Sheikh al-Qaraḍāwī's Independent Reasoning (Ijtihād) in Reformulating Contemporary Islamic Criminal Jurisprudence within the Framework of the Modern State

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Abstract:

Objective: The present article presents Sheikh al-Qaraḍāwī's innovative legal interpretations and choices on issues of Islamic criminal jurisprudence. It also examines al-Qaraḍāwī's independent legal rulings across various branches of criminal jurisprudence, analysing and evaluating them according to the principles he set for contemporary *ijtihād* (independent legal reasoning).

Methodology: This study employs an inductive, descriptive, and analytical approach. First, it traces al-Qaraḍāwī's *ijtihād* in criminal jurisprudence topics. Second, it examines his legal reasoning in light of his stated principles of *ijtihād* and his objective of adapting Islamic law to fit within the framework of the modern state. Third, it analyses his independent rulings (*ijtihādāt*) in relation to contemporary writings on criminal law.

Results: Islamic criminal jurisprudence was a central focus for Sheikh al-Qaraḍāwī as he worked to develop an approach to Islamic law that fits within the framework of the modern state while upholding the principles of the Sharia. He consistently maintained that any effort to implement criminal punishments prescribed in Islam must be grounded in a contemporary understanding of the Sharia's foundational sources. Sheikh al-Qaraḍāwī views Islamic criminal jurisprudence as fundamentally concerned with safeguarding religion, life, progeny, intellect, and property for all people. He believes that Islamic punitive measures primarily aim at promoting values and upholding human rights principles without discrimination based on religion, race, colour, or gender.

Al-Qaraḍāwī's views covered a range of complex criminal issues, including his stance on abolishing the death penalty, gender equality in matters of blood money, retribution between Muslims and non-Muslims, the changing jurisprudential concept of guardianship in retribution cases, the minimum threshold for amputation on theft, criticism of the modern prison system, punishment by stoning, the crime of apostasy, and his critique of the prevailing European narrative on corporal punishments in Islam.

Originality: The originality of this study lies in its focus on the overlooked distinction between public and private matters in modern and pre-modern Islamic criminal jurisprudence.

Keywords: Criminalization and Punishment; Islamic Criminal Jurisprudence; distinction between Public and Private ; abolition of the Death Penalty; apostasy; jail

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اجتهادات الشيخ القرضاوي لصياغة فقه جنائي معاصر ضمن إطار الدولة الحديثة

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ملخص البحث

أهداف البحث: يتناول البحث اجتهادات الشيخ القرضاوي واختياراته فيما يتعلق بأحكام الفقه الجنائي الإسلامي وتطبيقاته في إطار الدولة الحديثة. كما يتناول بالتحليل والتقييم مدى توافق الأصول الاجتهادية التي نص عليها الشيخ في مصنفاته، مع فروعه الفقهية في مواضيع متنوعة داخل الفقه الجنائي الإسلامي المعاصر.

منهج الدراسة: هذا البحث دراسة تحليلية واستقرائية ووصفية، من حيث تعقب اجتهادات الشيخ القرضاوي في مساحات الفقه الجنائي المعاصر وتقييمها في إطار القواعد التي شرطها في الاجتهاد المعاصر وفي إطار تصوراته عن وظيفة الدولة الحديثة، وأخيرًا تحليل هذه النتائج في إطار الأحكام الوضعية للقانون الجنائي المعاصر فقها وفلسفة وتطبيقًا.

النتائج: خلص البحث إلى أن حقل التجريم والعقاب المعاصر، طالما شغل الشيخ القرضاوي في اجتهاداته واختياراته، للتدليل على رؤيته في كيفية عمل الفقه الإسلامي داخل إطار الدولة الحديثة. وخلص الشيخ إلى أن الفلسفة العامة للتجريم والعقاب والحدود والقصاص في منظومة الفقه الإسلامي جاءت لحفظ المقاصد الخمسة. وعليه، فكل اجتهاد معاصر لا بد أن يعتمد هذه الفلسفة. وتفاعل الشيخ القرضاوي مع معظم العناوين التي شغلت الفقه الجنائي الإسلامي المعاصر والأحكام الجنائية الوضعية، بداية من المساواة بين الذكر والأنثى، وأحكام الردة، وفلسفة العقوبة، ونقد منظومة السجن، ودور الدولة الحديثة في العقاب.

أصالة البحث: تظهر القيمة العلمية للبحث في تناول اجتهادات الشيخ القرضاوي والفقه الجنائي الإسلامي المعاصر في إطار فلسفة التمييز ما بين العام والخاص في نظريات فقه ما قبل الدولة الحديثة، والأحكام الجنائية الوضعية المعاصرة التي تشكلت في إطار وظيفة وهيمنة الدولة الحديثة.

الكلمات المفتاحية: التجريم والعقاب، الفقه الجنائي الإسلامي، التمييز ما بين العام والخاص، عقوبة الإعدام، الردة، السجن

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1. Introduction

Islamic Criminal Jurisprudence was one of the main topics that concerned *Qaraḍāwī* in the process of recasting *Sharī'ah* in the modern context. He argued that reclaiming *Ḥudūd* (fixed punishment for certain crimes mentioned in *Qur'ān* or *Sunnah*) and *Qiṣāṣ* (retaliation for homicide or wounding) shall be preceded by a modern understanding of *Sharī'ah's* primary sources. *Qaraḍāwī* stated that the main philosophy of *Sharī'ah's* criminal commands is to preserve faith, life, mind, progeny, and property for all human beings. Besides, *Ḥudūd* maintains the Human Rights values for everyone without any discrimination based on religion, sex, colour, or race.

Qaraḍāwī's Ijtihādāt in Islamic Criminal jurisprudence was covered in different places of his published books, *Fatāwá*, articles, and media interviews. This wide coverage led to novel legal reasonings in the process of recasting Islamic criminalization and penalisation within the framework of the modern state. It included various controversial criminal topics, such as death penalty abolition, gender equality in blood money, *Qiṣāṣ* between Muslims and non-Muslims, the changeable nature of *Walī*, minimum value for theft penalty, prisons' critique, stoning, apostasy, and critique of the Euro-centric discourse on Islamic penalties.

The primary objective of this paper is to present and review *Qaraḍāwī*'s pioneering selective and creative *Ijtihādāt* in the aforementioned topics. Additionally, this paper aims to critically examine *Qaraḍāwī*'s legal reasonings within the broader context of his vision for the application of *Sharī'ah* within the framework of the modern state.

2. Qaraḍāwī's Principles (Uṣūl) of Islamic Criminal Jurisprudence

Qaraḍāwī pioneered various Islamic legal reasonings in criminal jurisprudence to recast *Ḥudūd*, *Qiṣāṣ,* and *Ta'zīr* (discretionary, corrective punishment) in the context of the modern state. These *Ijtihādāt* are divided into two main kinds: Initiative and Selective. The former refers to the jurist's proposal of solutions for the legal problems emerging from the contemporary situations in the scope of the Islamic legal maxims and *Sharī'ah*'s objectives. The latter *Ijtihād* refers to the jurist's selection of one of the opinions proposed in the classical Islamic scholarship, regardless of whether this choice is not agreed upon.[1]

> The initiative Ijtihād occurs when the Mujtahid issues an innovative view that was not stated by any previous classical jurist, such as Zakat of buildings, stocks, shares…. While the selective Ijtihād applies to choosing the most correct opinion among the various views that were initiated by the previous classical jurists. The most correct opinion is determined based on Sharī'ah's objectives, people's interests, and decade appropriate. The selective one could be extracted from or out of the four Sunni Islamic law schools.[2]

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1 Yusuf al-Qaraḍāwī, *Fī fiqh al-aqallīyāt al-Muslimah* [Jurisprudence of the Muslim Minority] (Cairo: Dār al-Shurūq, 2001) 40-41; Gräf Bettina and Jakob Skovgaard-Petersen, *Global Mufti: The Phenomenon of Yūsuf Al-Qaraḍāwi* (New York: Columbia University Press 2009); Munazza Akram, "Reform Through Tradition: An Analysis of Yūsuf Al-Qaraḍāwī's Approach To Ḥalal and Ḥarām" (2020) 03 *ĪQĀN*, 21.

2 Yusuf al-Qaraḍāwī, *Min ajl Ṣaḥwat rāshidah* [For a Guided Awakening] (Cairo: Dār al-Shurūq, 2001) 49.

Qaraḍāwī used both initiative and selective *Ijtihād* to propose modern Islamic criminal views that observe both *Sharī'ah* objectives and modern changes. His juristic outcomes were preceded by *Uṣūl*, maxims, and principles that shall be considered to balance between modernity and the definitive texts of the Islamic primary sources. For example, he called for modern Islamic legal reasonings in the whole fields of *Sharī'ah* so the Islamic penalties, *Ḥudūd*, and *Qiṣāṣ* could have a proper environment to be enforced. He added, that the innovative legal reasonings should include both the principles *Uṣūl* and branches *Furū'* of Islamic jurisprudence.

> The innovative legal reasonings that I call for do not only refer to the branches of Islamic jurisprudence but also include the principles and legal maxims, as was initiated by Imam al-Shāṭibī and Imam al-Shawkānī … Many Islamic law principles have not yet been settled, and need to be examined, counterbalanced, weighed, clarified, maintained, and elaborated. For example, we need to distinguish between the law-based Sunnah and non-law-based one, the permanent and temporary commands, and the governing-based Sunnah and Godly-based one. Ijtihād of Uṣūl shall include consensus Ijmā', analogy qiyas, legal preference Istiḥsān, and public interest maṣlaḥah as supplementary controversial sources.[1]

Besides, he considered humanity a basic principle that should be considered in proposing innovative solutions for the current criminal law problems. Namely, Islamic law states the legal rules and principles to maintain and preserve the value of humanity irrespective of race, colour, faith, or gender.[2] He argued that the Islamic philosophy of criminalization and penalization protects humanity from being breached, harmed, violated, or injured.[3] He defined the principle of humanity as the respect for every human being regardless of his faith, color, gender, race, or class. Thus, contemporary Muslim jurists must regard the humane element when proposing initiative or selective Ijtihād for modern times. In brief, Qaraḍāwī thinks the philosophy of criminalization and penalization in Islamic jurisprudence is free of any discrimination of race, faith, colour, or gender.[4]

In addition to humanity, *Qaraḍāwī* counted universalism as one of the main characteristics of Islamic *Sharī'ah* that must be considered before proposing any new legal rule. He defined the universality of Sharī'ah as a legal system that was not only revealed to the Arabs or people of a specific generation but also legislation for all human beings, times, and communities.[5]

Besides, one of *Qaraḍāwī's* vital *Uṣūl* for *Ijtihād* on the *Sharī'ah*'s criminal rules is his views

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1 Yusuf al-Qaraḍāwī, *al-Ijtihād fī al-sharī'ah al-Islāmīyah* [Legal Reasoning in Islamic Jurisprudence] (Kuwait: Dār al-Qalam, 1996) 97.

2 Yusuf al-Qaraḍāwī, *al-Fiqh al-Islāmī bayna al-aṣālah wa-al-tajdīd* [Islamic Jurisprudence Between Originality and Renewing] (Cairo: Wahba library, 1999) 9.

3 Yusuf al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", [Jurisprudence of Criminalization and Penalization], *al-Rāyah al-Ramaḍānīyah*, Vol. 12448 June 6, 2016; Yusuf al-Qaraḍāwī, *al-Khaṣā'iṣ al-'Āmmah lil-Islām* [The General Features of Islam] (Beruit: Mu'as-sasat al-Risālah, 2nd ed., 1983) 85.

4 Ibid., 97.

5 Al-Qaraḍāwī, *al-Fiqh al-Islāmī bayna al-aṣālah wa-al-tajdīd*, 12.

around the authority, state, or government that applies *Ḥudūd*, *Qiṣāṣ*, and Islamic penalties. His main purpose in modernizing classical Islamic jurisprudence is to recast it within the frame of the modern state. He says *Ḥudūd* and *Qiṣāṣ* shall be implemented through legitimate authority and the state.[1] Furthermore, the modern state is necessary for applying *Sharī'a'*s criminal rules.

> Islam needs the state to enforce the legislations and laws that are stated in the primary sources so the social, political, and economic fields of Islamic life can be regulated. The Islamic legal rules on inheritance, family issues, monopoly control, prohibition of alcohol, amputating the thief's hand, flogging the adulterer, enforcing Qiṣāṣ, and killing the apostate are inherent functions of the Islamic State.[2]

He adds that the modern Islamic state is a constitutional and legal entity, and everyone is subject to its justice system.[3] The constitution of this state shall expressly announce *Sharī'ah* as the main source for all life's fields, and any laws that contradict the definitive texts of Islamic primary sources are void.[4] Also, this modern state shall enact *Ḥudūd*, *Qiṣāṣ* code for the penalties that were stated in *Qur'ān* and Sunnah.[5]

Qaraḍāwī argues that this Modern Islamic state is a state of rights and freedoms. The rights to life, to property, to work, to faith, and to express are must and essential within the Islamic state. He adds that the main philosophy behind the Islamic penalties is to preserve these basic human rights.[6] Primarily, the freedom of religion is an Islamic invention, as there is no compulsion in faith, and every non-Muslim shall enjoy the right to practice his/her faith within the Islamic state.[7] In brief, he claims that the right to faith and freedom of expression are guaranteed, maintained, and preserved within the *Sharī'a'*s objectives.

Another essential principle in *Qaraḍāwī*'s *Uṣūl* is his frequent call to distinguish between worship *'Ibādāt* and legal transactions or dealings *Mu'āmalāt* in the process of practicing Islamic legal reasoning. Elsewhere, he added, Muslim jurists shall recognize and distinguish the custom- and interest-based rules, which could revolve around customs' changes and shift with the interest for which *Sharī'ah* commands or prohibits.[8] Put differently, the Muslim is obliged to follow the explicit and definite text in the worship commands and urged to look behind the meanings,

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1 Yusuf al-Qaraḍāwī, "al-Ḥudūd fī al-khiṭāb al-fiqhī al-mu'āṣir", *Al-Jazeera: al-Sharī'ah wa-al-ḥayāh*, January 1, 2011, video, https://www.youtube.com/watch?v=9twtcmug5L4. accessed 31 May 2024.

2 Yusuf al-Qaraḍāwī, *al-Ḥall al-Islāmī farīḍah wa-ḍarūrat*, [The Islamic Solution is Obligation and Necessary] (Beirut: Mu'assasat al-Risālah, 197479) .

3 Yusuf al-Qaraḍāwī, *Min fiqh al-dawlah fī al-Islām* [The Jurisprudent of State in Islam] (Cairo: Dār al-Shurūq, 2001) 32.

4 Al-Qaraḍāwī, *al-Ḥall al-Islāmī farīḍah wa-ḍarūrat*, 71.

5 Ibid.

6 Al-Qaraḍāwī, *Min fiqh al-dawlah fī al-Islām*, 48-49.

7 Ibid., 49.

8 Yusuf al-Qaraḍāwī, *al-Siyāsah al-shar'īyah fī ḍaw' nuṣūṣ al-sharī'ah wa-maqāṣidihā* [The Legitimate Politics Within the Objectives of Sharia] (Cairo: Wahba, 4th ed, 2011) 102.

objectives, and philosophies of the Sharī'a's commands in dealing with issues.[1]

> The non-worship rules were made to achieve a specific interest or block a certain harm. Thus, the Muslim jurist who practices Ijtihād shall examine the aimed interest and the blocked harm to understand the objective, wisdom, and reason behind the Godly command in every dealing's legal rule.[2]

Qaraḍāwī argued that one of the characteristics that help Islamic jurisprudence answer new problems and developing questions is the revolving of the legal rulings or *Fatwas* with dissimilar communities, times, societies, customs, and conditions.[3] Moreover, classical Muslim jurists used to be directed by customs and interests to change their views or their schools' stated opinions.[4] Thus, contemporary Muslim jurists must highlight custom-based rulings before proposing selective or creative *Ijtihād*. For example, enforcing the non-Muslims to wear a specific cloth at the time of 'Umar ibn al-Khaṭṭāb or 'Umar ibn 'Abd al-'Azīz was a custom-based rule that did not fit the contemporary time.[5] In brief, a basic condition for *Mujtahid* is to know the communities' customs and traditions.[6]

Although *Qaraḍāwī* urged the modern *Mujtahid* to look for the objective, logic, and philosophy of the *Sharī'ah* commands, which are related to legal transactions and dealings, he restricted this principle with the non-definite indication texts. Put differently, the expressly indicative *Qat'īy-ud-Dalālah* texts of *Qur'ān* and *Sunnah* are not included in the process of *Ijtihād*. Therefore, one of the main principles *Uṣūl* for *Qaraḍāwī* is that the expressly indicative and established texts in both worship and non-worships are not objects of *Ijtihād*.

Some *Sharī'ah* commandments are exempted from the philosophy, interest, logic, and objective-based view. For example, the numbers, quantities, and figures stated for the women's waiting period, inheritance shares, and number of lashes for the criminals are expressly indicative texts with no space for *Ijtihād*. Also, the *Ḥudūd* penalties that are clearly stated in *Qur'ān*, such as a hundred lashes for the adulterer, eighty lashes for the slanderer, and amputating the hand of the thief, are out of the circle of *Ijtihād*.[7] He adds that if the explicitly indicative text contradicts an

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1 Yusuf al-Qaraḍāwī, *Dirāsah fī fiqh Maqāṣid al-sharī'ah* [Studies in the Jurisprudence of Objectives of Sharia] (Cairo: Dār al-Shurūq, 2001) 200-202; See also, Umar ibn Salah Umar, Guidelines for Applying Maqasid (Objectives) in Islamic Legislation', *Journal of College of Sharia and Islamic Studies*, Vol. 27 No. 1 (2009): 2009.

2 Al-Qaraḍāwī, *al-Siyāsah al-shar'īyah fī ḍaw' nuṣūṣ al-sharī'ah wa-maqāṣidihā*, 122-125.

3 Yusuf al-Qaraḍāwī, *Sharī'at al-Islām Ṣāliḥah lil-taṭbīq fī kull Zamān wa*-makān [Validity of Islamic Sharia in Every Time and Place] (Cairo: Dār al-Ṣaḥwah, 1993) 50-53; Mahroof Adam Bawa, 'The Principle: "Fatwa and Rulings may Change due to Changes in Time and Place" and its Contemporary Implementations' *Journal of College of Sharia and Islamic Studies*, Vol. 29 No. 1 (2011): 2011.

4 Al-Qaraḍāwī, *Sharī'at al-Islām Ṣāliḥah lil-taṭbīq fī kull Zamān wa-makān*, 53.

5 Ibid., 102-103.

6 Al-Qaraḍāwī, *al-Ijtihād fī al-sharī'ah al-Islāmīyah*, 47-49.

7 Al-Qaraḍāwī, *Dirāsah fī fiqh Maqāṣid al-sharī'ah*, 203.

interest, the text shall prevail. *Qaraḍāwī* describes this contradictory interest as deluded, as Allah never legislates against the interest or benefit of human beings.[1] He argued that all Muslim Jurists agree that no consideration of any interest opposes *Sharī'a*'s explicitly indicative text.[2]

> A grave argument was claimed by the contemporary progressive liberals that interest should precede Sharī'ah' explicitly indicative text. Namely, the public interest abrogates, abolishes, blocks, and suspends Sharī'ah's clear text. Undoubtedly, this argument contradicts the jurists' consensus Ijmā'……. Besides, Sharī'a's explicitly indicative command means the text does not accept any Ijtihād, interpretation, explanation, or new readings. It indicates to only one meaning, which has been agreed upon by the Muslim Jurists.[3]

In brief, there is no space for *Ijtihād* in *Sharī'ah* legal issues that were explicitly stated in the primary sources, such as the prohibition of Alcohol, the amputation of a thief's hand, and inheritance shares.[4]

The last principle was considered by *Qaraḍāwī* for an innovative legal reasoning is the perception of *Sharī'ah* as a whole. In other words, enforcing *Sharī'a'*s criminal rules and doing *Ijtihād* in *Ḥudūd* and *Qiṣāṣ* shall be surrounded by a complete consideration and application of all *Sharī'ah*'s economic, financial, social, legal, and political commands.[5] Enforcing Islamic penalties while ignoring the other realms of life breaches the main objectives of *Sharī'ah*.[6] Besides, any Islamic legal innovation in the fields of penalties, *Ḥudūd* and *Qiṣāṣ* shall start from the ethical, political, social, and economic spheres of the Muslim communities.

> Ḥudūd would be a matter of injustice if the communities, nations, or societies -in which Islamic penalties are applied- are free of justice, freedom, equality, and solidarity. Islamic penalties should not be enforced in communities where patients cannot pay for their medicine, people cannot provide their food and housing, or the ignorant cannot know the rulings of their own Sharī'ah. Moreover, Ḥudūd in these lawless communities would be a weapon falling into the hands of authoritarian regimes to control people.[7]

In Summary, *Qaraḍāwī* stated principles *Uṣūl* either for himself or any other contemporary *Mujtahid* to propose selective or creative *Ijtihād* in the fields of Islamic criminal jurisprudence. Observing *Sharī'ah*'s objectives *Maqasid*, reconsidering *Sharī'ah*'s principles *Uṣūl*, human and universal nature of *Sharī'ah*, legitimate and constitutional features of *Sharī'ah*'s state, *Sharī'ah*'s consideration of freedom and rights, *'Ibādāt* and *Mu'āmalāt* distinguishing, differentiating between custom-based and divine rules, supremacy of the expressly indicative text *Qat'īy-ud-Dalālah*, and

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1 Al-Qaraḍāwī, *al-Siyāsah al-shar'īyah fī ḍaw' nuṣūṣ al-sharī'ah wa-maqāṣidihā*, 158.

2 Ibid.

3 Ibid., 165.

4 Al-Qaraḍāwī, *al-Ijtihād fī al-sharī'ah al-Islāmīyah*, 179.

5 Al-Qaraḍāwī, "al-Ḥudūd fī al-khiṭāb al-fiqhī al-mu'āṣir".

6 Ibid.

7 Ibid.

Sharī'ah's perception as a whole are the main principles on which *Qaraḍāwī* built his creative and selective *Ijtihādat*. Besides, he conditioned these jurisprudential maxims *Uṣūl* as a prerequisite for any Muslim jurist to propose *Ijtihādat* for recasting *Sharī'ah*'s classical criminal rules within the framework of the modern state.

3. Research Problems and Questions

Since the main purpose of *Qaraḍāwī*'s *Ijtihādat* is to recast *Sharī'ah* within the frame of the modern state by balancing modernity and traditionalism, the research questions focus on the harmony between his principles *Uṣūl* and his innovative jurisprudential outcomes *Furū'*.

For example, do Qaraḍāwī's *Ijtihādat* in *Ḥudūd* and *Qiṣāṣ* accord with his hypothesis on the nature of the Modern Islamic state? Is there a conflict between his arguments on the freedoms and rights of the modern Islamic state and his legal reasonings for apostasy? Does his Ijtihādāt agree with his principle on the humanity feature of Islamic criminal jurisprudence that is free of discrimination based on race, religion, or gender? Is there an inconsistency between the universality of *Sharī'a* and *Quranic* penalties? How do we understand the universality of stoning to death, flogging, amputation of hands and feet, and death penalties in *Qaraḍāwī*'s legal reasonings? Is there an opposition between the modern state and the Modern *Sharī'ah* state in the process of implementing *Ḥudūd* and *Qiṣāṣ*? Since *Qaraḍāwī* argues that the Modern *Sharī'a* state maintains freedoms for all human beings, how do we understand his legal reasoning for punishing apostasy, heresy, and blasphemy? Is there a uniformity between *Qaraḍāwī*'s human rights and the UN's International Human Rights? Did *Qaraḍāwī* distinguish between public and private rights in his arguments around *Qiṣāṣ* and *Diya*? How do we accord between the pre-modern tort logic of *Qiṣāṣ* and the public right nature of murder crimes in the modern state? Did *Qaraḍāwī*'s call to the Islamic authorities to penalize bank interest, pork trading, withholding *Zakat*, abandoning prayer, and giving up Ramadan's fasting accord with the modern philosophy of criminalization and penalization?

Going through *Qaraḍāwī*'s *Ijtihādat* would help to understand whether there is an inconsistency or contradiction between his stated principles *Uṣūl*, and his juristic outcomes *Ijtihādat*.

4. Qaraḍāwī's *Ijtihādat* in Islamic Criminal Jurisprudence

4.1 Definitions and Classifications

Qaraḍāwī continued on the same track as the classical Islamic theory that classifies criminal jurisprudence into *Ḥudūd*, *Qiṣāṣ,* and *Ta'zīr*. He defined *Ḥudūd* as the crimes that are committed against the rights of Allah *Ḥaqq Allāh* and punished with the determined penalties in *Qur'ān*, such as theft, highway robbery, adultery, apostasy, and slander. *Qiṣāṣ* was defined as the penalties that are stated for the crimes against life or body, such as murder and physical assault. Also, *Dīyah* comes under the category of *Qiṣāṣ* for both crimes against life and body. Last, the crimes that

neither come under *Ḥudūd* nor *Qiṣāṣ* categories are known as *Ta'zīr*. He adds that any innovative legal reasoning in criminalization and penalization created through *Ijtihād* should come under the *Ta'zīr* category.[1]

Hashim Kamali criticized the classical connection between *Ḥaqq Allāh* and *Ḥudūd* as a pre-modern jurisprudential outcome that had no basis in *Qur'ān* or *Sunnah*. Kamali argues that the insistence of modern jurists on linking between *Ḥudūd* and *Haqq* Allah leads to the rigidity of Islamic criminal jurisprudence. Furthermore, it leads to an inconsistency in the outcomes of the Islamic criminal legal reasonings, as if murder *Qiṣāṣ* is not against Allah's rights. Besides, this classical classification of rights into rights of God and rights of Man took the whole Islamic criminal jurisprudence astray from its main philosophy of rehabilitation and reform. Kamali adds that reducing the rights of God within the circle of *Ḥudūd* is a result of drowning the process of Islamic criminalization and penalization in legal details and *juristic technicalities*.[2]

> …to refer to certain crimes as "Rights of God" is not only odd…but also blind to the truism that in Islam all rights and obligations originate, theoretically at least, in the will and command of God.…. This is because the two sets of rights under review are almost always an extension of one another and convergent. A substantive revision of the philosophy and jurisprudence of Ḥudūd is therefore called for, indeed necessary, simply because technicality and regimentation need to be removed or minimised to facilitate a balanced implementation of the original vision of Islamic criminal law and Ḥudūd.[3]

4.2 Just Retaliation Qiṣāṣ

As it was stated above, *Qaraḍāwī* followed the classical definitions and classifications of crimes and punishments. However, he proposed -selectively and creatively- some new rulings on the section of *Qiṣāṣ* and blood money to recast them within the framework of the modern state. First, he selectively calls to adopt the *Ḥanafī*'s school on executing the Muslim murderer whether the victim is a Muslim or not.[4] The Majority's opinion of all the classical Islamic law schools distinguished between the Muslim and non-Muslim victims. Namely, the Muslim offender shall not be equally killed for murdering a non-Muslim.[5] *Qaraḍāwī*'s approach to modernizing the Islamic criminal jurisprudence to be suitable and adaptable to modern times made him call for opposing majority's opinion of the Islamic law schools and select the *Ḥanafī*'s approach.

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1 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12448.

2 Mohammad Hashim Kamali, *Crime and Punishment in Islamic Law* (Oxford: Oxford University Press, 2019) 5.

3 Ibid.

4 Yūsuf al-Qaraḍāwī, *Ghayr al-Muslimīn fī al-mujtama' al-Islāmī* [Non-Muslims in the Muslim Community] (Cairo: Wahba, 3rd ed., 1992) 12-14.

5 Aḥmad Fatḥī Bahnasī, *al-Qaṣṣāṣ fī al-fiqh al-Islāmī*, [Retaliation in Islamic Jurisprudence] (Cairo: Dār al-Shurūq, 5th ed., 1989) 37-52; Muḥammad Salīm al-'Awwā, *Fī uṣūl al-niẓām al-jinā'ī al-Islāmī* [In the Origins of the Islamic Criminal Jurisprudence] (Cairo: Nahḍat Miṣr, 2006) 296-298; Aḥmad Muḥammad Ibrāhīm, *al-Qaṣṣāṣ fī al-sharī'ah al-Islāmīyah wa-fī Qānūn al-'uqūbāt al-Miṣrī* (Cairo: Nahḍat al-Sharq, 1944) 121-123.

> This approach [the non-discrimination between the Muslim and non-Muslim victims] is more appropriate for modern times. As one of the modern misconceptions around Sharī'ah's application is the discrimination against minorities through cheapening non-Muslim's blood, selecting the minorities' non-discriminating opinion would refute this misconception and raise Sharī'ah's flag.[1]

Second, in addition to his call for non-discrimination between the Muslim and non-Muslim victims, *Qaraḍāwī* fought a long intellectual battle to achieve gender equality in blood money *Dīyah*.[2] Interestingly, the Qatari legislator, that was influenced by Qaraḍāwī's reasoning, reformed women's blood money to be equal to men's after it was half.[3] Again, *Qaraḍāwī* opposes the consensus of the whole Islamic school -*Sunni* and *Shia*- because gender equality in blood money is compatible with the modern trends on empowering women's rights.[4] He adds that the gender inequality in blood money is a pre-modern juristic perspective, which has no ground in both the *Qur'an* and *Sunnah*.[5] *Qaraḍāwī* claims that this classical juristic silence on gender equality of blood money was due to the scarcity of a situation where a woman is a victim of murder's crime, compared to the frequency of the situation between men.[6]

A third important selective *Ijtihād* is related to the changes in the family's offender definition of *Walī al-dam*. The term refers to the people who are responsible for paying the blood money to the offender when the victim or his/ her family waives their rights to punishment.[7] *Qaraḍāwī* argued that this term should be resolved around the entity that achieves security and advocacy. Therefore, the offender's family could be the normal family, people of his/ her trade, profession or military unity, work union, and state. He said the majority's opinion of the classical Islamic school reduced the term in the closest kin of the person based on a prophetic tradition. Obviously, this rule is custom-based; the prophet stated it on the closest kins because they were -at that time- the entity to achieve security, power, and advocacy.[8] Consequently, the offender's family definition shall customarily revolve around the body that achieves security and advocacy.

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1 Yūsuf al-Qaraḍāwī, *al-Shaykh al-Ghazālī kama ʿAraftuhu Riḥlata Niṣf Qarn* (Cairo: Dār al-Shurūq, 2000) 176.

2 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vols. 12473-12474; Yusuf al-Qaraḍāwī, *Fatāwá mu'āṣirah* (Kuwait: Dār al-Qalam, 2009) 4: 531-557.

3 Al-Qaraḍāwī Website, "Qatari Advisory Council adopts al-Qaraḍāwī's view on Blood Money" June 26, 2008. Retrieved from: https://www.al-qaradawi.net/node/1585

4 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vols. 12473-12474; Al-Qaraḍāwī, *Fatāwá mu'āṣirah*, 4: 531-557.

5 Ibid.

6 Ibid.

7 For both offender's and victim's family, see Gaber Mohamed, "Interrogating Two Concepts in Islamic Criminal Jurisprudence: Victim's Family vs. Offender's Family". *Yearbook of Islamic and Middle Eastern Law Online*, Apr 27, 2023, 7-12; See also, Muḥammad Abū Zahrah, *al-Jarīmah wa-al-ʿuqūbah fī al-fiqh al-Islāmī* [Crimes and Punishments in Islamic Law] (Cairo: Dār al-Fikr al-ʿArabī, 2007); Muḥammad Salīm al-ʿAwwā, *Fī uṣūl al-niẓām al-jinā'ī al-Islāmī* [The Origins of Islamic Criminal Regulation] (Cairo: Nahḍat Miṣr, 2006); ʿAbd-al-Qādir ʿAuda, *al-Tashrīʿ al-jinā'ī al-Islāmī* [The Islamic Criminal Legislation] (Cairo: Dār al-Kātib al-ʿArabī, 2006).

8 Al-Qaraḍāwī, *Sharī'at al-Islām Ṣāliḥah lil-taṭbīq fī kull Zamān wa*-makān, 121-122.

Paradoxically, *Qaraḍāwī* argued for the changeable and customary nature of the offender's family definition but was silent on the opposite term of the victim's family. He followed classical jurisprudence by keeping the victim's family definition rigidly to mean only the closest kin. Namely, the modern state could work as the offender's family and pay the blood money with the offender but could not be a victim's family and waive or abolish the death penalty in favor of another punishment. Indeed, that is a clear example of the enclosing of *Qaraḍāwī* and the modern Muslim jurists in the private justice nature of *Qiṣāṣ* crimes. Put differently, the classification of crimes against life and body under the tort category is a pre-modern jurisprudence that still influences *Qaraḍāwī* and modern Muslim jurists.[1]

Fourth, *Qaraḍāwī's* silence on the rigidity of the classical definition of the victim's family justifies his frequently opposing the abolition of the death penalty. He rejected any abolition call in the Muslim world, as the victim's closest kins are the only people who could waive the death penalty. Authorizing the modern constitutional and legislative *Sharī'ah* state, which *Qaraḍāwī* has been calling for, to abolish the death penalty has been opposed by *Qaraḍāwī* and the modern Muslim jurists. He totally rejected the abolition, arguing that the abolitionists breach Allah's commands, depart from Islam, suspend *Sharī'ah* rule, and defy Allah and his messenger.[2] Furthermore, he defended the death penalty for offenses other than murder, such as drug trafficking.[3]

> Giving the victim's family the same wide scope and flexibility as the offender's family would allow the inclusion of the Nation-State entity withing the scope of the victim's family. As a result, the legislative authority, which I argue to be included in the definition of victim's family, would have the ability to enact a law that refuses the application of death penalty. The traditional and fixed categorisation of the victim's family, which limits the definition to the heirs of victim, is the main argument on which the political regimes rely to keep death penalty in the national legal systems. Such political regimes claim that only the heirs of the victims can waive the death penalty, so the national lawgiver does not have the power to enact a law that abolishes the death penalty. I argue that redefining the victim's family term to include the Nation-State will be the first and main step to end the death penalty in Egypt and the Muslim world widely.[4]

Fifth, another example of Qaraḍāwī's premodern logic on the tort nature of Qiṣāṣ is his opinion

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1 For the pre-modern private justice in the European context, see Bruth Smith, "The Myth of Private Prosecution in England 1750–1850" in Markus Dirk Dubber and Lindsay Farmer (eds), *Modern Histories of Crime and Punishment* (Stanford: Stanford University Press, 2007) 159; Lindsay Farmer, "Criminal Wrongs in Historical Perspective" in R. A. Duff, Lindsay Farmer, S. E. Marshall, Massimo Renzo and Victor Tadros (eds) *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2010) 231; Allan Kanner, "Public and Private Law" *Tulane Environmental Law Journal* 10(2) (1997): 235–77, 236; S. F. C. Milsom, *Historical Foundations of the Common Law* (Lexis Law Publishing, 2nd ed., 1981) 403.

2 Yusuf al-Qaraḍāwī, "Ḥurmat al-dimā'" *al-Qaradawi Website*, November 15, 2015. Retrieved from: https://www.al-qaradawi.net/node/2306; Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", 176.

3 Yusuf al-Qaraḍāwī, *Fatāwá mu'āṣirah* (Kuwait: Dār al-Qalam, 1991) 2: 555.

4 Mohamed, "Interrogating Two Concepts in Islamic Criminal Jurisprudence", 41.

on the possibility of authorizing the victim's family to execute the penalty.[1] He conditioned that with the state's approval; however, the opinion shows a clear crisis of *Qaraḍāwī* and the modern Islamic jurisprudence on being entrapped within the classical pre-modern criminal view. Additionally, it demonstrates the absence of awareness of the state's function in modern times, as well as the public justice nature of the criminal legal system. According to Malcolm Thorburn,

> Criminal law and punishment, then, is not just another branch of the law with its own specialized subject matter and its own free-standing function it is, instead, an essential part of the state's exclusive claim to practical authority over all within its territory… only the state is entitled to exercise normative powers to change the basic rights and duties, powers and liabilities of subjects within the jurisdiction.[2]

Qaraḍāwī's proposal to authorize the victim's family to execute the offender is an obvious disharmony between his proposal on Sharī'a's modern state and the individual right to revenge. In modern legal criminal thought, crimes against life and body are not just personal harm to the victim; they are moral breaches against the public, community, and the whole nation.[3] Thus, responding to these public breaches and punishing the offenders are public functions. In short, modern criminal law is a matter of public justice.

Sixth, *Qaraḍāwī*'s logic on criminal justice has echoed in his fatwa on honor killing. Although he criticized this crime, he did not mind mitigating the penalty. He said the offender is either a husband, father, or brother; for the father, he should not be executed for killing his children, as a rule of thumb. For the brother, the whole family of the victim shall agree on killing the offender's brother, which is impossible to achieve. He adds that the victim's family will never agree to execute the brother who defends their honor. *Qaraḍāwī* concludes that the nature, structure, and circumstances of honor killing crimes incite to mitigate the penalty.[4]

Last, although *Qaraḍāwī* opposes any *Ijtihād* in *Ḥudūd* circle either by adding or removing, he moved the malice murder crime between spouses from *Qiṣāṣ* category to *the Ḥudūd one prompted by the* right of God approach. He argued that categorizing the crime under *Qiṣāṣ* waives the retaliation penalty because the children are the victim's family who cannot claim the penalty right against their parents. He claims that the classification of this crime as *Ḥudūd* would move it to the rights of God, thereby discarding the victim's family/children's rights, so the offender would

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1 Al-Qaraḍāwī, "Ḥurmat al-dimā'".

2 Malcolm Thorburn, "Privatizing Criminal Punishment: What Is at Stake?" in Avihay Dorfman and Alon Harel (eds.), *The Cambridge Handbook of Privatization* (Cambridge: Cambridge University Press, 2021) 79-80.

3 Thorburn, "Privatizing Criminal Punishment", 69–84; Alon Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014) 96–97; Alon Harel and Avihay Dorfman, "The Case Against Privatization" *Philosophy and Public Affairs* 41 (2013): 67–102; H.L.A. Hart, *the concept of law* (Oxford: Oxford University Press, 2012) 58.

4 Al-Qaraḍāwī, *Fatāwá mu'āṣirah*, 558-561; Yusuf al-Qaraḍāwī, Qatl al-sharaf, *al-Qaraḍāwī website*, March 28, 2017. Retrieved from: https://shorturl.at/hwCF4

easily be executed.[1] Again, it shows *Qaraḍāwī*'s pre-modern logic on the private/ tort nature of the criminal justice jurisprudence.

In Short, *Qaraḍāwī*'s *Ijtihādat* on *Qiṣāṣ* not only demonstrates a lot of inconsistency between his stated principles *Uṣūl* and his jurisprudential outcomes but also illustrates the incompatibility between *Ijtihādat* itself. More importantly, *Qaraḍāwī*'s *Uṣūl* on modernizing Islamic law did not release him from the pre-modern logic of criminal justice perceptions. This logic still considers the crimes against life and body as a personal dispute/ tort between the offender and victim.

4.3 Zinā Adultery and Fornication

Qaraḍāwī confirmed the classical jurisprudence's reasonings for *Zinā*'s prohibition. However, stoning to death, the definition of *Muḥṣan*, and the banishment penalty were the main matters of debate in his views *Ijtihādat*. First, *Qaraḍāwī* argues that stoning to death *Rajm* is *Ta'zīr*, not *Ḥadd*. In other words, it's a political decision subject to the discretionary power of the Muslim government.[2] Considering *Rajm* as *Ta'zīr* has never been stated by any classical Muslim jurist. *Qaraḍāwī* acknowledged that the prophet and his companions stoned the fornicators to death. However, he claimed that the main penalty is flogging, as stated in the *Qur'an*, and stoning was practiced by the prophet and companions as *Ta'zīr*. *Qaraḍāwī*'s conclusion on stoning to death was invoked by the *Ḥanafī*'s opinion on the banishment of *Muḥṣan* fornicators. *Ḥanafī* school argued that flogging is a *Qur'ānic* penalty, while banishment is a prophetic practice, so the former is *Ḥadd*, and the latter is *Ta'zīr*.[3] He concluded that flogging is a *Qur'ānic* penalty while stoning was a prophetic procedure, so the former is *Ḥadd*, and the latter is *Ta'zīr*.[4]

Second, the classical Islamic criminal theory defined the guarded person *Muḥṣan* as the one who has married before, whether he/ she was married or not at the time of committing marriage. Namely, the divorced, widow, and separated are included in the classical definition of *Muḥṣan*. However, defining *Muḥṣan* as the one who is married, and his/ her spouse is not away at the time of committing fornication is a modern definition that was initiated by Muḥammad 'Abduh and Rashīd Riḍā.[5] Namely, divorce, separation, and widow are not included in the definition. Thus, *Qaraḍāwī* conditioned that *Muḥṣan* should be practically married at the time of committing fornication. He adds that the logical definition for *Muḥṣan* means the person is guarded by a wife/ husband who protects him/ her from committing fornication.[6]

Third, regarding the non-Muslims who live in the Muslim state, *Qaraḍāwī* had two different

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1 Al-Qaraḍāwī, *Fatāwá mu'āṣirah*, 886-891.

2 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12452.

3 Abū Zahrah, *al-Jarīmah wa-al-ʿuqūbah fī al-fiqh al-Islāmī.*; Al-'Awwā, *Fī uṣūl al-niẓām al-jinā'ī al-Islāmī.*

4 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12452.

5 Muḥammad Rashīd Riḍā, *Tafsīr al-Manār* (Cairo: Maṭbaʿah al-Manar, 1953) 5: 25.

6 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12452.

answers for whether they should be flogged or stoned for committing *Zinā*. Once he said, Islamic law of stoning and flogging includes the non-Muslim minorities.[1] In another answer, he said that for the public interest of the Muslim state, the non-Muslims could be exempted.[2]

Fourth, *Qaraḍāwī* followed the *Ḥanafī* school for not considering banishment as a *Ḥadd* penalty for the adulterer. Although the prophetic traditions state banishment, he considered the prophetic actions as a matter of *Ta'zīr*, not *Ḥadd*.[3] Last, *Qaraḍāwī* stated that the modern Muslim state must criminalize and penalize homosexual practices with severe penalties. He also chose the *Ḥanafī*'s school opinion on classifying homosexuality as *Ta'zīr* penalty that subjects to the discretionary power of the judge.[4] Elsewhere, he wrote,

> The jurists of Islam have held differing opinions concerning the punishment for this abominable practice. Should it be the same as the punishment for fornication, or should both the active and the passive participants be put to death? While such punishments may seem cruel, they have been suggested to maintain the purity of the Islamic society and to keep it clean of prevented elements.[5]

Now, the question is how to understand *Qaraḍāwī*'s principle on describing *Sharī'a*'s modern state as the state of human rights and freedoms and his approval of the above-mentioned penalties. If modern human rights and international law prohibit physical penalties, what is the definition of human rights that are integral in *Sharī'ah*? The special rapporteur of the UN Commission on Human Rights argued that:

> Corporal punishment a variety of methods of punishment, including flagellation, stoning, amputation of ears, fingers, toes, or limbs, and branding or tattooing- is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, inter alia, in the 1948 Universal Declaration of Human Rights, 1966 International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[6]

Since stoning to death and flogging are crimes against the UN conventions, treaties, and resolutions, what would be the definitions of human rights and freedoms according to *Qaraḍāwī*'s reasonings? Also, how do stoning and flogging suit *Qaraḍāwī's* stated principles on the universality and humanity of *Sharī'a*'s criminal laws? In short, modern Islamic legal thought needs either to

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1 Yusuf al-Qaraḍāwī, "Ilzām ghayr al-Muslimīn bi-Qānūn al-dawlah al-Islāmīyah" *al-Qaraḍāwī website*, December 15, 2013. Retrieved from: https://www.al-qaradawi.net/node/4080

2 Yusuf al-Qaraḍāwī, "Alāqatinā ma'a al-Naṣārá: ḥiwār Umm Ṣaddām?" *al-Qaraḍāwī website*, February 6, 2016. Retrieved from: https://www.al-qaradawi.net/node/2268

3 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12452.

4 Yusuf al-Qaraḍāwī, *Fiqh al-usrah wa-qaḍāyā al-mar'ah* (Istanbul: al-Dār al-Shāmīyah, 2017) 46-48.

5 Yusuf al-Qaraḍāwī, *The lawful and prohibited in Islam* (Dar al-Taqwa, London 2011) 170.

6 UN Commission on Human Rights, Special Rapporteur on Torture, Report, UN Doc. E/CN.4/1997/7, 10 January 1997, §§ 5–6.

reconsider the definition of *Sharī'a*'s human rights or to present new readings and understandings of *Sharī'ah*'s penalties, such as stoning and flogging.[1] Abdullahi An-Na'im, argued,

> There is the question of what is to be done when both processes of extrapolation from the international standards and internal cultural change fail to produce total agreement on a given issue, such as the matter of cruel, inhuman, or degrading treatment or punishment. Assuming that international agreement on the meaning of this human right is achieved among all except Muslim nations, should Muslims accept that meaning or insist on their irreducible cultural position? Should this choice vary from one issue to another; that is, should a society concede to international consensus on more or on less fundamental issues? What criteria should be applied to determine what is more or less fundamental?[2]

4.4 Sariqah Theft

Qaraḍāwī stated that amputation of the right hand of the thief is a *Qur'ānic* clear penalty that has no space for *Ijtihād*.[3] However, modern legal reasoning could focus on the conditions and procedures of the crime and penalty. For example, the economic environment where the penalty is enforced, the minimum amount of money *nisāb* for which amputation is deserved, and distinctions between the definitions of theft, embezzlement of public funds, breach of trust, and fraud crimes.[4] First, *Qaraḍāwī* repeatedly stated that the Muslim community where the amputation Ḥadd is enforced should enjoy economic and social justice. In Muslim communities where a person cannot afford his/ her food, housing, or medicine, he must not apply theft *Ḥadd*. *Qaraḍāwī* invoked 'Umar ibn alkhaṭṭāb's refusal to enforce amputation of the theft during the starvation year as a guide for the necessity of empowering people economically before amputating thieves' hands.[5]

Second, he examined the minimum amount, which was determined in classical Islamic criminal jurisprudence, and concluded that it was a custom-based policy.[6] Put differently, there is no expressly indicative text *Qat'īy-ud-Dalālah* defines the minimum amount of amputating a thief's hand. He argued,

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1 Article 7 of the International Covenant on Civil and Political Rights of 1966 states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." See, *Basic Documents on Human Rights*, ed. Ian Brownlie (Oxford: Clarendon Press, 2nd ed., 1981).

2 Abdullahi Ahmed An-Naʿim, "Conclusion", in Abdullahi Ahmed An-Naʿim (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 427–36.

3 Al-Qaraḍāwī, *al-Siyāsah al-shar'īyah fī ḍaw' nuṣūṣ al-sharī'ah wa-maqāṣidihā*, 247-261; Al-Qaraḍāwī, *Dirāsah fī fiqh Maqāṣid al-sharī'ah*, 203; Al-Qaraḍāwī, *al-Ijtihād fī al-sharī'ah al-Islāmīyah*, 179.

4 Al-Qaraḍāwī, "al-Ḥudūd fī al-khiṭāb al-fiqhī al-muʿāṣir"; Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12452, 12458, 12459, and 12460.

5 Al-Qaraḍāwī, "al-Ḥudūd fī al-khiṭāb al-fiqhī al-muʿāṣir"; Al-Qaraḍāwī, *al-Ḥall al-Islāmī farīḍah wa-ḍarūrat*, 54-82; Al-Qaraḍāwī, *Dirāsah fī fiqh Maqāṣid al-sharī'ah*, 102-104; Al-Qaraḍāwī, *al-Siyāsah al-shar'īyah fī ḍaw' nuṣūṣ al-sharī'ah wa-maqāṣidihā*, 202-207.

6 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12458.

> The prophetic narrations on the minimum amount of amputation are policy-based, temporary opinions that were not meant to be permanent and obligatory for all communities and times. The minimum amount is a custom-based policy that should be determined through an Islamic, legal, social, and financial committee based on changes in prices and communities' circumstances.[1]

Third, as stated above, Qaraḍāwī had two answers for whether non-Muslim thieves are subject to amputation Ḥadd. Once, he said the law applies to every residence in the state, whether a Muslim or not. Another time, he said non-Muslim minorities could be excluded from the Islamic penalties.[2]

Last, one of the issues that he asserted is the distinction between the definitions of theft, embezzlement of public funds, breach of trust, and fraud crimes.[3] Amputation is only applied to theft, which is defined as *taking away the movable property of another with a minimum value from a locked location*.[4] *Qaraḍāwī* stated embezzlement of public funds, breach of trust, fraud, and other illegitimate taking away crimes that do not meet the definition are not included in the amputation *Ḥadd*.[5] Accordingly, the official who takes away millions of public funds shall not be amputated, while the thief who steals less than a thousand dollars from a locked safe must have his hand amputated.

Last, the prophet who commanded to cut the hands of the thieves said elsewhere, *There is no cutting of the hand for the traitor, the embezzler, or the plunderer*.[6] If amputation is not applied for crimes that sound much graver than theft, can we rationalize the logic behind the amputation of a thief's hand? In other words, the amputation penalty protected vulnerable houses, exposed homes, unguarded accommodations, and insecure tents. Besides, the people of these communities did not have immunized locked houses and safes to protect their valuable movable properties. Therefore, they needed a severe and harsh penalty to function as protectors, guards, and preservers for their vulnerable domicile. In short, it's easy to sneak into these tents, but the consequences are as severe as losing a hand. On the other side, traitors, embezzlers, and plunderers do not sneak into vulnerable places to commit their crimes, so there is no need for a severe guarding penalty. In short, the nature of the vulnerable, locked places and houses needed a harsh protection penalty to push back the thieves.

Again, Qaraḍāwī and the modern Islamic criminal jurists need to present a new definition of human rights that is different from the UN Human Rights one that denounces amputating as a

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1 Ibid.

2 Al-Qaraḍāwī, "Ilzām ghayr al-Muslimīn bi-Qānūn al-dawlah al-Islāmīyah"; Al-Qaraḍāwī, "Alāqatinā ma'a al-Naṣārá: ḥiwār Umm Ṣaddām?".

3 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12459.

4 Kamali, *Crime and Punishment in Islamic Law*, 96.

5 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12459.

6 Abū 'Īsá Muḥammad al-Tirmidhī, *Jami` at-Tirmidhi: The Book on Legal Punishments, Al-Hudud*, Hadith 1448, Vol. 2 (Cairo: Dār al-ta'ṣīl, 2016) 511.

penalty for theft crime.[1]

4.5 Apostasy Riddah

Qaraḍāwī argued that apostasy is a serious criminal offense that damages societies, divides communities, creates seditions, and leads to civil wars.[2] Thus, he called for the modern Sharī'ah state to impose severe sanctions on those who commit apostasy crimes. *Qaraḍāwī* adds that the whole eighth classical Islamic law schools agree that the apostate must be killed.[3] The classical Islamic criminal jurisprudence built this consensus on the authentic and clear prophetic traditions and companion practices of killing the apostates.[4] However, based on the different prophetic narrations, *Qaraḍāwī* divided apostasy into a minor and major. The latter refers to the apostate who invokes people to follow him/ her and attacks Islam verbally or physically. *Qaraḍāwī* cited the Indian novelist Salman Rushdie and the Egyptian biochemist Rashad Khalifa as examples of major apostasy, where apostates publish their beliefs and urge people to follow them. Hence, these apostates must be punished with the severe death penalty that was stated in the classical eight Islamic law schools.[5] *Qaraḍāwī* justified the death penalty for this major apostasy as the offender is not just a disbeliever or leaving Islam to another faith, but he/ she is considered a warrior and instigator against Islam.[6]

Regarding minor apostasy, where the offender neither announces his/ her offense nor urges people to follow him/ her, it is a crime that is considered *Ta'zīr*, and there is no need to impose the death penalty here.[7] Also, there is a civil consequential or ancillary penalty for apostasy crime. An apostate must be, judicially, divorced and separated from his/ her children. *Qaraḍāwī* stated that,

> The Egyptian judicial authority has brilliant judicial precedents for divorcing two spouses because one of them converted to Baha'ism. The Egyptian Council of State decided that although the executing apostates are not stated in Egyptian criminal law, the other consequential penalties shall be enforceable, and the converted to Baha'ism must be divorced.[8]

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1 UN Commission on Human Rights, Special Rapporteur on Torture; Brownlie, *Basic Documents on Human Rights*.

2 Yusuf al-Qaraḍāwī, *Jarīmat al-riddah wa-'uqūbat al-murtadd* (Beirut: Mu'assasat al-Risālah, 2001) 2.

3 Al-Qaraḍāwī, *Jarīmat al-riddah wa-'uqūbat al-murtadd*, 26. Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12476. Yusuf al-Qaraḍāwī, "Khuṭūrat al-riddah wa-'uqūbat al-murtadd", *al-Qaraḍāwī website,* July 24, 2007. Retrieved from: https://shorturl.at/tINQZ

4 Al-Qaraḍāwī, *Jarīmat al-riddah wa-'uqūbat al-murtadd*; Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12476; Al-Qaraḍāwī "Khuṭūrat al-riddah wa-'uqūbat al-murtadd".

5 Ibid.

6 Ibid.

7 Al-Qaraḍāwī, *Jarīmat al-riddah wa-'uqūbat al-murtadd*, 32.

8 Al-Qaraḍāwī, *Jarīmat al-riddah wa-'uqūbat al-murtadd*, 26-34; Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12476; Yusuf al-Qaraḍāwī, "Khuṭūrat al-riddah wa-'uqūbat al-murtadd", *al-Qaraḍāwī website,* July 24, 2007. Retrieved from: https://shorturl.at/tINQZ

Qaraḍāwī refused the *Ḥanafī*'s opinion on excluding the female apostate from being executed. He adds that the prophetic traditions on executing apostates include both male and female.[1]

Executing the apostates is a controversial topic in modern Islamic legal thought. Although *Qaraḍāwī* argued that *Sharī'ah* guarantees, respects, and maintains human rights and freedom of expression for all human beings, his modern legal reasoning of Islamic criminal jurisprudence led him to support the traditional *Fiqh* of executing apostates. Besides, he always claims the universality and humanity of Islamic jurisprudence, then ends up calling the authorities to execute, punish, and divorce the apostates. Is there a harmony between human rights and freedom of expression that *Qaraḍāwī* asserts, and his calls to execute the novelist Salman Rushdie and the biochemist Rashad Khalifa?

4.6 Women and Ijtihādat of Qaraḍāwī in Criminal Jurisprudence

Women in the classical Islamic criminal jurisprudence had some rules that were different from those stated for men. In this section, I focus on *Ijtihādat* of *Qaraḍāwī* on woman as a criminal judge, apostate woman, and blood money of a woman. In all these cases, *Qaraḍāwī* argued for gender equality, so a woman could work as a judge in a criminal court, submit her witnesses before a criminal court, get full blood money as a victim, and be fully responsible for apostasy crimes as a male criminal liability. His legal reasonings for giving women the right to full blood money were presented in the *Qiṣāṣ* section.[2]

Second, the majority opinions of *Mālikī*, *Shāfi'ī*, and *Ḥanbalī* schools agreed that women cannot work as judges either for criminal or civil courts.[3] The *Ḥanafī* school said that women can work as judges in the non-criminal courts.[4] Al-*Ṭabarī* and *Ibn Ḥazm* said Muslim women can be judges in criminal and non-criminal courts.[5] *Qaraḍāwī* selectively favoured the minorities' last opinion of *Ibn Ḥazm* and *al-Ṭabarī*. He argued that there is no expressly indicative text *Qat'īy-ud-Dalālah* supports the majority's opinion on prohibiting women from working as judges. [6]Elsewhere, he added that permitting women to be judges in all jurisdictions should be within the interests of the

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1 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", Vol. 12473.

2 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vols. 12473-12474; Al-Qaraḍāwī, *Fatāwá mu'āṣirah*, 4: 531-557; Al-Qaraḍāwī, *Sharī'at al-Islām Ṣāliḥah lil-taṭbīq fī kull Zamān wa*-makān, 121-122.

3 Abū Muḥammad 'Abd Allāh ibn Qudāmah, *al-Mughnī*, 'Abd Allāh ibn 'Abd al-Muḥsin al-Turkī and 'Abd al-Fattāḥ al-Ḥulw (eds.), Vol. 11 (Riyadh: Dār 'Ālam al-Kutub, 1997) 380.

4 'Alī ibn Muḥammad al-Simanānī, *Rawḍat al-Quḍāh wa-ṭarīq al-najāh*, Salah al-Din al-Nahi (ed.), (Beirut: Mu'assasat al-Risālah, 1984) 53.

5 'Alī ibn Muḥammad al-Māwardī, *Adab al-Qāḍī*, Vol. 1; Muhyi Hilal al-Sirhan (ed.), (Baghdad: al-Irshad, 1971) 626; Abū Muḥammad 'Alī ibn Ḥazm, *al-Muḥallá biāl'āthār*, Vol. 12; 'Abd al-Ghaffār Sulaymān al-Bindārī (ed.), (Beirut: Dār al-Kutub al-'Ilmīyah, 2003) 320; See also, 'Abd al-Karīm Zaydān, *Niẓām al-qaḍā' fī al-sharī'ah al-Islāmīyah* (Beirut: Mu'assasat al-Risālah, 1989) 30-31.

6 Yūsuf al-Qaraḍāwī, "Mawqif al-shar' min Tawallī al-mar'ah manṣib al-qaḍā'", *Al-Jazeera: al-Sharī'ah wa-al-ḥayāh*, September 20, 1998, video, https://www.youtube.com/watch?v=cb6LX-vCtgA

woman, family, society, and Islam.[1]

Third, the majority's view of the classical Islamic criminal jurisprudence agreed that the female apostate should be killed, while Abū Ḥanīfah excluded women from the apostasy *Ḥadd*. *Qaraḍāwī* selectively followed the majority's opinion, claiming that,

> The prophetic evidence for killing the apostate includes both males and females. There is no definite evidence that saying apostasy Ḥadd is not applied to females……It's not permitted for Muslims to punish the female apostate.[2]

Qaraḍāwī's innovative legal reasonings empower women to get their rights as a full judge and full witnesses in the criminal courts, to be paid their full blood money as victims, and to be punished with the same death penalty imposed over the male apostate. In short, a woman is a full judge, full witness, full victim, and full apostate, according to *Qaraḍāwī*'s *Ijtihādāt*.

4.7 Modern Topics in Criminal Jurisprudence

Qaraḍāwī's effort to modernize classical Islamic jurisprudence made him engage with both classical and modern topics of criminal legal theory. For example, his writings covered prison critique, the death penalty debate, law and ethics discussions, and the minimum age for criminal liability. *Qaraḍāwī* was preoccupied with modernizing and recasting targets more than how to adopt a consistent and harmonious theory. Namely, the goal distracted him from the means. Thus, contradictions were not only in his *Ijtihādat* but also in the harmony between these *Ijtihādat* and his stated *Uṣūl* principles for modern legal reasonings. For example, prison critique is a controversial topic in modern criminal justice. Incarceration has been criticized based on different modern approaches: social justice-based, ethical-based, abolition-based, and reformative-based. Some Muslim intellectuals also opposed prison institutions for ethical and moral motives.

> Empirical and historical studies have offered a strong case for the pervasive role of racial animus and discrimination in expanding the carceral state, which in turn has produced an abolitionist response as remedy to a broken system. At the same time, contexts far removed from America's racial paradigm have also produced fierce critiques of incarceration. The introduction of prisons by European colonial powers met with native resistance across the Global South.[3]

Adnan Zulfiqar argued that the Muslim intellectual *Jāvēd Aḥmad Ghāmidī* proposed a strong and inherent ethical-based discourse for criticizing and opposing the prison institution in modern times.[4] On the other side, *Qaraḍāwī's* views on modern prisons seem contradictory and inconsistent. Once, he argued that modern prisons come under the category of Ta'zīr, and the legitimate Muslim

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1 Yūsuf al-Qaraḍāwī, "Ta'yīn al-mar'ah fī manṣib al-qaḍā'", *Al-Qaraḍāwī Website*, December 26, 2004. Retrieved from: https://www.al-qaradawi.net/node/4384

2 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12463.

3 Adnan Zulfiqar, The Immorality of Incarceration, 3 *J. Islamic L*. (2022) 1.

4 Ibid.

state may use it as a penalty for new offences that have no stated penalties in *Qur'ān* and Sunnah.[1] Elsewhere, he criticized modern prisons as useless and futile. He argued that prisons neither achieve public nor private deterrence; they're a place for acquiring more criminal skills to commit more illegal offences.[2] He compared physical penalties and prisons and undermined the efficiency of the latter, considering incarcerations as academies for criminals to refine their evil abilities.[3] Indeed, *Qaraḍāwī's* non-consideration of the harmony between the legal outcomes, lack of consistency between his *Uṣūl* and his *Ijtihādat*, and preoccupation with modernizing goals more than theorizing means did not enable him to deliver an invariable discourse on modern incarceration.

> The views of contemporary jurists of Islamic law on long-term imprisonment might be divided into three broad viewpoints. First is a view that permits long prison sentences as a type of discretionary punishment (Ta'zīr). These jurists recognize that long-term imprisonment is generally absent from the Islamic historical record but utilize other jurisprudential ideas to empower political authorities with the discretion to legislate prison as punishment. Second is the view that incarceration is impermissible because it subverts Islamic law by replacing scripturally prescribed, corporal punishment with long-term confinement. This position does not critique prison per se, but laments how imprisonment is used to bypass scripturally prescribed punishments. The final viewpoint rejects the entire idea of long-term imprisonment as a form of punishment because it is fundamentally immoral and, since it is immoral, it is also effectively impermissible under Islamic law.[4]

Second, the death penalty is a trending criticized topic in modern criminal jurisprudence. Besides, the Muslim world is notorious for the sharp rise of the death penalty for several crimes. In 2021, Amnesty International reported that -except China- three Muslim countries represented 80% of the confirmed executions.[5] *Qaraḍāwī* has condemned the absence of fair trials, due process, and the rule of law in imposing the death penalty on him and hundreds of innocent people in the Muslim world.[6] However, these unfair trials and severe consequences of the death penalty in the Muslim world did not motivate *Qaraḍāwī* to back away from his opposing the abolition of the death penalty. Additionally, he described the abolitionists as imaginary people who feel compassion

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1 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", vol. 12471.

2 Al-Qaraḍāwī, *al-Siyāsah al-shar'īyah fī ḍaw' nuṣūṣ al-sharī'ah wa-maqāṣidihā*, 260.

3 Al-Qaraḍāwī, "al-Ḥudūd fī al-khiṭāb al-fiqhī al-mu'āṣir"; Yusuf al-Qaraḍāwī, "al-Qaṣṣāṣ fī al-sharī'ah al-Islāmīyah", *Qaraḍāwī's official page on Youtube*, November 1997, published on June 9, 2021, video, https://www.youtube.com/watch?v=8IaG8yAjLwE

4 Zulfiqar, *The Immorality of Incarceration*, 14-15.

5 Amnesty International, *Death sentences and executions 2021* (London, 2022), 40-52.

6 Reuters, "Influential cleric Qaradawi condemns Egypt death sentences", May 17, 2015. Retrieved from: https://www.reuters.com/article/us-egypt-muslim-brotherhood-qatar-idUSKBN0O206X20150517; Al-Qaraḍāwī Website, "Ittiḥād 'ulamā' al-Muslimīn yndd bi-aḥkām al-i'dām", June 8, 2014. Retrieved from: https://www.al-qaradawi.net/node/4726; Al-Qaraḍāwī Website, "al-Qaraḍāwī yndd b''dām al-'ulamā' wāl'bryā' fī Miṣr", April 13, 2015. Retrieved from: https://www.al-qaradawi.net/node/557; Al-Qaraḍāwī Website, "Bayān al-Shaykh al-Qaraḍāwī bi-sha'n I'dām Mīr Qāsim 'Alī", Sept. 4, 2016. Retrieved from: https://www.al-qaradawi.net/node/4626

with the poor offender and ignore the victim's family and community's security.[1] He argued that executing the murderers is an obligatory rule in *Sharī'ah*, and abolition is a departure from Islam, suspending to an Islamic rule, and hostile to Allah and his messenger.[2] Moreover, he stands up for execution as a proper penalty for offences other than murder, such as drug trafficking.[3]

Third, a member of the UN Committee on the Rights of the Child asked *Qaraḍāwī* about child criminal liability and *Sharī'ah*'s definition of child.[4] He answered that the criminal liability age is physically determined. Namely, when the person attains the puberty age. For example, wet dreams, menstruation, and pubic hair are the physical and biological signs that denote the age of puberty as well as the full criminal liability of the person. He added that Muslim jurists gave different ages for puberty in case these natural biological signs were not definite or clear. *Qaraḍāwī* chose eighteen years old for male and seventeen for female because girls reach puberty before boys. His opinion was chosen only for the serious penalties, such as execution, stoning, and hand amputation, while criminals between ten- and seventeen years old bear the criminal liability in non-serious penalties. Children aged seven to ten could be disciplined by their fathers or the government.[5]

Article 1 of the Convention on the Rights of the Child defines the child as any person below the age of eighteen years old. Namely, children shall not enjoy the same legal rights, duties and responsibilities that are entitled to adults. Consequently, the physical-based definition of the legal age *led to unfortunate instances whereby domestic laws impose duties, obligations and criminal responsibility on children*.[6] The UN definition of child motivated several countries around the world to abandon executing juvenile offenders, while the vague physical-based definition leads to the execution of children in many countries, such as Iran, Pakistan, Yemen, Nigeria, and Saudi Arabia.[7] Javaid Rehman criticized the traditional approach of defining the children in the Muslim world:

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1 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", 176.

2 Al-Qaraḍāwī, "Ḥurmat al-dimā'".

3 Al-Qaraḍāwī, *Fatāwá mu'āṣirah*, 555.

4 Ibid, 499.

5 Al-Qaraḍāwī, *Fatāwá mu'āṣirah*, 501. For minor's criminal liability in Islamic law, See Aymen Jasim Al-Duri, The Prophetic Methodology Concerning Corporal Punishment of Students, *Journal of College of Sharia and Islamic Studies*: Vol. 33 No. 2 (2015): 2015.

6 Javaid Rehman, Religion, human rights law and the rights of the child: complexities in applying the Sharī'ah in modern state practices, *NILQ 62* (2): 153-66, (2011) 158.

7 Amnesty International, "Executions of juveniles since 1990 (as of November 2019)", November 2019. Retrieved from: https://www.amnesty.org/en/documents/act50/0233/2019/en; Victor L. Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - April 30, 2004". Retrieved from: https://dpic-cdn.org/production/legacy/JuvDeathApril2004.pdf; Death Penalty Information Centre, "Saudi Arabia Condemned for Mass Execution of 37 People, Including Juveniles, After Unfair Trials", April 2019. Retrieved from: https://deathpenaltyinfo.org/news/saudi-arabia-condemned-for-mass-execution-of-37-people-including-juveniles-after-unfair-trials

> The critics of the Sharī'ah would therefore endorse the scepticism over Islamic law's ability to offer compatibility with the changing human rights values. Similarly, States following the Sharī'ah could never legitimately claim to protect child rights within modern societies……. Laws sanctioning child marriages [or definition of child] performed under the "option of puberty" represent archaic segments of indigenous tribal traditions – these traditions persist, preventing reform movements projected by the Sharī'ah or by modern human rights laws.[1]

Last, *Qaraḍāwī* argued that modern Muslim states should codify the crimes stated in the Qur'an or Sunnah but without a specified penalty. He cited usury *Ribā*, pork and dead animal trading, withholding *Zakat*, abandoning prayer, and giving up Ramadan's fasting as offences and major sins that shall be included in the modern codification of Islamic criminalization and penalizations.[2] Again, there is an inconsistency between the function of the modern state in criminal justice matters and *Qaraḍāwī's* precepted Islamic modern state in criminalization and penalization. What are the definitions of *Sharī'ah*' human rights, freedom, humanity, universality, constitutionality, and legality within the function of *Qaraḍāwī*'s Islamic authority to prosecute citizens for not doing prayer, Zakat, or fasting?

4.8 Philosophy of penalties in Qaraḍāwī's Ijtihadat

Qaraḍāwī called for an integral application and recasting of Islamic *Sharī'ah* in the modern times. He defined integral recasting as the comprehensive application of all Islamic legal fields that are based on a real Islamic philosophy within a Muslim society.[3] He added that the non-contradiction between the state laws and *Sharī'ah* is not enough because the application of *Sharī'ah* starts from its philosophy, ends with its objectives, and goes through its juristic reasoning process based on the principles *Uṣūl* that were agreed upon by the Muslim scholars.[4] Besides, there is a huge difference between the philosophy of man-made laws that permit adultery, homosexuality, and usury and the philosophy of Islamic law that prohibits all of these major sins.[5] *Qaraḍāwī* argued for different philosophies and functions for the criminalization and penalization in Islamic Jurisprudence.

For example, he argued that the Islamic penalties deter criminals and provide restitution for victims.[6] They are more likely than incarceration because prisons are more like academies for offenders to refine their criminal abilities and qualify them to be professional felons.[7] Elsewhere, he said the function of the Islamic penalty is to preserve society's security, stand in solidarity with

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1 Rehman, *Religion, human rights law and the rights of the child*, 158.

2 Al-Qaraḍāwī, "al-Fiqh al-jinā'ī wāl'qāby", Vol. 12471.

3 Yusuf al-Qaraḍāwī, "al-Tashrī' al-Islāmī: ahammīyatuh wa-ḍawābiṭuhu", *Al-Qaraḍāwī Website*, January 30, 2007. Retrieved from: https://www.al-qaradawi.net/node/4300.

4 Ibid.

5 Al-Qaraḍāwī, "al-Ḥudūd fī al-khiṭāb al-fiqhī al-mu'āṣir".

6 Ibid.

7 Ibid.

the victim's family, and deter these offenders who breach the inviolabilities. Regarding *Qiṣāṣ*'s philosophy, *Qaraḍāwī* claimed that it prevents the chaos of ignorance and tribal revenge.[1] *Qiṣāṣ* maintains equality and just retaliation between all human beings without discrimination based on gender, religion, colour, age, or position.[2] One of the interesting philosophies he argued for is the logic behind transferring the responsibility of paying the blood money to the offender's family. He reasoned it out using advocacy, security, and protection principles.[3] Namely, any entity that maintains these principles shall be responsible for standing in solidarity with this person. Last, *Qaraḍāwī* justified the death penalty for apostasy because faith is the main base, core, axis, and spirit of the whole Muslim society. Put differently, the apostate attacks and undermines the whole Muslim society, so he/ she should be eliminated.[4]

Thus, it appears that Qaraḍāwī's arguments on the function of Islamic penalties are based on the *familiar dimension of punishment in both the scriptural sources and the juristic doctrines of Islamic law*.[5] Tawfīq al-Shāwī considered reformation an essential function in Islamic penalties that have not attracted the attention of classic and modern Muslim jurists.[6] Hashim Kamali reasoned that a consistent and clear theory of punishment is absent in Islamic criminal jurisprudence because Muslim jurists generally avert philosophy and have *textualist orientations*.[7]

5. Conclusion

Qaraḍāwī has presented brave legal reasoning on different topics of Islamic criminal jurisprudence. He is also considered a representative of modern Islamic law scholarship, which has been arguing to recast *Sharī'ah* in the modern frame of the modern state.[8] This paperer argued that *Qaraḍāwī* and modern Muslim Jurists address the contemporary changes with the same traditional perceptions and perspectives. Although *Qaraḍāwī* characterized his modern *Sharī'a* with humanity, universality, actuality, legality, and constitutionality system, his conclusions on the death penalty, apostasy, and punishments negated all these characteristics. *Qaraḍāwī* proposed his *Ijtihādat* on *Qiṣāṣ* with pre-modern logic that classifies crimes against life and body as tort and personal rights. Contemporary Islamic scholarship does not give attention to the modern state's public functions in criminalization and penalization. Last, this legal reasoning method, which aims to recast the classical *Sharī'ah* in the modern state, creates a crisis of in-between status. Namely,

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1 al-Qaraḍāwī, "Ḥurmat al-dimā'".

2 Al-Qaraḍāwī, "al-Ḥudūd fī al-khiṭāb al-fiqhī al-mu'āṣir"; Al-Qaraḍāwī, "al-Qaṣṣāṣ fī al-sharī'ah al-Islāmīyah".

3 Al-Qaraḍāwī, *Sharī'at al-Islām Ṣāliḥah lil-taṭbīq fī kull Zamān wa*-makān, 123-124.

4 Al-Qaraḍāwī, *Jarīmat al-riddah wa-'uqūbat al-murtadd*, 31.

5 Kamali, *Crime and Punishment in Islamic Law*, 177.

6 Tawfīq Muḥammad Al-Shāwī, *Al-Mawsūʿah al-ʿAṣriyyah fī'l-Fiqh al-Jinā'ī al-Islāmī*, Vol. 4 (Cairo: Dār al-Shurūq, 2001) 192.

7 Kamali, *Crime and Punishment in Islamic Law*, 185.

8 Tariq Al-Bishri, 'Towards Renewing Domains in Islamic Political Thought' *Journal of College of Sharia and Islamic Studies*, Vol. 33 No. 1 (2015): 2015.

living between pre-modernity and modernity, arguing the pre-modern with a modern frame, and recasting the non-state criminal theory in a modern state structure is an in-between status that neither belongs to classical *Sharī'ah* nor modernity.

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