Islamic Studies (Islamabad) 21:2 (1982)

THE CONCEPT OF QISĀS IN ISLAMIC LAW

Mr. Mahfodz Mohamed

1. Its definition and origin :

Qiṣāṣ comes from the root *QṢṢ*, the basic verb meaning " to follow ", as for instance *Qaṣṣa aṯharahu,* "he followed his track," or " to cut " as for instance *Qaṣṣa al-Sha'r* " he cut the hair " or " to relate," as for instance, *Qaṣṣa 'alayhi al-khabar,* " he related to him the news."[1]

In XXVIII, 11, the Qur'an says, " And she said to the sister of (Moses), ' follow him,' and in XVIII, 64, " so they both went back on their footsteps, following (the path they had come)".[2] The idea of following is, therefore, the most basic meaning of *Qiṣāṣ,* because in the law of *Qiṣāṣ,* the guilty person is to be punished in the same way as he has treated his victim. In other words, every criminal act is followed by the equivalent punishment in the Law of *Qiṣāṣ.*

According to Islamic law, *Qiṣāṣ* or *Qawad* (just retaliation) is applied in cases of killing (*fī al-nafs*) and of non-fatal wounding (*fī mā dūna al-nafs*). This is established by the following verses of the Qur'an : " O ye who believe ! *Qiṣāṣ* is prescribed for you in the matter of the murdered ;....", " And there is life for you in *Qiṣāṣ,* O men of understanding, that ye may ward off (evil)"[3] and " and We have prescribed for them (the jews) in it (Torah) a life for a life,...."[4].

The Law of *talio* in Islam also has a basis in a *Ḥadīth* of the Prophet Muḥammad (peace be upon him). It is reported

that he said, " Anyone who murders may either be killed or required to pay the blood-money".[5] In another *Ḥadīth* the Prophet said, " Anyone who is killed or wounded has the choice of three things : to demand *Qiṣāṣ*, to receive compensation or to remit...."[6].

Robson states that the civil and criminal provisions of the Qur'an are based either on old Arabian customs or on foreign practices[7]. Schacht takes the same view and says that " Muḥammad takes it for granted that the blood-vengeance of Arab paganism.... is a divine ordinance.[8] Presumably, the law of *Qiṣāṣ* is based on foreign practices but, when it is established by the authority of the *Qur'ān* and the *Ḥadīth*, it becomes part of the Sharī'ah. No doubt there were many pre-Islamic customs that were retained in the Islamic era and Islamized by the authority of the Qur'an and the prophetic sanction. Certainly, the law of *talio* appears in many different codes before the revelation of Islam. It is perhaps worth while looking briefly at some instances.

The *lex talionis* given to Moses concerning offences against the person reduced the possibilities of private revenge and brought in the concept of personal responsibility on the offender as against substituted responsibility.[9]

The Qur'an recognises that retaliation is part of Jewish law[10]. In Greek law, a striking peculiarity of criminal jurisprudence in Athens was that the most grievous offences against the lives of citizens were not considered to be directly within the range of public coercion. When an individual was killed, the city left the prosecution to the relatives, and if there were no relatives or if they preferred entering into a bargain with the slayer, the latter was let off without further punishment. This

means that the affair was considred primarily as a private feu to be settled between the two parties by revenge or composition.[11]

In Roman law there was no *talio* for murder and homicide. Intentional killing was punishable with *deportatio* or banishment of the offender concomitant with the confiscation of his whole property. The punishment for homicide was *relegatio,* i.e., exile simpliciter.[12]

In pre-Islamic Arabia the blood-feud was almost unrestricted in its scope ; for the death of a tribesman at the hands of one of another tribe made any of the latter's fellow-tribesman liable to be killed in revenge, and frequently tribal pride would demand several victims as the equivalent of one fellow-tribesman[13]. This of course, usually provoked further retaliation and the consequent feud sometimes lasted for years.

"Islam minimized the evils of this system by introducing three most salutary restrictions : (a) only the guilty, and not his fellow-tribesman, was liable to be killed or wounded, and then (b) only if the homicide or wounding was regarded as both deliberate and wrongful, and (c) after the facts had been established before the ruler or judge.[14]

2. The Social Role of Qiṣâṣ :

Law in every society aims at the maintenance of social control and is established to protect the rights of the individual as well as of the whole community. Similarly, the law of *talio* in Islam is intended to deter a potential murderer. " If he realises that he will himself be killed if he kills another, he will refrain from killing, out of concern for himself and the preservation of his own life."[15]

" The maxim, ' a tooth for a tooth, an eye for an eye, a life for a life', though apparently rude, marks a distinct advance towards criminal justice. It indicates a sense of proportion and a certain degree of restraint in dealing between man and man."[16]

That is why *Qiṣāṣ* protects the life of the society as well as benefits the next of kin of the victim. On the other hand, if the law of *Qiṣāṣ* is not implemented, the life of the society will not be protected, blood will be shed with impunity, and eventually the right of innocent persons to live their lives free from fear of murder will disappear.

Qiṣāṣ implies equality and similarity. It means that the apprehension of criminals will be followed by realistic punishment. It is unreasonable that a father should lose his son by murder and that the killer should go unpunished, or that a person should lose his sight as the result of a heavy blow by another without receiving satisfaction.[17] Justice demands that the offender should be dealt with in a manner equivalent to that in which he has offended.

The law of *talio* is not to be stigmatized as heartless and lacking in mercy, but is to be considered as advocating that which is best for the society as a whole. The *Ḥadīth* says, " Anyone who has no mercy is not to be given mercy."[18]

The law of *qiṣāṣ* also aims at satisfying the natural desire for revenge, which is done if the victim or his next of kin knows that the offender has suffered the consequences of his act. In this way a blood feud can be avoided. The aggrieved party will not be satisfied if the malefactor receives a punishment that is not equivalent to his own act.

Another verse of the Qur'ān which indicates the object of imposing the law of *qiṣāṣ* is V, 35. It says, " On that account, We ordained for the children of Israel that if anyone slew a person — unless it be for murder or for spreading mischief in the land — it would be as if he slew the whole people. And if anyone saved a life, it would be as if he saved the life of the people.....". Reference in this verse is to the two sons of Adam, of whom the elder, Qābīl, puffed up with arrogance and jealousy, murdered his innocent younger brother, Ḥābīl.[19]

There is some confusion among commentators regarding the assimilation (*tashbīh*) which occurs in the above verse. Some interpret it that the sin of killing one person is equal to the sin of killing many. Others interpret it that the punishment for killing one person or many people is to be precisely the same.[20]

Life is indisputably our greatest possession. Therefore, anyone who kills a human being ought to be regarded as having killed the whole people. *Qiṣāṣ* gives the people the right to live free from fear. It is an instrument to guard righteous men against predators.

" And if anyone saved a life, it would be as if he saved the life of the people....". This sentence may mean that he who applies the law of *qiṣāṣ* to the offender has saved the life of all mankind, because the life of the victim is redeemed by the application of *qiṣāṣ*. The life of the aggrieved party will not have been given proper consideration and respect, if the malefactor is not punished by *qiṣāṣ* equivalently to his crime.

From the Islamic point of view, *qiṣāṣ* is also applied in order to restore the life of the victim. It is of course impossible

that life can be restored after a person has been murdered, but *qiṣāṣ* is at least regarded as in some way restoring the victim's life in spirit and giving the next of kin new hope and confidence in life. Al-Simanānī explains how this may happen: "The reason behind the liability of *Qiṣāṣ* is to give back the life of the victim in spirit by giving back his heir's life in spirit, in view of the fact that the victim continues his life in the life of his heir. When a person was killed, the life of his heir might be in danger, because the killer would take the opportunity of killing him, fearing that he would take revenge on him. If, therefore, we impose *Qiṣāṣ* on the killer and execute it, the motive for the death of the heir will disappear and his life will have been restored in spirit."[21]

3. Qiṣāṣ and Revenge :

Qiṣāṣ is far different from revenge which was prevalent in the days of Jāhiliyya. To explain the difference between *Qiṣāṣ* and revenge we will raise three questions on the subject : how *Qiṣāṣ* is to be executed, who has the right to demand it and who should carry it out.

With regard to the first question, all the jurists agree that if the murder is committed whith a sword, the qisas is to be inflicted with a sword as well. Dispute arises if the killer uses something other than a sword.

According to the Hanᵉfis Hanbalis and Zaydis, the guilty person should be beheaded with a sword,,[22] in accordance with the *Ḥadīth* "*qiṣāṣ* is not to be executed except with a sword."[23] This *Ḥadīth* indicates that *qiṣāṣ* is considered to be so only if it is inflicted with a sword. The object in the execution of *qiṣāṣ* is to put the killer to death. Beheading with a sword

is th simplest way to take his.[24] According to this rule, if the heir executes him with other than a sword, he has exacted his right, but he should be punished with a discretionary punishment, (*ta'zīr*) for using an unlawful weapon.[25]

According to the *Mālikīs*, *Shāfi'īs* and Ibn Ḥazm, *qiṣāṣ* is to be inflicted in the same manner as the slaying as far as possible. They do, however, distinguish between lawful and unlawful methods of slaying. If the weapon used is itself unlawful, the preferred view is that the killer is to be executed with a sword ; for instance if the killer, murders his victim by pouring alcohol into his mouth, he in turn, is to be killed by having water poured into his mouth until he dies.[26] But if the slaying is committed with a lawful weapon, for example, if the killer uses a piece of wood, he is to be executed with something similar.

It is most reasonable that *qiṣāṣ* should be executed with a sword, since this is the quickest and easiest way to take life. Muhammad (peace be upon him) said, "When you put (any one) to death, do it with propriety."[27] The Qur'ānic text on which some jurists base their argument that *qiṣāṣ* is to be inflicted in the same manner may possibly be interpreted as meaning that if the culprit takes another's life, his life is to be taken as well.[28] If, however, there is another instrument which can take life faster and causes less pain than the sword, is that lawful ? The implication of prescribing the sword as the means of execution of *qiṣāṣ* is that another weapon my be used provided that it is no less effective, because the word *Al-Sayf* in the *Ḥadīth* may mean any weapon.[29]

" There is nothing in the *Sharī'a* to prevent the execution of *qiṣāṣ* by guillotine or by electrocution or by any other means

which can take life easily and quickly.....and which does not lead to extra punishment."[30]

On the question of entitlement to *qiṣāṣ* for homicide, the avenger of blood (*walī al-dam*) is entitled to demand retaliation. The schools of law dispute the definition of *walī al-dam*. The majority of schools opine that all the heirs (*waraṯha*), male and female, children and adults, who inherit the property of the murdered person are entitled to prosecute or demand *qiṣāṣ*. According to the Malikis, the wali who has this right is the male agnate (*'āṣib*), while the *Ẓāhirīs* regard all relatives as entitled to prosecute *qiṣāṣ* making no distinction whether they are near relatives or otherwise and whether they are inheritors or not.[31] Whoever the heir is, he has the right to execute or demand *qiṣāṣ*, he may waive it, either gratuitously or by settlement, and he may receive blood-money or may waive his claim to it.

All the schools agree that if the victim has no heir, the ruler or the authority replaces the heir in taking charge of prosecution. The *Ḥadīṯ* states, " The ruler is the heir of anyone who has no heir."[32] Only Abū Yūsuf holds that the authority has no right to execute *qiṣāṣ*, if the person killed is a citizen of an Islamic state, but it can receive blood-money, and if he is a citizen of an enemy state, the authority may carry out *qiṣāṣ* and may receive blood-money.[33]

In cases of wounding, the injured person himself is entitled to demand retaliation. But if he is a minor, a lunatic or an imbecile, his heir may replace him. The most acceptable view, according to the jurists, is that the heir should not be allowed personally to carry out *qiṣāṣ* in cases of wounding,[34] because these require exactness and precision and should be carried out

by an expert. Most people are not fitted to perform this kind of duty. It is to be carried out by the authority, who in turn, appoints exprerts for the job.[35]

It is obvious from the above discussion that most jurists consider that *qiṣāṣ* may be carried out by the heir of the victim, provided that he knows precisely how to do so. The ruler or the authority has nothing to do with this. It would seem probable, however, that what was intended was that the heir has the right to demand the execution of *qiṣāṣ*, but it is not necessarily entitled to take personal retribution for homicide and wounding. The duty of any Islamic state is to take care of the interests of all its citizens and one of its functions is to implement the *Sharī'a* of which the law of *qiṣāṣ* is one part.

" It should be known that the exercise of authority for the benefit of the people is one of the greatest religious duties. Neither religion nor world order may be established without it."[36] " The Islamic state was set up for the succession of the prophethood, in order to safeguard religion and the governance of this world. The ruler should assume his duties according to the *Sharī'a* and reason, so that he may avoid injustice and arbitrate between the parties when there is a case of controversy and dispute."[37]

There is no positive evidence which gives the right to execute to the heir. The Qur'anic provision, " If anyone is slain wrongfully We have given his heir authority....",[38] does not indicate precisely the execution of *qiṣāṣ* by the heir himself. It is conceivable that the heir is only given the authority to demand *qiṣāṣ* and it should be carried out by the authority.[39]

The heir is not allowed to carry out *qiṣāṣ* himself before the judge has decided the case. If he does, he has committed

a sin because he has undermined public order, but he is not liable to *qiṣāṣ* or to pay blood-money. He is only to be punished with a discretionary punishment (*ta'zīr*).[40]

Al-Qurṭubī says, " There is no dispute that *qiṣāṣ* is to be carried out by the ruler, since he is assigned to implement the law of *qiṣāṣ*. Allah the, Al-mighty addressed his command to all believers to unite in carrying it out. Therefore, the authority should replace them instead in performing this duty."[41]

" All scholars of legal opinion agree that it is unlawful for anyone to execute his right of *qiṣāṣ* ; it is the duty of the authority to do so, or onyone who is appointed by the authority."[42]

Editor's Note

Schacht's remark quoted in para 5 of the article that " Muhammad takes it for granted that the blood-vengeance of Arab paganism is a divine ordinance " is totally unwarranted, because it was the holy prophet (peace be upon him) who abolished the custom of blood-vengeance prevalent among the pre-Islamic pagan Arabs.

Notes and references :

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3. Qur'ān, II, 178—9.
4. *Ibid.*, V, 48.
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6. Abū Dāwūd, *Sunan*, vol. 2, p. 158, ed. Naṣr al-Hūrīni, Cairo, 1863 A.D.

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8. J. Schacht, " Qiṣāṣ ", in the *Encyclopaedia of Islam*1 1038 A.D.
9. Khan Lodi, " Modernity of Penal justice of Islam," *Islamic Culture*, 41 (1967), pp. 159—60.
10. See Qur'ān, V, 48.
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13. Al-Shāfi'ī *Al-Umm*, vol. VI, p. 7.
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17. Abu Zahra, *al-'Uqūba*, p. 385, Dār al-Fikr al-'Arabī, Cairo, n.d.
18. Al-Bukhāri, *Al-Jāmi' al-Ṣaḥiḥ*, vol. IV, p. 114.
19. Yusuf 'Ali, *The Holy Qur'an, text, translation and commentary*, p. 250, note, 731, Beirut n.d.
20. Al-Qurṭubī, *Al-Jāmi' li-aḥkām al-Qur'ān*, vol. VI, pp. 146—7, Maṭba' at Dār al-Kutub, Cairo, 1935—1948 A.D.
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Ibn Qudāma, *Al-Mughnī*, Dār al-Manār, Cairo, vol. VII, p. 688, 1387 A.H./1947A.D.
23. Ibn Mājah, *Sunan*, Cairo, 1313 A.H. vol. II, p. 76.
24. Abū Zahra, *al-'Uqūba*, p. 583.
25. Al-Dardīr, *Al-Sharḥ al-Kabīr*, Egypt, 1319 A.H., vol. IX, p. 400.
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27. Abu Dāwūd, *Sunan*, vol. II, p. 5.
28. Ibrāhīm, *Al-Qiṣāṣ fi al-Shari'ū al-Islāmiyya*, Cairo, 1944 A.D. p. 209.
29. Marghīnānī, *Al-Hidāya*, vol. IV, p. 1254.
30. A legal opinion issued by the council of legal opinion, Al-Azhar, Egypt ; See Ibrahim, *al-Qiṣāṣ fī al-shari'a al-Islāmiyya*, p. 208.
31. Marghīnānī, *Al-Hidāya*, vol. IV, p. 175 ; Al-Shīrāzī, *al-Muhadhdhab*, vol. II, p. 196 ; Ibn Hazm, *Al-Muḥallā*, al-Maktab al-tijārī li-al-tibā'a wa al-nashr, Beirut, vol. X, p. 481.
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34. Ibn Qudāma, *Al-Mughnī*, vol. VII, pp. 691—2.
35. 'Awda,' Abd Al-Qādir, *Al-Tashrī' al-Jinā'ī al-Islāmī*, Dār al-Kitāb al-'Arabī, Beirut, n.d. vol. II, p. 155.

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38. Qur'ān. XVII, 33.
39. Al-Qurṭubī, *Al-Jāmi' li-aḥkam al-Qur'ān*, vol. X, p. 255.
40. Abu Zahra, *al-'Uqūba*, p. 580.
41. Al-Qurṭubī, *al-Jāmi' li-aḥkām al-Qur'ān*, vol. II, p. 580.
42. Ibid, vol. 11, p, 256.