

## Contemporary Issues in Islamic Criminal & Humanitarian Law (A Comparative Study)

Esmaeel Haditabar <sup>1</sup>, Fakhroddin Asqari Aghmashhadi <sup>2</sup>,  
Yaser Abdi<sup>3</sup>

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### Abstract

The Islamic religion is a global phenomenon and keeps expanding rapidly. Muslim law, like personal laws of other religious groups, is today facing several challenges from within the community as well as from outside. This is but natural in an era of unprecedented changes in societies everywhere. As a matter of fact, Islamic law like any other law is in need of reform. The urgency lies in the application of contemporary standards of principle of legality, equality, dignity and individual rights in matters relating to criminal law and marriage, divorce, inheritance, guardianship, maintenance and other social contemporary problems. Although religious scholars effectively terminated the practice of *ijtihad* five hundred years ago, the principles of interpretation are well established and hence; the need for contemporary interpretation is compelling. The practice of the *Companions*, the *Successors* and the leading *Mujtahidun* of the past tends to suggest that they enacted laws and took measures in pursuance of *maslahah* (issues) despite the lack of textual authority to validate them. Egypt is often taken as an example for a distinctively Islam nation and in the Western world it is often assumed that its legislation is based on Islamic principles. In recent years, the Iranian system has established the Exigency Council to resolve conflict between bodies like the Guardian Council and the Islamic Consultative Assembly, with regard to Islamic and criminal law's contemporary issues.

**Keywords:** Contemporary Issues; Islamic & Criminal Law; Exigency Council; *Ijtihad*.

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1. Assistant Professor, Department of Law, University of Mazandaran, e.haditabar@umz.ac.ir  
2. Professor, Department of Law, University of Mazandaran.  
3. Part-Time Teacher, Faculty of Law and Political Sciences, Mazandaran University.

## Introduction

The Islamic religion is a global one and is rapidly expanding. With over 1.3 billion adherents, one in every five of earth's inhabitants is a Muslim (Halim, 2008). There are 35 nations with population over 50% Muslim, and there are another 21 nations that have significant Muslim populations. There are 19 nations which have declared Islam in their respective constitutions. The sheer number of Muslims living today makes the idea of putting Islamic Law into a footnote in contemporary writings inappropriate (Wiechman, et al., 2003). Despite the ubiquity of this faith, it remains one of the least understood, especially in the West (p.3).

Muslim law, like 'personal laws' of other religious groups, is today facing several challenges from within the community as well as from outside. This is but natural in an era of unprecedented changes in societies everywhere (Fyze, 2005:15).

Therefore, Islamic law like any other law is in need of reform. The urgency lies in application of contemporary standards of equality, dignity and individual rights in matters relating to marriage, divorce, inheritance, criminal issues, guardianship and maintenance (Bassiouni, 1982).

The application of the Principle of Legality which calls for the right of the accused to be tried for crimes specified in the Qur'an or other crimes whose clear and well-established meaning and content are determined by Sharia Law or by a criminal code in conformity therewith:

The right to appear before an appropriate tribunal previously established by law;

The right of a public trial;

The right not to be compelled to testify against oneself;

The right to present evidence and to call witnesses in one's defense;

The right to council on one's own choosing;

The right to decision on the merits based upon legally admissible evidence;

The right to have the decision in the case rendered in public.

The right to benefit from the spirit of mercy and the goals of rehabilitation and reconciliation in the consideration of the penalty to be imposed.

The right to appeal (Bassiouni, 1982).

How can the Islamic Law be applied to modern societies without undermining Muslim characteristics? One will have to distinguish between al-Sharia and al-Fiqh al-Islami and Islamic Jurisprudence. The Islamic Law is part of the Qur'an or the Sunnah. This makes it obligatory for all Muslims. On the contrary, al-Fiqh al-Islami is a collection of legal opinion. It is a reference for academic purposes and legal practice but by no means is it obligatory (1982).

## The Islamic Law and Contemporary Issues

Muslims believe that Islam is a comprehensive guidance for life in this world. Based on the Qur'an and Sunnah,<sup>1</sup> Muslims have the guidance to address the problems encountered in human life and live a balanced and successful life. For more than a millennium since the death of the Prophet, the Islamic civilization was in the driver seat of the world. However, gradually decadence crept in and now the Muslim societies are virtually dysfunctional and, due to internal as well as external factors, unable to solve most of their problems on their own and also

1. Literally, it means "trodden path". In Islam, the Sunnah of the Prophet means "the way of the Prophet".

unable to even compete with the developed world (Farooq, 2006).

Today, Muslims have a lot of fond memories of the glorious past and a vast body of Islamic legal knowledge and codes that is now asynchronous with the realities of our contemporary time. For instance, despite the provision of *Mahr* (marriage gift), women hardly gain any economic security through marriage, a rude reality they wake up to when they encounter divorce. It is claimed that interest is prohibited (because *riba* is prohibited and it covers interest), and therefore, Islamic economy and finance must be interest-free. Why then the products and services designed and offered so far by the Islamic financial institutions merely mimic or shadow the conventional financial institutions (Movassaghi, 2002)?

Why is this gap between the existing Islamic laws and the reality on the ground in terms of solving problems and upholding the Islamic principles of justice and balance? Why Islamic laws, as enunciated by Muslim jurists, which are often claimed to be based on guidance from God *for all time*, constantly require invoking "the principle of *darurah* (necessity)" to expediently reinterpret or readjust for what is presented or claimed as the norm? Why many Muslim women are revolting against some key provisions in the Classical laws and either turning toward secular laws or challenging the traditional Islamic establishments to claim justice and seek a proper and dynamic implementation of Islam? Why Muslims are seeking greater freedom in their own societies, when Islam is claimed to be the vanguard of human dignity and freedom? Why the Muslim societies are encumbered with the problem of widespread poverty and destitution,

outdated education, and technological backwardness (ZamanMovassaghi, 2002).

However, all such juristic and scholarly analyses are to be guided primarily by the principles laid out by the Qur'an (a text – rather revealed text), Sunnah (as ascertained by the numerous hadith collections of various stature – again texts/books) and the books of Islamic jurisprudence (even more books/texts representing various schools, often in disagreement with each other – and, yes, more texts/books.) Noticeably, there is not even a hint of any research based on the real world outside the texts or books in "deducing" specific answer. There is also no hint of any role for any inductive approach, studies or research. It is all texts/books, and deductions (Abou el Fadl, 2002).

Advocates of conventional orthodox Muslim societies that resist the adaptation to Western lifestyle and values attribute a high priority to the implementation of legal principles as represented in the Sharia. According to them, only a true Islamic set of laws that is based upon and inspired by the sources of Muslim faith can guarantee the maintenance of Muslim societies and prevent their gradual westernization.

Those facts which are to serve as points of orientation are easy to enlist, as the present work has shown. They should be taken into consideration from both sides - Muslim scholars as well as representatives from outside the Islamic world. A view from within the Islamic world needs to include and acknowledge the following three points (Awabdeh).

### Contemporary Issues and Iran-Egypt Solutions

It must be understood that when we claim that Islam has a satisfactory solution for

every problem emerging in any situation in all times to come, we do not mean that the Holy Quran and Sunnah of the Holy Prophet or the rulings of Islamic scholars provide a specific answer to each and every minute detail of our socioeconomic life. What we mean is that the holy Qur'an and the holy Sunnah of the Prophet have laid down the broad principles in the light of which the scholars of every time have deduced specific answers to the new situations arising in their age. Therefore, in order to reach a definite answer about a new situation the scholars of Shariah have to play a very important role. They have to analyze every question in light of the principles laid down by the Holy Quran and Sunnah. This exercise is called *Istinbat* or *Ijtihad*... [T] the ongoing process of *Istinbat* keeps injecting new ideas, concepts and rulings into the heritage of Islamic jurisprudence..." (El-Gamal, 2000:7).

In fact, the application of the Sharia in Egypt and most of its neighbors only occurred in a limited period between the arrival of Islam and the late nineteenth century. It was then, that new codes of law were introduced, following European models. After this, the application of Sharia was reduced in most of the countries in the Arab world, especially those that used to be part of the Ottoman Empire. There a process of westernization had already been launched in the course of the 18<sup>th</sup> century in an effort to counterbalance the slow decline of the Empire. This process of modernization was based on the "perception of the technical, military and economic superiority of the west" and "the cultural hegemony of Western powers.

Therefore, it leaves much room for interpretation in view of many aspects

regarding the changing needs of people and the different circumstances they face. The details of those rules are to be determined in dependence of a particular situation but nevertheless have to meet the basic principles of Islam..." ( El-Gamal, 2000:7).

Religious scholars are in agreement that *istislah* is not a proof in respect of devotional matters (ibadat) and the specific injunctions of the Shari'ah (muqaddarat). Thus the *nusus* regarding the prescribed penalties (hudud) and penances (kaffarat), the fixed entitlements in inheritance (fara'id), the specified periods of `iddah which the divorced women must observe, and such other *ahkam* which are clear and decisive fall outside the scope of *istislah*.

*Istislah* derives its validity from the norm that the basic purpose of legislation (tashri') in Islam is to secure the welfare of the people by promoting their benefit or by protecting them against harm. The ways and means which bring benefit to the people are virtually endless. The *masalih* (pl. of *maslahah*), in other words, can neither be enumerated nor predicted in advance as they change according to time and circumstance.(Shatibi, II, 2-3; Sabuni, p. 134.) To enact a law may be beneficial at one time and harmful at another; and even at one and the same time, it may be beneficial under certain conditions, but prove to be harmful in other circumstances.

The practice of the Companions, the Successors and the leading mujtahidun of the past tends to suggest that they enacted laws and took measures in pursuance of *maslahah* despite the lack of textual authority to validate it. Similarly, the first caliph held his officials accountable for the wealth they had accumulated in abuse of public office and expropriated such wealth.

He also poured away milk to which water had been added as a punishment to deter dishonesty in trade. Furthermore, First Caliph suspended the execution of the prescribed punishment for theft in a year of famine, and approved of the views of the Companions to execute a group of criminals for the murder of one person ( Ibn al-Qayyim, I'lam, I, 185; Abu Zahrah, Usul, pp. 222-223; Mustafa Zayd, Maslahah, p. 52.) These decisions were taken despite the clear ruling of the Qur'an concerning retaliation (qisas), which is 'life for life' and the Qur'anic text on the amputation of the hand, which is not qualified in any way whatsoever. Furthermore, the third Caliph, distributed the authenticated Qur'an and destroyed all the variant versions of the text. He also validated the right to inheritance of a woman whose husband had divorced her in order to be disinherited. The fourth Caliph, `Ali, is also on record as having held craftsmen and traders responsible for the loss of goods that were placed in then custody.(Shatibi, I'tisam, II, 292, 302; Ibn al-Qayyim, I'lam, I, 182; Abu Zahrah, p. 223.)

In Shiite school, Maslehat theory particularly in regarding contemporary issues, taken root since Sheikh Mofid time in Shiite jurisprudence and then scholars of his generation to have paid attention to it, Sheikh Tusi expanded his legal thinking, the added branch and cleared more instances of it. (Shikh Mofid, p.288-274-616, Tousi, p 212.193, Almabsout.p. 38-8-29,Annahayeh.p. 193-194-289, Alkhelaf p. 515-534-543-544). Muhammad bin Makki Ameli)

With the productivity of views expedient to formulate the theory of sign solution and its layout in addition to the legal rules, Check out the new and diverse

aspects of the development brought.(Allameh Helli,Shahid Avval,)

Khomeini's theory in this regard is privileged compared to the previous scholars. Maslehat from the viewpoint of Imam Khomeini deemed to have clearer, more explicit and more comprehensive states, Imam Khomeini explicitly quoted as numerous examples of government knows best interest of the rulings. Hence it can be said that Imam Khomeini's viewpoint compared with the scholars before him, is a comprehensive and methodical march. On the one hand they deemed theory in the period after the revolution and to some extent already applied in practice and in practice it was faced with the shortcomings and adequacies and its various difficulties and consequences of recognition. (Hosseini, 2004)

He sought to achieve an outcome and it's the best way to identify and implement the best interest of institutions such as parliament, the government, the Guardian Council and the Expediency Council left. On the one hand the Imam could actually expediency and implementation of legal provisions Imam could actually run consistency between expediency and religious orders establish and it's nice to say that the Shiite political jurisprudence moral and material interests of people not only in conflict with each other, but complement each other and if both are considered together in community leadership decisions, society will lead to happiness and, on the legal side of it spread in all areas of jurisprudence precedence over all knew establish consistency (Hosseini, 2004) .

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interests of people not only in conflict with each other, but complement each other and if both are considered together in community leadership decisions, society will lead to happiness and, on the legal side of it spread in all areas of jurisprudence precedence over all knew it.

A religious order is a tool for governance and justice and, if so, negligence tool for governance and justice rulings have highly effective equipment.

The interpretation of religious orders in accordance with the rules of justice and the principle of *Velayat-e Faqih* among them and the priority of social interests of religious orders, of course, taking into consideration other criteria (Motahhari) .

Shortly after the Islamic Revolution of 1978–9 and the foundation of the Islamic Republic, religious scholars were charged with establishing the religious basis of the new regime's program and its social, economic and political order. At the same time, they had to manage the difficult transition from a standpoint of opposition to one of power. As the regime has increasingly faced real, contemporary issues of social policy and practice, clerics have had to make accommodations in many key areas of Islamic doctrine and law (Mir Hosseini, 2002).

There were many disagreements<sup>1</sup> between the representatives in the Consoling Assembly for passing certain laws, such as the 7<sup>th</sup> and the 8<sup>th</sup> Clauses of the Urban Lands Act, the Single Clause for Employers Tax Exemption when they have up to 5 employee, the 1<sup>st</sup> Section of

Unemployment Insurance Act, the 1<sup>st</sup> Clause of the Labor Act (Haditabar, 2008:171).

While the Consoling Assembly was persisting to pass these laws, the Guardian Council<sup>2</sup> has identified them as laws that were not well-matched with the Islamic regulations. Such a conflict has obligated the current President to seek advice from the top Iranian Leadership, Imam Khomeini. The spiritual leader at the time wrote a letter to the president which provided a base for the establishment of the Exigency Council.<sup>3</sup>

The Exigency Council was established at the end of February 1988. The Council had at first developed its own regulations and had it approved by the Supreme Leader, and then it started to function. During that period the council, which was acting as the top supervisor for both the Consoling Assembly and the Guardian council, supervised and ruled when there

2. Constitution of Iran, Art. 91 [Guardian Council]

With a view to safeguard the Islamic ordinances and the Constitution, in order to examine the compatibility of the legislation passed by the Islamic Consultative Assembly with Islam, a council to be known as the Guardian Council is to be constituted with the following composition

1. six religious men, conscious of the present needs and the issues of the day, to be selected by the Leader, and
- 2 six jurists ,specializing in different areas of law, to be elected by the Islamic Consultative Assembly from among the Muslim jurists nominated by the Head of the Judicial Power.

3 Constitution of Iran, Art. 112 [Exigency Council] (1) Upon the order of the Leader, the Nation's Exigency Council shall meet at any time the Guardian Council judges a proposed bill of the Islamic Consultative Assembly to be against the principles of Sharrah or the Constitution, and the Assembly is unable to meet the expectations of the Guardian Council. Also, the Council shall meet for consideration on any issue forwarded to it by the Leader and shall carry out any other responsibility as mentioned in this Constitution.

- (2) The permanent and changeable members of the Council shall be appointed by the Leader.
- (3)The rule for the Council shall be formulated and approved by the Council members subject to the confirmation by the Leader.

1. The debate has centered on whether shari'a injunctions should take into account the demands of time and place. The arguments for reform have come to be known as dynamic jurisprudence" ( feqh-e puya), as opposed to the traditional jurisprudence\_ (feqh-e sonnati)

was conflict between the Consoling Assembly and the Guardian council. In addition, the Council, based on the authority given by the Supreme Leader has executed its right to pass some new rules such as one important ruling that was the Anti-Drug Law (Mehrpour, 1992).

While some of the Consoling Assembly members have criticized the Exigency Council, they have also asked the Supreme Leader to explain their exact authority and all the rights that have been given to that new council. In his letter of 29/09/1988, the Supreme leader declared that

“Your concerns are gratefully true. I’m intending to make sure that we are all pursuing the right way towards the direction of the constitution. All the events that came about during the recent years have been related to the war. The interest of the nation and Islam has raised the necessity for finding a prompt solution resolving any complications in the current laws. Thanks for your notifications. I will pray for all of you...” (Khomeini, 1991:57).

As we can understand from the statements in the letter of the Supreme Leader, the institution of the Exigency Council was against the context of the Constitution. However, the interest of the government and Islam at that time required that for the benefit of the nation and Islam, this council was to be formed promptly and look for solutions that could solve the legal conflicts. Therefore, in including the Exigency Council into the Constitution, Imam Khomeini assigned a task to the Revising Council in 1988 to adapt a bill to include the Exigency Council into the Constitution for consulting with the Supreme Leader in a way that does not interfere with the other governing bodies in the Constitution. The Revising Council revised the Constitution and approved the

bill under Article No.112<sup>th4</sup> of the Constitution.

Based on the Article 112 of the Constitution, one of the most important duties of the Exigency Council is to solve the conflicts between the Consultative Assembly and the Supreme Guardian council. As such, at anytime that the Consoling Assembly persists in passing the laws that the Guardian Council doesn’t recognize as being well-suited with the religious laws, it is for the Exigency Council to review these laws. The decision made by the Exigency Council is the final say for such laws. Nevertheless, the Exigency Council was given no rights to legislate the new laws. Below are some reasons that why exigency council has no right to legislate new laws:

■ The 57<sup>th</sup> Article of the Constitution has divided the governing power of the country into 3 branches including; the legislative, executive and the branches. The 58<sup>th</sup> Article also declares that only the Islamic Consultative Assembly can rule on legislative issues. Additionally, the 59<sup>th5</sup> Article states that in some very sensitive moment the act of the Islamic Consultative Assembly can be verified by a public

4. Art. 112 [Exigency Council] (1) Upon the order of the Leader, the Nation's Exigency Council shall meet at any time the Guardian Council judges a proposed bill of the Islamic Consultative Assembly to be against the principles of Sharrah or the Constitution, and the Assembly is unable to meet the expectations of the Guardian Council. Also, the Council shall meet for consideration on any issue forwarded to it by the Leader and shall carry out any other responsibility as mentioned in this Constitution.

(2) The permanent and changeable members of the Council shall be appointed by the Leader.  
(3)The rule for the Council shall be formulated and approved by the Council members subject to the confirmation by the Leader.

5. The Constitution of the Islamic Republic of Iran 1979 Amended 1989.

referendum.<sup>6</sup> Therefore, based on the above Articles and also on the 123<sup>rd</sup><sup>7</sup> and 74<sup>th</sup><sup>8</sup> Articles there are only two sources of power that can determine the laws.

- According to the 75<sup>th</sup> Article<sup>9</sup> of the Constitution, the legislative reforms the proposals presented or passed by the Islamic Consultative Assembly Members can be perused only when these proposals are not the cause of a decrease in the national income or a ground for an increase in the inflation rate. In case of deviations in these regulations, it is for the Guardian Council to look at these deviated issues. The question that rises now is what branch of power should take an action when some similar deviations are issued by the Exigency Council?<sup>10</sup>
- The ruling by the Exigency Council is only to supervise the laws that do not comply with Islamic regulations. However, the best interest of the current government requires some new additional power for this Constitution. This doesn't mean that on the basis of this interest the Constitution should be overlooked. Therefore the Exigency Council not only

can't act as a legislator, it also can't make any regulation that is contradictory to the Constitution (Sasannejad, 1997:280).<sup>11</sup>

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### **Exigency Council Approvals**

The approvals of the Exigency Council are

6. *Supra* n.20.

7. Art. 123 [ Signing Legislation] The President is obliged to sign legislation approved by the Assembly or the result of a referendum, after the legal procedures have been completed and it has been communicated to him. After signing, he must forward it to the responsible authorities for implementation.

8 .Art. 74 [Bills]Government bills are presented to the Islamic Consultative Assembly after receiving the approval of the Council of Ministers .Members' bills may be introduced in the Islamic Consultative Assembly if sponsored by at least fifteen members.

9 .Art. 75 [Spending Bills]Members' bills and proposals and amendments to government bills proposed by members that entail the reduction of the public income or the increase of public expenditure may be introduced in the Assembly only if means for compensating for the decrease in income or for meeting the new expenditure are also specified.

10 .*Ibid*.

11. A.H. Sasannejad, *Exigency Council Approval's*, Vol 1, Ferdousi, Tehran (1997).p.280.



located in two categories:

1. The approvals resulted from the conflicts between the Assembly and Guardian council
2. The independent approvals which don't cause any conflict between the Assembly and Guardian council

**Table 1. The approvals resulted from the conflicts between the Assembly and Guardian council (Haditabar, 2008:174)**

1. The Act of the Task and Power of the Justice Minister 1988
2. The Act of Aggravation of the Punishments for Fraud and Embezzlement Criminals 1988
3. The Labor Act 1990
4. The Islamic Punishment Act 1991
5. The Act for Decreasing Smoking 1992
6. The Act of Attaching an Article to the 2<sup>nd</sup> Clause of the Checks Act 1993
7. Interpreting Law Regarding to the 3<sup>rd</sup> and 6<sup>th</sup> of Reforming Regulations about Divorce (Talaq) 1994
8. The Law for Reforming the Cheque act 1997
9. The Law for Reforming of the 1169<sup>th</sup> Article of Civil Act regarding Guardianship 2003
10. The Attachment to the 1130<sup>th</sup> Article of Civil Act Approved in 1990 (Regarding Right of Divorce(Talaq) for Women) 2002
11. The Law for Reforming Some Part of the 1041<sup>st</sup> Article of civil act (Regarding prohibition of marriage for children Under Maturity age 2002
12. The Attachment Law to the 297<sup>th</sup> Civil Act (Regarding Diya for Non Muslim Iranian)
13. Interpreting Law of the 9<sup>th</sup> and 12<sup>th</sup> Act of Urban lands 2003

**Table 2. The independent selected approvals of Assembly which don't cause any conflict with the Guardian council (Haditabar, 2008:176)**

1. The Law For Assigning Authority To The Exigency Council In The Governmental Discretionary 1988
2. Punishment Affairs
3. The Single Article For The Discretionary Punishment Of Flour, Bread And Wheat 1988
4. Act Of The Governmental Discretionary Punishment 1988

5. Act Of The Government Discretionary Punishment For Clinical And Medical Affairs 1988
6. The Anti Drug Law 1988
7. The Law About The Death Penalty For Drug Dealers 1988
8. The Law For Increasing The Punishments For Issuing Forged Moneys, Importing Distributing And Spending Forged Moneys 1989
9. The Law For Interpreting The 287<sup>th</sup> Clause Of The Anti Drug Law 1989
10. The Act Of Assigning The Government Discretionary Punishment Of The Public Section To The Judicial Power 1989
11. The Act For The Establishment Of The Disciplinary Supreme Tribunal For Judges 1989
12. The Law For Revising The Act For The 35<sup>th</sup> Clause Of The Anti Drug Act 1990
13. The Laws Related To Punishments For Disputes, Offenses And Forgery Of Legal Documents And Birth Certificates 1991
14. The Law For Reforming The 33<sup>rd</sup> Clause Of The Antidrug Law 1992
15. The Law For Confirmation Of The Law Passed By The Exigency Council in 1988 Regarding The Discretionary Punishment Of The Wheat, Floor And Bread. 1992
16. The Act of Explanation Of The Law Passed By The Exigency Council in 1988 Related To The Discretionary Punishment Of The Status Of The Wheat, Floor And Bread 1993
17. The Law For Determining The Authority Of The Prosecutor Office And Military Courts. 1994
18. The Law For Reforming The Governmental Discretionary Punishment 1994
19. The Law For Explanation Of The 3<sup>rd</sup> Clause Of The Law For Institution Of The Authority For The Prosecutor Office And Military Courts 1994
20. The Law For Carrying Out The Governmental Discretionary Punishment For Illegal Import And Export Of The Goods And Currency 1994
21. The Law For Interpretation Of The Governmental Discretionary Punishment For Illegal Import And Export Of The Goods And Currency 1994
22. The Law For Reforming The Antidrug Law And Including Some Additional Clauses To It 1997.

Since the beginning of its activities, the Exigency Council has approved up to

95 statutes. Most of them were related to the conflicts between the Assembly and the Guardian council. The other remaining laws have initially had no foundation originating either from the Assembly or from the Exigency Council (2008).

As we see, innovation of exigency council in Iranian constitution indicated possibility of dispute resolution between Islamic scholars (mojtahedin) and other branch of sharia in regarding contemporary issues.

The most positive and optimistic thinker must acknowledge that there rest several problems that could not that easily be solved. Those are issues that are not that easily to overcome since they are in the core of Islamic thought and practice. They represent prescriptions of the Sharia which cannot be overwritten or easily adapted to the circumstances and demands of modern life by the procedural and eclectic expedience of reform.

According to them, only a true Islamic set of laws that is based upon and inspired by the sources of Muslim faith can guarantee the maintenance of Muslim societies and prevent their gradual westernization. Therefore, the debate on the Sharia is of paramount importance to the Muslim world and outranks all debated issues in view of a safe, stable and prosperous Islamic world. It is in the centre of the cultural battlefield and therefore draws much attention in- and outside the Islamic world (Al Awabdeh).

### Recommendation

Islamic Law can be used in larger situations than guiding an individual's behavior. It can be used as guide for how an individual acts in society and how one group interacts with another. The Islamic

Law can be used to settle border disputes between nations or within nations. It can also be used to settle international disputes, conflicts and wars. This Law does not exclude any knowledge from other sources and is viewed by the Muslim world as a vehicle to solve all problems civil, criminal and international. Several steps are needed in this regard.

- The application of the Principle of Legality which calls for the right of the accused to be tried for crimes specified in the Koran or other crimes whose clear and well-established meaning and content are determined by Sharia Law or by a criminal code in conformity therewith;

The right to appear before an appropriate tribunal previously established by law;

The right of a public trial;

The right not to be compelled to testify against oneself;

The right to present evidence and to call witnesses in one's defense;

The right to council on one's own choosing;

- Many contemporary social problems require sensitivity at the human level. Those who formulate Islamic laws - and the process of formulation needs to be reexamined as well - should be duly sensitized to human issues by research as well as project level works to better and systematically know and understand the problem they are trying to address.
- Before formulating any law, the religious jurists and scholars should either make effort on their own, or draw on the expertise of the relevant researchers to understand and learn about the problem in question.
- Since human fallibility must be taken into consideration, except a few things

that are explicitly legislated in the Qur'an, all laws and codes must be treated as tentative, because our knowledge at the level of details are only probabilistic (Al Awabdeh). After formulating or enacting laws/codes, there must be ex-post study of the effects and consequences of the laws.

- Women must be integrated into the religious discourse at all levels, including the level of *ijtihad* (Omar Farooq, 2003)

The above suggestions can be helpful in making Islamic guidance effective and dynamic again in contemporary society. It can also help to bridge the gap between the objectives of the Islamic guidance and laws that are sometime ineffective and at other times contrary to the stated intents. In addition experiences such as exigency council in Iran proved that Muslim society can resolve its problems by interpretation (*ijtihad*). However, to reinterpret Islamic law for the twenty-first century, the practice of *ijtihad* (interpretation and reasoning based on the sacred texts) would be revived.

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## مسائل معاصر در حقوق اسلامی کیفری و بشری (مطالعه تطبیقی)

اسماعیل هادی تبار<sup>۱۲</sup>، فخرالدین اصغری آقمشهدی<sup>۱۳</sup>، یاسر عبدی<sup>۱۴</sup>

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دین اسلام جهانی است و به سرعت در حال گسترش است. حقوق اسلامی، مانند حقوق مختص به دیگر گروه‌های مذهبی، امروزه با چالش‌های گوناگون در درون جامعه و همچنین از خارج آن است. این امر در عصری که تغییرات بی‌سابقه‌ای در همه جوامع در شرف وقوع می‌باشد طبیعی است. قوانین اسلامی مانند هر قانون دیگری نیاز به اصلاح دارد. ضرورت اعمال استانداردهای معاصر در خصوص اصل قانونی بودن، برابری، کرامت و حقوق فردی در امور مربوط به حقوق جزا و ازدواج، طلاق، ارث، ولایت، تعمیر و نگهداری و دیگر مشکلات اجتماعی فوریت دارد. اگر چه، علمای دینی از حدود پانصد سال پیش به طور موثر عملاً به اجتهاد خاتمه داده اند، اما اصول و قواعد تفسیر به خوبی تثبیت شده و نیاز به تفسیر در زمان معاصر غیر قابل انکار است. در عمل صحابه، نمایندگان و مجتهدین پیشرو در گذشته با وجود عدم وجود نص معتبر بر وضع قوانین بر اساس مصلحت تمایل نشان دادند. مصر اغلب مثالی برای تمایز مکتب اسلام و دنیای غرب است که غالباً قانونگذاری آن بر اساس اصول اسلامی است و در ایران نیز مجمع تشخیص مصلحت نظام برای حل و فصل درگیری بین شورای نگهبان و مجلس شورای اسلامی با توجه به مسائل حقوق و جزایی معاصر در سال‌های اخیر ایجاد شده است.

واژگان کلیدی: مسائل معاصر، حقوق اسلامی و کیفری، مجمع تشخیص مصلحت، اجتهاد.

۱۲. استادیار دانشکده حقوق دانشگاه مازندران

۱۳. استاد دانشکده حقوق دانشگاه مازندران

۱۴. مدرس دانشگاه مازندران، دکتری حقوق خصوصی دانشگاه تربیت مدرس تهران.



