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The Concept of Retributive and Restorative Justice in Islamic Criminal Law with Reference to the Malaysian Syariah Court

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ABSTRACT

Among the objectives of the punishments in Islamic criminal law as enunciated by the Muslim jurist are retributive, deterrence and reformation. Reformation is not only confined to reform the behaviour of the offender but also to reform the relationship between the offender and the victims as well as with the society. Due to the reason, restorative justice plays its role. In another perspective, the Islamic criminal punishment as set out in the Quran and Sunnah such as amputation of limbs, stoning to death and death penalty were criticized on the ground of their severity. However, in fact; the brighter side and wisdom of the punishments are less highlighted to the society such as forgiving, patience, reconciliation and opt for an alternative punishments for the purpose of amicable settlement between the victims and offenders rather than invoking physical punishment to the offenders. This paper seeks to highlight the concept and objectives of punishments in Islamic criminal law which specifically focuses on the retributive and restorative justice. Hence, it discusses the concept of restorative justice in Islamic criminal law within the purview of the Quran and Sunnah. As comparative reference, this paper examines the law and practice of punishment in Malaysian Shariah Court in order to see the extent of the application of retributive and restorative justice within Islamic criminal justice in Malaysia. This paper finds that the concept of restorative justice is not widely applied in the Malaysian Shariah Court in punishing the offender who is found guilty with Islamic criminal offence. It is concluded that the importance of the awareness on the importance and objectives of restorative justice need to be enhanced among the Islamic law practitioners and Islamic judiciary officers in Malaysian Syariah Court in to reform the offender.

Keywords: *Islamic criminal law, Restorative justice, Punishment in Islam, Hudūd, Qisās, Taʿzir*

INTRODUCTION

Crime and punishment under Islamic law are basically categorized as determined and discretionary (Al-'Awwa, 1982, p. 21) which basically founded based on the revealed sources, that are *Qurān and Sunnah* as well as other rational secondary sources such as *qiyās*, *istiḥsān*, *istiṣhāb,maṣlaḥah mursalah* as well as *sadd al-dharīʿah* (Nyazee, 2003, p. 15). As a branch of law in the Islamic law or *Sharīʿah*, Islamic criminal law and its justice system form part of the religion of Islam as it rooted from the concept of Oneness of Allah (*tawḥīd*) and the individual human being is accountable for his conduct.

Basically, in Islam; an individual Muslim is bound with religious or moral obligations as well as juridical obligations which both of the obligations form as an integral part of devotional matters (*ʿibādāt*) that governs the relationship of Muslim with Allah and civil transactions (*muʿāmalāt*) that governs the relationship between a Muslim and other individuals in the society (Kamali, 2008, p. 17).

More than that, the obligations of Muslim are categorized into right of Allah (*ḥaqq Allah*) and right of man (*ḥaqq al-ʿabd*) (Kamali, 2008, p. 17).

Uniquely, in Islam; all virtue and good conduct of an individual Muslim is considered as an *ʿibādāh* based on the concept of Allah-consciousness (*taqwā*) and this basic value itself forms the core of Islamic criminal justice system – a Muslim is bound to observe the right of Allah (*ḥaqq Allah*) and right of man (*ḥaqq al-ʿabd*) through the performance of his duty or

ʿibādāh, and thus accountable for any infringement or violation of the rights.

Islamic law or *Sharīʿah* in general, and Islamic criminal law in particular is a designed system that are meant to achieve its objectives or *maqāṣīd al-Sharīʿah,* that are to preserve and protect the religion (*al-dīn*), life (*al-nafs*), reason (*al-ʿaql*), lineage or progeny (*al-nasl*) and property (*al-māl*) (Nyazee, 2003, p. 202). Within the Islamic criminal justice system, it serves to promote justice to the offender, victim and the victim's family as well as to the society at large. The objective of the implementation of Islamic criminal law is to protect the rights of an individual regardless of his or her religion as well to potect the rights and interest of the public at large. Therefore, for an example, the *ḥadd* punishment for apostasy (*riddah*) and drinking alcohol (*shurb al-khamr*) are respectively significant not only to preserve and protect the religion (*al-dīn*) and reason (*al-ʿaql*) of an individual Muslim but also to protect the interest of the people in the respective society.

As the principle of justice forms as a building block in Islamic criminal justice system, this writing discusses and analyses the concept of retributive and restorative justice in Islamic criminal justice system which it is dedicated in Part 2 of this writing. It follows with the discussion on the concept and fundamental principles of restorative justice, as well its practice today in Part 3. Part 4 of this paper is intended to discuss the extent of the application of restorative justice in the Malaysian Syariah Court practice with reference to some selected and decided cases within the year of 2010-2013. The analysis of this discussion and observation are provided in Part 5 before this paper accordingly summarized the whole discussion in Part 6.

The Concept And Objectives Of Punishment In Islamic Criminal Justice

Generally, the nature of punishment involves imposition of unpleasant or harmful consequences by a person who have the authority to do so upon a person who have sufficient mental control (*mukallaf*) but have breached certain established norms (Greenawalt, 2002, p. 1282-1293). In criminal justice system, punishment is an unavoidable consequence by a person who is found guilty in accordance to the enacted law in each legal system. Therefore, the theory and principles of punishment are generally interrelated with the substantive and procedural criminal law under which a person are charged or tried.

Hallevy (2013, p. 15-54) outlined the general purposes of punishment to include retribution, deterrent, rehabilitation and incapacitation. However, Bittner and Platt (1966) discussed that the meaning and objective of punishment are varied as it was looked from the perspective of moralist, philosophers, jurist and social scientist which consequently lead to the debate and polemic on the concept, objective and practice of punishment The idealism school of thought in view that punishment is needed based on the principle of retribution, whereas the utilitarianism school of thought in opinion that punishment plays its deterrent function (Bittner and Platt, 1966) which both of the thoughts are criticized. In spite of the concepts and theories, Conti (1918) regarded punishment has its essential purpose to restore the public peace or tranquility that tarnished by the occurrence of the committed crime.

The theoretical framework of retribution purpose of punishment is based on the *lextalionis* i.e. the law of retaliation. In essence, it based on the "principle of equal and direct retribution" (Meyer, 2002, p. 1393-1398). Under the retribution concept of punishment, the offender is deserved to be punished if he committed a blameworthy offence since a person must be responsible for their guilty conducts if he is found guilty under the criminal law by satisfying the requirements of *acts reus* (a guilty act) and *mens rea* (a guilty state of mind) (Meyer, 2002, p. 1393-1398). Therefore, the proponent of retributive theory of punishment viewed that the guilty offender must suffer the sanctions as to achieve justice (Moore, 2002, p. 1338-11343). The deterrent functions of punishment, as viewed by utilitarian; justified punishment as the mechanism of crime prevention in the society. Hence, the deterrence or incapacitation of the convicted criminals would restraint the individuals in the society from committing the similar act of crime (Moore, 2002, p. 1338-11343). Another distinct theory which also forms part of utilitarian, viewed that crime is a societal disease and need to be cured (Moore, 2002, p. 1338-11343). Hence, the proponent of the view regards placing the convicted person under focal point of punishment is irrational since it was not his actual fault. Therefore, a gentle mechanism such as rehabilitation, prevention, reformation and educational program should be implied to

substitute the deterrence and incapacitation in order to cure the society and prevent the occurrence of crime (Moore, 2002, p. 1338-11343). According to Munir, (1980, p. 121-122) the concept and purpose of punishment in Islam are preventive, reformative, retributive and deterrent in nature. The nature of the punishment can be implied through the practice of punishment in Islamic penology, as for example; stoning the convicted person to death and amputation of hand in certain *ḥudūd* cases reflects the deterrence nature of punishment in Islam. On the other hand, retaliation practiced in *qiṣāṣ* punishment implies the nature of retributive punishment. Whilst other aspects of punishment; i.e. preventive and reformative; can be seen through the implementation of *ta'zīr* punishment (Munir, 1980, p. 121-122)

Basically, the punishment under Islamic law are different based on the classification of the criminal offences, that are; *ḥudūd*, *qiṣāṣ* and *taʿzīr*. The *ḥudūd* crime are regarded as the most serious crime with strict requirements prior to the execution of the punishments, and abominable conduct which lead to a grievous effect or result to the victim in particular, as well as to the society in general. The term '*ḥudūd*' (plural: *ḥadd*) in Arabic means 'the limitation' which it implies the limit that are authoritatively fixed by Allah as prescribed in the Qurʿān (Shabbir, 2002, p. 48-50). Likewise, it also means "boundary, limit, barrier and obstacle" (Shabbir, 2002). The Jurists are in disagreement on the numbers of *ḥudūd* crimes. The Shafie School, for example; classified *ḥudud* crime into six types which include theft, armed robbery, drinking alcohol, *zinā*, *apostasy* and *qadhf*. On the other hand, the Maliki school in opinion that *ḥudūd* crime are seven which al-*baghy* is the most grievous crime and followed with *apostasy*, *zina*, *qadhf*, *sariqah*, *hirabah* and drinking alcohol. The Hanafi school recognized six types of offence as *ḥudūd* crime, that are *zinā*, *shrub al-khamr* (drinking the fermented brew of grapes), *al-sukr* (drunkenness caused by consumption of any intoxicant), *qadhf*, *sariqah* and *qatʿ al-tariq* (highway robbery). There is no express numeration of *ḥudūd* crime in any books of Hanbali school. However, the writings of the school on *ḥudūd* exposed their unanimity *on zinā, qadhf, shrub, sariqah, qatʿ al-tariq* and *riddah* as ḥudūd (Ahmad, 1995, p. 36-40.). However, for the discussion and scope of this writing, the *ḥudūd* crime is classified into five as agreed and accepted by all Jurists, that are: 1) Fornication and adultery (*zinā*), 2) Wrongful accusation of *zinā (Qadhf*), 3) Drinking alcohol (*shurb al-khamr*), 4) Theft (*sariqah*); and 5) Highway robbery (*qatʿ al-ṭarīq*) (Hallaq, 2009, p. 32).

The form of punishment prescribed for each *ḥudūd* crime is different as the requirement, condition and method of proof for each crime is varies from one and another. As punishment for *zinā*, for example; forms into two different categories; that are one hundred lashes of flogging to the unmarried convicted adulterer or adulteress (*ghayr muhsan*) and stoning to death for married convicted adulterer or adulteress (*muhsan*) (Shabbir, 2002, p. 99-102) since the word '*zinā*' in Arabic refers to include both act of illegal sexual relations between two married persons and fornication or sexual relations between unmarried persons (El-Awa, 2000, p. 13-14).

Ibn Al-Qayyim, as cited in El-Awa (2000, p. 17-18) highlighted the reason behind the difference of the *ḥadd* punishment for *ghayr muhsan* (unmarried person) and *muhsan* (married person) is based on the fact that a convicted *muhsan* has the opportunity to find pleasure of legal sexual relations with his or her spouse as the similar opportunity is unavailable to convicted *ghayr muhsan* (El-Awa, 2000, p. 18-20) and therefore the punishment for convicted *ghayr muhsan* is lighter than that of convicted *muhsan* or married persons.

In parallel to its severe punishment, the requirement for standard of proof in *zinā* case is also higher as compared to other form of *ḥudūd* offences and it must either be proved by the testimony of four male Muslim and trustworthy eye-witness or by the confession of the accused persons (Shabbir, 2002, p. 88) in which the former is almost impossible to be obtained.

In another example, the amputation of hand is provided as the punishment for theft (*sariqah*) as provided by Allah in the Qurʿān (Sūrah āl-Māʿidah: 42) and all Jurists are in agreement that the right hand of the thief must be amputated from the wrist for the first time offence regardless of the gender of the convicted person and differs on the punishment on the subsequent convicted offence by the similar person.

The majority of Jurist in Sunni schools, except Hanafi school; are in opinion that the thief's left foot must be amputated for the subsequent committed offence by the similar person, whilst the Hanafi school is in view that the punishment

of *taʿzīr* should be applied (Shabbir, 2002, p. 146).

Because of the grievous nature of the amputation of hand in *ḥadd* punishment for theft, the conditions and essential requirements for an act of dishonestly or wrongfully took away another's movable property from its owner possession must be accordingly and thoroughly satisfied in classifying the wrongful act as a theft offence within the context of *ḥudūd* crime. Shabbir (2002, p. 129-130) outlined the conditions, among others; the thief must be a sound adult person (*mukallaf*) with the intention to steal the property. In addition, the property must be of a prescribed value (*nisāb*) and its nature must be movable and illegally or secretly taken from the possession of its owner. Equally important, the property must also be under custody and the act was voluntarily committed by the thief without any force or duress (Shabbir, 2002, p. 131-136). On the similar ground, the conviction of theft under *ḥudūd* crime must be based on either the testimony of witnesses or by the confession of the accused as accordingly required under the Islamic law of evidence.

Apart from *ḥudūd*, *qiṣāṣ* (retaliation) is a form of punishment under Islamic criminal law for intentional murder, voluntary killing, involuntary killing, intentional physical injury and unintentional physical injury. For a convenient reference, Bassiouni (1982, p. 203-209) chategorised the offences under two main category, that are 1) Homicide, and; 2) Battery. As the term '*qiṣāṣ*' means "equality" or "equivalence", it significantly shows the mechanism of *qiṣāṣ* punishment that a person who committed and found guilty with the offence must be punished in the same way or means that he used in killing, violating or harming the victim. The prescribed punishment for *qiṣāṣ* are either the *qiṣāṣ*i.e. the equivalent inflction of physical harm against the offender, or the payment of *diyah* that is designed to compensate the victim (Al-Qurʿān, Al-Māʿidah:45, Al-Nisaʿ: 94 and 135, Al-Baqarah:186).

In specific, the *qisās* or retaliation of punishment only applicable and inflicted in the cases of wilful murder and intentionally causing injury, whereas the payment of *diyah* is designed to unintentional killing or unintentional causing bodily harm to others (Shabbir, 2002, p. 278). However, as the Lawgiver; Allah laid *diyah* and forgiveness to take priority over the infliction of the *qiṣāṣ* punishment (Bassiouni, 1982, p. 203-209). This preference illustrates the beauty of the punishment which works on the material compensation and spriritual installation as the mechanism. In contrary to the retributive and retaliative nature of the hudūd and *qiṣāṣ* punishment, Ibrahim (2000, p. 79) viewed that they are aim to prevent the occurrence of crime in the society, hence; they are not conclusively punitive since the interest of the society is the main concern in the eye of Islamic law as compared to an individual interest.

Another types of criminal offence in Islamic law is *taʿzir* which attracts various form of punishment based on the discreation of the Judge since the infliction and mechanism of *taʿzir* punishment is not specifically provided in the Qurʿān and *Sunnah* (Shabbir, 2002, p. 314). The *taʿzir* punishment is discreationary, reformative and deterrent in nature (Siddiqi, 1985, p. 217). According to Shabbir (2002, p. 315), *taʿzir* punishment is based on the mixed theories of deterrent and reformative since the term *"taʿzir"* is originated from the verb "*azar"* in Arabic; which means "to prevent, to respect and to reform". Hence, the dual intention of the punishment is meant to prevent the offender from repeating the similar crime as well as to reform him.

In contrary to the nature and objective of the punishment in the Islamic criminal justice system, they were commonly criticized and alleged by the Westerners as uncivilized, barbaric and illogic. However, the value and wisdom behind the punishment is Islamic criminal justice in Islam is unable to be appreciated without deep understanding on the concept and principles of *maqāṣīd al-Sharīʿah* as shortly discussed in Part I of this writing. The logicalness of the punishment in Islam can be based on the understanding of why a certain punishment is provided in Islamic criminal law and how an offender is tried or proved to be guilty for the offence based on the principles of evidence in Islam in the light of *maqāṣīd al-Sharīʿah.* Therefore, in spite of prejudice; the "barbaric" nature of amputation of hand for theft in *ḥadd* punishment, for example, must be analyzed and viewed based on the true knowledge on Islamic principles as a religion and system of life.

In addition, Islamic criminal law and punishment work on the philosophy of 'prevention is better than cure' and punishment form as a last resort in responding to a criminal act of an offender. Because of the reason, the

Islamic teaching prioritizes the principle of good morality or *akhlāq* in governing the relationship between a Muslim with other human beings since it is a nucleus to a social and economic system. In reality, a criminal act or offensive conduct can be restrained or controlled when the social and economic needs of a person in a state are fulfilled. For example, Islam dictates certain rules concerning the relationship between the opposite genders, segregates both man and woman in certain activities, prohibits *khalwat* as well as highly promotes lawful marriage with the aim to prevent the commission of offence relating to sexual and decency of a person.

THE CONCEPT AND SIGNIFICANCE OF RESTORATIVE JUSTICE IN ISLAM

In spite of the discussion on the concept and nature of punishment in the Part II of this writing, the concept of restorative justice is regarded as the most prevail and effective mechanism in eliminating and preventing crime whilst at the same time intended to restore the emotional and material loss of the victims and their family (Braithwaite, 2000, p. 323-344; Cragg, 1992, p. 88; Golash, 2005, p. 19) In contrary to the retributive justice which more focused on the criminal act of the offender, restorative justice process actively involved the offender, victims and society in the criminal process as both victims and society are affected with the crimes committed by the offender (Heath-Thornton, 2002, p. 1388-1393). In other words, restorative justice indirectly lays on the concept of restitution where the offender not just accountable for his act or offence, but also responsible to remedy the injury or restore the condition as before the crime is committed.

For that reason, restorative justice may play its role at any stages of the criminal process either during pre-trial process, during court prosecution as well as during sentencing process (Daly, 1999). In addition, it can be applied by all relevant agencies involved in the criminal justice process (Daly, 2008, p. 15). On this point, Umbreit (2002, p. 1333-1338) listed the examples or mechanism which restorative justice may be applied through the policies and practices of a state or community, that are: "victim support and advocacy, restitution, community service, victim impact panels, victim-offender mediation, circle sentencing, family group conferencing, community boards that meet with offenders to determine appropriate sanctions, victim empathy classes for offenders, and community policing." As restorative justice is regarded as "a more victim-centered criminal justice system", therefore, the mechanism of restorative justice is flexible and may include compensation, conciliation and pardon since the victim is actively and directly involved in the criminal process (Braithwaite, 2000, p. 323).

In analyzing the concept and models of restorative justice mechanism, it is interesting to highlight that the similar concept and mechanism has been practiced within the Islamic criminal justice system. It can be viewed from the context of *qiṣāṣ* punishment where the priority is given to victim's rights and options even though it also provides corporal punishment as discussed in Part 2 of this writing. In *qiṣāṣ* offence, the victim has a significant role during the prosecution and sentencing process where he may determine the method or option of punishment imposition to the offender. The victim or the victim's family (in case of homicide) may insist upon the imposition of *qiṣāṣ* or retaliation punishment on the offender if he is conclusively proven to be accountable to the offence. Alternatively, the victim may demand the payment of *diyah* as the compensation or waive his rights by forgiving the offender and leave him unpunished (Shabbir, 2002, p. 274-278). In a modern perspective, the practice and role of the victims in *qiṣāṣ* punishment reflect the idea and practice of restorative justice in the victim-offender mediation, circle sentencing and family group conferencing as commonly practiced in restorative justice today since family members or heirs of the victims in *qiṣāṣ* offence also play their role during the process (Hascall, 2012, p. 43-45; Siddiqi, 1985, p. 58).

As Islamic law is directly founded based on divine sources and designed to govern both the relationship between human beings with his Creator (Allah) and human beings with other individual people or society; Islam strongly encourages and recommends Muslims to repent.[1]

In this respect, it can be directly linked to the rehabilitation process as a mechanism to reform the moral character of the offender, to reform his integration and to restore the tranquility of the society as recognized in the modern concept of restorative justice (Zehr and Gohar, 2003, p. 12).

[1]Qurān, *al-Nūr*:5, *Al-Māʿdah*:34 and 39, *Al-Nisāʿ*:16-17

As restorative justice views the harm resulted from the committed offence should be a teachable lesson to the offender, therefore; he must be encouraged to reform himself in order to be part of the society. For that purpose, the community and religious institution plays a significant role in developing a moral standard in the society (Claassen, n.d.). Hence, the rehabilitation process in the concept of repentance as encouraged by Islam is recognized as a form of the offender reintegration.

RESTORATIVE JUSTICE IN MALAYSIAN SYARIAH COURT PRACTICE: AN OBSERVATION ON THE SELECTED CASES

The constitution and administration of the Syariah Court in Malaysia is governed by the Federal Constitution which specifically listed under State List of the 9th Schedule of the Federal Constitution. It have jurisdiction over Muslim concerning both civil and criminal matters. Each States in Malaysia enacted its independent Syariah Enactment as the jurisdiction and administration of Syariah Court is governed by each individual States, except for the Federal Territories which legislated by the Parliament.

By taking the Syariah Criminal Offences (Federal Territories) Act 1997 as an example, the Syariah criminal offences in Malaysia are basically categorized under the offences relating to ʿ*aqidah* (including wrongful worship and propagation of other religious doctrine other than the religious of Islam), offences relating to the sanctity of the religion of Islam and its institution (among the examples are insulting the religion of Islam, failure to perform Friday prayer, disrespect for *Ramadhan* etc.), offences relating to decency (such as incest, sexual intercourse out of wedlock, *liwat*, *khalwat* etc) as well as other offence such as destroying or defiling mosque,*qazaf* and abuses of halal sign). However, by virtue of the Syariah Courts (Criminal Jurisdiction) Act 1965, the sentencing power of the Syariah Court is limited to only 3 years imprisonment, a RM5000 fine and 6 strokes of whipping.[2] Therefore, it is important to note that the offence relating to homicide and causing bodily injury or harm is govern under the Penal Code of Malaysia and falls under the jurisdiction of Malaysian Civil Court.

As far as the discussion on restorative justice is concerned, this Part refers and analyzes certain selected cases decided by the Syariah Court in Malaysia in order to understand the extend of its application in Syariah Court practice as decided within the year of 2010 – 2013. In the case of *Pendakwa Syarie lwn. Kartika Seri Dewi Binti Sukarno* (2010) where the accused person was charged under Section 136 of Administration of the Religion of Islam and the Malay Custom of Pahang (Amendment) Enactment 1987 with consuming intoxicating drink and pleaded guilty. The Syariah High Court of Pahang decided that she was liable for RM5000 fine and six strokes of whipping. Since they were the maximum punishments for fine and stroke, the Judge highlighted the purpose of the punishment is to correct and to reform the accused as well as to refrain the society from committing the similar offence as ordained by Allah.

The case of *Muhammad Faris Bin Ismail & Shahidah binti Abdul Wahab lwn.Ketua Pendakwa Syarie Negeri Melaka* (2011) is one of the examples of decided case on offences relating to decency. The Appellant 1 and Appellant 2 were charged for *khalwat* offence under Section 53(1) and (2) of Syariah Criminal Offences Enactment 1991. Both of the Appellant 1 and Appellant 2 were respectively fined with RM3000 and RM2000, and 3 days imprisonment. The Syariah Court of Appeal, however; set aside the order for imprisonment and only retained the amount of the fine as the punishment.[3] However, it is interesting to refer

[2] The provisions on the sentences are commonly known among the authors and practitioners in Islamic law as "3-5-6 Principles".

[3] Other example of similar nature of punishment can be referred to the case *of Muhammad Ridhwan B. Tokiri&SeorangLagi lawn. Ketua Pendakwa Syarie*, JH 34 BHG.2 1433 H 213; where the Appellants were charged for khalwat under Section 27(a) and (b) of Syariah Criminal Offences (Federal Territories) Act 1997 where the Syariah Appeal Court retained the fine amount, RM3000 and set aside the punishment of 7 days imprisonment imposed by the Syariah High Court. Similarly, the Syariah Subordinate Court imposed a fine amounted to RM2000 and 1 month imprisonment to the offender in the case of *Samsudin b. Md. Husin lwn Ketua Pendakwa Syarie*JH 34 BHG.2 229 for the offence of *khalwat* where the similar punishment was retained by the Syariah High Court. Similarly, the punishment for the offence of performing sexual intercourse out of wedlock can be referred to the case of *Ketua Pendakwa Syarie WP lwn Junaizul hisham b. Juhari &SeorangLagi* [2013] JH 35 BHG.2 221-234 and the case of *Jumadi b. Patomdang lwn Ketua Pendakwa SyarieWP*[2013] JH 35 BHG.2 234-249. The Syariah Appeal Court reduced the fine amounted RM5000

to the case of *Pendakwa Syarie Wilayah Persekutuan lwn. SitiNurazniza binti Kamaruddin* (2013) in comparing the punishment on the similar nature of offence with the former case.

In the latter case, the accused was charged under Section 23(2) of Syariah Criminal Offences (Federal Territories) Act 1997 for committing sexual intercourse out of wedlock within the period of January 2008 – December 2008 when her age was within the range of 15-16 years old. She pleaded guilty and was fined with RM2,7000. However, the Court ordered the accused to live with a good conduct and behaviour for 6 months under the observation of her close family, and to present before the Sulh Officer for counseling sessions for each 3 months. Even though the order for the counseling session was made based on the capacity of the accused as a young offender by virtue of Section 128 of Syariah Criminal Procedure Enactment (Federal Territories) 1997, it is important to highlight that such 'punishment' is parallel with the concept and practice of restorative justice.

In addition, the case of *Sumathi A/P Maniam lwn Majlis Agama Islam Wilayah Persekutuan* (2013) regarding the application of denunciation from Islam can be viewed as an example of the application of restorative justice, where the Syariah High Court rejected the application and decided that the Plaintiff is a Muslim since the date she converted from Hindu. The Court ordered the Applicant to repent and learn the religion of Islam so as to instill its teaching into practice. Besides that, the Court also ordered the Plaintiff to attend counseling sessions for 6 months period.

FINDING AND ANALYSIS

The restorative justice is practiced within the Islamic criminal justice system, especially in the implementation of *qisās* and *taʿzir* punishment. As far as the application of restorative justice in Syariah Court practice in Malaysia, it can be observed that certain policies are consistent with the fundamental elements of restorative justice (as discussed in Part 3 of this writing). For example, the Section 54, Section 55 and Section 56 of the Syariah Criminal Offences (Federal Territories) Act 1997 as well as Section 53 and Section 54 of the Syariah Criminal Offences (Selangor) Enactment 1995 grant the power to the Syariah Court in deciding or determining the rehabilitation center for the purpose of the Acts, particularly to provide a relevant and practical place for the offender to undergo the rehabilitation or counseling process. In specific, the provisions in both Act and Enactment are designed for the offence relating to *ʿaqidah* and decency where the inner self of the convicted person is naturally need to be reform spiritually and it is interestingly to note that this objective is basically parallel with the foundation nature of the religion of Islam as the religion of *fitrah*.

With due regards to the facts of each cases, it is observed that the "3-5-6 principles" are widely applied by the Malaysian Syariah Court in deciding the punishment for each offence. Therefore, the gravity of the punishment in the cases are relatively similar where the offender are mostly be fined and rarely be whipped or imprisoned. To serve the deterrent purpose of punishment and to restore the peace in the society, it is suggested for the Court to 'step a distance' from the principle of judicial precedent and exercise its discretionary power to apply the principles of restorative justice since the nature of the decided cases are the offence related to the sanctity of the religion of Islam and the offence relating to decency in which the society will be directly or indirectly affected.

CONCLUSION

As Islam is a religion that promotes justice in every angle of human life, the concept and practice of restorative justice is not a new concept in Islamic criminal system. The concept of restorative justice is practiced within the Islamic criminal justice system through the implementation of *ḥudūd*, *qisā*s and *taʿzir* punishment. As far as the practice of restorative justice in Syariah Court practice in Malaysia is concerned and observed, this writing finds that the "3-5-6 principles" are widely applied by the Court in deciding the punishment for each offence.

Therefore, to restore the integrity of the offender and the peace of the society, it is important to widely apply and practice the principle of restorative justice in deciding the punishment in Syariah criminal offences in Malaysia. Hence, it is advisable for the Malaysian Syariah Court to 'unknot' the decision of punishment from the principle of judicial precedent which resulted to a relatively similar nature of punishment. It is

imposed by the Syariah Subordinate Court to RM1500 in the former case and the Syariah High Court retained the fine amounted to RM3000 as decided by the Syariah Subordinate Court and set aside the 4 strokes of whipping punishment.

also important for the Court to use his discretion and do not limit the punishment within the "3-5-6 principles" as provided in the existing law in order to ultimately apply the principles of restorative justice. Besides that, the importance of the principle and awareness of the purpose of restorative justice is need to be enhanced among the practitioners and judiciary officers in Malaysian Syariah Court with the hope that the offender is not just being punished, but also be reformed and reintegrated spiritually.

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