

INCORPORATING RESTORATIVE JUSTICE INTO THE
MALAYSIAN CRIMINAL JUSTICE SYSTEM BY
EXAMINING THE POSITION IN ISLAMIC LAW AND
AUSTRALIA

BY

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ABSTRACT

This research aims to analyse restorative justice; as a concept, a philosophy, and a practice, in order to propose its incorporation into the Malaysian criminal justice system. The current criminal justice system in Malaysia, which comprises both civil and Syariah law, has been developed based primarily on punitive justice. As its focus is to punish offenders, other rights, especially those of the victims of crime and the community, appear to have been disregarded. The concept and philosophy of restorative justice shifts the focus, where rather than solely punishing the offenders, it seeks to restore the position of key stakeholders who suffered by the conduct of the crime; the victims, the offenders and the community. The same idea is found in Islamic criminal law where qisas for example, treats victims as the centre of prosecution, while sentencing such as repentance (at-taubah) allows the offenders to amend his wrongs, and the concept of al-‘Aqilah places collective responsibility on the members of the community. In Australia, for example, the practices of restorative justice include conferencing, mediation and circle sentencing. These practices provide opportunities for victims to speak on how the actions of offenders have affected their life whilst at the same time offenders can provide victims with psychological and financial support through a sincere apology and restitution. In addition, restorative justice contends that a non-custodial sentence can be effective in the rehabilitation of offenders. Such sentencing, which enables the offenders to undergo their punishment within their community, reintegrates them back into their community, rather than isolating them from that community as is the case with custodial sentencing. The analysis undertaken in this thesis found that the Malaysian criminal justice system has yet to incorporate the three practices, the law does provide avenues for victims to be heard through the practice of victim impact statement and other provisions that guarantee financial and psychological supports for victims. The practice of non-custodial sentencing, however, in Malaysia though commendable, has not been systematically practiced. Notwithstanding, the policy of the government is now clear and restorative justice is welcomed. Such a shift will require proactive efforts by the government and the introduction of facilitating policies and legislation. To achieve this, the research suggests that the best approach is to work on the existing restorative legal means and sentencing and develop it further by utilizing the experiences of other countries which have successfully integrated restorative justice into their legal system.

خلاصة البحث

يهدف هذا البحث إلى تحليل العدالة التصالحية مفهوماً وفلسفةً وممارسةً؛ من أجل اقتراح دمجها في نظام العدالة الجنائية الماليزي الذي يضم نظام العدالة الجنائية حالياً القانوني المدني والشرعي، ويستند في المقام الأول إلى العدالة العقابية؛ لذا يبدو أنه يغفل حقوقاً أخرى، لا سيما حقوق ضحايا الجريمة والمجتمع المحلي، وذلك أن مفهوم العدالة التصالحية وفلسفتها يحوّلان التركيز من معاقبة المجرمين فقط، إلى استعادة حقوق أصحاب المصلحة الرئيسيين الذين عانوا من الجريمة، وهذا يشمل الضحايا والمجرمين والمجتمع في آنٍ معاً، وتلك هي نفس الفكرة نفسها في القانون الجنائي الإسلامي، فالضحايا مثلاً مركز المحاكمة في القصاص، في حين أن حكماً من مثل التوبة يسمح للمجرمين بتعديل أخطائهم، أما مفهوم العقلة فيضع المسؤولية الجماعية على أفراد المجتمع، وفي المقابل؛ تشمل ممارسات العدالة التصالحية في أستراليا مثلاً عقد المؤتمرات، والوساطة والأحكام الدورية، وتوفر هذه الممارسات فرصاً للضحايا للتحدث عن الكيفية التي أثرت بها أفعال المجرمين على حياتهم، بينما يمكن للمجرمين في آنٍ معاً أن يقدموا للضحايا الدعم النفسي والمالي من خلال الاعتذار الصادق ورد الحقوق، وكذا تدّعي العدالة التصالحية أن العقوبة غير الاحتجاجية يمكن أن تكون فعالة في إعادة تأهيل المجرمين، وهذا الحكم الذي يمكن الجناة من الخضوع للعقوبة داخل مجتمعهم، ثم يعيد دمجهم فيه، فلا يعزلهم عنه؛ كما هي الحال مع أحكام الحضانة، وقد أظهر نتائج هذا البحث أن نظام العدالة الجنائية الماليزي يتضمن ممارسات قانونية لا توفر سبلاً للضحايا تضمن دعمهم مادياً ونفسياً، غير أن ممارسة الحكم غير الاحتجاجي في ماليزيا - وإن كانت جديدة بالثناء- لم تمارس منهجياً، وعلى الرغم من ذلك؛ كانت سياسة الحكومة الماليزية واضحة من حيث ترحيها بالعدالة التصالحية، ولكن؛ يتطلب هذا التحول بذل جهود استباقية من الحكومة الماليزية، وإدخال سياسات وتشريعات تيسيرية، ولتحقيق ذلك، تشير البحوث إلى أن أفضل نهج هو العمل على الوسائل القانونية التصالحية القائمة، وإصدار الأحكام بشأنها، ومواصلة تطويرها من خلال الاستفادة من تجارب البلدان الأخرى التي نجحت في إدماج العدالة التصالحية في نظامها القانوني.

APPROVAL PAGE

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DECLARATION

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LIST OF ABBREVIATIONS

CLJ	Current Law Journal
CPC	Criminal Procedure Code
CSO	Community Service Order
DDA	Dangerous Drugs Act 1952
DPP	Deputy Public Prosecutor
Ed./eds.	Editor/Editors
Etc.	<i>(et cetera)</i> and so forth
Ibid	<i>Ibidem</i> (in the same place)
MLJ	Malayan Law Journal
Pbuh	Peace Be Upon Him
PP	Public Prosecutor
r.a	Radiallahu Anhu/Radiallah Anha
VIS	Victim Impact Statement
Vol. / Vols.	Volume/Volumes
VOM	Victim Offender Mediation

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

1.1.1 Restorative Justice

Restorative justice is not a concept developed yesterday; it has been a subject of debate and argument for more than 20 years. It has been in existence as an alternative to the current criminal justice which the public seems to be dissatisfied with due to its lacking of 'effective options for preventing repeat offending' which threatens the safety of the members of society in the form of insecurity living in a place where crimes could just happen to anyone and anywhere.¹ Rights of victims under the current criminal justice also tend to be 'neglected and ignored'² in criminal proceedings due to its punitive nature that focuses on punishing criminals. As a result, the victims are unsupported and faced with after-crime losses alone, especially financial and psychological losses. Proponents of restorative justice believed in the fact that restorative justice is able to solve the problems relating to ungratified victims, re-offending offenders³ and insecurity in community living together with former convicts.⁴

¹ Heather Strang and Lawrence W. Sherman, "Repairing the Harm: Victims and Restorative Justice," Vol. 15 (2003) *Utah Law Review* 15-42, at 19.

² Zvi D. Gabbay, "Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative justice Practices," Vol. 2 (2005) *Journal of Dispute Resolution* 349-397, at 349.

³ David Dolinko, "Restorative Justice and Justification of Punishment," *Utah Law Review* (2003) 319-342, at 320.

⁴ John Braithwaite in 'A Future Where Punishment is Marginalized: Realistic or Utopian,' Vol. 46 (1999) *UCLA Law Review*, defined that there are three purposes of restorative justice; to restore victims, restore offenders and restore communities in a way that is agreeable by all the three stakeholders. As cited by David Dolinko in 'Restorative Justice and Justification of punishment' (2003) *Utah Law Review* 319-342, at 320.

Until now, the active efforts of integrating and incorporating restorative justice into the current criminal justice could be seen in a few developed countries, such as Australia, the United States of America, some of the European and Asian countries. In Australia particularly, restorative justice has been developed since 2001 where at that time, it was only used in the case involving juvenile offenders. Nevertheless, today Australia has been developing restorative justice practices to include youth and adult offenders through youth conferencing, adult conferencing, victim-offender mediation and circles sentencing.⁵ Although some states in Australia might have different phases of development in integrating restorative justice into their criminal justice system, the overall development has been positive and encouraging.

Most of the Australian universities as well have included a special course on restorative justice.⁶ Monitoring the practice is done by national institutes such as the Australian Institute of Criminology. The report prepared by Heather Strang, a well-known expert in the field in 2001 has opened up for a more comprehensive and detailed study pertaining to its practice.⁷ Thus, the practice has evolved from practice only on juveniles and less serious crimes, to becoming its mainstream criminal justice where it is also used on serious crimes and adult offender.⁸ Until now, research has proven that restorative justice has impacted the criminal justice system positively where it satisfies the victims, rehabilitates offenders and promotes the security in the society. Though the finding on its positive impact on bringing down the number of re-offending criminals is still contested, the positive effects such as victim satisfaction,

⁵ Jacqueline Joudo Larsen, "Restorative Justice in Australian Criminal Justice System," No. 127, Australian Institute of Criminology Reports, Research and Public Policy Series (2014), at p. 6, viewed at <www.aic.gov.au> on 12 January 2015.

⁶ For example, the Australian National University has established the Centre for Restorative Justice and a number of law schools offered the restorative justice course.

⁷ Jacqueline Joudo Larsen, "Restorative in the Australian Criminal Justice," report by Australian Institute of Criminology (AIC) (2014) 1-42, at 5, viewed at <www.aic.gov.au> on 12 January 2015.

⁸ Ibid.

offender taking responsibility for actions and increased compliance of orders are basically the established impacts of restorative justice in Australia.⁹

1.1.2 Restorative Justice in Islam

The restorative features in the law are deduced from the three categories. To cite a few; the restorative features in *qisas* are seen through the treatment of victim as the centre of prosecution, encouragement of pardon by the victim or the family to the offender and compensation (*al-diyah*) for the victim or the family by the offender or the family. The fact that forgiveness is stressed upon under the law of *qisas*, it again coincides restorative justice as the latter in practice encourages discussion through mediation and conferencing between the affected parties which usually ends with both parties making amends and forgiveness. The finding is interesting as *Qisas* has in the past been made synonymous with retaliation, which is incorrect.¹⁰ As a whole, *qisas* embodies restorative features through the concept of collective responsibilities among the families of the victims and the offenders.¹¹

Besides that, another restorative features in the law is observed through the functions of punishments. Apart from the retributive, the punishment in Islamic criminal law also functions to prevent and deter crimes, and to rehabilitate and reform offenders. These functions are instilled through repentance, surety (*al-kafaalah*) and expiation (*al-kafarah*) which will be analysed in the next chapter.

⁹ Ibid, at vii.

¹⁰ M. Cherif Bassiouni, "Qesas Crime," in *The Islamic Criminal Justice System* edited by M. Cherif Bassiouni, (Oceana Publications, Inc.: 1982), at 207. 'Talion' originally a Latin word means retaliation.

¹¹ Ibid.

1.1.3 Existing Restorative Legal Means in Malaysian Criminal Justice

On the other hand, Malaysia currently does not have a specific legal component that provides for active participation of victims and offenders in criminal proceeding; let alone the community. Though there are some movements towards establishing criminal mediation in the country, it is yet to be specified in any provision and the principle might be scattered in the Criminal Procedure Code [Act 593] ('CPC'), the Child Act 2001 [Act 611] ('Child Act'), and the Domestic Violence Act 1994 [Act 521] ('Domestic Violence Act').¹² Although these provisions might provide for physical protection for the victims, it seems to lack on providing other kinds of protection such as emotional and financial.¹³

Probably, one of the efforts that encourage the involvement of victims in a criminal proceeding in Malaysia would be the procedure called the Victim Impact Statement ('VIS').¹⁴ The procedure was introduced through the amendment to the CPC in 2010 to two sections;¹⁵ section 183A which details the procedure of VIS before the High Court and section 173 (m) (ii) before the Magistrates Court. The two sections made it clear that a victim or the victim's family is to be given the opportunity to explain how the crime committed by the offender has affected his or her life before the offender is sentenced. The victims or the family are allowed to give the statement orally or in writing and the court may consider such a statement as an aggravating factor in deciding the appropriate sentence on the offender that

¹² Azlinda Azman and Mohd Taufik Mohammad, "Crime Victims Support System and Restorative Justice: Possible Implementation in Malaysia," Vol. 1 No. 2 (October 2012) *Journal of Arts and Humanities* 18-26, at 22.

¹³ Nasimah Hussain, "Punitive Justice in the Malaysian Criminal Law," Vol. 7 No. 13 (2011) *Journal of Applied Sciences Research*, 2399-2404, at 2402.

¹⁴ N.a, "Victim Impact Statement: A New Concept of Sentencing Principle," <<http://jasonngpartners.com/articles/victim-impact/>> (accessed on 12 January 2015)

¹⁵ Criminal Procedure Code (Amendment) Act 2010 (Amendment) Act 2012 A1422 <www.federalgazette.agc.gov.my> (accessed on 16 January 2015)

commensurates the damage caused.¹⁶ However, it is observed that there are not many cases where the court considered VIS before sentencing offenders as victims in most cases do not present their impact statement. The right to present VIS is however only upon request of the victims or the family members, and not without it, and there are cases in which the victims are not told of this particular right.¹⁷ Nevertheless, the introduction of VIS is seen to be a positive move towards integrating restorative justice into the current criminal justice in Malaysia.

The amendment to CPC in 2010 as well has amended section 426.¹⁸ The section was previously used as an avenue for victims of crimes to be compensated after the offender has been found guilty. Originally the section was used by the Public Prosecutor to apply for payment of the cost of prosecution from the court and the court, in its discretion may allow such payment.¹⁹ In 2010, subsections 1A, 1B, 1C and 1D were inserted. These subsections elaborate on the eligibility of victims of crimes to apply for monetary compensation to be paid by the offender or the family to the victim.²⁰ The application would be through the Public Prosecutor and the court upon such application shall assess and make an order for the compensation to be paid.²¹ The court in determining the amount of compensation looks at several factors²² including the nature of the offence, the effect of the offence on the victim and loss suffered. Furthermore, the ability of the offender to pay the amount is also considered

¹⁶ Tashni Sukumaran and Qishin Tariq, "VIS Allow Victim to State Impact of Crime before Sentence is Meted Out," *The Star* (7 September 2012) <http://www.malaysianbar.org.my/legal/general_news/thumbs_up_for_victim_impact_statements.html> (accessed on 12 January 2015)

¹⁷ <<http://itslaw.blogspot.com/2012/09/victim-impact-statement.html>> on 12 January 2015.

¹⁸ Criminal Procedure Code (Amendment) Act 2010 (Amendment) Act 2012 A1422 <www.federalgazette.agc.gov.my> (accessed on 16 January 2015)

¹⁹ Section 426(1) of the CPC.

²⁰ Nasimah Hussin, "Punitive Justice in the Malaysian Criminal Law: Balancing the Rights of Offenders with Those of the Victims," Vol.7 (13) *Journal of Applied Sciences Research* 2399-2404 (2011), at 2403-2404.

²¹ Section 426(1A) of the CPC.

²² Section 426(1C) of the CPC.

by the court and this limits the amount of compensation. Subsection 426(3) specifies that in the case when there is an order for the cost of prosecution and order for compensation, the court will give direction as to which order to be prioritized. However, in the absence of such direction, the payment of prosecution cost shall have priority.²³ Regarding the amount, many argue that the amount awarded is insufficient to top the loss suffered.²⁴ Even though, some view this opportunity would be a great platform not only to address the injury and loss of the victim but also for the offender to take responsibility for his misdeed; the law, on the contrary, provides insufficient measures to enforce it. Moreover, while the compensation through application under this section would not prejudice the victim's right for civil remedy,²⁵ how many victims would have the courage to initiate civil proceeding to get remedy, considering the money and time that he has to withstand until he is finally compensated?

1.2 STATEMENT OF THE PROBLEM

The call to establish a taskforce to look into restorative justice in Malaysia was made back in 2014 by the then Minister of Women, Family and Development, Datuk Seri Shahrizat Abdul Jalil.²⁶ The call was made when the efforts taken by the government in the Government Transformation Plan 2010-2015 in combating crimes in Malaysia seem to revolve around apprehending and imprisoning the criminals.²⁷ This raises worry as the rights of victims before the Malaysian criminal justice seem to be put out

²³ Section 426 (3) of the CPC.

²⁴ Section 432 of the CPC. This is also in according to informal interview of researcher with a Deputy Public Prosecutor, Puan Norfadzila Ishak on 20th October 2014. She observed that throughout her service, the highest amount of compensation awarded was RM 1000.

²⁵ Section 426(4) of the CPC.

²⁶ 'Shahrizat Jalil: Taskforce to look into restorative justice system' *New Straits Times* (22 October 2011) <<https://www.thestar.com.my/news/nation/2011/10/22/shahrizat-jalil-taskforce-to-look-into-restorative-justice-system/>> on 11 December 2014. Accessed on 25 February 2015.

²⁷ N.a, "Reduction of Crime", Government Transformation Plan, Annual Report 2012, Prime Minister Office, at 57.

of the picture. Legal recourse available for victims to be restored of the loss they suffered due to crimes is only detailed in few provisions and normally, the compensation is on case-to-case basis and awarded only in small amount. On the other hand, as custodial sentencing is more preferred than non-custodial, convicts who completed their terms seem to fail to adapt themselves into the community.²⁸ With the existing negative perception of the community against the convicts, they failed to reintegrate themselves into the society and tend to repeat their crimes. In 2012, 96% of criminals committing violent crimes were repeat offenders.²⁹ Although, from 2015 to 2017, there was a slight decrease in the number of crimes, the decrease was small and repeat offending were still reported. It is observed that the number of crimes in Malaysia only varied from year to year with no significant decrease recorded.

With the gaining recognition of restorative justice around the world; the justice that recognises the rights of the victims, offenders and the community; Malaysia is also called to introduce some provisions that are restorative. Thus, beginning from 2010, amendments to the CPC and other legislations introduced a few restorative legal means such as VIS, compensation for victims and non-custodial sentencing for offenders. However, the application of the provisions are restricted to certain types of cases only. Recently, there has been another call by the former minister in the Prime Minister Office, Liew Vui Keong that it is time for Malaysia to consider ‘restorative over a punitive justice system’.³⁰ The call calls for legal reform to remove ‘the archaic

²⁸ Syed Saddiq Syed Abdul Rahman, “*Penjara*,” Portal Rasmi Kementerian Belia dan Sukan (5 November 2018) < <http://www.kbs.gov.my/arkib-berita-kbs/4536-penjara.html> > (accessed on 25 February 2019).

²⁹ Elizabeth Zachariah, “Ex-detainees behind 96%of crimes in state,” *News Straits Times* (7 November 2012)<<http://www2.nst.com.my/latest/ex-detainees-behind-96pc-of-crimes-in-state-1.167722/facebook-comments-7.227611> > (accessed on 26 January 2015).

³⁰ N.a, “Time to Move From Punitive to Restorative Justice System,” *Malaysiakini* (30 June 2019) <<https://www.malaysiakini.com/news/481823>> (accessed on 17 October 2019).

and draconian laws' existing in the Malaysian criminal justice.³¹ The outcome of the call is still pending.

1.3 RESEARCH OBJECTIVES

The study aimed to achieve the following objectives:

- 1) To explore the concept and philosophy of restorative justice as one of the accepted current criminal justice principles.
- 2) To highlight and examine the restorative aspects and features that are in existence in Islamic law;
- 3) To examine the legal and practical framework of the restorative justice practices in Australia;
- 4) To identify the restorative legal means that are in existence in the Malaysian criminal justice, both in civil and syariah legal systems.

1.4 RESEARCH QUESTIONS

1. What is the concept of restorative justice?
2. What is the underlying philosophy of restorative justice?
3. What are the restorative aspects and features in the Islamic criminal law?
4. How successful is Australia in incorporating restorative justice into its criminal justice?
5. Are there any restorative legal means within the Malaysian criminal justice system?

³¹ Ibid.

1.5 RESARCH HYPOTHESIS

Restorative justice is suitable to be incorporated into the Malaysian criminal justice system as it can cater for the rights of the victims, better rehabilitate the offenders within the community and create a safer environment for the community.

1.6 LITERATURE REVIEW

The purpose of conducting literature review is to find out about what others have written on a topic in order to find a gap of which is yet to be tackled in previous research.³² Nevertheless, when a topic has already been vastly written and studied, researching the same would not be a worthless exercise as there is always certain angle in the topic that is worthwhile for research.³³

In conducting this research, the aims include looking into the concept of restoring justice in the conduct of crimes in Islamic law and to compare with a concept that is acceptable and practiced in the world by some of the western countries, named as Restorative Justice. The scenario of crimes, criminals and victims of crimes as well as the current principle of sentencing of offenders in Malaysia will be analysed. In order to get a view and to learn from the experience of country that adopts restorative justice, Australian's practice will be examined. The research also intends to prove the similarities between Islamic law and that of restorative justice; and the possibility of adopting it in the criminal justice of Malaysia. Thus, the literatures referred in conducting the research are mainly literatures on the concept of restorative justice and the concept of justice in Islamic law. It also analyses literatures that explained the experience of countries that practice restorative justice other than Australia; the United Kingdom, New Zealand and the United States of America.

³² Anwarul Yaqin *Legal Research and Writing* (2007) LexisNexis, at 42-43.

³³ Ibid.