

Al-Wasatiyyah in Criminal Punishment: The Comparison of Thai Law and Islamic Law

Suthisak Duereh

*Assistant Professor, Lecturer in Islamic Law,
College of Islamic Studies, Prince of Songkla University, Thailand*

Email: suttisak.d@psu.ac.th

Abstract

Islamic law groups criminal offences into three categories: Hudud, Qesas and Ta'zir, those criminal punishments are absolutely different themselves. Whereas, criminal punishments of Thailand to whomever commit those offences that may be imposed, that is, death, imprisonment, confinement, fine and forfeiture of property.

It could be said that, the criminal punishment in Islam has itself severe penalty. Whereas, Qesas punishment is full of hidden deeply with the philosophy of punishment and highly moral principle. On the other hand, those strictly prescriptions are referred to an ***Eye for an Eye and a Tooth for a Tooth principle***, which punish and deter the offenders in criminal violation. Also, another aspect is to purpose to forgiveness, tolerance and demand compensation (blood money or diyya) to the victims. This could be said that, it would create sympathy and harmony among parties peacefully including giving chance for any offenders.

Committing crime as murder in Islamic law is not absolutely criminal offences. In addition, the right in decision to waive the punishment is to belong to the victim or the surviving heirs. Contrary to the conventional criminal law, the authority is wholly and legally owned by the state. This is obviously proved that the existence of Wasatiyyah in the Islamic ***Shariah***.

In case of Ta'zir, it is prescribed by the discretionary power of the judges and state rulers. Also, its penalty is to authorize and privilege to the state in determining the proper forms, procedure and the penalized measurement with accordingly the certain community. Exactly, the state itself could stipulate the just and fair punishment. That is why ***Wasatiyyah*** is definitely the dynamics of Islamic Jurisprudence.

Keywords: Wasatiyyah, Criminal Punishment, Thai Law, Islamic law

1. Introduction

The term, Wasatiyyah is defined variously, such as, the balance, the moderation and the middle path. The approach of Wasatiyyah, itself, which is prescribed in the highest constitution of Islam the Quran, Surah Al-Baqarah, verse 143.

Scholarly, many philosophers have defined many aspects of “Wasatiyyah”, such as, goodness, just, convenience and comfort, wisdom, the straight path, and the middle¹.

In this paper is divided into many parts: Wasatiyyah and law, law and punishment, criminal punishment in Thailand, punishment in Islam, Wasatiyyah and punishment in Islamic law and conclusion. Also, the details of definition and three categories of criminal offences and penalty are explained in the part of Wasatiyyah and punishment.

2. Wasatiyyah and Law

Wasatiyyah has prescribed in Holy Quran various features i.e., consumption, expenditures, donation, subsistence, marriage, education, belief and faith, politics, economics including legal enforcement to existence of justice especially the issues of criminal punishment and dispute resolutions. The prescription of Quran which is mentioned² to revenge, tolerance, forgiving, and conciliation in order to enhancing the goodness among mankind in society as appeared in Quran (Surah 16:26).

3. Laws and punishment

Conventionally the understanding in the law is “It is the rules which enforce the people’s behavior in the certain society”. Those rules are in the various forms of, orders, norms, traditionally practical customs, and explicitly traditions of certain legally imposed organization, which are imposed in the enforcement process³. In case, any party is violated, or else it will be either meted or punished”. Such definition, anyone must bear in mind that obeying the rules is must, otherwise the punishment is the measurement to and the enforcement are two things going side by side.

¹ Numsuk, A. “Wasatiyyah in Quran” Papers in Seminar: Al-Wasatiyyah: From Principles to Practice in Multicultural Society on the 18th of August 2014.

² *Ibid*, pg 2-3.

³ Saenguthai, Y. *Introductory of Laws*.(2011) pg. 125-137.

4. Criminal Punishment in Thailand

The criminal punishment is categorized into three theories⁴, that is, retributive theory, deterrence theory and rehabilitative theory.

4.1 Retributive Theory

According to the past political system, religion and society system, the retribution to the offenders is wholly owned by the authority which is characterized “An Eye for an Eye and a Tooth for a Tooth”. Its legal punishment is extremely forms, such as decapitation, penalty, including various types of corporal punishment to deserve ones committing such crime and to confess and to make the offenders having own conscience.

4.2 Deterrence Theory

This theory relies on three individual components: severity, certainty, and celerity. The more severe punishment, it is thought, the more likely that a rationally calculating human being will desist from criminal acts⁵. Thus, this could generate that the penalty could intimidate and deter the offenders from refraining the offences. Punishment that is too severe is unjust, and not severe enough will not deter criminals from committing crimes

4.3 Rehabilitative Theory

Rehabilitation is another utilitarian rationale for punishment. The goal of rehabilitation is to prevent future crime by giving offenders the ability to succeed within the confines of the law. Rehabilitative measures for criminal offenders usually include treatment for afflictions such as mental illness, chemical dependency, and chronic violent behavior. Rehabilitation also includes the use of educational programs that give offenders the knowledge and skills needed to compete in the job market.

Regarding to the Criminal Penal Code, Chapter 2 in Section 2, the criminal punishment would be enforced whenever 1) offence 2) such offence is defined by the law 3) that certain offence has the punishment to be inflicted upon the offender that provided by the law.

These are punishments for inflicting upon the offenders as mentioned in the Penal Code, Section 18: death, imprisonment, confinement, fine, and forfeiture of property.

⁴ Suthiyothin, N. Chapter 2: Theory of Criminal Liability. Available from [[http:// www. Stou .ac.th/Schools/Slw/upload/41716_2.pdf](http://www.Stou.ac.th/Schools/Slw/upload/41716_2.pdf)] Accessed on 29 August 2016.

⁵ Deterence Theory, pg. 235. Available from [<https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf>] Accessed on 10 August /2016.

5. Punishment in Islam

There are basically three categories of punishment in Islamic shariah⁶: Hudud, Qesas, and Takzir

5.1 Hudud

This type of criminal offence is classified into six forms as follows and their punishment which is fixed and enjoined as the right of Allah by the Quran, and Sunnah.

5.1.1 Theft

The punishment for theft is stated in the Quran, Surah 5:38 as follows: Cut off (from the wrist joint) the (right) hand of the thief, male or female, as a recompense for that which they committed, a punishment by way of example from Allah. And Allah is All-Powerful, All-Wise. (Quran 5:38)

5.1.2 Robbery

Criminal offence must be intensive and deliberate and the offenders shall penalized in various forms, as mentioned in Quran: The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be cut off on the opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter. (Quran 5: 33)

5.1.3 Drinking

In the Hadith, Ibn Umar quoted the Prophet when he said: Every intoxicant is *khamr* (wine) and every intoxicant is forbidden. The punishment for alcoholism and public intoxication from the Hadith is 80 lashes. Too, all kinds of alcoholic drinks are prohibited as prescribed in Quran (5:90).

5.1.4 Apostasy

Apostasy is rejection of Islam. This is also a criminal offence in Islamic penal system and its punishment is a death penalty⁷ as prescribed by Prophet Muhammad (peace be upon him) that “whoever changes his religion (of Islam) kill him”, reported by Bukhari no 2854. The convicted apostate is given three days of grace to return to Islam. Competent Islamic scholars will educate him on the enormity of the crime he has committed. If the convicted person decides to return to the Islamic community, he will be set free⁸.

5.1.5 Adultery and Fornification

⁶ Mahama, M. Available from [http://www.islammore.com/main/content.php?] Accessed on 29 August 2015.

⁷ Okon, Etim E. “Hudud Punishments in Islamic Criminal Law”. European Scientific J. May 2014, pg.228

⁸ Ibid, pg. 230.

Adultery means extra-marital sex. The stoning to death for people convicted of adultery is prescribed by the Messenger of Allah.

And come not near to the unlawful sexual intercourse. Verily, it is a *Fahishah* [i.e. anything that transgresses its limits (a great sin)], and an evil way (that leads one to Hell unless Allah forgives him). (Quran 17:32)

Fornication means sexual intercourse outside marriage, and its punishment in the Quran is 100 lashes. The punishment of flogging with a hundred stripes is ordered in the Quran: Surah 24:2. This punishment is for unmarried persons guilty of the above crime but if married persons commit it, the punishment is to stone them to death, according to Allah's Law.

5.1.6 Defamation

Adultery and fornication are called Zina. While defamation is false accusation of charges of Zina, such offence is punishable as prescribed by Quran, that is, and those who accuse chaste women, and produce not four witnesses, flog them with eighty stripes, and reject their testimony forever; they indeed are the *Fasiqun* (liars, rebellious, disobedient to Allah), Quran 24:4.

However, most competent Islamic scholars have agreed that if the culprit repents in the offence, he will be forgiven, as in Surah 24:5, Except those who repent thereafter and do righteous deeds, (for such) verily, Allah is Oft-Forgiving, Most Merciful.

5.2 Qesas (Retaliation)

It could be said that Qesas is additional crime that common law do not have⁹. A Qesas crime is one form of retaliation. Generally, Qisas crime is divided into two categories¹⁰:

5.2.1 Voluntary killing

Committing such crime, the victim has a right to seek retribution and retaliation. The exact punishment for such crime is set forth in the Quran. If you are killed, then your family has a right to seek Qesas punishment from the murderer. Its punishment can come in several forms and also may include "*Diya*."

5.2.2 Purposely Body Injuriousness

The penalty has mentioned in Holy Quran (5:45), that is, and 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

⁹ "Human Rights from an Islamic Worldview: An Outline of Hudud, Ta'zir&Qisas" By Mohammad Salam Madkoar, Available from [<http://www.muhammad.com/docstorage/hudud.htm>] Accessed on 20 July 2016.

¹⁰ Dorloh, S. and Mingsamorn, Y. (2014). *Criminal Islamic Law*. Songkhla: Bunlue Printing. (in Thai).

retaliation by way of charity, it shall be for him expiation. And whosoever does not judge by that which Allah has revealed, such are the *Zalimun* (polytheists and wrong-doers - of a lesser degree).

And if you punish (your enemy, O you believers in the Oneness of Allah), then punish them with the like of that with which you were afflicted. But if you endure patiently, verily, it is better for *As-Sabirin* (the patient ones, etc.) (Quran 16:126)

5.3 Ta'zir (Discretionary)

Ta'zir means literally punishment. Itself, Ta'zir punishments are not prescribed in the Quran or Sunnah, and are executed under the discretionary powers of the judge. The punishment of Ta'zir is not fixed by the law-giver but is left to the discretion of the head of the state or Qazi.

Punishments range from the death penalty for espionage and heresy to flagellation, imprisonment, local banishment, and a variety of fines. Determination of punishment is left to the judge or chief executive, who can vary the punishment according to a number of criteria including who has inflicted the crime and upon whom.

According to Islamic literature, Ta'zir offences are broadly grouped into two categories¹¹. The first category is those offences characterise as the same nature but not exactly meet the complete requirements of hudud crimes, such as, thefts among relatives.

Examples of Ta'zir offenses

Tazir offenses are broadly grouped into two sub-categories in Islamic literature.

a) Those offenses that have the same nature but do not exactly meet the complete requirements of Hadud crimes, such as, thefts among relatives, or attempted but unsuccessful robbery, attempted fornication witnessed by four male Muslims, and homosexual contacts such as kissing that does not result in fornication¹².

b) The second sub-category of Ta'zir offenses relate to offenses committed by an individual that violate the behavior demanded in the Quran and the Hadiths, for example, the false testimony, loaning money or any property to another person for interest in addition to principal, any acts that threaten or damage the public order or Muslim community or Islam¹³.

These are the examples of Ta'zir offences:

¹¹ Criminal Law in Islam, The Oxford Encyclopedia of the Islamic World, Oxford Islamic Studies, Oxford University Press (2013)

¹² Bassiouni, M (1982). *The Islamic criminal justice system (Ta'azir Crimes chapter)*. London New York: Oceana Publications.

¹³ Loc.cit.

5.3.1) Forbidding some kind of food

Dead animals and blood and the flesh of swine and animal slaughtered as a sacrifice for other than Allah, are forbidden as prescribed in Holy Quran 2:173.

5.3.2) Breach of Contract

Any person, who is breaching of contract, is still not perfect believer.

5.3.3) Balance Cheating in weighting

As Quran, in Surah 83:1, Woe to *Al-Mutaffifin* [those who give less in measure and weight (decrease the rights of others)]. Those who, when they have to receive by measure from men, demand full measure, (Quran 83:2). And when they have to give by measure or weight to men, give less than due. (Quran 83:3). And give full measure when you measure, and weigh with a balance that is straight. That is good (advantageous) and better in the end. (Quran 17:35)

5.3.4) Prohibiting in involvement of Riba

Those who eat *Riba* (usury) will not stand (on the Day of Resurrection) except like the standing of a person beaten by *Shaitan* (Satan) leading him to insanity. That is because they say: "Trading is only like *Riba* (usury)," whereas Allah has permitted trading and forbidden *Riba* (usury). So whosoever receives an admonition from his Lord and stops eating *Riba* (usury) shall not be punished for the past; his case is for Allah (to judge); but whoever returns [to *Riba* (usury)], such are the dwellers of the Fire - they will abide therein. (Quran 2:275)

Allah will destroy *Riba* (usury) and will give increase for *Sadaqat* (deeds of charity, alms, etc.) And Allah likes not the disbelievers, sinners. (Quran 2:276)

5.3.5) Concealing either the witnesses or evidences

And if you are on a journey and cannot find a scribe, then let there be a pledge taken (mortgaging); then if one of you entrust the other, let the one who is entrusted discharge his trust (faithfully), and let him be afraid of Allah, his Lord. And conceal not the evidence for he, who hides it, surely his heart is sinful. And Allah is All-Knower of what you do, Quran 2: 283.

5.3.6) False Statement in Witness

That (*Manasik* prescribed duties of Hajj is the obligation that mankind owes to Allah), and whoever honours the sacred things of Allah, then that is better for him with his Lord. The cattle are lawful to you, except those (that will be) mentioned to you (as exceptions). So shun the abomination (worshipping) of idol, and shun lying speech (false statements), Quran 22:30.

5.3.7) Slander

This guilty is prescribed in Quran 49:11, O you who believe! Let not a group scoff at another group, it may be that the latter are better than the former; nor let (some) women scoff at other women, it may be that the latter are better than the former, nor defame one another, nor insult one another by nicknames. How bad is it, to insult one's brother after having Faith [i.e. to call your Muslim brother (a faithful believer) as: "O sinner", or "O wicked", etc.]. And whosoever does not repent, then such are indeed *Zalimun* (wrong-doers, etc.).

5.3.8) Bribery

And eat up not one another's property unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc.), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully. (Quran 2:188)

5.3.9) Gambling

Gambling is included as an abomination of *Shaitan's* (Satan) handiwork as appeared in Quran 5:90. *Shaitan* (Satan) wants only to excite enmity and hatred between you with intoxicants (alcoholic drinks) and gambling, and hinder you from the remembrance of Allah and from *As-Salat* (the prayer). So, will you not then abstain? (Quran 5:91)

5.3.10) Entering any houses without permission

O you who believe! Enter not houses other than your own, until you have asked permission and greeted those in them, that is better for you, in order that you may remember. (Quran 24:27)

Wasatiyyah and Punishment in Islamic Law

Islam has ordained three kinds of punishment, namely, Hudud, Qesas, and Ta'zir for different offences and crimes. Hudud offences are directly related to the right of Mankind versus the Creator (Allah). Thus, the Hudud crimes are punishable strictly and severely as prescribed in the Quran and Sunnah.

Whereas, Qesas offences are additional category of crimes that common law do not have. Committing of this crime, the victim has right to seek retribution and retaliation. Exactly, such penalty is stipulated in the Quran and Al-Hadith. According to Qesas punishment, a victim family has right to seek punishable the murderer in several forms and also including "Diya". This could be said that, this type of crime is not totally criminal and the discretionary right to pardon still belongs to the victim not only officially the state. That is why the aforementioned prescription and the criminal law are

definitely divergent as the criminal penal code is specified explicitly regarding the criminal offences in Section 288, 295 and 297¹⁴.

A case study:

Mr. A is bodily injured till death by Mr. B, whereas both Mr. A's and Mr. B's wife are sisters. Generally, according to the conventional criminal law, Mr. B will be penalized either death, whole life imprisonment, or else fifteen to twenty years-imprisonment. Meanwhile, either Mr. A's or Mr. B's family felt loss of their family leaders.

On the other hand, such case enforcing Islamic Jurisprudence instead, Mr. B shall be death penalty. Instead of that, Mr. A's wife as a victim may decide to pardon the offender, and then he will be free. In addition, the mentioned offender (Mr. B) could financially support the surviving heirs (Mr. A's family). The outcome of such remedy will make their having life harmony and peacefully.

Ta'zir penalty is not criminal punishment as prescribed in Quran and Sunnah. Therefore, it may be defined by either judge discretionary or state ruler. Flexibly, it could be changed up time to time. In addition, the main objective of such kind penalty is to protect the offender to repeat the same wrongdoing. The appropriate process and penal measurement could be decided by the state upon the concept of balancing, moderate, and not too extreme. This could be said that Wasatiyyah in the Islamic Law.

Conclusion

The primary objective of penal system is to protect society from the dangers of crime. The severity of penal system is aimed at discouraging criminal behavior. On the contrary, Islamic criminal penalty is more suitably located at the middle path as it is not great extremely, especially, the Qesas crime has its own punishment just an eye for an eye, a tooth for a tooth. Also, the forgiveness among the victim and offenders exists.

¹⁴ "Thailand Penal Code" Available from [www.Samuiforsale.com/Law-Texts/Thailand-penal-code.html] Accessed on 12 August 2016.

References

- _____ “Deterrence Theory”, pg. 235. Available from <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> Accessed on 10 August /2016.
- _____ “Criminal Law in Islam”, The Oxford Encyclopedia of the Islamic World, Oxford Islamic Studies, Oxford University Press (2013).
- _____ “Thailand Penal Code” Available from [\[www.Samuiforsale.com/Law-Texts/Thailand-penal-code.html\]](http://www.Samuiforsale.com/Law-Texts/Thailand-penal-code.html) Accessed on 12 August 2016.
- Bassiouni, M (1982). *The Islamic Criminal Justice System (Ta'azir Crimes chapter)*. London New York: Oceana Publications.
- Dorloh, S.and Mingsamorn, Y. (2014). *Criminal Islamic Law*. Songkhla: Bunlue Printing. (in Thai).
- Etim E. Okon. (2014). Hudud Punishment in Islamic Criminal Law. *European Scientific Journal* May 2014 edition vol.10, No.14 ISSN: 1857 – 7881(Print) e - ISSN 1857- 7431.
- Mahama, M. Available from [<http://www.islammore.com/main/content.php?>] Accessed on 29 August 2015.
- Mohammad Salam Madkoar. “Human Rights from an Islamic Worldview: An Outline of Hudud, Ta’zir&Qisas”, Available from [<http://www.muhababah.com/docstorage/hudud.htm>] Accessed on 20 July 2016.
- Numsuk, A. *Wasatiyyah in Quran*, Papers in Seminar: Al-Wasatiyyah: From Principles to Practice in Multicultural Society on the 18th of August 2014 at Aiyobbi the 5th floor, Conference Room, CIS Building. College of Islamic Studies (CIS). Pattani, Prince of Songkhla Uiversity, Pattani Campus. (in Thai)
- Saenguthai, Y. (2012). *Introductory of Laws*. Thammasart University, Bangkok. (in Thai).
- Suthiyothin, N. Chapter 2: Theory of Criminal Liability. Available from [http://www.Stou.ac.th/Schools/Slw/upload/41716_2.pdf] Accessed on 29 August 2016. (in Thai).