

FORMALISING THE CONCEPT OF RESTORATIVE
JUSTICE WITHIN THE SAUDI CRIMINAL JUSTICE
SYSTEM: A LEGAL ANALYSIS

BY

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ABSTRACT

Restorative justice (hereinafter referred to as RJ) concept is recognised and practised globally; many legal systems have begun to recognise the principles of RJ four decades ago. Meanwhile, the Saudi legal system which derives its authority from Shari'ah recognises and implements many principles of RJ since the establishment of the Kingdom of Saudi Arabia. Shari'ah practices such as reconciliation, mediation, intercession, mercy, forgiveness, pardon, compensation and others are implemented in the Saudi criminal justice system; however, the concept of RJ is not recognised per se. Therefore, the objective of this research is to investigate the principles and practices already implemented in the Saudi criminal justice system that are of an RJ nature, and to introduce them to be recognised as "Restorative Justice system-نظام العدالة الإصلاحية". Moreover, it aims to examine New Zealand and Canadian RJ practices to adopt potential approaches within Saudi criminal justice system as experienced and practised in those countries. The research depends on doctrinal and non-doctrinal, namely empirical, research methodologies; the doctrinal is based on primary and secondary sources of Shari'ah, legal systems, and case laws/judicial rulings of Saudi, Canada, and New Zealand. The empirical study depends on in-depth and semi-structured interviews with judges and reconciliation officers from Saudi. Undoubtedly, RJ is practised as a prime method within the Saudi criminal system; however, it is lacking essential tools to be fully implemented as it is practised in other systems. These tools are the alternative sentences which were suspended in 2015 due to lack of mechanism to regulate the practice of these alternatives. From the experience of New Zealand and Canada, contracting with private service providers is one of the solutions to facilitate the implementation of RJ practices. Adopting an RJ framework within the Saudi judicial system is going to have a significant impact in acknowledging, at the international level, the remarkable practices and efforts of the Saudi judicial system in dealing with crimes restoratively.

خلاصة البحث

مفهوم العدالة الإصلاحية معترف به ويتم تطبيقه عالمياً في كثير من الدول؛ فقد اعترفت العديد من أنظمة الدول القانونية بمفهوم العدالة الإصلاحية منذ ٤ عقود. في الوقت نفسه، فإن النظام القانوني السعودي، الذي يستمد سلطته من الشريعة، يقر ويطبق العديد من مبادئ العدالة الإصلاحية منذ إنشاء المملكة العربية السعودية. بعض مبادئ الشريعة كالصلح والوساطة والشفاعة والرحمة والعفو والمغفرة والتعويض وغيرها يتم تطبيقه في النظام الجنائي السعودي؛ هذه الممارسات جميعها من مبادئ العدالة الإصلاحية المعترف بها عالمياً. إلا أن مفهوم العدالة الإصلاحية غير معترف به في القانون السعودي في حد ذاته. لذلك، فإن الهدف من هذا البحث هو التحقيق في المبادئ والممارسات المطبقة بالفعل في النظام الجنائي السعودي والتي تعتبر ذات طبيعة إصلاحية، وتقديمها ليتم الاعتراف بها على أنها "نظام العدالة الإصلاحية". علاوة على ذلك، يهدف البحث إلى فحص ممارسات العدالة الإصلاحية في نيوزيلندا وكندا والاستفادة من بعض الأساليب المعتمدة في كلا النظامين لتبنيها داخل النظام الجنائي السعودي. يعتمد البحث على منهجيات البحث القانوني الفقهي (التقليدي) وغير الفقهي (الاجتماعي). يستند الأول على المصادر الأولية والثانوية للشريعة، والأنظمة القانونية في السعودية وكندا ونيوزيلندا، والقضايا السابقة لكل نظام. ويعتمد الأخير على مقابلات شخصية وشبه منظمة مع قضاة ومصلحين في مراكز الصلح. لا شك أن العدالة الإصلاحية تُمارس كمنهج أساسي في النظام الجنائي السعودي. ومع ذلك، فإن النظام يفتقد إلى أدوات مهمة ليتم تنفيذ العدالة الإصلاحية بشكل متكامل كما تتم ممارستها في الأنظمة الأخرى. من هذه الأدوات، العقوبات البديلة التي تم تعليق العمل بها عام ٢٠١٥ بهدف تنظيم ممارسة وتنفيذ هذه البدائل. وكذلك قد يفتقر إلى الاهتمام بحقوق الضحية في قضايا التعزير؛ حيث يتم التركيز على مصلحة الجاني والمجتمع دون الضحية. وأخيراً، من واقع تجربة نيوزيلندا وكندا، يعد التعاقد مع مقدمي خدمات من القطاع الخاص واحداً من أفضل الحلول لتسهيل تنفيذ ممارسات العدالة الإصلاحية. وسيكون تبني هيكله لنظام العدالة الإصلاحية في النظام القضائي السعودي تأثير كبير في التعريف، على المستوى الدولي، بالممارسات والجهود البارزة للنظام القضائي السعودي في التعامل مع الجرائم بشكل إصلاحي.

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DECLARATION

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*Dedicated with gratitude and affection to my parents Talal and Saliha, my husband
Hassan and Children Muath, Munirah, Muhannad, and Muhammad*

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CANADA

Canadian Victims Bill of Rights, SC 2015, c 13.
Corrections and Conditional Release Act, SC 1992, c 20.
Criminal Code, RSC 1985, c C-46.
The Constitution Act, 1867, 30 & 31 Vict, c 3.
The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

The Restorative Justice Act, CCSM c R119.6.
Youth Criminal Justice Act, SC 2002, c 1.

LIST OF ABBREVIATIONS

AH	After <i>Hijrah</i> (the migration of Prophet (ﷺ) to Madinah)
ed./eds	Editor / Editors
Etc.	(<i>et cetera</i>) and so forth
FGC	Family Group Conference
MOJ	Ministry of Justice
NZ	New Zealand
ﷺ	Peace Be Upon Him
RJ	Restorative Justice
YCJA	Youth Criminal Justice Act

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Forgiveness, mercy, pardon, reconciliation, offender reintegration and a victim and community healing are all aspects of restorative justice (RJ) process, and they are also embedded principles within the Islamic law. The Saudi legal system has adopted and implemented these principles; however, the degree of the implementation of these principles in Saudi is different from other legal systems around the world. In addition, these principles are not recognised in the Saudi system under the phrase of "restorative justice", and they are not embedded under a separate institution. This thesis examines the principles of RJ that are recognised in the Saudi system, discusses the contemporary methods of implementing them and the effect of such implementation into the Saudi system and society.

The principles of RJ have been practised globally in many countries for years. RJ is a concept that has attracted legal systems and societies around the world, in an attempt to restore and repair damages which have been committed by offenders instead of punishing them. RJ, in addition, assist the healing process for victims and the community at large. There have been many attempts to define the concept of RJ, and scholars have different perspectives in viewing this concept. The followings are three different definitions of RJ from recognisable sources which discuss the concept at a global level. First: According to the United Nations, RJ is defined as:

any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the

crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing, and sentencing circles.¹

Second: Kathleen Daly suggested that it is challenging to define RJ because it is considered to be a broad concept that might have many references. She stated that:

It can refer to an alternative process for resolving disputes in organisations, to alternative sanctioning options, or to a distinctively different, “new” mode of criminal/juvenile justice organised around principles of restoration to victims, offenders, and the communities in which they live. It is used in juvenile justice, criminal justice, and family welfare/child protection cases.²

Third: Gerry Johnstone and Daniel W. Van stated that the difficulty of having a global definition of RJ comes from the fact that it is a "deeply contested concept"; they have examined the term and concluded with several meanings as it is viewed internationally. The conclusion is as follows:

For some, it is principally an encounter process, a method of dealing with crime and injustice that involves the stakeholders in the decision about what needs to be done. For others, it is an alternative conception of the state of affairs that constitutes justice, one that seeks to heal and repair the harm done by crime rather than to ignore that harm or try to impose some sort of equivalent harm on the wrongdoer. Still, others would answer that it is a distinctive set of values that focus on co-operative and respectful resolution of conflict, a resolution that is reparative in nature. Others argue that it calls for the transformation of the structures of society and of our very way of interacting with others and our environment.³

The researcher believes that RJ is described as a “deeply contested concept” because each country shapes the concept to suit its legal system, culture and society. These various definitions of one concept have similar elements in which they explained RJ to be an alternative method in dealing with crimes. A method that also involves victims and the community where the traditional method excludes those parties from

¹ The United Nations Economic and Social Council, Basic principles on the use of restorative justice programs in criminal matters, (2002).

² Kathleen Daly, "Restorative Justice: Moving Past the Caricatures" in *Seminar on Restorative Justice organized by Institute of Criminology, University of Sydney Law School*, (Sydney, April 1998), 2.

³ Gerry Johnstone and Daniel Van Ness, *Handbook of restorative justice*, (England, UK: Routledge, 2013), 19.

intervening. The researcher believes that the concept defines itself, and it is not a vague term that needs to be explained in detail. The only thing that makes scholars differ in providing a universal definition is the way it is implemented. The implementation of any practice cannot be universal. Implementation of RJ differs from one state to another because each state has its own regulations and laws, and any new concept has to comply with the fundamental law of each country. Therefore, this leads to different definitions of the concept and different methods of implementation.

RJ is a developing concept in all legal systems because of its connection to various and unclassified types of offences and offenders. Even though numerous legal systems have adopted the principles of RJ in the last quarter of the twentieth century. Islamic law has recognised these principles and implemented them more than 1400 years ago. However, other countries such as the United State, Canada, and some European countries have been attempting to separate the RJ from the legal system to ensure fair treatment for all parties.⁴ Islamic law, on the other hand, has recognised RJ principles as part of the legal and judicial system when it is connected to crime; for instance, mediation and pardon in *Qisas* cases as it will be demonstrated further in chapter two. Moreover, reconciliation in other issues such as marriage or tribal disputes could be handled by society or an official agency representing the government (such as the Reconciliation Commission).

It must be clarified that RJ, per se, is not mentioned as a phrase in the Islamic jurisprudence. However, the principles of RJ are embedded within principles of Islamic law as methods of spreading peace and harmony among society. They are integral parts of the Shari'ah that have been recognised and implemented among Muslims in all aspects of life. What differentiates other systems from the Islamic legal system

⁴ Ibid

regarding this matter is the recognition of RJ as a phrase when practising its principles in addition to acknowledging it as a separate system.

The underlying reason for choosing the Kingdom of Saudi Arabia as the case study for this thesis is that the Saudi Arabian legal system is unique in comparison to others around the globe because it relies on the Shari'ah law as its fundamental source of regulating and decision making. This uniqueness appears in the fundamental sources that cannot be changed or altered, the Quran and the Sunnah of the Prophet Muhammad (ﷺ). All rules, laws, and regulations must comply with the principles and teachings of those sources. Regardless of the subjects of all contemporary issues, Islamic scholars and state regulators have the tools and methods for deducing rules of such issues from the principles of the fundamental sources. As stated in the Basic Law of Governance in Saudi Arabia, Article 7:

the Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of the Prophet (ﷺ), both of which govern this Law and all the laws of the State.⁵

Although the Saudi Legal system is based on Shari'ah which was revealed more than 1400 years ago, it is always progressing. There are always applicable rules for contemporary issues and crimes. This modernity on the regulations and decision making of the Saudi legal system comes from implementing the principles of Islamic jurisprudence. The Islamic Jurisprudence is an entire field of science in and of itself; however, it is essential to point out some of these principles in order to understand how the principles and practices of RJ have and still are implemented without significant difficulties or obstacles.⁶

⁵ The Basic Law of Governance of Saudi Arabia. Royal Decree No. A/90, (1992).

⁶ Abdelwahab Khallaf, *The Science Of The Principles Of Islamic Jurisprudence (The Methodology Of Islamic Law)*, (Beirut: Dar Alkutub AlElmeeyah, 2016), 17. Islamic Jurisprudence refers to knowledge of the practical rules of Shari'ah which are derived from the detailed evidence in the sources, or it is the set of practical rules of Shari'ah which are derived from the detailed evidence in the sources

Before explaining some of the Islamic principles, it is important to clarify that the Quran and Sunnah have many fixed rules for specific issues whether criminal, social, personal status or commercial. The Saudi legal system applies these rules as it is described in the Quran and Sunnah. However, for issues that do not have fixed rulings, or if there is more than one interpretation for the Quranic or Sunnah-based statement, then the rule of other methodologies of deducing a law becomes relevant and necessary.⁷

As expressed before, the Quran and Sunnah are the first fundamental methods or principles; then, there are secondary methods of deducing a rule for a specific issue. These methodologies are called *Usul al-Fiqh*. Some of these *Usuls* that come after Quran and Sunnah are *Ijmaa* which can be described as Consensus of Opinion; *Qiyas* refers to analogy; *Istihsan* which is a juristic preference; and *Istishab* which means the presumption of continuity. Scholars follow those methods to understand the fundamental sources and to aid the process of *Ijtihad*.⁸

Ijtihad-جهاد is derived from the Arabic root “*Jahad*-جَاهَد” literally means struggle.⁹ In Shari’ah context, it is defined as "the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of Shari’ah from their detailed evidence in the sources"¹⁰. *Ijtihad* is a continuous source of knowledge, and therefore it is the most crucial source of Shari’ah after the Quran and Sunnah. As Kamali indicated, since the divine revelation discontinued after the death of Prophet Muhammad (ﷺ), *ijtihad* has emerged and become the main instrument of interpretation

⁷ Mohammad Hashim Kamali, *Principles of Islamic jurisprudence*, (Cambridge, UK: Islamic Texts Society, 2003), 12; Abdelwahab Khallaf, *The Science...*, 16.

⁸ Kamali, 20.

⁹ Ibrahim Mustafa and et al, *Al-Mu’jam Al-Waseet [a dictionary]*, (Cairo: Maktabat al-Shorouq al-Dawliyah, 2004), 142.

¹⁰ Kamali, 22.

of the Quranic and prophetic texts. It relates them to the current conditions and issues of modern life.¹¹

With this brief explanation of the Islamic law methodology, especially in dealing with contemporary issues, it becomes evident that RJ principles in its modern features can be implemented in the Islamic legal system as long as they comply with Shari'ah principles. Forgiveness, mercy, reconciliation, and compensation are some of the principles of RJ which are found in the sources of Islamic law since the beginning. More clarification on this matter will be demonstrated in chapter two and three when discussing the Islamic principles of RJ and the Saudi legal system.

Here are some Quranic and Prophetic texts indicating the existing of RJ. Firstly: from the Quran, there are various numbers of verses which encourage the act of forgiveness, mercy, and reconciliation, for example, in Surat *Al-Shura*, Allah states:

وَجَزَاءٌ سَيِّئَةٍ سَيِّئَةٌ مِّثْلُهَا فَمَنْ عَفَا وَأَصْلَحَ فَأَجْرُهُ عَلَى اللَّهِ إِنَّهُ لَا يُحِبُّ الظَّالِمِينَ

The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from God: for (God) loveth not those who do wrong.¹²

The above verses, Allah assures the right to retribution when a person finds it difficult to forgive; however, He indicates that forgiveness and reconciliation are better because Allah heavily rewards them. Another example is:

وَإِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا فَإِنْ بَغَت إِحْدَاهُمَا عَلَى الْأُخْرَى فَقَاتِلُوا الَّتِي تَبْغِي حَتَّى تَفِيءَ إِلَى أَمْرِ اللَّهِ فَإِنْ فَاءَتْ فَأَصْلِحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ

If two parties among the believers fall into a quarrel, make peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of God; but if it complies, then make peace between them with justice, and be fair: for God loves those who are fair (and just).¹³

¹¹ Ibid.

¹² Al-Shūra: 40.

¹³ Al-Hujurāt: 9.