Forgiving the Enemy: A Comparative Analysis of The Concept of Forgiveness in Shari’ah and Malaysian Law

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ABSTRACT

The law of Qisas is a concept under Islamic law which allows the victim who has been physically hurt by an offender or the heirs of the deceased to a murder to play a role in determining the fate of the offender once he is found guilty. This includes the ability to choose whether to opt for equal punishment (qisas) or to demand monetary compensation (which is diyat), or to forgive the offender altogether. This article concentrates on the concept of forgiveness in qisas involving murder. The aim of the article is to show that contrary to popular criticism, the law of qisas is not about revenge. This is proven by the choice of forgiving the offender in total for the hurt or even life that he has taken. If compared to the current position in Malaysia, the right to forgive an offender is not given to the heirs of the decease but instead, it is given to the Yang di-Pertuan Agong or the Ruler of ALL States. This goes against the rights of the victim’s heirs who not only is deprived of any compensation but also deprived of seeing justice done for the deceased. Malaysia is taken as an example of a modern country and the criminal law practised here is similar to many modern countries such as Singapore and India. Hence, this article submits that this concept of forgiveness should be revisited and re-applied to allow the victim or his heir(s) to decide the fate of the offenders instead of merely leaving it to the Rulers. This submission is arrived at after critically analysing primary sources being the injunctions in the Holy Qur’an and secondary sources that have interpreted its application. Meanwhile, the Malaysian position is examined in light of the Penal Code and the right to forgive as provided by the Malaysian Constitution.

Keywords: Concept of forgiveness, qisas, Islamic criminal law, diyat.
INTRODUCTION

“In the Law of Equality (Qisas) there is (saving of) life to you, O you men of understanding, that you may restrain yourselves.” (al-Qur’an, al-Baqarah, 2: 179)

The above mentioned verse clearly states that with qisas, there is the saving of life. If one were to read this verse in isolation, one could not help but be baffled. This is because, according to the literal and direct translation of the word qisas, it means “to retaliate”, then one cannot help but be confused. Why is it that Allah has promised that there is life in qisas when at face value it would seem like a simple act of revenge. How could there be life if the law allows, for example in the case of murder, the heir(s) of the deceased to take revenge over the person who had committed the act of murder? If taken from this angle, then in qisas, there is no life, there is only certain death!

This article is about the other side of the law of qisas, which is rarely highlighted. In actual fact, the law of qisas provides options for the victim of a hurt or the heir(s) of the deceased in cases of murder to choose from if the accused is found guilty of causing hurt or death by the Court (Awang Osman, 1996; Anwarullah, 2004). The first option is of course the choice of qisas or equal retaliation. The second option is to choose payment of diyat or compensation from the offender, and the third option is to forgive the offender and accept payment of compensation or to forgive the offender without any compensation whatsoever. This article concentrates on the concept of forgiveness in qisas cases involving the crime of murder. The aim of the article is to show that contrary to popular criticism, the law of qisas is not about revenge. This is proven by the choice of forgiving the offender in total even if he has committed one of the most heinous crimes to man, i.e. by taking the life of another human being without just cause.

Compared to the current position in Malaysia, the right to forgive an offender is not given to the heirs of the decease but it is instead given to the Yang di-Pertuan Agong or the Ruler of each State. This goes against the rights of the heirs of the victim who not only deprived of any compensation but also deprived of seeing justice done for the deceased. Hence, this article submits that this concept of forgiveness should be revisited and re-applied to allow the victim or his heirs to decide on the fate of the offenders instead of merely leaving it to the Rulers. This submission is arrived at after critically analysing primary sources being the injunctions in the Holy Qur’an and secondary sources that have interpreted its application such as in the books of Tafsir. Meanwhile, the Malaysian position is examined in light of the Penal Code and the right to forgive, as provided by the Malaysian Constitution.

The article is divided into four parts. The first part is the crux of the article, where it discusses the interpretation behind the Qur’anic verse mentioned above, as well as its preceding verse. This understanding is important because it provides the basis for forgiveness in such a difficult
circumstance. From here, part two of the article looks at the existing law in Malaysia to see how the crime of murder is being punished. Malaysia is taken as an example of a modern country and the criminal law being practiced here is similar to that in many modern countries such as Singapore and India. In this part, a critical analysis is made on the concept of forgiveness being practiced under the Malaysian correctional system. The third part of the article looks at whether or not the concept of forgiveness as it is practiced in Islam could be adopted to the modern Malaysian scenario. This is the final part of the article where it is concluded that the concept of forgiveness under Islamic law should be revisited and applied to the modern world, especially in Malaysia, whereby in the interest of justice and fairness to the heirs of the deceased, the option to forgive should be given to them instead of placing it in the hands of the Yang di-Pertuan Agong or the Rulers of each state.

THE LAW OF QISAS AND THE CONCEPT OF FORGIVENESS

Siddiqi (1985) rightly sums up the law of qisas as:

“The subject of qisas must be considered, first, as to occasions affecting life and, secondly, as to retaliation in matters of hurts or causing bodily injury.”

Nevertheless, since the article only discusses the issue of forgiveness in cases of murder, there is a need to return to the abovementioned verse. This verse is preceded by verse 178 which discusses the hukum or legal ruling of qisas as being mandatory for Muslims under the Shari’ah. The word ‘katiba’ signifies ‘wajib’ or a mandatory obligation to fulfil the rights of those who demand for it (Al-Maraghiy, 2001). Meanwhile, the word ‘qisas’ literally means to make a thing equal or fair to another thing (Siddiqi, 1985; Al-Maraghiy, 2001). It is further explained that the word ‘scissors’ in Arabic is known as ‘miqas’, which shows that both sides of the shape and size of the blades are similar (Al-Maraghiy, 2001). The word ‘musawah’ has also been used to describe the meaning of qisas as taking something that is similar or equal to another thing (Shabbir, 2003). The preceding verse reads as follows:

“O you who believe! Retaliation has been prescribed for you in the matter of murder. The free for free, the slave for a slave, the woman for a woman. If any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with gratitude. This is a concession and a mercy from your Lord.

1 The implementation of the Islamic criminal justice system is actually dependent on whether or not the Government of the day accepts the whole corpus of the Shari’ah as the applicable law of the State. This will depend largely on the political will of Muslims who are in power.

2 In relation to the meaning of this part of the verse, it does not mean that there is discrimination in terms of the punishment where for example if a woman kills a man then there will be no qisas as the verse specifically mentions "the woman for a woman". On the contrary, according to al-Marghiy, this means that if a woman commits the crime of murder than a woman shall be punished.
and after this whoever exceeds the limits, shall be in grave penalty.” (al-Qur’an, al-Baqarah, 2, 178)

The verse mentions the right of requesting for diiyat in place of qisas in the case of intentional murder (Anwarullah, 1997; Oudah, 1999). This part of the verse shows the permission given by Allah to the victim or the heirs to the victim of a qisas crime to opt for diiyat (Al-Sagoff, 2007; Ismail, 2012). According to this verse, when the victim or the heirs of the deceased opts/opt for this option in place of qisas, they must not do so with an intention of asking for an unreasonable amount. The request for diiyat must be done according to the specific calculation on the amount of diiyat to be awarded to the victim or the heirs of the deceased (Ismail, 2012). As for the offender, if diiyat has been requested, he must endeavour to pay the amount as soon as possible and it must be done in a cordial way within the prescribed period, without forsaking the rights of the victim or the heirs of the deceased (Al-Maraghiy, 2001).

Should the offender be in a difficult position to pay the amount of diiyat that has been determined, the Court has the power to order that the payments be made in instalments. Another option for the offender is to seek assistance from his ‘aqilah or next of kin (Haneef, 2000). There are jurists like Imam Abu Hanifah who are of the view that there can be concessions made by the heirs of the deceased. If this happens then through sulh, the offender can offer any other concessions and if this is accepted, this is known as badal al-sulh (Anwarullah, 1997).

Forgiving the Enemy (al-’Afw)

The jurists are unanimous that to forgive the offender gratuitously is the principal ground for remitting qisas. It is considered in remitting the punishment from an offender only if it is granted from the victim’s side and not from the ruler’s side. Thus, when the victim or his relatives forgive the offender, the prescribed punishment cannot be inflicted on him. However, the forgiveness of the victim and his relatives does not affect the right of the ruler to impose a ta’zir punishment on the offender after that, if the public interest necessitates it. The ruler, on the other hand, cannot remit the prescribed punishment of qisas on the offender by granting his pardon, if the victim does not allow him to do so (Oudah, 1999).

The right of the victim or his relatives to forgive the offender from the punishment of qisas is in fact encouraged by the Prophet s.a.w., who said:

No person is caused to suffer injury on his body and then he forgives him (who injured him) but Allah elevates him a degree on that account or expiates his sin (Ansari, 2000; Ibn Majah, n.d.; Hadith no. 2693).

Anas ibn Malik is reported to have said that the Prophet s.a.w. invariably advised forgiving cases involving qisas (Ansari, 2000; Ibn Majah, n.d.).
The right given to the victim or the heirs of the deceased to forgive the offender must be done freely and without any pressure or insistence on the part of the offender. The verse shows that once the heirs have chosen to forgive the offender, there can be no longer any ill-feelings or dissatisfaction or vengeance towards the offender. Anyone who wishes to avenge the death of the victim shall be given painful recompense (Al-Zuhayli, 1991).

Al-Maraghiy (2001) continues to explain the situations that the offender could be forgiven instead of demanding for qisas or even diyat. These include a situation where the offender is the sole breadwinner of the family and the exercise of qisas on him which would result in the whole family having no means of fending for themselves. If the offender were to be given the qisas, then this would not only affect him alone, but it would also give a negative impact on his family (Anwarullah, 1997). This is especially so in situations where the offender has a family with small children depending on him. However, the choice to forgive does not depend on these reasons. If the heir of the deceased so wishes, forgiveness need not be prompted by these reasons.

The main aim of the law of qisas that is administered in a fair and proper manner is actually to educate the victims to have forgiving heart, for even after having been victims to the most heinous crime, where their loved one is killed and taken away, they can still forgive for the sake of Allah. This means that they are willing to let the offender go so that his family will not feel the pain that they are suffering from. It is this sacrifice which in the end sets them free from any need for revenge because Allah has promised them the best rewards in this world and more importantly in the Hereafter. The belief in the existence of the Hereafter and the fact that it will last far longer than this existing world has become an impetus for Muslim victims to forgive the offender and hope for Allah’s blessings and mercy. This is further confirmed in the following verse, which mentions:

“And if you punish (your enemy) then punish them with the like of what which you were afflicted. But if you endure patiently, verily, it is better for those who are patient.” (al-Qur’an, Surah al-Nahl(16), 126)

This verse emphasises the virtue of patience over retribution against the offender. It shows that in order to give forgiveness to an offender, the heirs of the victim must have absolute trust in the hidden benefits and rewards that only Allah can award to His servants who are patient. It is an ultimate test in faith and trust in the will of Allah and it is a test to the believers as to the extent of their belief in Allah as the best recompense and the existence of the Hereafter, where each individual will be answerable for their deeds in this world.

This is what is meant by there is ‘life’ in qisas. Although the act of forgiveness allows the offender to continue to live, it does not mean that Allah s.w.t. allows offenders who have done wrong to simply be set free and endanger the rest of the
society. Instead, verse 178 states the need of the offender to “compensate him (the victim) with gratitude. This is a concession and mercy from your Lord and after this, whoever exceeds the limits shall be in grave penalty”. This shows that once forgiven, the offender is to show remorse and truly repent for all the wrongful act that he has committed and vow to never commit the same crime again. Nevertheless, according to the views of Imam Malik, which is agreed upon by Maulana Abdullah Yusuf Ali, the State may still impose other types of ta’zir punishment to ensure that the offender has really repented and to provide rehabilitation programmes to this effect (Ibn Rushd, 1983; Al-Mawardi, 1973; Abu Zahrah, n.d.).

**The Effect of Forgiveness**

Once forgiveness has been granted, even by only one member of the heirs of the deceased, the result would be the lifting of the death penalty (Al-Maraghiy, 2001). The right of forgiveness is only given to the heirs of the deceased because to award it to the State or any other pardon body would not result in fairness. It is the family who has been left bereft without a member, who feels the pain, who will be directly affected by the loss. If the power to forgive was to be awarded to the State or the Pardons Board, this would violate the rights of the heirs of the deceased as they might feel that justice has not been done. This feeling of dissatisfaction could later develop and promote the need for revenge. This will lead to a prolonged feeling of hatred and add to the possibility of causing unrest in society which may lead to further condemnation or fitnah (Al-Maraghiy, 2001; Abu Zahrah, n.d.).

Coming back to the issue of lifting the qisas, once this has been done, then it becomes the responsibility of the offender to pay diyat unless that too has been remitted by the heirs of the deceased. This is based on a reading of the following verse, which means:

“...and verily has paid diyat which has been given to the heirs of the deceased, except if they have agreed to give it up (as-sadaqah) and forgiven her.” (al-Qur’an, An-Nisa’(4): 92)

According Abu Syuraih al-Khuzai r.a., Rasulullah s.a.w. was reported to have said:

“And whoever has been victimised by murder or insanity, verily they may choose one of three:

1. To ask for qisas; or
2. To award forgiveness; or
3. To make payment of diyat.
If more is asked verily stop it with your hand and whoever transgresses, verily the Hell of Jahannam are open and there they will stay forever.” (Bahreisy et al., 1988; Abu Dawud, 1998; Hadith No. 4496)

It is important to note that the fact that the heirs of the deceased have forgiven the offender does not mean that the offender can go free. As mentioned above, the State may provide for ta'zir punishment such as imprisonment for a determined amount of time, together with a structured rehabilitative programme aimed at reforming the offender and preparing him to be released as a better person than he was before.

THE PUNISHMENT FOR MURDER IN MALAYSIA

This part of the article concentrates on the punishment for the crime of murder under the Malaysian Penal Code. A discussion shall also be made on the possibility of forgiving the offender. The position in Malaysia could be taken as a reflection of the position in Singapore and India as the Malaysian and Singaporean Penal Code are in pari materia with the Indian Penal Code. Section 302 of the Malaysian Penal Code provides:

“Whosoever commits murder shall be punished with death.”

This section clearly does not provide any options to the heirs of the deceased to have any say in the punishment of the offenders. This is largely due to the fact that under the Malaysian criminal justice system, a criminal act is considered an unlawful act against the State as it affects the public at large. Hence, once the punishment of a particular crime has been determined by way of statute, the individual has no say in the matter, although he is the one who has been victimised. The State views criminal acts against any of its citizens as criminal acts against the State. This is because the citizens have subjected their rights to be protected by the States (Aun, 2005).

The current law relating to the punishment for the crime of murder only provides for the death penalty to be awarded to an offender who has been found guilty of the offence. The punishment is retributive in nature and does not reflect any consideration made to the welfare of the surviving heirs of the deceased (Dhillon et al., 2012).

Nevertheless, Article 42(1) of the Malaysian Constitution provides:

“The Yang di-Pertuan Agong has the power to grant pardons, reprieves and respites in respect of all offences (emphasis added) which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur, Putrajaya and Labuan; and the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State.”

Article 42(1) uses the word “pardon” to describe forgiveness. This power to pardon offenders is given to the Yang di-Pertuan Agong for crimes committed in the
Federal Territories. For crimes committed in other parts of the country, each of the Rulers of the States has similar power to pardon criminal offenders.  

The above discussion shows that although the concept of pardoning an offender under Malaysian law does exist, the exercise of this particular concept is different from the position under the Shari’ah. The most glaring difference lies in who has the power to grant pardon between the two systems. Under the Shari’ah, only the heirs of the deceased may choose to forgive the offender in cases of murder. This is clearly different from the position under the Malaysian law which gives the power of remitting the death punishment to the State Ruler or the Yang di-Pertuan Agong, who does not know the reasons behind the cruel act, who has not suffered the effects of the crime and who does not know any who has not felt the loss which has been suffered by the victim and his family. Therefore, what right does the Ruler have to forgive an offender who has committed the crime of murder? On the contrary, under the Shari’ah, the heirs of the victim are given the powers to decide whether to opt for qisas, diyat or forgiveness. This is justified because the heirs of the deceased are the ones who are directly affected by the act of the offender.

Nonetheless, there is the issue of whether it is right for the heirs of the deceased to forgive the offender, which leads to the release of a murderer into the society and hence endangering the lives of other citizens of the state. Therefore, there is a need to remember that one of the influencing factors which can lead to the heirs forgiving the offender is the fact that the offender has shown total remorse and repented for all his terrible acts. Aside from that, the State has the authority to provide for ta’zir punishment to ensure that the offender can no longer hurt other members of the public (Anwarullah, 2004). What is clear here is that, contrary to the practice under Malaysian law where the Ruler may remit the prescribed death penalty, the law of qisas does not allow the Ruler to remit a Qisas punishment unless the victim allows him to do so.

The Process of Pardoning in Malaysia

Article 42(4) mentions that when exercising his powers to grant pardon, the Ruler and/or the Yang di-Pertua Negeri is to exercise based on the advice given by the Pardons Board which is constituted under Clause (5) of Article 42. The Pardons Board is to be constituted at each State and shall consist of the following:

4 In the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, a single Pardons Board shall be constituted and the provisions of Clauses 5,6,7,8 and 9 of Article 42 shall apply mutatis mutandis to the Pardons Board under Clause 11 except that reference to the "Ruler or Yang di-Pertua Negeri" shall be construed as reference to the Yang di-Pertuan Agong and reference to "Chief Minister of the State" shall be construed as the Minister responsible for the Federal Territoty of Kuala Lumpur, Labuan and Putrajaya.
a. The Attorney General of Malaysia;

b. The Chief Minister of the State;

c. Not more than three other members, who shall be appointed by the Rulers or the Yang di-Pertua Negeri.

Although the Article mentions that the members of the Pardon Board are appointed for a term of three years and may be eligible for reappointment, the Article does not specifically mention how many times the Board must meet in order to hear applications. As such, this gives rise to the issue of prolonging detention time while waiting for pardon to be given by the Ruler or the Yang di-Pertuan Agong. This in turn goes to the rights of the offender to have his case being determined within a specified period of time. There is a case where the offender had to wait for years to have his petition for pardon or clemency heard by the Pardons Board. Among the reasons for this is the absence of a fixed duration that requires the Board to meet and settle such petitions. As a result, the offender is subjected to the punishment of imprisonment and the death penalty if his petition for pardon is not granted by the Pardons Board.

An analysis of cases in Malaysia such as Juraimi bin Husin v Lembaga Pengampunan Negeri Pahang & Ors [2001] 3 MLJ 458 and Sim Kie Chon v Superintendent of Pudu Prison & Ors. [1985] 2 MLJ 385 show that the Courts do not consider the requests for pardon to the Pardons Board as a legal right. Justice Faiza Tamby Chik, in the case of Juraimi bin Husin for example held that “mercy is not the subject of legal rights. It begins where legal rights end.” Therefore, he decided that, “the exercise of a royal prerogative of mercy by His Royal Highness the Sultan of Pahang cannot be varied or confirmed.” In this case, although the Court of Appeal agreed with the Appellant that the prolonged delay in the execution of the death sentence had deprived him of his life in accordance with law, this decision was reversed by the Federal Court. In justifying the prerogative of the Ruler in making his decision, Abdul Hamid in the case of Sim Kie Chon stated that, “...the power of mercy is a high prerogative exercisable by the Yang di-Pertuan Agong or the Ruler of the State ...who acts with the greatest conscience and care and without fear or influence from any quarter.”

The above discussion also shows that there are no cases or statutes that provide for a time limit to petitions for clemency to be heard. There are also no cases or statutes to show that if there is a delay in the execution of the death penalty, then the offender may be absolved from the death penalty.

5 The Attorney General may delegate his functions as member of the Board to any other person provided that he does so through an instrument in writing. See Article 42(5) of the Federal Constitution.

6 There is a caveat here, in that a member of the Legislative Assembly of a State or the House of Representatives shall not be appointed by the Ruler or the Yang di-Pertua Negeri to be a member of a Pardon Board or to exercise temporarily the functions of such a member. See Article 42(7).
Another issue relating to the issuance of pardon by the Ruler or Yang di-Pertuan Agong is the fact that Article 42 is also silent on the criteria that would allow pardon to be given. Nothing is mentioned on the need to look at the views of the heirs of the deceased on this matter. Neither is there any specific consideration given to repentance, remorse and willingness to rehabilitate and mend his ways on the part of the offender. It is true that the Ruler or Yang di-Pertuan Agong does rely on good behaviour reports and the fact that the offender has already served a long-term jail sentence is a factor which may influence him to commute the death sentence to the sentence of life imprisonment. However, there is an absence of a definitive law which lays down what needs to be fulfilled by the offenders in order to have his petition to be pardoned accepted by the Ruler or Yang di-Pertuan Agong. Therefore, it is submitted at this point that the current practice of awarding pardon or clemency to offenders in Malaysia needs to be revisited and improved in order to ensure that justice is done not only to the heirs of the victim but also to the offender.

CONCLUSION AND POLICY RECOMMENDATIONS

There have been suggestions made by writers such as Guru Dhillon, Noor Mohammad and Ng Yih Miin (2012) that the mandatory death sentence in cases of murder be replaced with a compulsory compensation scheme for the heirs of the deceased. Making compensation compulsory, however, still does not address the issue of recognising the rights of the heirs of the victim. To this, the three writers did agree that in determining the punishment for murder, the Court should decide according to the wishes of the victim’s family. Hence, it is submitted that in order to ensure that the rights of both the victim and offender are protected, an adoption of the full concept of qisas as a whole is necessary. This would entail the recognition given to the heirs of the deceased to exercise the three options, i.e., whether to choose qisas or equal retaliation, or to opt for diyat, or to opt for pardoning the offender, either with or without diyat.

It is submitted that the concept of forgiveness is possible as it is understood under the Shari’ah, and could be adopted in the Malaysian context. The spirit of the law is aimed at protecting the innocent party and allowing for the form of the law to be administered in order to bring the offender back to the right path by allowing him to realise his mistakes, repent and be rehabilitated. The challenge in this is to convince the Malaysian public, both the Muslims and the non-Muslims to accept a law that is based on religion. There is also a challenge of educating the public of the universal aim of the Shari’ah, that is, to protect the five essential values of life, religion, intellect, honour and property of every member of the society, regardless of their religion.

It can be seen that the concept of forgiveness should be revisited and re-
applied to allow the victim or his heirs to decide on the fate of the offenders instead of merely leaving it to the Rulers.

This would indeed be possible with the amendment to Article 42 of the Federal Constitution to replace the power to give clemency to the heirs of the deceased instead of to the Rulers of the States, the Yang di-Pertua Negeris, or the Yang di-Pertuan Agong. Aside from that, there is also a need to amend Section 302 of the Penal Code to not only provide for mandatory death penalty as a punishment for murder, but also to allow for a remittance of the death penalty by paying a determined amount of monetary compensation if the heirs of the deceased wish so. The law should also provide that before the pronouncement of the punishment, the Court needs to consult the heirs of the deceased as to what options that they would prefer the Court to declare. The concept of justice in the law of qisas is aimed at being fair and just primarily to the victim, while at the same time providing hope and repentance for the offender.

REFERENCES


