



Research Paper

A Critical Analysis of Article 351 of the Islamic Penal Code: Examining the Transfer of the Right of Retaliation to Spouses - A Jurisprudential Comparative Study of Islamic Denominations

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Abstract

The transfer of the right of retaliation (qisās) to spouses and the quality of their share in this right is a significant topic in Islamic jurisprudence and law, drawing considerable attention from jurists, legal scholars, and experts in judicial courts and criminal jurisprudence. Given the paramount importance of human life in Islamic law, this research holds substantial significance. The choice between transferring or not transferring the right of retaliation to spouses can lead to major changes in the forgiveness or punishment of offenders and, in some instances, expedite the processing of criminal cases. Article 351 of the Islamic Penal Code does not currently recognize such a right for spouses. In Imamiyyah jurisprudence, there is a claimed consensus on excluding spouses from inheriting the right of retaliation. However, contrary to Imamiyyah jurists, many Sunni scholars argue that spouses, like other heirs, should inherit the right of retaliation equally. This study employs a descriptive-analytical and comparative approach. It concludes that the primary basis for the Imamiyyah position is Sheikh Tūsī's consensus, which is deemed unreliable due to the inherent weakness of transmitted consensus. Additionally, arguments such as the healing of the guardian's heart (tashaffī walī al-dam) are found to be insufficiently substantiated. Considering the rule of "retaliation is bound to blood money" (al-qisās malzūm al-dīyah), the absence of explicit narrations excluding spouses, and linguistic evidence, the research adheres to general principles and concludes that the exclusion of spouses from the right of retaliation is unfounded. The study aims to propose an amendment to Article 351 of the Islamic Penal Code.

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Extended Abstract

1- Introduction

One of the significant and pressing issues today is the disinheritance of spouses from the right of retribution (Qisas) in Imami jurisprudence and the Civil Code. This claim must be substantiated by strong and well-founded evidence capable of overriding the general principle that heirs are entitled to the right of Qisas and justifying the exclusion of spouses.

To address this issue, it is first necessary to determine the nature of Qisas in order to clarify how spouses are excluded from the holders of this right—whether this exclusion constitutes a specific exception (takhsis) or a categorical exemption (takhasos). Subsequently, the precise definition, scope, and limits of the term *wali al-dam* (guardian of blood) must be examined to establish whether spouses, by default, fall under this category.

It is evident that, given the paramount importance of blood-related matters in Islamic law, research of this nature—and the present study in particular—holds significant scholarly value. Adopting either stance on the transfer or non-transfer of the right of Qisas to the spouse(s) can lead to major implications for the pardon or punishment of offenders and, in many cases, expedite the adjudication of criminal cases.

2- Method

The present article has been written using a descriptive-analytical and comparative research methodology. Initially, the issue under study has been precisely and scientifically defined, and its scope and boundaries have been delineated to facilitate a more accurate and purposeful analysis. Subsequently, the existing evidence in Islamic sources, along with the opinions and arguments of Imami and

Sunni jurists, has been thoroughly examined and analyzed separately.

This research strives to critically and impartially assess various perspectives from the viewpoints of jurisprudence, legal principles, and fundamental legal doctrines. The strengths and weaknesses of each opinion have been independently evaluated. The application of a comparative approach in this section has provided the researcher with the opportunity to highlight the similarities and differences between the legal and jurisprudential reasoning of these two schools of thought through a precise and comprehensive comparison, ultimately leading to well-substantiated and scholarly conclusions.

3- Result

Based on the analysis of the evidence concerning the exclusion of spouses from the right of retribution (Qisas), it becomes evident that the primary basis for this exclusion is the consensus (Ijma') reported by Sheikh Tusi. However, the probative force of transmitted consensus is disputed among many jurists and principles scholars. Furthermore, the argument of Tashaffi (emotional solace), cited by some, lacks credibility, as, first, its rationale and foundation in either religious or rational convention are unproven, and second, the exclusivity of Tashaffi to blood relations cannot be substantiated.

Additionally, the nature of the right of Qisas inherently includes spouses. The apparent exceptions mentioned in the narrations pertain to Kalālah Umī (maternal kin) and remain silent regarding spouses. Therefore, no specific legal



restrictor (Mukhassis) was found to exclude spouses from the general principle of inheritance of Qisas. Given the absence of juristic consensus on the exclusion of spouses from this right, issuing a ruling without any supporting jurisprudential opinion appears challenging and contrary to precaution. Thus, the claim of excluding spouses from Qisas is set aside. Accordingly, considering Sheikh Tusi's ruling in one of his works on the exclusive exclusion of the wife from Qisas, along with linguistic evidence supporting the application of the term Wali (guardian of blood) to the husband—but not to the wife—the husband's entitlement to the right of Qisas remains valid.

4- Conclusion

The present study, adopting a descriptive, analytical, and comparative approach, examines the inheritance of the right of Qisas by spouses from the perspectives of Imami and Sunni jurisprudence. To establish a coherent analytical framework, the concept of Qisas and its position among heirs were first precisely defined. Subsequently, the primary arguments of Imami jurists regarding the exclusion of spouses—particularly the transmitted consensus (Ijma') reported by Sheikh Tusi—were scrutinized, and their validity was assessed from both jurisprudential and legal principles perspectives.

The findings of this study indicate that the transmitted consensus, which serves as the primary basis for excluding spouses from the right of Qisas, lacks sufficient legal robustness and does not qualify as an independent and binding legal argument. Additionally, reliance on the principle of Tashaffi (emotional solace for the guardian of blood) is questionable, as its foundation in religious and rational conventions is not clearly established, and the exclusivity of Tashaffi to blood relatives is not supported by any authoritative evidence.

Furthermore, jurists who advocate for the ratification-based nature of criminal rights have not explicitly denied the inheritance of Qisas by spouses.

Conversely, a detailed analysis of jurisprudential and legal arguments reveals that the nature of the right of Qisas inherently includes spouses, and there is no valid restrictive evidence (Mukhassis) to exclude them from the general principles of inheriting this right. From a comparative perspective, Sunni jurists, unlike the majority of Imami scholars, consider spouses entitled to Qisas in the same manner as other heirs and do not recognize any justification for their exclusion. Additionally, a review of relevant narrations demonstrates that explicit exceptions to the inheritance of Qisas primarily concern Kalālah Ummi (maternal kin), with no textual basis for excluding spouses. This silence in the narrations may itself serve as an implicit indication that spouses fall under the general provisions of inheriting Qisas.

From a legal standpoint, denying the husband's right to Qisas without a firm religious or jurisprudential basis contradicts fundamental jurisprudential principles and the broader framework of criminal justice. Moreover, from a linguistic perspective, the term Wali (guardian of blood) applies to the husband, whereas the wife does not fall under this designation. This, along with supporting evidence, indicates that the husband retains the right of Qisas, whereas the wife is excluded.

Given these findings, Article 351 of the Islamic Penal Code requires revision to better align with jurisprudential foundations and legal principles, thereby preventing the potential deprivation of heirs' rights. Overall, a comprehensive analysis of this issue suggests that excluding spouses from the right of Qisas without strong jurisprudential and legal justification is inconsistent with established legal principles and criminal



justice. A reconsideration of this ruling could facilitate greater harmony between religious texts and criminal law regulations.

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6- Authors' contribution

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7- Conflict of Interest

Authors declared no conflict of interest

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