

Barriers to the Retaliation and the Way of Its Implementation

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ABSTRACT

Retaliation is one of the Islamic penal entities. By term it means reprisal of the crime which is occurred to the victim. This crime can be, for example, murder, amputation and intentional injury to the victim. In fact, retaliation is a reprisal proportionate to the crime of criminal. The main aim of the law of retaliation is protecting the human life. Establishment and execution of the retaliation needs some circumstances and absence of any one of them could prevent its execution. The rule of retaliation would prevents the future crimes, because if anyone knows that any crime they commit would be punished as well then they would not commit that crime. In the sacred religion of Islam, although the "principle of Retaliation" in crimes against physical integrity of persons is accepted, but the holy God always has recommend and emphasized to pardon and forgive and with promising the otherworldly rewards because of forgiveness has made forgiveness superior and better than the execution of the retaliation. In other words, the Islamic legal system, in response to these crimes has paid attention to two important principles of justice and mercy. According to the above context, it can be said that the importance and necessity of considering the retaliation as well as to study its conditions is not less than the importance of the fall of retaliation (retaliation's barriers), i.e. cases in which despite the verdict of the court to retaliate the retaliation does not occur. The fall of retaliation would lead to the new life of people, as in the case of its realization would ultimately cancel the retaliation.

KEYWORDS: execution of retaliation, Sunni jurisprudence, Shiite jurisprudence, retaliation, retaliation barriers.

INTRODUCTION

1. Evidences to prove the retaliation

In Islamic criminal law, evidences are presented to prove the murder. It seems that all of them are the ways to achieve to the reality and termly has Tariqat and not Mozoiyat. This means that, one of these reasons is not sufficient alone to prove murder, but the reason must satisfy the conscience of the impartial judge and convince him so that he considers his verdict consistent to the reality and so if the knowledge of the judge is against one of this arguments he cannot based on that reason issue his verdict. However, there is another jurisprudential theory which considers these reasons as having Mozoiyat, meaning that the judge must judge according to these arguments, though it may be opposed to his knowledge.

These arguments include:

1.1 Confession

The meaning of confession, in Arabic «اعترف بالشئ»، is to prove the object (Qarshi, Ali-Akbar, Lexicon of Quran, vol. 5, p. 303) and its meaning according to the Civil Code of the Islamic Republic of Iran is: [confession is to say something in favor of others and against the individual himself]¹.

According to the above definition, confession in criminal matters means admission of charge and physical actions that are attributed to someone. Thus, stating something which lacks one of these aspects shall not be considered confession.

For example, if someone is convicted of intentional murder then his confession to unintentional killing is not valid. Confession in criminal matters in general and in intentional murder in particular is among the arguments.

1.2 Testimony

Another way to prove murder is the testimony of witnesses. If two wise and mature men witness the murder, the murder would be proved and the retaliation would be allowed. But in the case of manslaughter, in addition to what was said, women's testimony will be also accepted and the testimony of two women would be considered equal to the testimony of one man. Also, the testimony of one witness and the oath of the claimant

¹ Civil Law, Article 1259.

free woman to kill a free man or woman would be killed and the surplus of the blood money of man will not be taken from the guardian of the woman. Abu-Hanifeh believes that if a free man killed a slave should be retaliated, provided that the victim is not the slave of the killer. On his point, the validity of this claim is the generality of the 2nd verse of retaliation as well as the narrations (Noori, Hussein, Mustadrak Alvasael, retaliation chapters, Chapter 36, vol. 5 and 6; Kashani, IbnMas'ud, Badaye Alsanaye, vol. 7, p. 237).

2.1 Gender equality

Another condition of retaliation that is discussed considered as the first requirement in the books of jurisprudence is that if the victim is a woman, the man killer cannot be retaliated against him, unless the parents of the victim pay half of the blood money of the murderer that in this case they can to retaliated him. Therefore, gender equality, is one of the conditions of the retaliation so that the men would be retaliated for the killing of a man and the woman should be retaliated for the killing of a women, but retaliating a men for the killing of a woman is not possible unless where half of its blood money is paid, but retaliation of a women for the killing of men with respect to the juristic reasons is possible, however there is a disagreement that whether the half of her wealth should be paid to the parents of the victim, in addition to her retaliation, or not (Mousavi Khomeini, Ruhollah, Tahrir al-Vasileh, vol. 2, p. 648; Khoi, Abolqasem, Principles of Takmalat al-Menhaj, vol. 2, p. 35; Najafi, Javaher al-Kalam, vol. 42, p. 81 onward).

However, the famous quote among Sunnis is that is a man killed a woman should be retaliated without payment of half of the blood money and this payment is considered very weak (Ibn Qadameh, Almoghni, vol. 9, p. 377; Qartabi, Inb Rashid, Badayat Almojtahed and Nshayt Almoqtased, vol. 2, p.400). On the other hand, as Hasan Basri has quoted Shazi, retaliation of man for killing a woman due to the concept of the holly verse of "الانثى بالانثى" is not allowed the verse "النفس بالنفس" also cannot be opposite to that, because it is from the Law of Moses and is not very convincing for us. Thus, killing of men for killing a woman is based on the consideration of the public interest (Qartabi, Inb Rashid, Badayat Almojtahed and Nshayt Almoqtased, vol. 2, p. 400).

According to this theory, parents of victim can require the murderer to pay blood money and his consent is not required in this case, because otherwise, the victim's blood will be wasted. But, the owner of Javaherby rejecting this theory states:

According to the principle that the main punishment for the murder is to retaliate and the atonement needs the agreement of both sides, thus, when the killer does not accept to pay the atonement then we cannot require him to pay it, but the parent can only make a claim of retaliation and his refusal to pay half of the atonement or his poverty would not cause the conversion of retaliation to the atonement and only it possible to give him enough time up to when he could pay it and this should not be considered as the waste the blood of Muslims (Najafi, Mohammad Hassan, Jvahr al-Klam, vol. 42, p. 82).

It seems that this solution cannot solve the problem, because if the parent of the victim is not able to pay half of the blood money or from the beginning to refuse to pay it and the also killer is not satisfied except by retaliation, Of course, the victim's blood will be wasted. Thus, it seems according to the rule of "لا يطل دم امرء" (Shahid Thani, vol. 10, p. 101; Tabarsi, Fazlibn Hasan, "المؤتلف من المختلف بين أئمة السلف", vol. 2, p. 321), here, the murderer must be required to pay the blood money.

2.3 Equality in Islam

Another condition of retaliation is equality in Islam, in the sense that no Muslim for a non-Muslim including Zammy, Mostaman and Harbi would be retaliated. However, if the victim is a Zammy or Moahed then the killer would be judged, because killing him is unlawful and the atonement of the Zammy should be paid in money, but Muslim for the Muslim would be killed and this the case when a non-Muslim kills a Muslim, regardless of the religion of the killer and the victim (Mousavi Khomeini, Ruhollah, Tahrir al-Vasileh, p. 649; Khoi, Abolqasem, Principles of Takmalat al-Menhaj, p. 61 onward, Najafi, Javaher al-Kalam, p. 105; Saduq, Alhedayah, p. 303; IbnBoraj, Almahzab, vol. 2, p. 461).

About the Equality in Islam between Sunnis there are three quotes:

First, the believer will not be killed for any disbeliever. This quote by Shafi'iyah, Hnabali and some other Sunni scholars are narrated (Hosni, Kifayat Alakhyar, vol. 2, p. 99; Mazni, Mokhtasar Aalmazni, p. 237; Sherbini, Moghni Almohtaj, vol. 4, p. 16; Ibn Qadameh, Almoghni, vol. 9, p. 342).

Second, Muslims for the murder of Zammyunbelievers would be killed, but they will not be killed for killing the non-Zammy infidel. This quote is quoted of Abu Hanifa and Ibn Abi Layla (Kashani, Ibn Mas'ud, Badaye Alsanaye, vol. 7, p. 237, Sarakhsi, Mohammad ibn Ahmad, Almaboot, vol. 26, p. 131, Ibn Qadamh, Almoghni, vol. 9, pp. 341- 342).

Third, if a Muslim kills a Zammy abruptly to take his property, shall be retaliated. This quote has been attributed to Malik and Laith (Qartabi, Inb Rashid, Badayat Almojtahed and Nshayt Almoqtased, page 399; Ibn Qadameh, Almoghni, pages 341 and 342; Abobarakat, interpretation of Alkabir, vol. 4, page 238, Ibn Qadamh, AbdAlRahman, Alsharh Alkabir, vol. 9, p. 383).

Among these words, the opinion of Abu Hanifa and Ibn Abi Layla, which are opposite to the opinion of Shiite and Sunni scholars, is briefly examined.

The documentary for this promise is the general verse of "النفس بالنفس" which has stipulated that the killing of Muslims for the killing of the Zammis is allowed, because people are equal. In addition, Zammis and Muslims in terms of blood are equal and this is sufficient for retaliation, as the sanctity of his own property is equal to that of Muslim and stealing it requires punishment. In fact, the sanctity of property is due to the sanctity of the blood of its owner. Another reason is a narration that has been quoted of the Prophet that a Muslim killed a Zammis and the Prophet judged that: "انا احق من وقى بدمته، ثم امر به فقتل" (Ibn Qdamh, Almoghni, vol. 9, p. 341), namely: I am the most loyal person to the contract of Zamma and then ordered to kill the killer.

Then it refers to the verse 29 of Surah Toubah that considers the permissibility of blood as disbelief². Thus, if one accepts the contract of Zamma, there is no reason to shed his blood and at the end refers to the following reason:

If the retaliation between Muslim and Zammis infidel do not run would lead to the emergence of bloodshed and murder among within the society (Aljaziri, AbdAlrahman, pages 284 and 285).

However, this argument has been criticized in his place and even the Sunnis have responded to it and from the viewpoint of Shiite jurists its generality is flawed, as the documented narrations are not reliable. About killing the non-Muslim when killing a Muslim there is no disagreement between jurists (Najafi, Javaher al-Kalam, vol. 42, p. 156).

But from the viewpoint of Shiite jurists, if the killer is Zammis then the parent of the victim have the right to retaliate, pardon and so on (the same), this right is stated in the reason for this rule, but at the same time in some religious books such as "Javaher", "Tahrir al-Vasileh" and "Al-Lom'eh" the pardon is not allowed and its reason probably has been its clarity (Hashemi Shahroudi, Mahmoud, necessities of Criminal Jurisprudence, p. 304).

2.4 Lack of filiation

Be ruled out, because in this assumption if the child to do the retaliation, in fact, he the next requirement for the realization of is that the filiation should not be existed between the murderer and the victim. In other words, the father for killing his child would not be retaliated. In this case, there is no difference between son and daughter. So, if a father killed his son only would be required to pay atonement to the other parents of the child, unless when to be pardoned. However, in this case, in addition to the atonement, he would also be chastised, regardless that the other parents have forgiven him or not. This judgment is unanimous between Shiite jurists.

Imam Khomeini in this regard says: "الثاني: انتفاء الأبوة فلا يقتل أب بقتل ابنه و الظاهر أن لا يقتل أبو الأب و هكذا"، which means: the father would not be killed if he killed his child and this judgment seems be correct also for the grandfather and so on (Mousavi Khomeini, Ruhollah, p. 232).

But among the public jurists, Ibn Nafe' believe that the father should also be retaliated and there is no difference between him and others. Malek also believes that, if the murder is such that no doubt there is in its intentionality then the retaliation is possible, unless where his had been training (Ibn Qodameh, Almoqni, vol. 9, p. 359).

If a son to kill his father, his retaliation is for certain. In most jurisdictions of the world, patricide murder is among the most severe ones and its punishment is death (Shambiyati, Hoshang, General Criminal Law, p. 236). Some jurists in the subject of non-retaliation of the father who has killed his son have discussed widely, including that the father and the grandfather have a wish of their child's happiness and perfection. Fathers are the guardian, breadwinner and head of household. Thus, fathers and grandfathers would not be retaliated, because their punishment is incompatible with the dignity and respect for the fatherhood (Asghari, Shokrollah, the Islamic penal system and reply to questions, p. 167). But about the mother there is a disagreement between Shiite and Sunni jurists. Shiite jurists except Ibn Junayd Askafi believe that the mother due killing his child would not be retaliated, but the public jurists except Ahmad Ibn Hanbal say that there is no difference between the father and mother. Shiite jurists have mentioned mainly two reasons: first, the verses of retaliation that are considered only the killing of the child by his father (Hure Ameli, Cahapter of Mayaktasab, Chapter 19, Chapters of murder retaliation, Chapter 32) and second, is the consensus of the Sheikh on the retaliation of mother (Tousi, Mohammad ibn Hasan, Alkhalaf, p. 90). The other reason is the consensus which Sheikh has claimed on the retaliation of mother, especially with regard to the opposition of Askafi that has lived before Sheikh. So it cannot be cited as a reason independently. All the verses of the retaliation is estimated to be eleven and all of them have emerged to the child's murder by father and none of them can be used in child's murder by mother.

Thus, juristically, there is no way to generalize this rule. Sunni jurists for some reason also consider the mother subject to this sentence:

1. Mother is one the parents and in this view is alike father;

²Surah Toubah, Verse 29

2. The other reason is that they wish for the child happiness, so it is not rational to be retaliated for the intentional murder of her child. Also, if the mother is not his guardian, the rule would not be changed. Similarly, if the father kills his mature and wise son would not be retaliated, although he may not be his guardian.

This rule for the father, even if he slave or infidel his son is Muslim and free would be stable (ShahidThani, Sharh Lom'e, vol. 2, p. 407) and as the child for the killing of his father would not be retaliated, if he kills someone that his right of retaliation is allotted to his child, according to the wide opinion of jurists, his retaliation punishment would have killed his father, which is subject to the rule of "لَا يُقَادُ وَالِدُ بَوْلَدِهِ". However, some jurists, such as the owner of Javaher believe that this narrative results that father for killing of his child would not be retaliated and does not include other items. And allocation should be done about the text. (Najafi, Mohammad Hassan, Javaher Al-kalam, pages 175 and 176; Mousavi Khomeini, Ruhollah, Tahrir al-Vasileh, vol. 2, pp. 651 and 655). About the cause of this condition it is said that as father is the cause of creation of his child thus he cannot be the cause of death of his child (ibn Qodameh, Al-Moqni, vol. 9, p. 359, Alzajiri, Abd al-Rahman, vol. 5, p. 375).

This sentence is much emphasized so that the child is being said that: "انت و مالك لأبيك" (Hur Ameli, Cahapter of Mayaktasab, Chapter 78), which means: you and what belong to you are belonging to your father.

For this reason, if a father steals the property of her child would not be punished. This creates great roles and responsibilities for children against their parents, which would not disappear even after the death of the father. One effect that may be applied to this relationship is lack of retaliation of the father for the killing of the child and perhaps it can be said that with respect to the fact that parents are particularly interested in his own children so that even is not satisfied to their smallest discomforts, killing of children by parents should be conducted in an abnormal condition so that in that situation he may not be considered responsible for his actions.

Of course it is possible that a father because of ambitious motives to kill his son, which has no effect on his liabilities. But such cases are extremely rare and judgment is not levied on rare cases, but it would be issued regarding the type of crime. Thus, in explaining the lack of retaliation of father, for the murder of his child two issues would be raised:

First: the relationship between father and his children is of such worth and respect that despite the fulfillment of criminal liability would prevent from applying the death penalty and, in fact, it is one of the factors which remove the responsibility to the retaliation.

Second: the relationship between father and his children is such that prevents the realization, which is a clear reason of the crime, and causes the retaliation to be voided. But what that seems correct is that the relationship between father and his children prevents punishment as no effect on the criminality of the act of father.

ShahidThani, in addition to the narrations, considers the honor and dignity of the father as other reason which he should not be retaliated (ShahidThani, Sharh Allome'h, vol. 10, p. 64).

According to the viewpoint of Sunni jurist in addition to the narrative (Ahmad Hanbal, Musnad Ahmad ibn Hanbal, vol. 1, p. 49; Tarmazi, Sonan al- Tarmazi, vol. 4, p. 12, 2000; IbnMaje, Sonan of IbnMaje, vol. 3.), the role of father in the life of children would prevent his retaliation (Sherbini, vol. 4, p. 18; Mesri, IbnNajim, Albahr al-Raqaeq, vol. 9, p. 21). Another reason is that father is the guardian of his children as well as the infinite love and interest of father to his children (Kashani, IbnMasoud, Badaye Alsanaye, vol. 7, p. 235). The cult of Maliki believes that we know the death has not been intentional then father would not be retaliated for killing his and in the case that it has been intentional he would be retaliated. The intentionality in cases where for example the father beheads his child would be recognized (Malek ibn Anas, alM-doonat Al-Kobra, vol. 6, p. 308; Ibn Rashid, Badayat Al-Mojtahed, vol. 2, p. 327; Assqalani, IbnHajar, Sabal al-Islam, vol. 3, p. 234).

2.5 Pregnancy of a woman sentenced to death

If a convicted woman is within the periods of pregnancy, puerperium or giving milk to her babe then the retaliation would be delayed (Ahmadi Movahhed, Asghar, Criminal Enforcement, p. 78; Fazel Lankarani, Muhammad, 2006, Tafsil al-Sharia fi alv-sharh al-Vasile, Al-Qisas, (Alqsas), p. 295).

About the retaliation of a pregnant woman sentenced to death the opinion of Shiite and Sunni scholars is the same.

If a woman sentenced to death is pregnant, regardless that before or after the pregnancy the crime is occurred and regardless that her pregnancy has been legitimate or the result of adultery, her retaliation would be delayed (Najafi, Mohammad, vol. 41, p. 303; Mousavi Khomeini, Ruhollah, vol. 2, p. 538; Issue 23, Subject 23, p. 27). Even if the woman is suspected to the pregnancy the status of his retaliation must be delayed (Najafi, Mohammad, vol. 41, p. 303; Shahid Thani, p. 83).

After the birth of the child, until the babe's life depends to her the retaliation cannot be enforced, because when the retaliation for the baby has postponed then for protecting of the sacred gift of life of the babe it must be delayed, too. (Najafi, Mohammad, vol. 41, pp. 303.). Even it is not unlikely that when a person kills a mother that the life of his newborn baby is dependent to him and this act typically leads to the death of the babe, and the killer is aware of this issue then in the case of the babe's death the killer to be accused to the another murder,

because his act has resulted to the death of the babe (the same, the opinion of Shafei is the same, p. 28). However, the proof of intentionality of murder or killing in this case is very difficult. In cases where the babe's life is not dependent to mother and the babe is able to feed from other sources the retaliation of the mother sentenced to murder is permissible.

The fault of "Islamic criminal law" is the lack of determining the status of the pregnant woman before giving birth to the babe and the lack of need of the babe to her. Is it possible to confine her in this case or by obtaining collateral and guarantees we can let him to leave or to use another method? Some jurists have said that the victim's family can want the imprisonment of the women until childbirth and when the child no longer is dependent to her (AmirAbd al-Aziz, *AlfiqhyAljinai fi al-Islam*, p. 26).

2.6 Escape of criminal

In this issue, no article found in Sunni sources and only Shiite jurisprudence and legal sources are mentioned. When the criminal sentenced to death escaped, execution of the judgment until it is out of our reach will be hampered. "the Islamic criminal law", in addition to the Article 260 that in which the atonement of escaped criminal that before arresting dies is allowed to be paid from the property of his relatives or public funds, in different cases has predicted different responsibilities and punishments for those help criminals to escape. Article 267 in this field states that: [whenever a person or persons help a sentenced to death to escape are obliged to return him back and if with the opinion of the judge investigating the task he has neglected to do this work until arresting the sentenced he should be imprisoned.³ The exception in this Article is when the killer dies before delivery or his arresting for another reason to be delayed. In this case, the person helped the sentenced to escape would be reliable of the victim's atonement.

2.7 Forgiveness by the victim's parent

Victim's parent at any stage of the judgment or file execution can render of their retaliation. Sometimes this pardon is provided to obtaining blood money, more or less, which in this case the satisfaction of the murderer is required.

2.8 Lack of request for the retaliation

Execution is required to submit a request by the victim's parent.

2.9 Lack of payment of the Fazel of atonement

According to Article 212 Iran's Civil Code, if more than one person is killer, the victim's family for retaliation of all murderers should pay the Fazel of all of them. It is the case also when a man has killed a woman (Article 258 Iran's Civil Code).

2.10 Lack of payment of the share of forgivers

If the victim's parent are several and some of them decide to forgive and others choose to retaliate, according to the Article 258 of Iran's Civil Code, those who want to retaliate should pay the share of forgivers to the killer.

2.11 Lack of payment of the share of ones requesting the atonement

If the victim's parents are several and some of them decide to receive atonement and others choose to retaliate, according to the Article 264 of Iran's Civil Code, those who want to retaliate should pay the share of those want the atonement and this way the retaliation would be possible.

2.12 Lack of payment of the share of immature

Where the victim's parents are several and some of them are immature and the mature parents wants the atonement, according to precedent Vote No. 31 - 20/08/1987, the mature parents of victim for retaliation should pay the share of immature ones.

2.13 The need to run retaliation

Although before sentencing of the court, the family of the victim has requested the penalty of retaliation for the killer, but after closing of the court's order, for the execution of retaliation another request is needed.

In addition to the necessity of the request of the victim's family for the execution of retaliation, the permission of the Leader of Muslims to execute the retaliation is also needed. At present, the Leader of Iran has allotted this right to the Head of Judicial System. So after receipt of the request of parents for the execution, before execution of the retaliation the consent Head of Judicial System should be received (Ahmadi Movahhed, Asghar, *Criminal Enforcement*, p. 78; Lankarani, Mohammed Fazel, *al-Sharia Fi detailed description of the Tahrir al-Vasila (retaliation)*, p. 295).

3. Concussions

Addressing the important issue of the philosophy of retaliation in Islam needs some pre-assumptions, which in this paper are addressed to the extent of their necessity. However, it requires very deep and wide discussions which should be independently issued and researched. Our efforts in this thesis was to prove that

³ Islamic Civil Law

discussion on the philosophy of retaliation not only is possible, but it is an undeniable necessity in our times that may have not been such in the past and for this reason little research has been done in this area.

To determine the philosophy of punishment and retaliation from the Islamic point of view, inevitably legal and important matters relating to this subject were studied and besides their precise explanation are reviewed so that the position of retaliation as one of the three main punishments to be cleared in the realization of the punishment and the philosophy of punishment and barriers to it can be easily explained.

According to the Islamic point of view, retaliation not only for the crime of offender and realization of criminal justice and not merely for the realization of personal and social consequences is issued, but the retaliation in addition to giving attention to the last will also consider the future and the most effective way to prevent offenses acts against the physical integrity of people.

According to the Islamic sources, the most important function of retaliation is preventing crime and maintaining social order and security, although other functions, such as justice or intercession of the victim or his parents as well as edification of the offender in addition to it would be realized and no other punishment as retaliation could prevent or reduce physical crime. However, despite the existence of these penalties, some people may still commit physical crimes, but the amount crimes in societies where there is such a penalty is much lower than that in other communities and only by eliminating these penalties from the societies in which there is currently such a laws, the effectiveness of these punishments can be evaluated.

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