

Qisas: The Theory and its Application on Women A Comparison Between Civil and Islamic Views

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Abstract: According to Islam, qisas is a form of punishment which is carried out on both men and women who commit crimes related to physical injury. The term qisas is not used in civil law but is instead replaced with the term tort as used in courts today. This study aims to discuss the view of scholars on qisas and its relation to civil law. The discussion is expanded through library research, using books, study and internet resources on qisas, its application and the differences from civil law, especially on criminal tort law. The objective of this study is to find a suitable alternative which can be carried out on criminals with special attention to female criminals in both civil and syariah laws. A comparison between these 2 aspects of law is used as the basis for finding the differences and similarities of their application. An in-depth study on the sources found that there are differences in the application of civil and syariah law, though their purpose remains the same. It is hoped that this study research will help readers in understanding the meaning of qisas.

Key words: Qisas, theory, women, comparison, civil, Islamic views

INTRODUCTION

Islam is a syumul (comprehensive) and just religion. Therefore, it puts great emphasis on the delivery of capital punishment that equals the severity level of the crime, based on what is recorded in the Quran and Sunnah. Justice which forms the basis for the implementation of punishments, involves both men and women. However, this study research shall only focus on the implementation of qisas on women by comparing the views of scholars and the provisions of civil law. Qisas is the law of retaliation implemented by Islam while civil law calls it as compensation. Qisas is only implemented when an individual has been proven to be truly guilty. However, the punishment may be dropped based on several reasons, such as when the offender is granted forgiveness by the victim's family or with the implementation of the law of ta'zir. The concept of qisas has been explained in the Quran in which Allah s.w.t. says:

O you who believe! Al-qisas (the Law of Equality in punishment) is prescribed for you in case of murder; the free for the free, the slave for the slave and the female for the female. But, if the killer is forgiven by the brother (or the relatives,

etc.) of the killed against blood money then adhering to it with fairness and payment of the blood money, to the heir should be made in fairness. This is an alleviation and a mercy from your Lord. So, after this whoever transgresses the limits (i.e., kills the killer after taking the blood money), he shall have a painful torment (Al-Baqarah: 178)

However, the implementation of Islamic criminal punishment in Malaysia only covers the scope of the law of ta'zir with no provisions for hudud and qisas.

In addition, further discussion on criminal punishment in civil law only covers claims in the form of compensation. Therefore, provisions such as the Penal Code become the basis for any claims that arise.

THE DEFINITION OF QISAS AND TORT

According to scholars, qisas refers to acts which causes the injury or death of another person (Rahim, 2010) is a form of punishment which is categorised as individual right and certain rights. The word 'certain' here means that the criminal has no other choice but to accept punishment unless he receives pardon from the victim or his family (Mehat, 1977).

Literally, qisas means justification in which one who has committed a crime is punished by the same act he has acted on upon the victim. Qisas can also mean equality as criminals will be sentenced to punishment that equals the severity of his crime upon the victim (Rahim, 2010).

From a terminological point of view, qisas means that criminals receive punishment in the form of exactly what he has committed. For example, if he has committed murder upon another, he must then himself receive the penalty of death (Audah, 1968). This is based on Allah's commands which mean:

O you who believe! Al-qisas (the Law of Equality in punishment) is prescribed for you in case of murder; the free for the free, the slave for the slave and the female for the female. But if the killer is forgiven by the brother (or the relatives, etc.) of the killed against blood money then adhering to it with fairness and payment of the blood money, to the heir should be made in fairness. This is an alleviation and a mercy from your Lord. So, after this whoever transgresses the limits (i.e., kills the killer after taking the blood money), he shall have a painful torment (Al-Baqarah 2:78)

On the other hand, tort has quite a different meaning from qisas. The word tort can be specifically defined as wrong in English. Apart from this, tort can also mean cheating, lying, being dishonest, twisted, not straight or winding (Mohamad and Roslan, 2001). This is because there is a difference between qisas and tort therefore, criminal law is much more serious than tort (Nigam, 1965).

Tort refers to law that is used from common law based on suitability. This can be seen from the judgement results for the case of the Perak government against Adams 2 F.M.S.L.R 144 in which the court held the following verdict: In cases of tort, the nation's courts is always guided by the basic principles of common law. Therefore, the local court judicial decisions will be the legal source for tort and is not codified (provision). Although, not specifically codified there are still provisions concerning the tort law which is the 1956 Civil Law Act. Though, there is no comprehensive list, the provisions contained in this act mentions compensation for death, injury and other types of compensation (Mohamad and Roslan, 2001).

THE CONDITIONS FOR THE RESPONSIBILITY OF IMPLEMENTING QISAS AND THE LAWS OF TORT

Qisas is a punishment that must be delivered with justice and made suitable with the objectives that have

been set for it. Therefore, there are a number of conditions that support the application the qisas, as follows:

Crimes involving female criminals: Qisas which involves life and involves female criminals must fulfil the following conditions:

An individual that has been sentenced with qisas must be mukallaf, akil (sane) and baligh (of age). This means that qisas may not be carried out on children or insane people. The dalil or evidence for this law narrated as follow:

Meaning: Narrated by Ali r.a. that the Prophet s.a.w. said: The pen has been lifted from three people those who are deep in sleep until he awakens, a child until he has dreamt and those who suffer from insanity until he becomes sane or gains consciousness (narrated by AbiDawud).

The victim of murder must be a person whose life is in guarantee he must be either Muslim or a kafirzimmi. For those who are kafirharbi their lives are not protected. The same goes for those who are murtad (have committed apostasy) as their blood is halal to be spilled. Rasulullah s.a.w. said:

Meaning: Kill those who commit apostasy (narrated by Al-Bukhari). This law is also mentioned in the Quran, in which Allah says:

“And make war for the musyrikin just as they have made war for you” (Surah at-Taubah 9:36).

The murderer and murdered must be of equal rank: The rank of the victim must not be lower than that of the murderer, based on absence of faith or slavery. Therefore, a Muslim may not be sentenced to murder for killing a kafir, be him a kafirzimmi, zimmi refers to disbelievers (Kafir) who obey Islamic governing by paying taxes (for their property and honour) in order to be protected and to gain justice. A kafir who has made a treaty (mua'hid), a kafirharbi Harbirefers to disbelievers kafir who must be fought based on conditions that have been set by Islamic law or a kafir who has yet to receive the call of Islam. Nor may a free person be sentenced using qisas for killing a slave. This is based on a hadith narrated by Ali r.a. in which Rasulullah s.a.w. prohibited the killing of a Muslim who has killed a kafir, as follows:

Meaning: “A free person is not sentenced to death for killing a slave” (Narrated by AbiDawud). Allah s.w.t. also mentions in the Quran:

Meaning: O you who believe! Al-qisas (the Law of Equality in punishment) is prescribed for you in case of murder, the free for the free, the slave for the slave and the female for the female. But, if the killer is forgiven by the brother (or the

relatives, etc.) of the killed against blood money, then adhering to it with fairness and payment of the blood money, to the heir should be made in fairness. This is an alleviation and a mercy from your Lord. So after this whoever transgresses the limits (i.e., kills the killer after taking the blood money), he shall have a painful torment (Surah al-Baqarah 2:178)

Crimes involving parts of the body: Some of the conditions for this type of criminal act are as follows:

- The part of the body that is to be amputated from the criminal must be the same as to what he has dismembered from another person. For example, a criminal who has dismembered another person's right hand will be punished by the amputation of his own right hand
- The loss of a paralysed body part may not be replaced by the amputation of a normal body part. For example, a normal, working hand may not be amputated to retaliate for the loss of a paralysed hand, even with the agreement of the offender
- The body part to be amputated must be suitable for amputation at the joints such as the elbow and wrist or a defined part such as the ear. Qisas cannot be implemented if the level of injury of a body part cannot be defined as to whether it is swollen, wounded or amputated at the joints (Audah, 1968)

This statement is supported by a hadith which means: Narrated by Nimran bin Jariyah from his father that a man had hacked at the lower part of the arm with his sword until it was dismembered but not at the joints. The victim then made a complain to Rasulullah s.a.w. who ordered the offender to pay diyat. The victim said: I would like to file for qisas. Rasulullah s.a.w. replied, take the diyat may you be blessed by Allah with it (IbnuMajah).

Criminal responsibility in Common Law must fulfil the mental element or better known as *Mens Rea* whether it involves a man or woman, as included in a well-known maxim-*actus non facit reum nisi mens sit rea* which can be literally translated as that the intention and act must both exist during the crime. This means that if a criminal does not have the right amount of *mens rea*, he may not be convicted with wrongdoing. This was explained in the case of *Harding versus Price*.

The general method used on criminal cases is the *actus non facit reum nisi mens sit rea* in which the court must always be reminded of the importance of a person's liberty unless a particular statute whether expressed or implied, must produce *mens rea* as an important element in

any criminal offense in which the court must then presume a person as not guilty of an offence in criminal law, unless he possesses a guilty mind.

Apart from this mental element, the criminal intention and desire must also be taken into consideration before sentencing an offender to punishment. The intention comprises of knowledge and fore-knowledge on the implications of an act. The combination of both elements will form a criminal act (Nigam, 1965). Intention is important in determining criminal acts as it does not only predict something but also depicts the desire to do something which is later exhibited through action (Turner, 1974). This matter is also included in the provisions of the Penal Code adopted in Malaysia which follows the provisions of study 39 which is that a person is said to have purposely caused an incident when he uses ways clearly intended to execute it or through ways which were at the time known to him to be able to cause the incident.

Another condition which can cause a person to be convicted is motive. Motive is the hidden matter behind the intention (Nigam, 1965), such as revenge. According to the provisions of study, 8 (1) under the 1950 Evidence Act, motive is not an important factor in convicting a person with crime; on the contrary, it is a factor that should be considered as relevant in determining whether the intention can be used to convict the offender.

Discussions on motive touch on how the element of knowledge is also underlined as a factor which causes criminal accountability. This is clearly stated in the provisions of study 26 of the Penal Code in that a person is said to have reason to believe in something if he has enough reason to do so and not with other reasons. Intention will usually form knowledge even if it is evaluated in different degrees. When an assumption is formed through near-intention or doubt, it is considered knowledge.

Apart from this negligence is also considered a factor which can cause a crime to be convicted. However, this would depend on the circumstances. A person is said to be negligent when he produces a result which can normally be avoided or predicted by a prudent man.

HOW TO IMPLEMENT PUNISHMENT

Qisas is the right gained by the victim, if he is an adult, sane and of age. If the victim is still a child or insane, the right falls to his wali (guardian), based on the opinions of Imam Abu Hanifah and Imam Malik.

Meanwhile according to Imam Syafie, the guardian or parent of the child or insane victim does not become the

owner of the right for qisas. Instead, the implementation of qisas will be postponed until the child has grown up or the insane victim has become sane (Mehat, 1977).

However, if the victim or his family grants the offender with forgiveness, the punishment will be cancelled in place of the punishment, the offender must pay diyat, unless the victim's family also waive this claim (Mehat, 1977).

Qisas is implemented in order to deliver a lesson to other individuals so that they will avoid the act. It is not a form of cruelty towards criminals. This has been stated by IbnHumam, Punishment is a deterrent (mawani') before the criminal act and is a zawajir (punishment) after the crime has been committed this means that is knowledge of the enforcement of the punishment prevents the crime or prevents the crime from being repeated after it has been delivered as a result of the criminal act.

Therefore, the implementation of qisas also takes into consideration the physical and environmental conditions before sentencing. One factor is that the physical condition of the offender must be good and she must not be pregnant during the implementation of the punishment (Mehat, 1977). If the offender is pregnant, the punishment must be postponed. Environmental conditions, such as the heat must also be taken into consideration so as to prevent harm from being done to the offender's body.

THE IMPLEMENTATION OF ISLAMIC CRIMINAL LAW ON WOMEN

In Islam, criminal accountability is of the same level as men. Women have the capacity of taklif which is the conscious and will of choice as well as being sane and of age when committing a crime. Islam does not distinguish the position of men and women as law offenders whether the offense involves bringing harm to life, body parts or property. According to Imam Shafi'i in his book al-Umm, I have found no evidence on that the blood of the murderer and victim is of the same level if they are free and Muslim. Therefore, a man who deliberately murders a woman will in turn be given a death penalty and vice versa. Nothing may be taken from the woman or her family to be given to the man's party if she has been sentenced to death. The punishment is still the same as what men have to receive should her crime cause the loss of life (Mehat, 1977).

The scholars of fiqh agree that there is no discrimination between male and female offenders in terms of receiving punishment. According to the scholars of the mazhab of Imam Hanafi, qisas may not be applied upon the lips or sexual organs of women. On the other hand, Imam Syafi'i and Imam Ahmad have 2 differing opinions

on this matter. The first is of the opinion that qisas may be applied on the aforementioned body parts while the latter opines that it does not. Meanwhile, Imam Abu Hanifah states that qisas may not be applied on the breasts or backsides but may be applied on the nipples.

According to the Hanafi mazhab, qisas may not be implemented on offences which do not involve the loss of life on female offenders until after she has given birth, even if she had been pregnant when she committed the crime. On the other hand, Imam Shafi'i states that qisas on life or body parts must be postponed, should the offender be pregnant until she has given birth and breastfeed her labu' milk (milk that she gains during the early stages after giving birth) and has replaced breastfeeding with other milk or food or until the period for breastfeeding has ended which is until the baby has reached 2 years of age.

A woman who has committed a crime may be detained depending on 2 situations. First, she may be detained for interrogation if she has not yet been prosecuted. Second, she may be detained for punishment should the sentence have been delivered. A female offender who has been convicted still has the rights and responsibilities of a human being and should she be a Muslim, must still perform her duties towards her religion. A female offender must be supervised by a female officer unless in public or is too violent that she cannot be handled by a female officer. Muslim female offenders must take care of their aurat (limitations on the parts of their body that may be seen by others) even among women in that only their face, in that only their face, hair and their hands up to their arms may be exposed to ease movement and research. If the place of detention accommodates non-Muslim women, the aurat would include the hair.

Female offenders must be allowed to meet with their husbands, children and immediate relatives at the place of detention for a limited amount of time. They are also entitled to sexual rights with the husband. However, a woman must not be detained with another men. She must be prevented from attending meetings, celebrations, funerals or visiting the sick.

Female offenders must also be provided with worshipping facilities, such as the being given room to make solah (daily prayers), fasting and owning a copy of the Quran. They must also be given reminders should there be time as it is a good practice in the recovery process. This is because the main objective of a punishment is to deliver a lesson to the offenders and to allow them to recover and change (Rahim, 2010).

Should a female offender fail to meet the conditions of qisas or to obtain forgiveness from the

victim's family, the authorities may choose to implement corporal punishment. This, however is subject to certain regulations.

Some of the rules and methods of whipping according to civil law are as follows:

- Whipping may not be applied on either male or female offenders who are over 50 years of age, unless it involves sexual crimes
- Whipping may not be applied for >10 strokes with a light rattan rod on young offenders under 21 years. The maximum number of strokes that may be applied is six
- Whipping using a rattan rod must be applied on the offender's buttocks
- The rod used for adult offenders must not exceed 1.25 cm in diameter
- Only a light rod may be used on younger offenders
- The punishment may not be imposed gradually
- The officer-in-charge and the medical officer must be present during the time of punishment with the health officer giving directions so as to prevent any harm from taking place
- The whipping may not be carried out in 24 h after the pronouncement of the punishment unless under special instruction in emergency cases
- The medical officer must recommend for a punishment to be stopped in order to prevent harm to the health of the offender
- If any harm takes place, the officer-in-charge must postpone or reduce the severity level of the remainder of the punishment (Rahim, 2010)

Meanwhile, whipping according to syariah law, must follow these conditions:

- The rod should be made of rattan or a small branch without any segments
- The length of the rod must not exceed 1.22 m while its thickness must not exceed 1.25 cm
- The sentence for pregnant offenders must be carried out 2 months after delivery
- The level of the offender's health must be examined by government health officials
- Strokes cannot be applied on the face, head, stomach, chest or private parts
- Male offenders must be in a standing position when the strokes are applied while female offenders must be in a sitting position

- Strokes must be applied using medium strength. The canner must not raise his hand above his head so as not to inflict damage upon the offender's skin
- Government health officials will give verification on whether the offender is still able to receive more strokes or must rest before being given the remainder of the punishment (Rahim, 2010)

CONCLUSION

The discussions on qisas as laid out above have led us to the conclusion that a criminal may only be sentenced to qisas when he meets the necessary conditions. However, a criminal who does not meet all the conditions does not escape qisas altogether. Instead, he will be sentenced to pay diyat and ta'zir as set by the judge. This shows that by using qisas, researchers can curb and prevent the widespread of crime. Though, qisas has yet to be carried out in Malaysia, qisas crimes such as causing injury is punishable through tort in which the criminal must compensate for the injury he has inflicted upon the victim.

Therefore, researchers propose that the government deal out punishments that are based on the laws of syariah as it is clear that syariah punishments do not inflict torture on criminals as much as civil law does. Researchers hope that the government will enact syariah criminal law as a whole. Finally, the syariah law court as well as the mufti must play their roles in enforcing the syariah law upon criminals in order to bring justice.

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