

Relationship of Maqasid Al-Shariah with Qisas and Diyah: Analytical View

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Abstract: Qisas is considered in the Islamic law, the largest and the most important factors for the stability of justice in the society and the feeling of secure in the hearts of people and it also preserving the human dignity and freedom. It is a purification for the murdered and the life of the humankind and the healed for the oppressed and justice between the murderer and the murdered. It is equality between punishment and crime. It is from the law of Allah Glory which His law that far above other that prescribed by the corrupted minds suggestion and opinions of the misguided oppressive. The punishment in Islam tends to justice and the protection of virtue and morality. Thereby, it tends to be equal to the crime and its effects. Without qisas, people attacked each other violently; qisas is prevention to the evil consequences of the blood violation by crime. This wise legislation preserves the life of people and their organs. Qisas is aimed to achieve the equality between crime and punishment so that the penalty shall be equal to the crime committed as qisas is similar deterrent punishment waiting for the criminal who deters the victim and his guardian and the community who he lives in with this dreadful crime. In addition to these meanings, qisas heals the rage of the victim and the rage of his heirs. In this study, the inductive and analytical approach to gather the views of jurists, researchers, their evidences and arguments on the subject and texts related to it trying to perform fundamental and judicial analysis to suit the contemporary reality and the intent of the Sharia and to the practical approach which study of the subject in the field and applied study. The Islamic Sharia developed wise legislation to keep the souls of the people and limbs from being assaulted. They made the punishment of killing intentionally in the highest degree of penalty it is death and made it to the guardian of the murdered the right of amnesty for free or a replacement of money and set for the mistaken murder some penalties which makes him sensitive human in his actions and wise deeds and more alert and rises above all indulgence and lack of caution. In which does not lead the neglecters to destroy the life or organs and this wise legislation preserves the life of people and their organs.

Key words: Maqasid al-Shariah, qisas, diyah, the crime, punishment, legislation

INTRODUCTION

Praise be to Allah and peace and blessings be upon the most honourable Prophet and Messenger Muhammad ibn Abdullah who Allah seals the prophethood prophecies and completed His divine message by Him.

Recently, the talk about Maqasid al-Shariah is often frequented, this topic is highlighted in any research solving a problem or book about Shariah as a necessary methodology to resolve crisis and deal with the immortal and fixed manuscript to interact with the changes and revolving in the life of the ummah. The Shariah is reasonable and its judgments are reasonable in meaning too thus researchers supposed (So, it does not become

law on templates and formalities) to find out the meanings that observed by Shariah and wanted us to incorporate them in our lives throughout a comprehensive study of the manuscripts contained in the subject we are studying. That is by a comprehensive invoking the properties of Shariah and the general purposes of it and then try to relate theses meanings and values in the real life that we knew its intervention, details and circumstances using of innovative and creative mentality that has the foresight to know the appropriate approach and the extend to achieve these and meanings and values in reality. The era in which we live is the era of collapsing all the dams and borders and we could no longer control people in what they hear or read, we all then must provide the ummah with the

standard and balance to deal with what they hear and read by promoting the culture of the rational, the practical of Maqasid which linking the judgments with its function and roles to upgrade of one self and life.

MAQASID AL-SHARIAH BEHIND THE APPLICATION OF QISAS PUNISHMENT IN INTENTIONAL MURDER AND INJURY

Definition of qisas: Scholars have defined it with several definitions such as: A legal punishment means to punish the offenders as much as they did to fulfil Allah and His servants right whether the criminal murder or others so murdering with the murder, injuring with the injury and cut the organ equivalent with it (Qurtubi, 1980). The jurists also defined it and said: Qisas is to punish the offender of such a criminal on people's lives or an organ of their organs and if killing someone else he deserved qisas which he killed as he killed others (Auda, 1982).

The obligatory condition on qisas: The scholars obligated qisas on conditions in the case of death and conditions for non-death cases such as injuries or destruction of certain organs from the human body. The conditions of death cases as followed:

- The offender kills intentionally
- The offender is a mature adult and sensible
- The offender and the murdered are to be equal in term of religion and freedom
- The offender is not a descendant of the murdered
- The murderer's blood is not permissible
- The tool is used in the criminal causes murdering in the most cases
- The approval of the family murdered on the qisas of the offender and added that the offender is killed only after taking the approval of murdered family on it and this covers the expiation for his killing

On the other hand, if the murdered family forgive him and take diyah instead which estimated at about 4250 g of gold then the offender's expiation is freeing a slave if he could not then fast 2 consecutive months (Abu Zahra, 1966). The al-Mufasssireen and jurists pointed out qisas conditions for the injuries can be summarized as follows:

- Qisas is away from injustice and oppression at the interpolation of the aggressor offender
- The similarity of the organ in term of name and position of the destroyed organ by the offender
- There is similarity of the organ in term of healthiness, not as example of cutting of the well organ of the offender while he cut the paralyzed one of the victim or taking a well eye for visually impaired eye

- No qisas will be held only after the victim is cured. If the organ is totally cured and no changed in the original form then no qisas on him. If there are changes, qisas is held according to the caused
- Qisas must be possible to be established exactly as the damage that the offender did but if this is not possible then the punitive punishment is performed which the damage is estimated by to diyah

Maqasid al-Shariah for the requirement of equivalence between the offender and the victim. There is no different opinion among the jurists in the killing of man for murder man and woman for woman for the presence of equality and similarity between the murderer and the murdered. However, they differed in the rule of killing man for murder woman and whether woman is regarded in this case equivalent to the man who intended to establish qisas for him.

In addition, that of the majority of jurists is the required qisas among them because Allah says: The life for the life (Al-Maida:44) and to the meaning of the saying of the Prophet (PBUH): The bloods of Muslims are equal and they seek releasing of the least among them (Bukhari, 1979). Narrated also by Abu Bakar Muhammad ibn Amr ibn Hazm from his father and from his grandfather: The Messenger of Allah (PBUH) wrote a letter to the people of Yemen in which there is obligations and sunnah and the man killed of murdering women.

It seems the wisdom behind the equality between man and women on the obligation of qisas because it explicit and obvious in the Shariah texts and clear to equal between them. There is no difference between a man and a woman. Even, a man may reduce the role played by woman yet it should not be justified to distinguish man from woman. Such this opinion is considered abnormal for violating the all Shariah texts that because it is contrary to the principle of the equality adopted by Islam.

Ibn Rushd said: As for killing the believer for murdering non-Muslim, the scholars differed at the three points of view: Some said that a believer not killed for non-Muslim who said this are Shafe'i, Thawri, Ahmad, Dawood and his group. While, other group said, to be killed for killing and who said that are Abu Hanifa and his companions and Ibn Abi Layla. Whereas, Malik and al-Layth said: Not to be killed unless he kills intentionally for his property.

The first team quoted as evidence for his madhhab from the Quran and Sunnah of the Prophet (PBUH). From the Holy Quran that the verse of qisas was revealed particularly to the Muslims, the speech was to the believers as Allah said in: (If one is somewhat forgiven by his brother, the recourse of the latter is to pursue the

former for the diyah with fairness and the obligation is to pay it to the latter in a nice way (Baqarah:8)) and the brotherhood indicated by the verse is particularly to the believers who Allah said on them (The believers are brothers (Hujurat:10)).

From the Sunnah in which narrated from 'Ali (May Allah be pleased with him) that the Prophet (PBUH) said: a Muslim not to be killed for non-Muslim (Bukhari, 1979). Therefore, the Muslim shall not be killed for non-Muslim because it in contrast to the Sunnah.

They also said that: Qisas is evaded by suspicion and in the infallibility of the dhimmi is suspicion and this suspicion is the disbelief. This dhimmi may also invalidate the covenant that between him and the Muslims. This possibility raises the suspicion and prevent off qisas for Muslims because the basic principle the blood of disbeliever is permissible. The dhimmah contract prevents this permitted and the continued existence of the disbeliever even with contract of dhimmah led to suspicion hudud (Islamic penalties) are prevented by suspicions (Bukhari, 1979).

The other group who consider that a Muslim is killed for murdering non-Muslim who included are Abu Hanifa, Thawri and Ibn Abi Layla as Allah said: (Qisas is prescribed for you in the deaths) and He also said: (We prescribed for you in that the life for the life). These texts are served to the general meaning that there is no distinction between Muslim and non-Muslims on the issue of qisas and the speech in all these verses are for all people. The speech requires that to apply to all people because Islam recognized the principle of equality and justice among the people and there is no exceptional individual of this general statement.

In comparison between the evidence of the two groups shows us that the evidence of the first opinion that is not to kill a Muslim for dhimmi is not an excuse for them because even the speech was directed to the believers, it does not mean that non-believers not included within it. Particularly, since there are other clear texts addressed to all people. However, the text that says the Holy Prophet do not recognize to kill a Muslim for murdering non-Muslim, for that he meant a military non-believer not dhimmi who gave protection.

For this said the equality between Muslims and dhimmis on the issue of qisas is required for the justice of Islam which recognized the principles for a just which reflect human equality among human beings except for necessity and within the limits of that necessity.

Therefore, researchers find that the the four righteous Caliphs were killing Muslim for dhimmi to accomplish of the principle of justice as required by the high Islamic morals (Abu Zahra, 1966).

MAQASID AL-SHARIAH IN OBLIGATING DIYAH, THE EXPIATION, DEPRIVATION OF INHERITANCE AND WILLS IN THE CRIMES OF QISAS AND DIYAH

Maqasid al-Shariah to be achieved in the legislation of diyah: Diyah, the money that the offender pay to the victim or his heirs as a substitute of the crime he committed whether the crime is killing one self or non-killing self. Nevertheless, the jurists are termed the word diyah in substitute the payment done by the offender instead of the crime of self and al-Arsh for the wounds he committed (Idris, 1986).

Appeared to us from the above that the Shariah has separated between the death punishment of intentional murder and semi-intentional murder so it makes it in the first qisas and in the second diyah private parts. That is because the offender in the murder means the killing of the victim while in the semi-intentional he does not intend to kill the victim. The existence of this difference between them in the act prevents them in the equality of the sentence as well as this cannot applies the punishment of qisas for semi-intentional murder because qisas requires similarity between what the offender does and what to be done to him and the offender did not intend to kill the victim so the killer of the victim must the offender have intended to kill him. This in this case is lacking of similarity. In fact, the justice and logic are the basis of the distinction between intentional murder and semi-intentional murder death (Idris, 1986).

This from one side and from other side: Shariah separated between the punishment of pure intentional and the mistaken murder so it makes it in the case of intentional is qisas and in the case of by mistake light diyah. Concerning that is the offender in the intentional crimes, intended the crime, thinks about it and pleading to commit it in the various ways to achieve for him or other material or moral interest. Whereas, the offender of crimes by mistake is not intended to commit a crime does not thinks about it and there is no incentive to commit it and all there is a negligence or lack of preparation that leads to the occurrence of an act constituting the offense without turning the mind of the offender to do it. Thus, the intentional crime made up of two elements: The moral element is the direction of the psychological of offender toward the offence and the material element is the act constituting the offense (Auda, 1982).

While, in the crime of the mistaken murder, comprises of the material element only and lacking of the mental element to be equal to committing a crime intentionally. The difference between the mentality of the offender intentional and the offender by mistake is the reason for

the difference in punishment of the crime, the difference between two mentalities is equal to exactly the difference between the punishments. That is because if the offender by intentional is lack of the mental factors that was invited him to commit the crime, he has become equal to an offence by mistaken and remains only the material element of the crime. Therefore, Shariah settled between the punishments of intentional murder in the case of forgiven and mistake murder and made it diyah in both cases as though the pardon deal to the mental element in intentional crime.

Shariah did not punished in the case of mistake by qisas as the lack of psychological motives of the offender and he did not intend the crime or thinks about it. This occurred because the crime is caused by negligence and lack of care which was causing it mostly financial damage to the victim or his heirs. Here, Shariah considered two reasons that the punishment shall be in the dearest and the keen for the humans after themselves which is the money. A penalty was for not to be careful is deprivation of the money that makes people tired them to ensure it and the penalty for damaging the money of others is damages with the money. There is no doubt that this punishment is sufficient to make the careless negligent person to adhere more to the clung of cautious and alertness (Auda, 1982).

MAQASID AL-SHARIAH TO BE ACHIEVED IN OBLIGATING THE EXPIATION

Expiation original penalty which is freeing a slave believer, if one could not afford it or its value, he fast two consecutive months, fasting is as alternative penalty that can only be done if he could not implement the original penalty.

The scholars differed in concerning the obligatory of expiation in the intentional murder: Abu Hanifa considers that there is expiation of intentional murder because the expiation from the estimated penalties, so it must be recognised. However, Malik does not require the expiation in the intentional murder but he sees it necessary to the intentional which has not approved for qisas whether it due to shariah rule or pardon.

Shafi'e sees it as obligatory on the intentional murder because if it is obligatory in the mistaken murder who is not sinful then with the intentional is more worthy (Dardeer, 1966). While, the known from madhhab Hanbali that no expiation of intentional murder because the text of the the intentional murder was free of expiation (Ibn Qudama, 1978). The opinion of Ahmed is in accordance with the opinion of Shafi'i.

MAQASID AL-SHARIAH ON THE INTENTIONAL OFFENDER IS DEPRIVING FROM THE INHERITANCE

Deprivation from the inheritance is a dependency penalty infects the offender according to the sentenced to death and the origin of this the saying (PBUH): Nothing for the murder from the inheritance (Ibn Qudama, 1978). The scholars differed greatly in this matter.

Moreover, Abu Hanifa sees as depriving the offender from the inheritance regardless the type of murder if the killing is directly not by caused and should not be aggression and should not be from a young child or insane (Al-Kasani, 1998).

Malik views that the killing that an inhibitor of inheritance is the intentional and aggression murder whether was directly or by caused murder and whether the qisas applied to the offender or free him from qisas for some reason. The murder by mistaken does not deprive the offender from the inheritance but depriving them from diyah only which is obliged due to murder (Dardeer, 1966).

Shafi'e's companions have disagreement in this issue: Some of them distinguish between murder Madhmon (Intentional murder) and murder non-Madhmon (Semi-intention or mistaken murder) and they saw the deprivation of inheritance if murder was intentionally kills for he did kill unjustly while murder non madhmon does not deprive of inheritance because he kills with the right.

Some of them said that if he was accused of hurrying for inheritance he is deprived of inheritance as in the mistaken murder as if the ruling of the ruler on the hairs in the crime of adultery based on the evidence then it is deprived because he was accused in the murder of in hurrying for inheritance. However, if he not accused of hurrying for inheritance there is no deprive as if he sentenced in adultery by own convince.

The most correct opinion in the madhab is to deprive of inheritance of the murderer in every case because the the deprivation of inheritance was intended to prevent the pretext and to prevent the heir from hurrying for inheritance.

In the view of Ahmed, that the madhmon murder is derived from the inheritance but non madhmon not prevented such as in the murder defending of self or murder by qisas punishment.

They also give reason for deprive the child and the insane of inheritance in the madhhab of Ahmad that what they did is a forbidden act but did not punishable by death due to his age and the failure of qisas for lack of eligibility does not prevent deprivation of the offender from inheritance but the caution requires a prevented from

inheritance in order to safeguard the blood (Auda, 1982). The wisdom of legislation in the depriving the murderer from inheritance: The Sunnah indicated that the murder has nothing from inheritance either intentionally as said by Malik and either directly as stated by Abu Hanifa or either madhmon murder, qisas or diyah or expiation and either absolute murder as the statements in the view of madhhab Shafi'e and Ahmed and whether the murderer intended to hurry for inheritance or not intended as the care of this intention is not considerable in the parallel prevention. That inheritance of the murderer leads to the occurrence of this act so preventing the pretext by deprivation (Al-Alim, 1981).

MAQASID AL-SHARIAH FROM DEPRIVATION OF THE MURDERER FROM THE WILL

The deprivation of the will is dependence punishment. The origin in it the saying of the Prophet PBUH: No will for the murderer (Bukhari, 1979) and the saying: No for the murderer thing and the mentioned of (Thing) meant refute and cover all the inheritance and the will.

The views of scholars in depriving the will from the murderer: In the view of Abu Hanifa, deprivation the murderer from the will of any type murder if the murder is directly or by violence to be adult and not insane. Abu Hanifah also believes that the will is valid if approved by the heirs. Whereas, Abu Yusuf sees it is not valid even if approved by the heirs as the deprivation of the will is the murder not the interest of the heirs (Al-Kasani, 1998).

In the madhhab Malik, they distinguish between the intention and mistaken murder and agree that mistaken murder is not eligible to be deprived of the will. The wills of mistaken murder is valid in his money even if the murdered knows that he is the murderer if he knew the murderer and recommend to him his will from money or diyah, this will is correct. However, they disagree in the intention murder, some saw that the will is not valid if the murdered was not aware that the recommended is his murderer if he aware that he is the murderer and recommended him the will after the crime is valid in the money only not valid in diyah because the diyah money only obligatory in death. Thus on this, the will before the crime is invalidated by committing the crime of intention murder unless the murdered insist to remain on the will. Other view agrees that the will valid to murderer intentionally whether the murdered aware of murderer or did not know. The owner of this view concluded that the will that before or after the murdered is valid in both cases (Dardeer, 1966).

In the Shafi'i madhhab and Ahmad two opinions:

First: According to them, the will is not valid for the murderer and the owners of this theory divided into two groups: Group believes that the will is not valid even if approved by the heirs because deprivation of the will is the murder not the interest of the heirs and the approved of the heirs to be as heba (Gift) is an initiator that should meet the conditions for Heba. While, the other group believes that the will is valid with the approval of the heirs.

Second: The view that the will of the murderer is valid in every case without the need to the approval of the heirs.

CONCLUSION

There is no doubt that the qisas prescribed penalty in which is similar crime. The crime attacks on the life, so the justice to be taken for aggressor as much as the attacked and the offender as much as the offence and this penalty cast in the self of offender when intend to commit the crime that is painful punishment a waiting that may stopped him in taking the crime and may not stop the crime and murdering a self with aggression and injustice. Allah has authorized the guardian of the murdered in the legality of qisas to the murder for the healing of his anger. Hence, Allah has decreed qisas on this ummah and make it in her a life and make it the original in the first place but His mercy and kindness in this ummah has eased it and legislated an alternative for this original in order not to block the door of good manner to them if they want to waive their right in whole or in part. The study reached the following results:

- This research has shown that such qisas is not revenge but it legislated in order to maintain people's lives and build healthy social relationships between people
- In the qisas, justice between the offender and the victim is achieved as the murderer deprives the murdered to enjoy his life, the murderer shall be deprived of life as of the other deprived
- Qisas in which is healing for the guardians of the victim and releasing the rage and hatred and willingness that accumulate in their hearts to take revenge on the offender and qisas that prevents them from this revenge which may exceed the offender. This also turns off the flames of revenge that could become a destructive war for the energies and capacities of the society as it was happening between the tribes during the Jahiliyyah

- It has confirmed the advantages of the Islamic law and its supremacy over fabricated laws and tackling all forms of crime. The humanity now lives in misery and unhappiness and lack of security and it will remain in this misery if do not take the model of Islamic criminal legislation. If the punishment of qisas applied with its Shariah rule is potential to reduce the incidence of murder and other crimes. While at the same time, the stability of societies and the dissemination of safety among the people with the discipline and the reform of the offender in the case of pardon or conciliation. Application of qisas also served for the lives of millions of people
- This research has also shown that important factor in the maintenance of life and increase socialization is to bring individuals to fear Allah which connects the soul for not attack on the sanctity of others because the heart that feels the fear of Allah refrain from murdering
- The socialization grows and increases whenever caring the application of the divine approach and attention to family, school, mosque and friends with good people
- The Islamic Sharia developed wise legislation to keep the souls of the people and limbs from being assaulted
- Caring for the Muslim family as a social and educational institution especially for poor families by provide the social services to overcome the obstacles of what intercepted in raising their children with proper socialization educational
- The work on applying qisas and other hudud for maintain the security and safety of the community from the aberration and the deviation
- The researcher recommends the care and the support of the researches and the Islamic studies related to Quran because it is the healing for the problems of society

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RECOMMENDATIONS

- The researchers recommend the need to acquire the values of Islamic principles and attention to it by making it as food provides for people in educational and social programs through the media and others