



A COMPARATIVE ANALYSIS OF RETRIBUTIVE JUSTICE AND THE LAW OF QISAS

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ABSTRACT

Discussion on penology generally revolves around the philosophy behind the 'punishment' and its 'implementation' in order to maintain a crime-free, harmonious society. To understand the philosophy of the major school of thoughts for punishment, this paper discusses the theory of retributivism as a punishment mechanism and relates it to Qisas - the theory of punishment that hinges on Islamic criminal law jurisprudence. The objective of this paper is to compare the retributive concept of punishment with the Islamic theory of Qisas and to unravel how Islam attempts to establish justice through punishment while implementing forgiveness. It is significant to note that we can find a nexus between the retributive and Qisas school of theory that perpetrators should be punished as a consequence of the crime or an act that is against norms of the community. Nonetheless, this paper concludes that Qisas is quite distinct from the concept of retributivism in the case of punishment. Whereas the core of the retributive justice system is to put the moral blame on the offender for the offence and to provide justice through similar punishment; the law of Qisas is more concerned with the fairness and forgivingness.

Keywords: Forgiveness, Islamic criminal law, punishment, retributive justice, Qisas

1.0 INTRODUCTION

Punishment is an antediluvian form of an act to prevent crimes in the society (Roy, 1989). It has been in use, as an important tool in order to maintain a socio-economic-legal balance in the society and to ensure the peaceful environment amidst the citizens. Punishment is the inflicting of an unwanted or obnoxious outcome upon an individual or a group by the authority, because of any specific activity or conduct that is considered inadmissible or intimidating toward any norm (Sigler, 2010). For thousands of centuries, every monarch ruled, every religion practiced, every changed political government system or the scholar that provided the theory of punishment in the society, have had recognized the importance and the existence of punishment in the society. There is altogether four school of thoughts, which are retribution, utilitarian, abolition, and denunciation (Barker, 2012).

Firstly, the utilitarian from the root word ‘utility’ targets public utility more than retribution does (Posner, 1980). On the one side of the coin, the utilitarian theory of punishment stays, on the other, the retributive system. Within the utilitarian theory, the perpetrator is sentenced for the felonious act as they should be entitled to be punished (Posner, 1980). Felonious/criminal conduct agitates the stability of society and punishment aids to revive the balance (Ezorsky, 2015). The retribution philosophy is more focused on the harm that is done rather than culpability (Posner, 1980). Abolitionist school of thought focuses on abolishing the punishment absolutely (Davis, 2011). The last school of thought for punishment is the denunciation theory. Following the theory of denunciation, the punishment should be an expression of social conviction (Rychlak, 1990). This theory is also a combination of retribution and utilitarianism. It is part utilitarian as the likelihood of being denounced publicly works as an impediment. Similarly, it is part retributive as it supports the notion that offenders need to be punished (Rychlak, 1990).

The aim of the paper is to enlighten the philosophical discussion on the retributive justice theory in order to make a clear understanding of how the Islamic perspectives of punishments are intertwined with the thoughts of western philosophers. The paper, thus, initially describes the historical background of the law of Qisas and retributive justice, then discusses the core of retributive justice system, and examines how they are connected. Also, it compares the two theories in order to find out the similarities and differences.

2.0 HISTORY OF RETRIBUTION AND THE ISLAMIC LAW OF QISAS

In 18th century B.C., the law of retribution originated from the Code of Hammurabi, where 282 laws had been put together by the Babylonian King Hammurabi in order to set standards of conduct and justice for his empire in ancient Mesopotamia (Andrews, 2013). What it says in the Code of Hammurabi is that if a man has destroyed the eye of another man, they shall destroy his eye. If he has broken another man’s bone, they shall break his bone (Prince, 1904). This code also established many gruesome laws on crimes such as incest, hitting a father, murder and many others. In addition with the Code of Hammurabi, the idea of an eye for an eye was also clearly mentioned in the Old Testament (Roth, 2014).

The similar idea is also restated in the Holy Quran (Wasti, 2006). According to the religion, the Islamic Law was granted to Muhammad (May the peace and graces be upon him) in an impeccable form as a feature of his last message to the mankind. It also provides a careful consideration to the punishment methods and methodologies and portrays a total legitimate legal system. The legal system of Islam or Sharia mulls over the dynamic conditions of the society and the steadiness and perpetual quality of human instinct. Subsequently, it contains extensive standards and general principles appropriate for managing every issues and conditions related to daily human lives. Islamic Law established some perpetual punishments for particular violations/crimes that are unique in a sense that it actually can be implemented for different situations and conditions (Fuller & Kurpershoek, 2013). Along these lines, Islamic Law creates a nexus among flexibility, stability, and firmness (Williams, 2008). The Quran in its many verses has enunciated this supreme objective. And God says: “God commands justice, righteousness, and spending on ones’ relatives, and prohibits licentiousness, wrongdoing, and injustice...” (Quran 16:90). He also says: “God wants ease for you, not hardship...” (Quran 2:185).

And He says: God wants to make things clear for you and to guide you to the ways of those before you and to forgive you. God is the All-knowing,

the Wise. God wants to forgive you and wants those who follow their desires to turn wholeheartedly towards (what is right). God wants to lighten your burdens, and He has created man weak.

(Al-Quran 4:26-28).

And He says: We have sent our Messengers with clear signs and have sent down with them the book and the criterion so that man can establish justice. And we sent down iron of great strength and many benefits for man.

(Al-Quran 57:25)

Forthrightly, the history of retributive justice and the law of Qisas are broad, extensive, diverse and comprehensive. To remain the focus of this study and to give general ideas about such theories to the readers, some basic history has been discussed. However, to have a deeper knowledge about the retributive justice system and the law of Qisas, one must dig into deep scholarly readings. In addition, it is also important to mention that some of historical discussions have also been carried out in this study in the following sections in order to justify the logics of this comparative study.

3.0 PHILOSOPHICAL DISCUSSION ON RETRIBUTION AND ISLAMIC LAW ON QISAS

Retribution is Latin word which means 'to pay' (Wilson, 1983). In theory, it idealizes the principal of equality and fairness. It clearly means that if you take my eye, I could take one of your eyes. This indirectly shows a given right to punish as well.

In today's modern society, this right has been given to the state where the injured may report to authorities and they may take action (Jervis, 2015). If a person retaliates in private and causes another person to die as a result of the retaliation, he or she would be charged in court and would take on the defense of provocation.

Quinton describes retribution as a 'logical doctrine' (Quinton, 1954), however, it has been mentioned by Zaibert (2016, p. 15) that there are two types of retributivism: "one type of retributivism is logical and it relates to the very definition of punishment whereas the other type of retributivism is moral".

A positive side of retribution is that it neither looks at a person's stature nor gender; for the virtue of punishment to take place (Zaibert, 2016). For instance, if a person would snatch an eye of another person that would be trivial and the victim would still have given the right to claim one of the perpetrator's eyes. Like other legal systems, the eye for an eye retributive way of thinking is clearly demonstrated in many legal systems including Malaysia's (e.g. Section: 302 of the Penal Code of Malaysia).

Nevertheless, such justice system has negative implications as well. For instance, the retributive theory does not give leniency to the unknown (Wheeler, 1972). It contains a 'must' element, whereby, the wrongdoer 'must' be punished. This does not give leniency or space for the development of the cases as well. For example, the retributive justice system provides no ground for a person to repent or receive pardoning.

Another cynical side is that it does not take into account 'the number of people' killed. For instance, the legal system has already determined whether a person kills 01 or 10 whatever number of people with an intent to kill, therefore, he deserves the death penalty (Simon &

Blaskovich, 2007). However, it is pretty odd that the value of 10 lives cannot outweigh the value of one single life.

Again, the retribution philosophy does not focus on the 'who' (Blake, 2001). It is marketability noteworthy to point that agreeing with the 'eye for an eye' theory not necessarily implies adhering to the death penalty. In the retributivist philosophy, "to claim that someone should only be punished if she deserves it, and that if she deserves to be punished then she should be punished, is in no way to say how much she deserves to suffer" (Zaibert, 2016, p. 16). Retributivists are neither confined to any specific penalty system nor to any specific punishment as deserved (Zaibert, 2016).

In addition, the retribution philosophy does not function within a lot of cases, such as drug overdoses and suicidal cases (Collison, 1993). The procurement and usage of drugs are wrong, and a person can be charged by the state with both possessing and administering it to his or her body. However, when a wrongdoer is admitted to a hospital as a 'patient', he or she could possibly be excused from any charges. For instance, this can be observed when a patient from a drug overdose is admitted to a hospital and claims that he or she attempted suicide. In this case, the right to punish is essentially at the hospital at first glance, whether or not the attendant would telephone the police. In the case of suicidal tendencies, which is morally wrong from every aspect, the wrongdoer would escape all drug charges altogether, thus rendering the retributive theory as helpless in our justice (Wymer, 1986).

The philosophy of retribution can be viewed as harsh and can be marked as an outcome of legislative policy options (Cunneen et al., 2016). The Punishment which is not deserved is not punishment. Quinton (1954) suggests that "retributivism permits three possibilities: the punishment of the guilty, the non-punishment of the guilty and the non-punishment of the innocent" (p. 137). In Quinton's perspective, retributivism seeks to normatively justify punishment. In that case, retribution only works as a sort of an automatic theory.

Retribution philosophy can also be viewed from the 'satisfaction theory' (Bedau, 2001). This is demonstrated by the reciprocity between the sense of grievance felt by the victim of an offense and the satisfaction he gets from the suffering of the offender (Cottingham, 1979). In our criminal justice system of punishment, the sufferings of the victim are usually matched by sentenced given by the court to punish the offender.

There are several aspects which indicate the negative effect or non-applicability of such school of thought. Now, it is very important to see whether the Islamic law of Qisas possesses the same or different philosophical understanding in relation to retributive justice.

3.1 Qisas According to the Islamic Law Jurisprudence

Qisas is an Islamic expression signifying 'retaliation in kind' or retribution, 'Nemesis', 'eye for an eye' or retributive justice (Wymer, 1986, p. 17). Within Islamic law, it is a mode of punishment system, where Sharia permits to possess the theory of revenge as the punishment (Hakeem, Haberfeld, & Verma, 2012).

Qisas principle is in place when a Muslim is murdered; when the victim or victim's descendants undergoes physical trauma or experiences property loss (Wasti, 2008). As per the Islamic Penal Law, Qisas is just the one of the few types of punishment; and the rest are Hudud, Diyya and Ta'zir (Schirazi, 1997). The concept of justice in Islam is different from that of the

other religions. As argued by Ruthven (2012), the primary doctrine of Islam is justice and the fundamental doctrine of Christianity is love.

Consequently, in Islamic Criminal Law justice is the prime theory/concept; nevertheless, compassion and mercy are greatly recommended too with emphasis (Ruthven, 2012). Rather perpetrating corrective punishment to sustain order through the state; Islamic law approaches murder/killing as a civil conflict between believers (Wasti, 2008). Under traditional sharia doctrine, in all cases of unintentional bodily injury, murder, homicide, and property damage; the prosecutor is not the nation/state; rather the victim or the victim's descendent (Hakeem, Haberfeld, & Verma, 2012). Here, only the victim or victim's descendants may ask for Qisas (Peters, 2005).

3.2 The Concept of Justice in Islam

In numerous occasions, Justice is mentioned in the Holy Quran. Justice is the objective of Islamic law, as it is the objective for Islamic society in general. As per the Latin saying goes, justice should remain even if the heaven may fall (Cardozo & Kaufman, 2010). Nevertheless, unlike the formal decree of Roman law or whatever other human-made law, the Islamic justice can be distinct on a higher note. It is considerably more infiltrating than the subtle Justice observed in the considerations of the Greek savants (Djait, 1985). The reason for that is the Sharia principle seeks out the deepest thought processes since Muslims are in duty to act honestly and justly as they believe in the ubiquity of Allah to whom all objects, motives, and deeds, are known (Doi & Clarke, 2008). In general, justice may incorporate all the characteristics and virtues of cold philosophy as it is a holistic expression.

Nonetheless, religion like Islam demands of something empathetic and more human that may persevere a just society. Among the Qur'an's references to justice are the following:

God commands justice and good-doing . . . and He forbids indecency, dishonor and insolence.

(Al-Qur'an 16:90)

God commands you to deliver trusts back to their owners, and when you judge among men, you should judge with justice.

(Al-Qur'an 4:58)

Of those We created are a people who guide by the truth, and by it act with justice.

(Al-Qur'an 7:181)

We sent our Messengers with the Clear Signs and sent down the Book and the Balance with them so that mankind might establish justice. And we sent down iron in which there lies great force and which has many uses for mankind.

(Al-Qur'an 57:25)

We have sent down the Book to you with the truth so that you can judge between people according to what Allah has shown to you. But do not be an advocate for the treacherous.

(Al-Qur'an 17:105)

4.0 RELATIONSHIP BETWEEN QISAS AND RETRIBUTIVE JUSTICE SYSTEM

Both the retributive and Qisas schools of theory elaborate that perpetrators should be punished as they are worthy to get punishment as a consequent, where they had committed an act that is against norms of the community. In both cases, the subsequent conduct of the offender or other members of the society is not the underlying reason to punish the offender. The judicial punishment is with an aim to place moral blame on the offender for the offence he had committed. However, it is important to note that there are also many differences between these two punishment theories. The major difference is that in Qisas, Diyya is acceptable as a form of punishment. Diyya (Arabic: *دية*, plural *diyāt*) in Islamic law, is the financial compensation paid to the victim or heirs of a victim in the cases of murder, bodily harm or property damage. It is an alternative punishment to Qisas (equal retaliation). In Arabic, the word means both blood money and ransom, and it is spelled sometimes as *diyah* or *diyeh*. The Qur'an endorses oppressed Muslim litigants to obtain monetary demurrage instead of Qisas (Warren, 2010), oppositely, the right of Qisas can be relinquished either as an act of charity or in redemption for the past sins of victim family. As stated in Quran (5:45),

We ordained therein for them: Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal. But if any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers.

In the case of retributivist's point of view, there is no such remedies/provisions which an offender may practice. For example, the murderer shall only be punished only by death though he might obtain forgiveness from the deceased family.

The most important aspect is that the principles of the restorative justice system are more similar to that of Qisas rather than the retributivist's point of view. A standout amongst the most significant associations between the restorative justice and the ideas of justice rooted in Islamic criminal law is the prerequisite that people take personal liability for their acts. In Islamic criminal law, where Qisas crimes are involved, this concept applies to both the offender and the victims, as well as their families and the larger community. The wrongdoer is urged to atone, which is not just the initial phase in mending the break between the offender and God, it is also the first move toward absolution by the victims and the society (Hascall, 2011).

Thus, retributivism is more like a candid theory of punishment, rather than judging the gravity of the crime. Moral culpability (desert) is a sufficient and necessary ground/condition for the implementation of punishment according to the retributivist's point of view. The theory also elaborates that offenders should be punished to the extent what they deserve. Whereas, the law of Qisas holds the same view, nevertheless, it provides a possibility for forgiveness and mercy. This unique abstraction of Qisas is significant and such attribute makes the law of Qisas a complete theory to uphold justice and to foster a good relationship among people within the society by practicing forgiveness and mercy.

5.0 CONCLUSION

The major philosophy behind punishment is to maintain a crime-free, harmonious society. Revenge was also considered the rational attitude toward achieving the goal/purpose of the punishment. However, with the time and development of human society, punishment is now

only considered as a tool for upholding the harmony in human society. The thorough discussion of the paper on the theory of retributivism as a punishment mechanism and relating it to Qisas provides a new scope in the study of penology. This study unravels how Islam attempts to establish justice through punishment as well as forgiveness. After analyzing retribution and the Islamic law of Qisas, we are more in agreement with the fairness, forgivingness, security, and allowance of privacy in the law of Qisas. Muslims, the people who believe and practice Islam, look at the crime as a test from Allah and ultimately allows a person to repent or even pray for that person. It is also important to note that in the religion of Islam, God possesses 99 names, which includes the names of Compassionate and the Merciful. Muslims, in addition, believe that the ending is always important than the beginning as stated in the Al-Quran in Ad-Dhuha, and by a good ending, everyone should show mercy, patience and compassion always.

Even though there is a strong relationship between the theory of retribution and the law of Qisas, the law of Qisas seems to be more adequate for the modern societies. However, it is important to note that, we are not recommending the implementation of the law of Qisas in the justice system of any country, rather we want to enrich the literature of philosophy of punishment. Although many assessments of penology written by the philosophers are highly persuasive, still, they often neglect the comparative and religious analysis related to punishment. As this research provides a comparative and religious analysis on the retributive justice system and the law of Qisas, and avoid unsubstantiated assertions, this paper is hoped to stand as a major reference work on the subject.

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