
- Ansari, Z. (1519). *Asna Al-Matalib*. Cairo: DKI.

- Archibald, B. & Llewellyn, J. (2006). The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia. *Dalhousie Law Journal*, 29(2), 297-343.
- Asbahi, M. (795). *Al-Mudawana Al-Kubra*. Beirut: DKI.
- Askalani, A. (1477). *Al-Talkhis*. Cairo: Cordova Foundation.
- Babarti, M. (1348). *Al-Enaya*. Beirut: Intellectual Library.
- Baer, B. F. (1991). When Prison Isn't Punishment Enough: The Effective Use of Home Incarceration, Community Service, Curfew Parole, and Substance Abuse Testing. *Criminal Justice*, 6(1), 2-8.
- Baji, S. (1081). *Almuntaka*. Cairo: Islamic Book Library.
- Balachi, N. (1626). *Indian Verdicts*. Beirut: Intellectual Library.
- Bazemore, G. & Maloney, D. (1994). Rehabilitating Community Service Toward Restorative Service Sanctions in a Balanced Justice System. *Federal Probation*, 58(1), 24-35.
- Bazemore, G. & Stinchcomb J. (2004). A Civic Engagement Model of Reentry: Involving Community through Service and Restorative Justice. *Federal Probation*, 68(2), 14-24.
- Bazemore, G. (2005). Whom and How Do We Reintegrate? Finding Community in Restorative Justice. *Criminology and Public Policy*, 4(1), 131-148.
- Bazemore, G., Zaslaw, J. G. & Riestler, D. (2005). Behind the Walls and Beyond: Restorative Justice, Instrumental Communities, and Effective Residential Treatment. *Juvenile and Family Court Journal*, 56(1), 53-74.
- Benabdelsalam, I. (1261). *Judicial Procedures for the People's Interest*. Beirut: DKI.
- Benabdien, M. (1836). *Rad Al-Muhtar*. Beirut: DKI.
- Benabishaiba, A. (849). *Al-Musanaf*. Beirut: Intellectual Library.
- Benarabi, M. (1148). *Kuran Rules*. Cairo: DKI.
- Benfarmouza, M. (1480). *Durar Al-Kukkam*. Beirut: Awakening of Arab Books.
- Benhamam, K. (1456). *Fatah Al-Kadir*. Beirut: Intellectual Library.
- Benhazm, A. (1002). *Al-Muhalla*. Beirut: Intellectual Library.
- Benkudama, M. (1223). *Al-Moughni*. Beirut: Reviving Arab Heritage.
- Benmurtada, A. (1436). *Compilation of Jurisprudential Theories from Various Countries*. Cairo: Islamic Book Library.
- Bennujaim, Z. (1562). *Al-Bahr Al-Raik*. Cairo: DKI.
- Bentaimia, T. (1327). *The Greatest Verdicts*. Beirut: DKI.
- Bibas, S. (2007). Forgiveness in Criminal Procedure. *Ohio State Journal of Criminal Law*, 4(2), 329-348.
- Bradshaw, W. & Roseborough, D. (2005). Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism. *Federal Probation*, 69(2), 15-21.
- Braithwaite, J. (2000a). Restorative Justice and Social Justice. *Saskatchewan Law Review*, 63(1), 185-194.
- Braithwaite, J. (2000b). Shame and Criminal Justice. *Canadian Journal of Criminology*, 42(3), 281-298.
- Braithwaite, J. (2002). Setting Standards for Restorative Justice. *British Journal of Criminology*, 42(3), 563-577.
- Brennan, T. P. & Mason, L. (1983). Community Service: A Developing Concept. *Federal Probation*, 47(1), 49-57.
- Chiste, K. B. (2008). Faith-Based Organizations and the Pursuit of Restorative Justice. *Manitoba Law Journal*, 32(1), 27-60.

- Consedine, J. (1999). The Third Millennium: Restorative Justice or More Crime and Prisons? *Sri Lanka Journal of International Law*, 11(1), 1-48.
- Crawford, A. (2007). Situating Restorative Youth Justice in Crime Control and Prevention. *Acta Juridica*, 1, 1-21.
- Damren, S. C. (2002). Restorative Justice: Prison and the Native Sense of Justice. *Journal of Legal Pluralism and Unofficial Law*, 47(1), 83-112.
- Dikotter, F. (2002). The Promise of Repentance: Prison Reform in Modern China. *British Journal of Criminology*, 42(2), 240-249.
- Doolin, K. (2007). But What Does It Mean? Seeking Definitional Clarity in Restorative Justice. *The Journal of Criminal Law*, 71(5), 427-440.
- Dosouki, A. (1814). *Hashiat Al-Dosouki*. Cairo: Reviving Arab Heritage.
- Dzur, A. W. & Wertheimer, A. (2002). Forgiveness and Public Deliberation: The Practice of Restorative Justice. *Criminal Justice Ethics*, 21(1), 3-20.
- Eaton J. & Theuer A. (2009). Apology and Remorse in the Last Statements of Death Row Prisoners. *Justice Quarterly*, 26(2), 327-347.
- Fields, S. (2007). Private Crimes and Public Forgiveness: Towards a Refined Restorative Justice Amnesty Regime. *International Journal of Civil Society Law*, 5(2), 7-22.
- Friedland, M. L. (1970). Arrest, Bail and Legal Aid. *Canadian Journal of Corrections*, 12(3), 221-228.
- Goulding, D., Hall, G. & Steels, B. (2008). Restorative Prisons: Towards Radical Prison Reform. *Current Issues in Criminal Justice*, 20(2), 231-242.
- Haithami, A. (1566). *Tuhfit Al-Muhtaj*. Cairo: Reviving Arab Heritage.
- Hamawi, A. (1686). *Ghamz Ouyoun Al-Basaier*. Beirut: DKI.
- Hathali, J. (1277). *Permissible and Prohibited in Islamic Law*. Tehran: Ismaielian Press.
- Hattab, M. (1547). *Mawahib Al-Jalil*. Beirut: Intellectual Library.
- Hayes, S., & Hayes, H. (2008). Developing Ethical Identities in Young Offenders through Restorative Justice Practice in Australia. *Queensland University of Teaching Law and Justice Journal*, 8(2), 380-391.
- Hill, F. D. (2008). Restorative Justice: Sketching a New Legal Discourse. *International Journal of Punishment and Sentencing*, 4(2), 51-81.
- Hudson, B. (2007). The Institutionalization of Restorative Justice: Justice and the Ethics of Discourse. *Acta Juridica*, 2007(1), 56-72.
- Jasas, A. (980). *Kuran Rules*. Beirut: Intellectual Library.
- Jawzia, B. (1350a). *Ilam Al-Muwakien*. Beirut: Hadith Library.
- Jawzia, B. (1350b). *Judicial Approaches*. Damascus: Eloquence Publisher.
- Karabisi, A. (1174). *The Differences*. Beirut: Books World.
- Karafi, A. (1285). *Anwar Al-Borouk*. Beirut: Books World.
- Kasani, A. (1191), *Badaei Al-Sanaei*. Beirut: DKI.
- Katz, J., & Bonham, G. (2006). Restorative Justice in Canada and the United States: A Comparative Analysis. *Journal of the Institute of Justice and International Studies*, 6(1), 187-196.
- Khatib, M. (1569). *Mughni Al-Muhtaj*. Beirut: DKI.
- Knox, F. (2001). Three Concepts of Justice. *Police Journal*, 74(3), 229-236.
- Kurashi, M. (1328). *Ombudsman Rules*. Cambridge: Arts Publisher.
- Mackay, R. E. (2003). Restorative Justice and Children's Hearings: A Proposal. *European Journal of Crime, Criminal Law and Criminal Justice*, 11(1), 1-17.

- Makdisi, B. (1751). *Al-Foroui*. Beirut: Books World.
- Mardawi, 1480, A. (1480). *The Equity*. Beirut: Reviving Arab Heritage.
- Mawardi, A. (1058). *The Law of Governance*. Beirut: DKI.
- Mawak, M. (1491). *Al-Taj*. Beirut: DKI.
- McThenia, P. (2000). The Role of Forgiveness in Capital Murder Cases. *Capital Defence Journal*, 12(2), 325-344.
- Meier, B. D. (1998). Restorative Justice — A New Paradigm in Criminal Law? *European Journal of Crime, Criminal Law and Criminal Justice*, 6(2), 125-139.
- Mousourakis, G. (2004). Understanding and Implementing Restorative Justice. *Tilburg Foreign Law Review*, 11(3), 626-652.
- Myers, N. M. (2010). Shifting Risk: Bail and the Use of Sureties. *Current Issues in Criminal Justice*, 21(1), 127-147.
- Nasfi, O. (1142). *Tulbat Al-Talaba*. Baghdad: Amera Press.
- Pratt, J., & Bray, K. (1985). Bail Hostels - Alternatives to Custody. *British Journal of Criminology*, 25(2), 160-171.
- Prenzler, T. & Hayes, H. (1999). Victim-Offender Mediation and the Gatekeeping Role of Police. *International Journal of Police Science and Management*, 2(1), 17-32.
- Rahami, M. (2007). Islamic Restorative Traditions and Their Reflections in the Post Revolutionary Criminal Justice System of Iran. *European Journal of Crime, Criminal Law and Criminal Justice*, 15(2), 227-248.
- Rassai, M. (1488). *Sharh Hodoud Ben Arafa*. Tunis: Scientific Library.
- Roach, K. (2000). Changing Punishment at the Turn of the Century: Restorative Justice on the Rise. *Canadian Journal of Criminology*, 42(3), 249-280.
- Rodriguez, N. (2005). Restorative Justice, Communities, and Delinquency: Whom Do We Reintegrate. *Criminology & Public Policy*, 4(1), 103-130.
- Saniani, M. (1768). *Subul Al-Salam*. Beirut: Arkam Library.
- Sarkhasi, M. (1096). *Al-Mabsout*. Beirut: Educational Publishing.
- Sarre, R. (1999). Restorative Justice: Translating the Theory into Practice. *University of Notre Dame Australia Law Review*, 1(1), 11-26.
- Schmid, D. J. (2003). Restorative Justice: A New Paradigm for Criminal Justice Policy. *Victoria University of Wellington Law Review*, 34(1), 91-134.
- Shafei, M. (819). *Al-Um*. Beirut: Science House.
- Shalhoub, N. & Abdelbaqi, M. (2003). *Tribal Justice and Its Effect on Formal Justice in Palestine*. Birzeit: Institute of Law.
- Shawkani, M. (1834). *Nail Al-Awttar*. Cairo: Hadith Library.
- Skinns, C. D. (1990). Community Service Practice. *British Journal of Criminology*, 30(1), 65-80.
- Taft, L. (2000). Apology Subverted: The Commodification of Apology. *Yale Law Journal*, 109(5), 1135-1160.
- Tarabulsi, A. (1440). *Manual for Judges on Procedural Law*. Beirut: Intellectual Library.
- Tasiolas, J. (2007). Repentance and the Liberal State. *Ohio State Journal of Criminal Law*, 4(2), 487-521.
- Thompson, S. D. (1885). Bail in Criminal Cases. *Criminal Law Magazine*, 6(1), 1-49.
- United Nations (2000). *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*. U.N. Doc. E/2000/INF/2/Add.2 (2000).
- United Nations Office for Drugs and Crime (2006). *Handbook on Restorative Justice Programmes*. New York: United Nations.

- 
- Walgrave, L. & Geudens, H. (1996). Restorative Proportionality of Community Service for Juveniles. *European Journal of Crime, Criminal and Law and Criminal Justice*, 4(4), 361.
- Yamari, B. (1396). *Guide on Judicial Procedures and Judgment Methods*. Beirut: DKI.
- Zailai, O. (1342). *Tabien Al-Hakik*. Cairo: Islamic Book Library.
- Zarkashi, B. (1391). *Al-Munthour*. Kuwait: Ministry of Endowments.