



Jurisprudential Analysis of *Qisas*: The Views of the Maliki School of Jurisprudence

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Abstract: To maintain peace and tranquillity in our societies/communities, and to protect the lives and properties of individuals living in a society, it is necessary to have certain rules and regulations that govern the whole system of society. Thus, some guidelines for each aspect of human life are therein. Islamic law took its origin in governing an Islamic state, to avoid injustice and to prescribe different forms of punishment which constitute the basic criminal justice system of Islam. These include *Qisas*, *Diyah*, etc. Therefore, the Glorious Qur'an specifies not only the principles of retaliation (*Qisas*) but also gives an option of monetary compensation (*Diyah*) to be paid to the aggrieved family of the victim. The fact of fear of the consequences of punishment prescribed by *Shari'ah* will assist an individual to abstain from violating human dignity (by destroying his life and or property).

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INTRODUCTION

In addition to the punishment of murder, Islam stipulates retaliation or compensation for different injuries to the body of a person. Whether the injury is deliberate and not accidental, retaliation is to be observed. In order to maintain the system of the universe, there are certain rules and regulations which govern the system. Similarly, to maintain the system of a society, rules and regulations must have been prescribed, this is to avoid riots, chaos, and distraction of the system of the universe. Therefore, a society can only achieve success by following some principles and these principles established by the superior authority (lawgiver) are called Islamic Law.

The Concept of *Qisas*

The word *Qisas* has been variously defined by different scholars and authorities in different ways. However, *Qisas* means retaliation of injury for injury equal to, murder by murder. It could also be seen as infliction of injury on the culprit equal to what he has done to the victim, or murder by murder as he exactly murdered the victim.

According to al-Ribataniy (n.d p. 367), a Maliki scholar sees it as the punishment prescribed in Islamic law for murder and the infliction of injury is what is called "*Qisas*" or "*Qawad*" (retaliation) that is inflicting on a culprit an injury exactly equal to the injury he inflicted on his victim.

The word *Qisas* according to Bambale (2003 p. 87) is a derivation from the Arabic verb "*Qassa*", which means "he cut it" or "he followed his track in pursuit". Technically, it signifies retaliation by slaying for slaying, wounding for wounding mutilating for mutilating, etc. He further states that *Qisas* is divided into two categories namely: *Qisas* for homicide and *Qisas* for wounds or injuries.

Doi (2007 p. 232) says that the word *Qisas* is derived from an Arabic word *Qassa* meaning he cut or he followed his track in pursuit, and it comes therefore to mean Law of Equality or equitable retaliation for murder already committed. Thus, the treatment of the murders should be the same as his horrible act, that is, his own life should be taken just as he took the life of his fellow man. This does not mean that he should be killed with the same instrument or weapon.

Wali Ullah (1986 p. 153) postulates that Qisas means retaliation, i.e. if the accused has committed Qatl-al'Amd, he is liable to be sentenced to death and if he has caused hurt to someone, he is liable to receive a like hurt. He further noted that Allah (S.W.T.) categorically ruled out the issue of Qisas in the following verses:

يأيتها الذين آمنوا كتب عليكم القصاص في القتلى الحر بالحر والعبد بالعبد والأنثى بالأنثى فمن عفي له من أخيه شيء فاتباع بالمعروف وأداء إليه بإحسان، ذلك تخفيف من ربكم ورحمة فمن اعتدى بعد ذلك فله عذاب أليم. ولكم في القصاص حياة يا أولي الألباب لعلكم تتقون. (البقرة، 179-178).

O ye who believe! Retaliation is prescribed for you in the matter of the murdered ... And for him who is forgiven somewhat by his (aggrieved) brother; prosecution (for blood money) should be according to usage and payment unto him in kindness. This is alleviation and mercy from your Lord. He who transgresses after this will be having a painful chastisement. And there is life for you in retaliation, O men of understanding that you may ward off (evil) (al-Baqarah, 178-179).

Wali Ullah (1986 p. 153) further noted that, according to the above Qur'anic verses, the heirs of the deceased may:

- Demand that, the murderer be sentenced to death, or
- Demand that, he be made to pay Diyah, i.e. blood-money, or
- Forgive him altogether.

He also states that the following Hadith also bears upon the point as thus:

...The Prophet said: He who commits willful murder shall be handed over to the heirs of the deceased, and they may kill him if they like or may accept blood money if they so choose (Wali Ullah, 1986 p. 153).

Diyah or blood money in the time of the Prophet (S.A.W) was fixed at one hundred camels or their market price, 8000 Dirhams. Later 'Umar (R.A) raised it to 12,000 Dirhams, because, he said, the price of camel had gone up. Dirham was a silver coin weighing a little more than over old weight of silver price. Thus 12,000 Dirhams would mean about 3,300 grams of silver. But the amount of Diah today would be the price sent market-value of one hundred camels.

Shaheed (2005 p. 134) expounds that Qisas is broadly divided into two categories:

Crime involving Qisas is as under:

- Willful murder
- Willful dismemberment of limbs and

Crimes entailing diyah fall under the following:

- Crime entailing *Qisas* if Qisas is remitted or if there is anything repugnant to carrying out the sentence of *Qisas*.
- Qisas* –willful murder.

- Murder by mistake
- Dismemberment of limbs by mistake, and
- Infliction of injury by mistake.

Wakili (2011 p. 6) while explaining the *Qisas* offences, explains that Qisas offences are divided into five categories viz: qatl and (intentional killing), qatl shibhal and (quasi-intentional killing), qatl khata'a (mistaken killing), jarahal Qatl (intentional wound or hurt), and jarahal khata'a (wound by mistake).

From the foregoing discussions and explanations the word Qisas therefore, stands for the infliction of injury on a culprit exactly equal to the injury he has inflicted on his victim and this is the basic punishment prescribed in Islam in cases of murder and injury. Qisas simply means retaliation of murder by murder, injury for injury equal thereto and the basis for this could be seen in the Glorious Qur'an (2:178-179) as stated on page 91 above.

Thus, the above Qur'anic provision (2:178-179) refers to Qisas in issues of homicide. Also from this verse, Islam has mitigated the horrors of revenge and retaliation which were practised in the Jahiliyyah period much of which is even described in a slightly modified form in the so-called modern civilized world of ours. A quality in retaliation is prescribed with a strict sense of justice, but it makes a clear provision for mercy and forgiveness. The brother of the slain can make remission based on granting his reasonable demand and compensation with handsome gratitude. As regards to injury, the Glorious Qur'an further provides that:

وكتبنا عليهم أن النفس بالنفس والعين بالعين والأنف بالأنف والأذن بالأذن والسن بالسن والجروح قصاص فمن تصدق به فهو كفارة له ومن لم يحكم بما أنزل الله فأولئك هم الظالمون (المائدة، 45:5).

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 anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by what Allah has revealed, they are wrong-doers (al-Ma'idah, 5:45).

The Glorious Qur'an further provides solution for lives taken wrongfully and thus states:

ولا تقتلوا النفس التي حرم الله إلا بالحق ومن قتل مظلوما فقد جعلنا لوليه سلطانا فلا يسرف (آل عمران، 33:17).

Nor take life which Allah has made sacred-except for just cause. And if anyone is slain wrongfully, We have given his heir authority (to demand Qisas or to forgive): but let him not exceed bounds in the matter of taking life; for he is helped (by the law). (al-Isra', 17:33).

From the above provisions it is understood that the law of retaliation i.e. Qisas applies to willful crimes against life and body. While for unintended or accidental crimes, the payment of Diah (blood money) as

indemnity applies. Also in a case of willful murder, the heirs can remit the death sentence against the convict and accept blood money instead of the death sentence.

It should also be noted that the victim or his agnatic heirs could insist on retaliation in Shari'ah or decide to forgive the convict. However, in a situation where they either agree on Diyyah or the accused is pardoned, he (that is the culprit or accused) has to perform an expiation to atone for the sin of murder. In this regard, the Glorious Qur'an explains the position thus:

وإن كان من قوم بينكم وبينهم ميثاق فدية مسلمة إلى أهله وتحرير رقبة مؤمنة، فمن لم يجد فصيام شهرين متتابعين توبة من الله وكان الله عليما حكيما (النساء، 4: 92)

If he belonged to a people with whom you have a treaty of mutual alliance, blood money should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to Allah: for Allah has all knowledge and all wisdom (an-Nisa', 4:92).

It is important to note here that, the expiation is performed by freeing a Muslim slave for those who have the means, otherwise one should fast for two (2) months consecutively as contained in the above verse.

Conditions obligating Retaliation (Qisas)

According to shari'ah, before Qisas are to take place there are certain conditions which if met, obligate Qisas, and these conditions are five according to the enunciation of Imam Malik (2007:954-5) as thus:

1. The killer must be Mukallaf

The killer must be legally responsible, and so there are no Qisas on a person who is in puberty, insane, or sleeping, according to the requirement of legal responsibility on Takhlif. The prophet (S.A.W) said:

رفع القلم عن ثلاثة: عن الصبي حتى يبلغ، وعن النائم حتى يستيقظ، وعن المجنون حتى يفقه (أبو داود في كتاب الموطى، Vol. 2, P. 954)

These (persons) are exempt from (legal) responsibility: the sleeping person until he awakens, the boy until he reaches puberty, and the insane person until his sanity he restored (Narrated by Abu Dawud as in Muwatta, Vol. 2, P.954).

2. The killed person must not be one of those whose blood can be lawfully shed

The Prophet (S.A.W) said:

لا يجل الدم الإمرئ المسلم إلا بإحدى ثلاثة: النفس بالنفس، والثيب الزاني، والتارك لدينه (المفارق للجماعة) (إمام البخارى، Vol. 9, P. 25 – 26)

The shedding of the blood of a Muslim is not lawful except for one of these (reason): a life for life, (when) a married person commits adultery, and (when) a person turns aside from his religion and abandons the

community (of Muslims), (Narrated by Imam Bukhari vol.9, P. 25-26).

3. The killed person must not be the son of the killer

The killer must not be a son of the killer; this is because the prophet (PBUH) said:

ولا يقاد الأب بالابن (إمام مالك، Vol. 2, P. 895)

A father shall not be killed because of (killing) his son (Narrated by Imam Malik, Vol. 2, P. 895).

Imam Malik maintained that the father is not to be subjected to qawad (retaliation), except when he catches him unawares and slaughters him (kills him in cool blood), but he restrains him with a sword or a stick and thereby kills him, he is not to be subjected to qisas. This was also the opinion of the majority of the jurists. Their reliance is on the tradition of Ibn Abbas that the Prophet (SAW) said: The hudud is not to be applied in mosques, nor is a father to be subjected to retaliation because of his son (Ibn Rushd, 1996:485) and (al-Jaziriy, 2004:213-214).

According to Ibn Rushd (1996:486), Imam Malik further states that:

As the father has the authority to discipline his son and bears love for him, the interpretation of homicide that occurs in these circumstances should not be considered intentional. He does not accuse the father, when the murder is not by way of ghila, but considers the perpetrator of ghila, to have intended the homicide based on predominant probability and strength of the accusation, for true intentions are only known by Allah (S.W.T).

Thus, Imam Malik does not accuse the father where he does charge a stranger, due to the strength of the law that exists between a father and his son. Therefore, the majority of the jurists deemed the cause of waiving the hadd penalty from the father due to his right over his son.

4. The killed person must not be a disbeliever and the killer a Muslim

The killed person must not be a disbeliever while the killer is a Muslim, for the prophet (S.A.W) said:

A Muslim shall not be killed because of (killing) a disbeliever (Narrated by Imam Bukhari Vol. 9, P. 37-38).

5. The killed person should not be a slave and the killer a free man

The killed person should not be a slave and the killer a freeman as stated by Imam Malik thus:

ولا يقتل الحر بالعبد، وإن قتله عمدا، وهو أحسن ما سمعت (إمام مالك، Vol. 2, P. 900 – 901)

A free person should not be killed for (killing) a slave (Narrated by Imam Malik Vol. 2 P. 900-901).

From the above narrations, it could simply be deduced that, before Qisas can take place certain conditions should be met or fulfilled, otherwise it should be suspended. The killer must be Mukallaf, the killed person must not be one of those whose blood can lawfully be shed, the killed person must not be a son of the killer, the killed person, must not be a disbeliever and the killed Muslim, and finally the killed person should not be slave while the killer is a free man. This is also according to the views adopted by the majority of the scholars.

When Qisas is Established

Qisas is to be established or confirmed by either of the two things as enumerated and explained by Imam Malik in al-Maghibiy (2008:50-53) and Abdul-Fattah (2004:955-956) as follows:

1. Confession

Qisas is to be executed by the confession of the culprit; they base their reason on the Hadith as thus:

عن أنس بن مالك رضى الله عنه عن يهوديا رضى رأس جارية بين حجرين فقيل لها: من فعل بك هذا؟ أفلان أو فلان؟ حتى سمى اليهودي فأتي به نبي صلى الله عليه وسلم فلم يزل Vol. 9, P. 9, و Vol. 9, P. 9, حتى أقره فرض رأسه بحجارة (إمام البخارى، 2, P. 896)

It has been narrated on the authority of Anas, may Allah be pleased with him, that the Jew crushed the head of a girl between two stones. She was asked, who has done so to you? (is it) so and so? So and so? Until the name of the Jew was mentioned, whereupon she nodded (in agreement). So the Jew was brought and was questioned until he confessed. The prophet (PBUH) then ordered that his head be crushed with stones (Imam Bukhari, Vol. 9 P. 9 and Muslim Vol. 2 P. 896).

2. The testimony of two upright witnesses

On the issue of the testimony, Imam Malik opines that, unless two upright witnesses testify the witness of murder, then Qisas is established. He based his reason on the Hadith thus:

عن بشير ابن يسار، أنه أخبره، أن عبد الله بن سهل الأنصاري ومحبيصة ابن مسعود خرجا إلى خيبر، فتفرقا في حوائجهم، فقتل عبد الله بن سهل فقدم محبيصة فأتي هو وأخوه حويصة وعبد الرحمن بن سهل إلى النبي صلى الله عليه وسلم فذهب عبد الرحمن ليتكلم لمكانه من أخيه. فقال رسول الله صلى الله عليه وسلم كُذِّبَ، كُذِّبَ؛ فتكلم حويصة ومحبيصة فذكرا شأن عبد الله بن سهل فقال لهم رسول الله صلى الله عليه وسلم أتخلفون خمسين يمينا وتستحقون دم صاحبكم أو قاتلكم؟ قالوا يا رسول الله صلى الله عليه وسلم فتبترنكم يهود بنمسين يمينا؟ فقالوا: يا رسول الله كيف نقبل أيمان قوم كفار؟ قال يحيى ابن سعيد: فزعم بشير أن رسول Vol. 2, P. 904) الله صلى الله عليه وسلم واده من عنده (إمام مالك،

It has been narrated that Bushir Ibn Yasir said: that one morning a man from Ansar was (found) killed in Khaybar. His awliya (plural of waliyy) went to the Prophet (S.A.W) and mentioned that to him, whereupon

he (S.A.W) said: do you have two witnesses to testify that your man has been killed (By a certain person)? They said: O messenger of Allah! No Muslim was there (in the place where he was killed) Only Jews were (there), and they would dare to do (things) more heinous than this; He (S.A.W) said, so select fifty (persons) from among you and let them take oaths (concerning the killing) those (awliya) refused to do that prophet (S.A.W) paid the diyah for him (the killed man), (Imam Bukhari, Vol. 9, P.25 and Imam Malik, Vol.2, P.904).

Putting the above Hadith into cognizance, Qisas should only be established by the confessions of the culprit as it appears in the first Hadith where the Jew confessed and the Prophet (S.A.W) ordered that his head be crushed with a stone. Secondly, by the testimony of the second narration where the prophet (S.A.W) asked the awliya of the deceased if they have two witnesses to satisfy that their man has been killed by a certain person, which according to their reply they do not have. yet the prophet (S.A.W) asked them to bring (select) fifty persons from among them so as (to take oaths), which they refused to do, then the Prophet (S.A.W) paid the diyyah for the testimony of at least two upright witnesses to testify the incident.

Conditions of fulfilling Qisas

Qisas cannot be fulfilled except when certain conditions are met, and these conditions are three as enumerated and explained by Imam Malik in Ibn Rushd (1996:479) and San 'ani (n.d.:1253) as follows:

1. The person to whom Qisas is to be applied must be Mukallaf

Before Qisas be fulfilled, the person to whom the Qisas is to be applied must be Mukallaf, therefore if the person is young or insane; he is to be confined until he becomes Mukallaf.

2. Those who have the right to have it fulfilled must agree to its fulfilment

For the Qisas to be fulfilled those who have the right to have its fulfilment must agree to its fulfilment, so if some of them forgive the criminal, Qisas will be concealed. Imam Malik (2007:902) expresses that:

قال مالك: وإذا قتل الرجل عمداً و قامت على ذلك البيعة، وللمقتول بنون وبنات، فغفالبنون، وأبى البنات أن يعفون فغفوا البنين جائزٌ على البنات، ولا أمر للبنات مع البنين في القيام بالدم والعفو عنه.

Imam Malik said, that if a man murders intentionally and there is clear evidence of that while the murdered man has sons and daughters, and the sons pardon the killer, while the daughters refuse, the pardon of the sons is permitted in case of the opposition of the daughter and there is no authority for the daughters with the sons in demanding revenge and pardoning.

3.The Qisas must not be extended to someone other than the convict

The Qisas must not be extended to someone other than the criminal, so if a pregnant woman is to be executed, she is to be granted respite until she delivers her baby and feed him with the first product of breast milk.

روي أن امرأة من أتت رسول الله صلى الله عليه وسلم وهي حبلى من الزنا. فقالت: يا نبي الله أصبت حدًا فأقمه علي، فدعى نبي الله صلى الله عليه وسلم وليها فقال: أحسن إليها فإذا وضعت فأنتى بها، ففعل. فأمر بها النبي الله فضدت عليها ثيابها ثم أمر بما فرجمت ثم Vol. 3, P. 316) ثلثي عليها (إمام مسلم،

It has narrated that women of Juhain, a branch of Azd, come to the prophet (S.A.W) and said: O messenger of Allah! Purify me, whereupon he said:” Woe be upon you! Go back and seek forgiveness from Allah and turn to Him in repentance”, she said:” I find that you intend to send me back as you sent back Maiz ibn Malik; He (PBUH) said:” what has happened to you? She said that she had become pregnant as a result of Zina. He (S.A.W) said: ” It is you (who has done that)?; She said “Yes,” He (S.A.W) said to her “You will not be furnished” until you deliver what is in there in your womb." one of the Ansar became responsible for her until she delivered (the child) then he (the Ansar) come to the message of Allah (S.A.W) and said that the woman of Ghamid had given birth to a child, He (S.A.W) in that case said: we should not stone her and so leave her child with none to suckling him; one of the Ansar got up and said:” O Messenger of Allah! Let the responsibility of the suckling be upon me, she was then stone to death (Narrated by Imam Muslim Vol. 3, P.316).

Considering the above Hadith whereby the noble Prophet (S.A.W) refused to put the pregnant woman to death until she delivered. By implication, the Qisas must not be extended to someone other than the criminal, as the Prophet (S.A.W) refused to stone the pregnant woman and gave her a respite until her delivery so as not to affect the fetus in her womb. Therefore, this shows that, in any case, Qisas must not be extended to someone other than the criminal or criminals this is in line with what Allah (S.W.T) categorically stated in the Glorious Qur'an and it reads:

... (الأنعام، 6:164...

...Every soul draws the mead of its acts on none but itself: no bearer of burdens can bear the burden of another... (al-An'am, 6:164).

How and by whom Qisas is Applied

Originally, a murderer is to be killed in the same way he has killed his victim because this is how the principle of equality (retaliation) can be established. In this context the Glorious Qur'an buttresses:

والحرمات قصاص فمن اعتدى عليكم فاعتدوا عليه بمثل ما اعتدى عليكم (البقرة، 194:2).

... And for the prohibited things, there is the law of equality. If then anyone transgresses the

prohibition against you, transgress likewise against him... (al-Baqarah, 2:194).

And in another chapter, it says:

126:16 (وإن عاقبتهم فعاقبوا بمثل ما عوقبتم به (النحل،

And if you punish, then punish with the like of that with which you were afflicted... (al-Nahl, 16:126)

Similarly, the Prophet (S.A.W) explained and did the same as it is contained in one of his AHadith quoted earlier that, he (the Prophet) ordered that the head of a Jew be crushed with stones the way that Jew had crushed the head of a girl with stones as narrated by Imam Bukhari and Muslim.

However, Qurtubi (n.d: 245,246) states that scholars unanimously agreed that, Qisas is to be executed by those in authority and it is not permissible for the Waliy or relatives of the killed to retaliate by himself or themselves and kill the culprit, because this is apt to cause mischief (Qurtabi, n.d: 245,246).

Qisas Concerning Things Other Than Killing

Qisas is also applicable concerning things other than killing, and "other than" according to Abdul-Fattah (2004:959) generally refers to crimes which are less than murder in degree such as breaking an organ, gouging out an eye, etc.. as Almighty Allah says in Surah al-Ma'idah, 5:45 as earlier cited. Though the ruling concerned the people who were before us, it applies to us as well because the Noble Prophet (S.A.W) affirmed it in the following Hadith as thus:

وقد روي أن الربيع عمه أنس بن مالك رضى الله عنه كسرت ثنية جارية من الأنصار بلطمة Vol. 9, P. 21) فأمر النبي صلى الله عليه وسلم بالقصاص (إمام البخارى،

It has been narrated by Anas (RA) that, the daughter of An-Nadr slapped a Girl and broke her incisor tooth. They (relatives of that girl came to Propheht (S.A.W) and he gave the order of Qisas (equality in punishment) (Imam Bukhari Vol. 9, P. 21).

Still, to apply Qisas in things other than killing, certain conditions must be met, and these conditions as opined by Imam Malik (2007:898) are as follows:

1. The criminal must be Mukallaf
2. The crime in question must have been committed on purpose. This is because even if a person "killed" by mistake, this does not obligate Qisas, so it is becoming common that no Qisas is applied in cases less than killing when the crime in question is committed unintentionally.
3. The blood of the victim must be equivalent to that of the criminal, so retaliation is not to be applied to a free person for wounding a slave or to a father for wounding his son, for example.

It is worth mentioning here that, whenever Qisas concerning "wounds and the like" causes harm to the criminal more than that which the latter has caused to the victim and there is no way to avoid such excessiveness, Qisas is not obligatory and Diyah is to be judged as the alternative to it.

CONCLUSION

Juridically, *Qisas* requires that the perpetrator of a given crime is punished in the same way, in the same proportion, and if possible by the same means that he used in killing or hurting his victim. The punishment should, in other words, be equal to the crime as far as possible.

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