

***SULH* IN ISLAMIC CRIMINAL LAW: ITS APPLICATION IN MUSLIM COUNTRIES**

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Abstract

Sulh or reconciliation is becoming an alternative problem solver in many cases lately. It is a mutual agreement between the conflicting parties so that the dispute is solved amicably. Many people assume that sulh is only applicable in civil cases. Nevertheless, in Islamic law sulh is also applicable in criminal cases particularly in homicide and bodily injury cases. This paper will highlight the issue of sulh, its ruling and application in the above cases. The first part of the paper will discuss the concept of sulh in Islam particularly in criminal law cases based on the provisions in the Qur'an, hadith of the Prophet as well as the practice of the Companions. The second part of the paper will examine the application of sulh in some Muslim countries including that of Malaysia. An analysis will be made to check the extent of which sulh in criminal matters is applied in those countries so that we can suggest a better alternative to dispense justice to the people.

Introduction

Generally in criminal cases, the offender has no say to settle the case amicably with the aggrieved party once he is arrested. Similarly the victim has no say either to halt the proceeding or to negotiate with the convict. Criminal cases are not handled by the parties involved but it is between the accused and the prosecutor (the state). In some cases which rely on a report made by the victim such as the crime of sexual harassment or defamation the victim will have no chance to reconcile with the offender unless he revokes the police report.¹ In that case he might lose his right in getting compensation that he possibly will get if the case is settled amicably.

In dealing with the parties involved in criminal proceeding, we tend to neglect the right of the aggrieved party. In the case of theft, for example, when the offender is convicted and sent to prison, he is not asked to restore the stolen property or its value to the victim. Sometimes, the convict is sentenced to pay fines. Again, the aggrieved party has no right in taking the money since fines is payable to the government. This scenario is in fact creates unfairness and dissatisfaction on the part of the victim. Nevertheless, if *sulh* is applied in criminal cases, this tension can be released. *Sulh* plays a vital role and is considered the best alternative dispute resolution to overcome the problem. *Sulh* or reconciliation means to encourage the parties to come to an amicable agreement. When

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sulh is practised, not only the offender gets the benefit from it but also the interest of the victim is secured. The application of *sulh* does not mean the power of a judge to determine the sentence is denied since he still has the discretion to impose punishment on the offender. *Sulh* also should not be interpreted as encouraging the commission of crime as the offender does not know the extent of which the victim would agree and the fact the judge still use his discretion to impose the punishment.

Concept of *Sulh* in Islam

The word *al-sulh* in Arabic means to reconcile and to make peace with the opponent.² It is derived from the verb *saluha* or *salaha* “to be sound, righteous” denotes the idea of peace and reconciliation in Islamic law and practice.³ According to Sayyid Sabiq, *sulh*, literally means to settle any dispute.⁴ Technically, *sulh* means an agreement between two parties by relying on the prescribed conditions, which they have agreed earlier on in the process of settling their disputes. According to Ibn Qudamah, *sulh* is an agreement between two disputed parties which would lead to peace.⁵

From the above definition, it can be understood that the purpose of *sulh* is to end conflict and hostility among the disputants so that they may conduct their relationships in peace and amity without any further interference from the court. *Sulh* is settlement grounded upon compromise negotiated by the parties in dispute themselves or with the help of a third party. Thus it requires consent of all parties involved. *Sulh* is a form of contract (*'aqd*) and once it is mutually agreed by the parties, it becomes binding and all the legislative rules of contract apply.

In Islamic law, *sulh* can be applied in civil cases such as in matrimonial cases, inheritance, transaction etc. *Sulh* can also be applied in criminal cases.⁶ In the context of Islamic criminal law, what is meant by *sulh* is to come to an agreement to remove the punishment provided for the offence committed or to mitigate it. *Sulh* can be made between the offender and the victim or his relative particularly if the crime infringes the right of individual. It can also be made between the offender and the judge if the crime involves the right of Allah (i.e. the right of public). However, it should be noted that *sulh* cannot be applied in all criminal cases. Only certain types of crime that *sulh* can be applied.

Crimes in Islamic law and the Application of *Sulh*

² Elias, A.Elias, *Modern Dictionary: Arabic English*, Dar al-Jalil, Beirut, 1986, pp.377-378.

³ Encyclopaedia of Islam, http://www.brillonline.nl/subscriber/uid=3454/entry?entry=islam_SIM-7175

⁴ Sayyid Sabiq, *Fiqh al-Sunnah*, Vol.3, Dar al-Diyan li al-Turath, Kaherah, 1990, p.389.

⁵ Ibn Qudamah, *al-Mughni*, Vol.4, Maktabah Tijariyyah, Makkah, 1984, p.351.

⁶ There are also *sulh* between Muslim and Non-Muslim, i.e. to suspend fighting between them and establish peace, and *sulh* between the ruler and the rebels, i.e. to reconcile and make peace between two disputed parties as mentioned in the Qur'an 49:9. A hadith of the Prophet affirms that: “Every peace (*sulh*) is permissible except the one, which makes the prohibited lawful or vice versa”. See: Ibn Qudamah, *al-Mughni*, vol.12, p.595.

Before we elaborate further on the application of *sulh* in Islamic criminal law, it would be necessary to discuss the classification of crime in order to understand the nature of crime in Islamic law and the extent of which *sulh* can be applied.

Crimes and punishments in Islamic criminal law are divided into two categories, fixed and discretionary. The first category includes *hadd* and *qisas* punishments which are prescribed by Allah and thus unchangeable. The second category consists of all kinds of transgression where no specific punishment is prescribed but for which there may be *ta'zir* (i.e. discretionary punishment).

1. *Hadd*

Hadd (plural: *hudud*) signifies an unchangeable punishment prescribed by Divine law which is considered as the right of Allah.⁷ In the penal context, prescribed punishment means that both the quantity and the quality thereof are determined and that it does not admit of degree. What is meant by its being prescribed as the right of Allah is that it is prescribed for the public interest (*maslahah 'ammah*) and individuals as well as the community cannot annul it. It means that whenever a *hadd* crime is established on the offender the judge has no choice other than punishing him with a *hadd* punishment prescribed for it.⁸ According to the majority of the jurists, *hudud* crimes are *zina* (unlawful sexual intercourse), theft, *qazaf* (false accusation of *zina*), drinking intoxicants, *hirabah* (highway robbery), *baghy* (rebellion) and *riddah* (apostasy).⁹

It is worth mentioning that the question of *sulh* does not arise in *hudud* punishments since *hudud* are prescribed punishments. *Sulh* or other circumstances are not considered in inflicting *hudud* punishments. Once the offender is convicted with a *hadd* crime, the judge has no choice other than to impose the prescribed punishments neither more nor less. The judge cannot remove the punishment of *hadd* or mitigate it even if the victim consents to it. However, though *sulh* has no effect on *hudud* punishments, there is a strong tendency to narrow down the applicability of these punishments as much as possible based on the *hadith* of the Prophet which says:

Set aside the execution of *hudud* punishments in cases of doubt.¹⁰

This is clearly reflected in the strict nature of proof required in establishing *hudud* offences, for instance, high demands are made of the witnesses as regard to their numbers, qualifications and the content of their statements. If there is doubt in proving the crime, even the slightest one, a *hadd* punishment may not be imposed.

⁷Awdah, 'Abdul Qadir, *al-Tashri' al-Jina'i al-Islami Muqaranan bi Qanun al-Wad'i*, 13th ed., Vol. 1, Muassasah al-Risalah, Beirut, 1994, p.79.

⁸*Ibid.*, pp.343-344.

⁹For further details on *hudud* crimes, see: 'Awdah, *al-Tashri' al-Jina'i al-Islami* Vol.1, p.79 & Vol.2, p.345, Abu Zahrah, *al-'Uqubah*, Dar al-Fikr al-'Arabi, Cairo, p.56.

¹⁰Al-Shawkani, *Nayl al-Awtar*, Vol.7, Dar al-Jayl, Beirut, 1973, p.272.

When any reasonable doubt is found in the case of a *hadd* punishment, the benefit of doubt is given to the accused. A *hadd* punishment is not imposed and may instead be reduced to one of *ta'zir*. The members of the society are also discouraged from exposing the offence committed by any member of the society as far as they can, as advised by the Prophet s.a.w. who said:

Avoid condemning a Muslim to a *hadd* punishment whenever you can, and when you can find a way out for a Muslim then release him for it. If the imam errs, it is better that he errs in favour of innocence (pardon) than in favour of guilt (punishment).¹¹

The above *hadith* shows that in implementing *hudud* punishments there are no questions of *sulh* when a *hadd* crime has been committed and the offender has been found guilty and convicted. The prescribed punishments must be imposed on him regardless of his status or conditions. Nevertheless, the *hadith* also implies that if the case is not brought to the authority concerned, *sulh* can play its role in removing or mitigating the punishment.

It is worth to note that even though *hudud* are categorized as crimes that involve the right of Allah, there are some *hudud* offences that are considered infringing both the right of Allah and the right of individual, such as the crime of *sariqah* (theft), *hirabah* (robbery) and *qazaf* (false accusation of zina).

Concerning *sariqah* and *hirabah*, both are crimes that involve taking away the property of another person which of course infringe the right of individual as the property belongs to the victim. Thus, *sulh* can be made between the offender and the victim as long as the crime is not brought to the court. This is mentioned in the *hadith* of the Prophet which says:

Forgive each other among you for *hudud* offences (if committed). When an offence of *hudud* reaches (informed to or tried by) me, it becomes enforceable.¹²

It has been related on the authority of Safwan ibn Umayyah who said that he was sleeping in the mosque and his sheet was under his head. A person took away his sheet while he was sleeping. When he got up he ran after the offender and caught him and then brought him before the Prophet s.a.w. The Prophet ordered to cut his hand. Safwan said to the Prophet, "I did not intend this (punishment), I give my sheet to him for free and I forgive him". The Prophet said, "Why did you not forgive him before bringing him to me".¹³

¹¹Ibn Majah, *Sunan*, Vol.2, 'Isa al-Babi al-Halabi, Cairo, p.850, al-Tirmizi, *Sunan*, 2nd ed., Vol.4, Matba'ah Mustafa al-Babi al-Halabi wa Awladuh, Cairo, 1975, p.33.

¹²Al-Tibrizi, *Mishkat al-Masabih*, Vol.2, al-Maktab al-Islami, Dimashq, 1961, p.292.

¹³ Muhammad Tufail Ansari, *Sunan ibn Majah (English Version)*, Vol.4, Kitab Bhavan, India, 2000, Hadith no.2595, p.33.

The above *hadith* indicates that when the case of theft is referred to the court, the normal procedures apply and the victim has no right to interfere or to make *sulh* after that.

Regarding the admissibility of *sulh* for the crime of *qazaf*¹⁴, Imam Malik in *al-Mudawwanah al-Kubra* states that whenever the case of *qazaf* is brought to the attention of people in authority including the police or enforcement officer, there is no more negotiation allowed and the prescribed punishment must be imposed. Conversely, if the victim keeps silent by not reporting the case to the authority, *sulh* can still play its role. Al-Mawardi and Judge Abu Ya'la mention that the prescribed punishment for *qazaf* is eighty lashes and it can neither be reduced nor increased. However, in terms of infliction of the punishment, it will not be executed unless with the victim's demand as it involves the right of individual.¹⁵ It means even after the offender of *qazaf* has been convicted, negotiation or *sulh* can still be made.

2. *Qisas and Diyah*

Qisas and *diyah* are crimes punishable with fixed punishments which are mentioned clearly in the text of the Quran and the Sunnah. The crimes include homicide and causing bodily harm to others. According to al-Mawardi, *hadd* covers *qisas* and *diyah* as they are also prescribed punishments.¹⁶ However, *qisas* and *diyah* differ from *hadd* in the context that they concern the individual right.

The punishment of *qisas* and *diyah* is fixed and thus the judge has no right to remove or mitigate the punishment based on his own discretion. However, since this type of offence involves the right of individual, the infliction of punishment depends on the demand of victim or his relatives. The victim or his relatives may want to demand the infliction of *qisas* or choose to reduce it to *diyah* or to pardon the offender. It also depends on them whether or not to consider any negotiation in determining their rights. *Sulh* can play its role in remitting or mitigating the punishment of *qisas* after the offender has been convicted or found guilty.

The validity of *sulh* in *qisas* and *diyah* crimes is supported by many Qur'anic verses and hadiths of the Prophet s.a.w. For example in the case of murder, Allah says to the effect:

O ye who believe! The law of equality is prescribed to you in cases of murder...But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord.¹⁷

¹⁴ *Qazaf* means to accuse of zina an adult, sane and chaste person or to refuse the legitimacy of a child. For further details, see: Anwarullah, *the Criminal Law of Islam*, A.S. Noordeen, Kuala Lumpur, 1997, p.159.

¹⁵ Cited in Bahnasi, Ahmad Fathi, *al-'Uqubah fi al-Fiqh al-Islami*, Dar al-Shuruq, Cairo, 1989, p.234.

¹⁶ Al-Mawardi, *al-Ahkam al-Sultaniyyah*, 3rd ed., Maktabah wa Matba 'ah Mustafa al-Babi al-Halabi wa Awladuh, Egypt, 1973, pp.219 & 231.

¹⁷ Qur'an, 2:178

In the above verse, the punishment prescribed for a murderer is *qisas*¹⁸ or retaliation, however, if the heir of the victim pardon the murderer then there should be compensation given to former. According to Ibn ‘Abbas, the above verse indicates that *sulh* is one way to achieve justice and peace between two parties.¹⁹

In the case of murder, the heir of the victim can forgive the murderer or can ask the court to reduce the punishment imposed. In one *hadith*, the Prophet s.a.w. is reported to have said:

He who causes intentionally the death of another, it is left to the family of the deceased to decide on *qisas* or the taking of *diyah*... and if they agree on *sulh*, it is for them.²⁰

There is a *hadith* reported by ‘Alqamah ibn Wa’il on the authority of his father who narrated that a man brought a murderer of his relative to the Prophet s.a.w. After the interrogation, the accused confessed. The Prophet s.a.w. then asked:

Do you have anything to pay blood-wit on your behalf? The accused said: I do not have any property except this robe and axe of mine. The Prophet said: Do you think your people will pay ransom for you? He said: I am more insignificant among my people than this (that I would not be able to get this benefit from my tribe). The Prophet threw the strap towards the claimant of the blood-wit saying: Take this man away. As he left, the Prophet said: If he kills him, he will be the same. The man returned and said: God's Messenger, I have heard you saying that, 'If I kill him, I would be like him'. Whereupon the Prophet said: Don't you like that he shoulder (the burden) of your sin and the sin of your brother? He said: Why not? The Prophet said: If it is so, then let it be. He threw away the strap (that tied the accused) and set him free."²¹

All the jurists agree that *sulh* is allowed in all *qisas* and *diyah* crimes including causing injury, causing miscarriage and related offences as mentioned in the Qur’anic verse:

The recompense for an injury is an injury equal thereto but if a person forgives and makes reconciliation, his reward is due from Allah, for Allah loves not those who do wrong.²²

¹⁸ *Qisas* means to inflict a similar punishment on the offender as he has caused to the victim with certain conditions.

¹⁹ As quoted by Ali Ahmad, “Compensation in Intentional Homicide in Islamic Law”, *Journal of Islamic and Comparative law*, 1980, p.40.

²⁰ *Ibid.*

²¹ Muslim, *Mukhtasar Sahih Muslim*, al-Maktab al-Islami, Beirut, 1987, p.273.

²² Qur’an, 42:40 see also 5:45.

From the above it can be said that *sulh* in the case of *qisas* and *diyah* is not only allowed but recommended since it has the force of calming the urge for blood feud and desire for revenge by the legal heirs. There are conditions required in a *sulh*,²³ i.e. as follow:

1. The property in consideration must be lawful and valuable.
2. The property must be made known to the parties.
3. The amount of settlement should not exceed the amount of normal *diyah*. This is held by the Shafi'is, as they regard any extra amount apart from its fixed amount is tantamount to *riba*. The Hanafis and the Malikis, however, hold that the amount of settlement depends on negotiation made by the parties and can even exceed the amount of normal *diyah*.

If the settlement is reached by the legal guardians on behalf of the incompetent heirs like infant or insane, the amount agreed must not be less than normal *diyah* according to the Shafi'is and Hanbalis. The Malikis and the Hanafis, on the other hand, maintain that it depends on negotiation and *sulh* is valid even if the amount of settlement is less than *diyah* as long as it is for best interests of child or insane.

3. *Ta'zir*

Ta'zir (plural : *ta'azir* or *ta'zirat*) is a crime punishable with penalties that are discretionary, i.e. it is left to the discretion of the judge to determine the suitable punishment to be imposed on the offender. It consists of all kinds of transgression where no specific and fixed punishment is prescribed²⁴. The *Shari'ah* gives the ruler or the judge considerable discretion in the infliction of *ta'zir* punishments, which range in gravity from a warning to death.

According to the jurists, *ta'zir* punishments can be inflicted on the offender for the commission of *ta'zir* crime whether commission of such crime infringes the right of Allah such as in the case of not performing daily prayer, or breaking the fast in the month of Ramadan without excuse or that infringes the right of individuals²⁵ for example, in the case of insulting another person. It is to be noted that there is no crime which does not involve the right of Allah at all. In fact, in the case of *ta'zir* crimes which infringe totally the right of individuals, the criminal still infringes the right of Allah, since obeying the law and preventing the criminal from violating others, and keeping all people in right order are the rights of Allah.²⁶

As to the application of *sulh* in *ta'zir* crimes, all the jurists agree that it is allowed since the determination of *ta'zir* punishment depends on the discretion of the judge. However,

²³ Abu Zahrah, *al-'Uqubah*, pp.482-484.

²⁴ 'Awdah, *al-Tashri' al-Jina'i al-Islami*, Vol.1, p. 80.

²⁵ What is meant by the right of Allah is something which has a relation with the public welfare (benefit) and something which protects them from harm. And what is meant by the right of individuals is something whose benefit is confined to a specific individual. In fact, there is no clear cut distinction between these two rights. Sometimes the right of Allah is dominant and sometimes the right of individuals is dominant.

²⁶ Amir, 'Abd al-'Aziz, *al-Ta'zir fi al-Shari'ah al-Islamiyyah*, Dar al-Fikr al-Arabi, Cairo, 1969, p.57.

in determining whether or not to pardon or mitigate the punishment, the judge must take into consideration the type of *ta'zir* crime. *Ta'zir* punishment which is due to the infringement of the right of Allah is obligatory. The authorities should enforce it and should not pardon it. However, they may not impose the punishment if, according to discretion on the basis of *maslahah* (public interest), the offender's crime can be deterred without his being punished. The ruler or judge can forgive the offender or mitigate the punishment if, according to his discretion, the public interest necessitates it, or if the offender has rectified himself before the infliction of punishment.²⁷

On the other hand, if the *ta'zir* crime is the infringement of the right of individuals, whether to forgive the offender or not depends on the victim's decision. The proceeding would only take place when it is brought to the court by the plaintiff who has the right. Therefore, whenever there is an allegation concerning this type of *ta'zir* crime brought to the court, the judge cannot set it aside. It also cannot be waived by the ruler's pardon unless with the victim's permission. Thus *sulh* can be applied in this matter. It should be remembered that though *ta'zir* punishment due to the infringement of the right of individuals can be remitted on account of *sulh*; the ruler can still punish the offender in order to reform him.²⁸

Pardon ('*Afw*) as one of Amicable Settlement of Punishment

Pardon means to relinquish the infliction of the merited punishment and it is considered the best method to settle criminal cases. The same principle is applied here as that of *sulh*. Pardon can remit a punishment whether it comes from the victim's side or the ruler's side. However, not all punishments can be remitted whenever pardon is granted. Some crimes are not affected by pardon, such as crimes which are punishable with a *hadd* punishment. This is because the *hudud* punishments are considered part of the right of Allah and are pre-determined and unchangeable. However, the jurists have a difference of opinion as to the effect of pardon in the case of *qazaf*. This difference results from their conflicts on whether *qazaf* infringes the right of Allah or that of individuals. According to Abu Hanifah, al-Thawri and Awza'i, pardon in the case of *qazaf* is not considered since they hold that *qazaf* is an offence which merely infringes the right of Allah.²⁹ The Shafi'is, on the other hand, hold that *qazaf* is an offence which merely infringes the right of an individual and therefore, the pardon of the victim may remit the punishment.³⁰ Another opinion states that pardon may remit the punishment of *qazaf* only if the case is not brought to the court. The Malikis, in this context, have two opinions; the first agrees with the Shafi'is, and the second agrees with the opinion that pardon may remit the punishment of *qazaf* if the case is not brought to the court.³¹

As to the crime of *qisas* and *diyah*, the jurists are unanimous that to pardon the offender gratuitously is the principal ground for remitting *qisas*. It is considered in remitting the

²⁷ al-Mawardi, *al-Ahkam al-Sultaniyyah*, p.238.

²⁸ *ibid.*

²⁹ Ibn 'Abidin, *Hashiyah*, Vol.6, Dar al-Kutub al-'Ilmiyyah, Beirut, 1994, p.93.

³⁰ Al-Ramli, *Nihayat al-Muhtaj*, Vol.8, Dar al-Fikr, Beirut, 1984, p.23.

³¹ Ibn Rushd, *Bidayat al-Mujtahid*, Vol.2, Dar al-Kutub al-Islamiyyah, Abidin, 1983, p.541.

punishment from an offender only if it is granted from the victim's side and not from the ruler's side. Thus, when the victim or his relatives forgive the offender, the prescribed punishment cannot be inflicted on him. However, the pardon of the victim and his relatives does not affect the right of the ruler to impose a *ta'zir* punishment on the offender after that, if the public interest necessitates it. The ruler, on the other hand, cannot remit the prescribed punishment of *qisas* on the offender by granting his pardon, if the victim does not allow him to do so.³² The right of the victim or his relatives to forgive the offender from the punishment of *qisas* is derived from the Qur'anic verses, one of which says:

We ordained therein for them: a life for a life, an eye for an eye, nose for nose, ear for ear, tooth for tooth and for wounds retaliation. But if any one remits the retaliation by way of charity, it is an act of atonement for him.³³

Pardoning of *qisas* is, in fact encouraged by the Prophet s.a.w. who said:

No person is caused to suffer injury on his body and then he forgives him (who injured him) but Allah elevates him a degree on that account or expiates his sin.³⁴

Anas ibn Malik is reported to have said:

No case involving *qisas* was referred to the Prophet s.a.w. unless he exhorted it to be pardoned therefore.³⁵

As to what are the implication of pardon granted by the victim or his relatives, the jurists have differed. The Malikis and Hanafis are on the opinion that it will amount to free pardon while the Shafi 'is and Hanbalis maintain that the *diyah* would be due.³⁶

Regarding *ta'zir* crimes, the jurists unanimously agree that the ruler has the right to forgive the offender, either by overlooking the crime or letting him off the punishment.³⁷ This agreement is based on the *hadiths* of the Prophet which say:

Forgive or be lenient towards the faults of respectable persons (*dhawi al-hai'at*) except the ordained crimes.³⁸

³² Awdah, *al-Tashri' al-Jina'i al-Islami*, Vol.1, p.775.

³³ Qur'an, 5:45, see also: 2:178, 4:92

³⁴ Muhammad Tufail Ansari, *Sunan ibn Majah (English Version)*, Vol.4, Hadith no. 2693, p.90.

³⁵ *Ibid.*

³⁶ For further details, see: Sayed Sikandar Shah Haneef, *Homicide in Islam: Legal Structure and the evidence Requirements*, A.S.Noordeen, Kuala Lumpur, 2000, pp.121-129.

³⁷ Awdah, *al-Tashri' al-Jina'i al-Islami*, Vol.1, p.777.

³⁸ Ibn Hanbal, *al-Musnad*, Dar al-Ma'rifah, Cairo, 1956, Vol.6, p.181.

Let's accept their (the *Ansar*) good qualities and forget their bad ones.³⁹

They, however, dispute as to whether the right of granting pardon that the ruler has, covers all *ta'zir* crimes or only some of them. According to some jurists, the ruler has no right to forgive an offender of *hudud* and *qisas* crimes when the prescribed punishment for them has been reduced to a *ta'zir* punishment due to certain reasons. Apart from the above crimes, the ruler may, at his discretion, forgive an offender for a crime or a punishment if he thinks that the public interest necessitates it.⁴⁰

According to some other jurists, the ruler has full power to grant his pardon to an offender of any *ta'zir* crime whether it involves the right of Allah or the right of an individual as long as it conforms to the public interest.⁴¹

Regarding crimes which involve the right of an individual, for example, beating or insulting others, the victim of such crimes can forgive the offender, but his personal pardon cannot affect the right of the public to discipline an offender with a suitable *ta'zir* punishment. This means that in such a case the ruler can still use his discretion either to punish an offender or forgive him, according to the public interest. However, if the victim does not grant his pardon and demands the infliction of a punishment, the ruler has no right to forgive an offender but to inflict a suitable punishment on him.⁴²

Application of *Sulh* in Muslim countries

Sulh has become an integral part of the substantive and procedural law in some Muslim countries. It has to proceed prior to the execution of the original punishment. In the case of homicide and bodily injuries, the original punishment is *qisas*.

In section 130 (2) of the criminal Act 1991, Sudan, provides that;

Whoever commits murder shall be punished with death by retribution and where retribution is remitted shall be punished with imprisonment for a term not exceeding ten years without prejudice to the right of *diyat*.

It is highlighted in the above section that the original punishment of murder is *qisas*. However, if there are factors remitting *qisas* punishment, the authority should substitute it with imprisonment which most of the Muslim jurists consider as *ta'zir* punishment.

Section 28 (2) of the same Act provides:

³⁹ Ibn Qudamah, *al-Mughni wa al-Sharh al-Kabir*, Vol.10, Dar al-Kutub al-'Ilmiyyah, Beirut, (n.d.), p.349.

⁴⁰ Awdah, *al-Tashri' al-Jina'i al-Islami*, Vol.1, p.777.

⁴¹ al-Ramli, *Nihayat al-Muhtaj*, Vol.8, p.23

⁴² al-Mawardi, *al-Ahkam al-Sultaniyyah*, p.237

The right of retribution is initially established for the victim (bodily injuries cases) and then vests in his relatives.

The power to settle the case through *sulh* is the prerogative of the family of the deceased in the case of homicide. However, in the case of bodily injuries, the right to demand *qisas* punishment vests in the victim solely.⁴³

In Pakistan, the right to substitute *qisas* punishment in murder cases with *sulh* is provided in section 310 of the Criminal Law Act 1997. The provision reads as follows:

In the case of *Qatl amd* (intentional murder) an adult sane *wali*, may at any time on accepting *badl I sulh* compound his right of *qisas*.

The word *badl i sulh* here means the mutually agreed compensation according to Shari‘ah to be paid or given by the offender to a *wali*⁴⁴ in cash or in kind or in the form of movable or immovable property.⁴⁵ In other words, in replacing *qisas* punishment after a process of reconciliation has taken place, the substitute could be in several forms such as paying cash or kind or any property which they agreed upon.

In Malaysia, the Syariah Criminal Offences (*Hudud* and *Qisas*) Enactment 2002 of Terengganu, Section 40 (c) and (d) provides as follows:

Qisas Punishment shall not be imposed in the following cases:

- c) Where pardon is given by the victim or his *wali*
- d) Where a settlement and agreement between the victim and the offender is made.

The above provision makes it clear that the right of the authority to punish the convicted accused is not absolute. There is, to a certain extent, the right of the individual, the victim and the family of the deceased, to determine their decision on this matter it since it has been incorporated in the statutes.

It is to be noted that even though the right to have reconciliation exists in Shari‘ah criminal cases, Terengganu does not have constitutional right to implement it due to the non-state jurisdiction as prescribed in the Federal Constitution. As far as Shari‘ah criminal offences is concerned, the maximum punishment for Shari‘ah Court to punish the offenders are limited to a fine not exceeding five thousand Malaysian Ringgit, or imprisonment for a term not exceeding three years, or whipping not exceeding six strokes, or any combination thereof.⁴⁶

⁴³ If the victim is not a *mukallaf* (e.g. an insane or a minor) the power is vested to guardian of the victim.

⁴⁴ i.e. legal heirs who are entitled to claim *qisas*.

⁴⁵ See Section 310(5) under *explanation*.

⁴⁶Section 2 of Syariah Courts Criminal Jurisdiction Act 1965 (Amendment) 1984.

It is essential to mention there is a difference between criminal cases and civil cases in the application of *sulh*. *Sulh* in criminal cases, particularly in homicide and bodily injuries cases should take place after the judge has sentenced him with the original punishment. However, in civil cases *sulh* should take place before the hearing starts. In other words, the parties would have to settle their case at the *sulh* level, if there is no mutual agreement at that level, the *sulh* officer will have to bring this matter to the court.

The legal provisions of *sulh* as a method in settling disputes in civil cases are provided in each state. Among others are Syariah Court Civil Procedure (*Sulh*) Federal Territory Act 585 Rules 2004, Syariah Court Civil Procedure (*Sulh*) Malacca Rules 2004 and Syariah Court Civil Procedure Enactment , Selangor 2003.⁴⁷ For instance, section 99 of the Federal Territory Rules reads as follows:

The parties to any proceedings may, at any stage of the proceedings, hold *sulh* to settle their dispute in accordance with such rules as may be prescribed or in the absence of such rules, in accordance with *Hukum Syara'*.

In Rule 3 of the same Rules mentions that it is the duty of the Registrar of the Syariah Court to look into the case and used his discretionary power to decide on the date and to issue the notice of the *sulh* session.⁴⁸

Despite *sulh* has been applied in the Syari'ah Courts of Malaysia pertaining to civil cases, there is no provision to grant *sulh* in criminal law cases. The reason could be that the maximum punishment provided for Shari'ah criminal offences is not severe enough as such it is not necessary to grant *sulh*. Further, this could be due to perception which claims that since Malaysia is not implementing *hudud* and *qisas* hence, it is not necessary to apply *sulh* as part of procedure in settling criminal disputes.

In the Penal Code, there is no provision that confers right to mediation between the accused and the aggrieved party. Instead, if the accused is not satisfied, he can appeal to the sentence given at the lower court. Any criminal act that is committed by the accused is considered as breach of state's right. Legally speaking, if any person commits any crime by virtue of the Penal Code, it is a crime that involves the state's right. The aggrieved party is not given any option to reconcile with the convict and claim his right against him. Conversely, in Islamic law, any criminal act that affects the body and life as well as that infringes the property and integrity of the victim is actually affecting two rights, individual and state. As such, the rule of *sulh* can be granted to the aggrieved party

⁴⁷ Just to name a few states.

⁴⁸ Where, after receiving a summons or an application for any cause of action, the Registrar is of the opinion that there is a reasonable possibility of a settlement between the parties to the action, the Registrar-

- a) shall not fix a date for the trial of the action within a period of three months from the receipt of the summons or the application;
- b) shall fix a date, as soon as practicable, for the parties to hold *sulh*; and
- c) shall serve the notice for the date fixed for *sulh* on the parties.

to make negotiation, what could be the best option to be imposed on the accused if the *qisas* or the original punishment is remitted. It should be borne in mind that the significant of having *sulh* is to bring to an end of the dispute so that it could be resolved amicably. Thus, hopefully, the parties as well as the society can live in peace and harmony with no feeling of hatred, vengeance and enmity.

Case Studies in Malaysia and other countries

There are two cases which the authors would like to share here. The first case is about a man who was sentenced with twelve years imprisonment for murdering his wife. This is a case where the accused killed his wife who is a compulsive gambler. The deeper the wife got into debt, the more stressful life became for her husband and her three children. Twice he bailed her out, paying RM24,000 on each occasion to keep the loan sharks at bay. However, she amassed RM100,000 debt all hell broke loose for the family. The wife had attacked him with a knife during a heated argument between them and in retaliation he killed her. He pleaded guilty for the crime he had committed and yet he said he loves his wife. During mitigation, the accused pleaded a short sentence so that he could join with his family.⁴⁹

After reading this case, to a certain extent, one could say that his late wife did not love her family when she took part in gambling and involved in loan sharks. This irresponsible act had jeopardized her family's life and property. In view of this case, there was a letter to editor of NST by anonymous who is known only as C J, when he wrote that "Justice did not address plight of victim". The writer, C J had pleaded if somebody could throw some light on these issues.⁵⁰

The comment that the authors could highlight here is that, if Malaysia had a provision of *sulh* in such a case, we believe he would not be punished with that much sentence. There could be some negotiations made between the children and the accused, who is apparently their father, to mitigate the punishment. At the same time, the reconciliation can take place to discuss the issue of children's interest which we think, the biggest task of the court. Of course, to punish the accused with the right punishment can be achieved through a reconciliation facilitated by the court official, lawyer of the accused and any other party who has no personal interest in the case. Islamic law also recognized the right of the individual to pardon the victim.

Another interesting case is Sarah Balabagan's story which happened in 1994. Sarah is Muslim Filipino girl who worked at Abu Dhabi. She was employed by Al Baloushi family to take care of their elderly father Mohammed al Baloushi. However, according to the report Mohammed al Balaoushi had made several aggressive sexual overtures to Sarah. She complained to her employment agency and only to be told; "Why not give the old man a kiss" One day he tried to rape her and Sarah in the act of self defense, killed him.⁵¹ Sarah was sentenced to 7 years imprisonment at the lower court and at the

⁴⁹ *New Straits Times*, December 4th 2005.

⁵⁰ *New Straits Times*, December 18th 2005.

⁵¹ *The Guardian* (London), p.7, 9th May 1996.

subsequent trial the judge had sentenced her to death penalty. After an international groups rallied to her defense, her sentence was reduced to one year imprisonment and 100 lashes. The Baloushi family, on the other hand, withdrew its demand for *qisas* punishment and instead asked for USD26,000 *diyah* for her release. The money was paid and Sarah returned to Manila in 1996.⁵²

It can be understood from the above case that Sarah could not be punished with *qisas* punishment since she was 15 years old at the time when she committed the offence. Besides, she could also use self defense so that the original punishment would not be invoked on her. Nevertheless, the issue here about the Baloushi family had retracted their demand to execute Sarah and substituted with amount of blood money or *diyah*.

If the former Malaysian case followed the Balabagan's case, the accused would not have been punished with twelve years imprisonment since the heirs of the victim, who are the children of the deceased and the accused, could negotiate what sort of option to be imposed on their beloved father. The children could also pardon the act committed by their father and the court can think of a lesser punishment for the accused.

Concept and Practice of *Sulh*: An Analysis

Some analysis could be made on the concept of *sulh* in Islamic criminal law and its practice in some countries. Islamic values are universal that is to promote justice and to forsake any evil. Ibn Qayyim says that Shari'ah aims at safeguarding people's interest and in this world and the next; "in its entirety, it is justice, mercy and wisdom".⁵³ Having said that, the *hukm* in Islam is clear, i.e., the right of individual and the right of Allah exist hand in hand in the crime of homicide and bodily injuries. The right of Allah refers to the fixed punishment which Allah had specified in the Quran or in the *Sunnah* of the Prophet s.a.w. Generally this right is not to be mitigated, it is absolute and mandatory. However, if the crime involves the right of the individual then, it is up to the individual to waive his right or not so that the original punishment would be remitted such as the crime of *qazaf* (false slander) or *sariqah* (theft).

The application of Islamic law in Malaysia is not something new, it is the law of the land and the local law is a matter of which the court must take judicial notice.⁵⁴ Hence, to include Islamic values in the any statutory provisions and to remove any provisions which are inconsistent with Islamic law and universal of justice are necessary. This suggestion is not only applied here but also other non Muslim countries such as United Kingdom. There was a suggestion made by Dr Rowan Williams, the archbishop of Canterbury that the adoption of elements of Shari'ah law in Britain was unavoidable if social cohesion was to be fostered.⁵⁵ He further suggested that British authorities would inevitably have to make some accommodation with Shari'ah in British legal system.⁵⁶ It

⁵² Deutsche Presse-Agentur (German Press Agency), 1st August 1996.

⁵³ Ibn Qayyim al Jawziyyah, *I'lam al Muwaqqin*, ed. Muhammad Munir al Dimashqi, Idarah al Taba'ah al Muniriyyah, Cairo,(n.d.),Vol.2, p.33.

⁵⁴ *Ramah V Laton*, [1927] 6 FMLSR 128.

⁵⁵ Dr Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, lecture at the Royal Courts of justice, 7th February 2008.

⁵⁶ "A Row in Britain spreads", *The Economist*, 9th February 2008.

is not surprised at all that his suggestions were considered outrageous. Besides, religion should have a smaller official role in Britain and not a greater one as they said.⁵⁷

In the context of Malaysia, it is surprising that the research findings which was published in Singapore newspaper that 77.3% want stricter Shari'ah laws and 57.3% of the Malaysian Muslims want the *hudud* punishment to be implemented in Malaysia. Only 44.1% want the authorities to monitor and punish immoral behavior.⁵⁸

Conclusion

From the above discussion, it can be concluded that *sulh* plays a very important role in resolving any dispute in Islamic law, be it civil or criminal. In the context of Islamic criminal law, the aim of *sulh* is to remove the prescribed punishment or mitigate it. The right of the victim in getting his claim is also secured. *Sulh* can be done between the offender and the aggrieved party if the crime infringes the right of individual as it also can be done between the offender and the authority particularly, if the crime infringes the right of Allah. *Sulh* cannot be applied in all criminal cases but the jurists agree that it can be granted in *ta'zir* cases. Though *sulh* is granted and the victim forgives the offender, the judge can still impose punishment on the offender. Thus, *sulh* should not be interpreted as encouraging crime as the offender does not know the extent of which the victim would agree and the fact the judge still use his discretion to punish the offender.

In view of jurisdiction given to the Civil Courts pertaining to criminal cases, particularly homicide, there is no win win situation exists between the accused and the victim or his family. This is due to the fact that criminal cases affect the nation's security and therefore the aggrieved party cannot interfere in determining their right. A similar situation applies to the Shari'ah Courts of Malaysia. There is no provision in the Syariah criminal offences enactments that grants *sulh* as a method to settle the criminal case even if there are some offences provided for in the enactments which affect the right of individual such as *qazaf* and even if the punishment provided for are of *ta'zir* type.

It is high time for the authority concerned to incorporate the element of *sulh* in the Syariah criminal offences enactments as well as in the Penal Code. Malaysia, being a country whose criminal laws punishable with *ta'zir*, could implement *sulh* for best interests of the aggrieved party and the accused. There is no harm in adopting and applying Islamic values in our existing rules and regulations. There is nothing wrong either to follow the Civil laws or Common laws as long as they are not inconsistent with Shari'ah.

If there is any rule mentioned in the Quran which is poorly administered and executed by the authority, this rule is automatically inconsistent with Shari'ah. This rule should therefore, be revised through *ijtihad* (i.e. legal reasoning) in the light of *Maqasid al-Shariah* and the prevailing interest of society so that justice is attained.

⁵⁷ "Sever Them:", *The Economist*, 14th February 2008.

⁵⁸ "What Malaysian Muslims think", *The Straits Times Singapore*, 21st August 2006.

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