

Study of restorative justice and distributive justice from the perspective of Islamic law and jurisprudence

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Abstract: Theories of Explicit or implicit justice, rely on the philosophical presuppositions, epistemological and specific ethical and typically do not conceal this fact that suggest a model for social life that have recognized correct and right and the legitimacy and trueness is based on certain philosophical attitudes to human and community and ethics. Criminology theory of restorative criminal justice is of the most challenging focuses of interdisciplinary studies among Islamic teachings of criminal Jurisprudence with science modernism in the field of rights knowledge. The centrality of Islamic discourse of restorative justice based on principles and various installation including encouraging ignoring crime, forgiveness in suspended right of Allah and right of humans, modification of interpersonal, arbitration, intercession, the compensatory nature of the wergild, rule of repentance and indicates the ability of Islamic criminal policy in the implementation of restorative justice is devoid of defects which western criminal policy several decades after birth of criminology theory is facing with that defects. But distributive justice is economic and computational approach to criminal law and have humanist root and emphasizes on retribution, debilitation, remove of guilty from society and the associating goals of penalty to the financial cost and court and prison. This article after description of distributive justice and restorative justice, describes the origin, aspects and processes and effects of following of each country's penal system from each of these two huge paradigms and in the end, explains function of Islamic penalties in the suspended and nemesis and even some of penalties based on orbit of the restorative justice, and distributive justice not in economic meaning of the word, but in the sense of retaliation and retribution commensurate with the crime is the characteristic of some other species of penalty in teachings of Islam criminal jurisprudence that of course with a particular reading has been entered in Iran's Islamic criminal laws.

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1. Introduction

The field of criminology 'restorative justice' and "Distributive justice" sometimes is against "restorative justice", is legal and jurisprudential and criminology contrast and contrast of "distributive justice" with "reviser justice" is a kind of economic contrast. For understanding the contrast between distributive justice with restorative justice - as the two readings of the discourse of justice in jurisprudential and legal thinking - it is first necessary to review the field and origin of the appearance of the criminology theory of restorative justice. The origins of today and modern of restorative justice theory have root in movement of reducing recourse to imprisonment penalty, a movement that appears in crisis "penal inflation" in the criminal system of countries.

During the years, there has been interesting discussion about the purpose of prison. The question is this, whether the prison should only be used to "punishing" of guilty until other people who are in

prison after release, is not committed a crime, or purpose is "modification" of guilty, or in other words, the objective is people who are sent to prison when they are in prison be reclaimed and understand that committing a crime has been wrong act and also skills be taught to them until after freedom, they choose a life with respect for the law? Some penologist believes that whatever penalties are being more and also probability of discovery and control of deviational behavior are being higher, reduce likelihood of deviational work. They believe that economic and financial penalties are more effective than prison, because not only, imprisonment is not so suitable, but in many cases have the reverse effect. Sutherland - the American famous criminologist - says one of the great weaknesses in the judicial methods nowadays is continuous relying on the threat by penalty for attracting attention of people in order to respecting to law. While never it has not became possible with threat and fear, anyone with desire and devotional respects what is imposed him to force.

Durkheim - French sociologist - also believes that penalty has not useful role and only in a few cases it is possible be effective directly in penalty of culprit or intimidation of others. In an overall vision, we can say that prison have the negative objective and subjective effects on the prisoners. Negative objective effects are including familial fields, employment, and unemployment, teaching and learning techniques of committing crime and Negative subjective effects include image of prisoners from prison management, trend to justifying crime, his view than the legal system, his views about family law and etc. The explanation is that familial disruption appears in divorce, lack of head, separation from families, lack of replication for family, the lack of the necessary identification with family and lack of acceptance and rejection from family and... in families of prisoners. Addition to the above entering in prison leads to changes in the benefits and costs. Prisoners with losing their jobs causes to come down the level of themselves live and probability of obtaining a suitable job after release from prison reduce and, consequently cause losing legitimate tool of business. Teaching and learning techniques of committing crime and also learning desire to crime and increasing the quality and quantity of crime by the guilty is other negative effects of prison and it has converted a proverbial saying that "prison is a school of crime". In this way gradually among them create the social relations that like any other social relationship within itself have a specific set of rules and norms , during of it, in individual create a sense observance of superiority over others. This means that the person who has done dangerous and adventuresome works enjoys further courage and creates himself than ability and history of the deviations, a type of hierarchy and a type norm and scale of values.

2. Explanation of problem

From the seventies of the twentieth century AD, gradually disadvantages of rehabilitation model unfold in Western Criminology. The inability of governments in providing costs of modification and treatment of prisoners, failure of rehabilitation pattern in preventing the repetition of crime and pressure of public opinion and populist protests - populist - was based on the necessity of strengthening the punishment of offenders including factors of fading rehabilitation model and then the need for replacing other pattern in criminology order to following criminal law systems from achievements of that pattern was felt (Ward, 2010: 11). This movement with revival of idea of tends to punishment based on rereading Kant's theory leads to the formation of "Penalties entitlement" or the idea of "what is worthy

of offender" formed the basic axis of America criminal rights system. State of constant and severe penalties and reducing the authorizations of the judge in applying discount and suspension and conditional release to offender is the characteristics of the school criminology - "School of entitlement Criminal Justice" - in process zigzag evolution of transient and unstable schools Western criminology. Criminological theory of "restorative justice" is an idea based on the logic that the legal worthy system is a system of all those who have a share about a specific crime, come together until collectively about how to deal with the consequences of crime and problems arising from it for future decisions. Purposes and principles of restorative justice include: compensation, reaccept, participation and non-retribution approach. restorative criminal justice just the opposite of thought retribution, with the support of the victim on the one hand and replacing " shame re- compatibilizer" instead of " destructive Shame " in criminal on the other hand, and also involving rings of the local community in the process of criminal procedure, reduce from violence of criminal law and "community-oriented" to bring for criminal organizations. Because on the one hand, many experts sought to provide solutions and alternatives for traditional deficient penalties (specially prison punishment) have emerged and this alternatives in the enacted criminal law system of the countries as a series of installations of leniency, including conditional release, deferral of sentencing, suspension implementation punishment, procrastination and suspension of care, mediation, daily monetary fine and social public services have been crystallized and on the other hand, in the evolution of legal and legislative and executive criminal policy of the Islamic Republic of Iran always have seen attention of our authorities of criminal policy-making to restorative Justice and entering flaunts of restorative justice to Iran rights, , It is necessary to review the latest developments of legislative criminal policy in terms of implement teachings restorative justice to our country's criminal law. Islamic Penal Code of adopted in the 1392 is the most important criminal law that has been appearance flaunts of restorative justice in it. Hence comparative study of this law - and especially its leniency / reconstructive new mechanisms and installations such as deferment sentencing, penalty of community services, care suspension, mediation and conciliation, forgiveness will be the subject of analysis in this thesis.

The theory of "restorative justice", in comparison with other theories of criminal policy that inspired by the developments in criminology, the most efficient and capable theoretical model is in

accordance with the conditions, provide the criminal justice purposes more than other criminal policy strategies. Islamic jurisprudence is full of reconstructive teachings generally is preferred on the mere retribution and distributive teachings of. However, distributive justice basis of definitive penalties and relatively rigorous (penalty of murder, flogging, rigid and nemesis, retributions is aimed at and intimidation penalty Degrading and belittling. Of course purpose of generally and principally is rehabilitation and correction and upbringing and therefore can be the territory of restorative justice and nemesis are principally the territory of distributive justice. In legislative criminal policy of Iran, Islamic Penal Code of adopted in 1392, far more than the previous Islamic Penal Code enjoys restorative justice mechanisms and hence than disadvantages of classical retribution attitude to enacted criminal law - which is essentially based on the idea of distributive justice - is less affected. Despite the benefits of restorative measures prescribed in Islamic Penal Code , adopted in 1392, many of these measures, such as semi-free system, penalty of free social services, postponement of sentencing and with quite a lot of challenges and barriers is facing from different directions and have conflicts with the parts of Iran Current criminal policy; Something that causes chaos in our legal system in front of resorting to discourse distributive criminal justice in the field of penalties applicable on low-risk offenders committed mild crimes, is contrary to Islam leniency penal policy and the with religious reconstructive teachings of Islam and Rahmani face of Islam and ignore crime and covering defect and the reluctance of criminal jurisprudence to facilitating proof of crimes is incompatible.

3. Recognizing the concept of restorative justice

Restorative justice is based on the fundamental belief that crime is violence and encroachment to individuals - not the government - and the relationships between them, and attitude to the crime should be defined as "objection to damage to the victim and peace of community". These bases leading to acceptance of elements are as follows 1) Criminal Justice demands that victims and offenders and members of the local community be involved in the efforts to rectification of the affairs, not removed from the cycle of criminal procedure and judge own investigates and sentence. 2) Influencing offender by explaining the real effects of his crime (on victim, his family and society) 3) attempts to healing to victims of crime 4) Commitment to involving all sides related to the victim and in particular encouraging offender to accept responsibility for their actions and the adoption of acceptable policies to live in the

community. Two insight of the crime axis and the offender axis reform-oriented and classical criminal justice, criminal drag into the abyss of again crime, with the rejection of the victim of the judicial process, provided the field of secondary victimization, is propelling both to revenge on each other and community criminal justice devices. Restorative justice, meanwhile focusing on the role of the victim, crime in the form of damage to a human being, not the governance of the government and public discipline Society defined, and through and diversion of file from entering the criminal justice system, offers solutions restoration victim damage

4- Sources of revelation and validity of restorative justice in the criminal teachings of Islam.

Criminal policy is a subsection of Public policy. "Criminal policy" is all the measures that can be done by the state and society to counteract with crime and deviance. (Delmas Marty, 1381: 24). Islamic criminal policy, a "value criminal policy" or ideological is that relies on do's and don'ts that only product of the field research and criminal statistics, but also based on moral principles or religious orders or cultural values of society. (Inductive, 1385: 15)

4-1- Occasion of the penal reaction to criminal actions

Although the principle of proportionality Penal reaction to crime in many verses decreed; one objections leveled by the European criminologists to Western restorative justice is imposing dissimilar executive guarantees on the perpetrators of identical crimes in restorative processes. Von Hirsch and Ashworth - two founder of restorative justice in Europe - have been conceded that determining penalty according to the opinion of victim can not be generally proportional to the crime. (Ashworth & Von Hirsch, 1998: 36). Interestingly, the Quran is flexible implementation of the principle of proportionality of crime and punishment and is not suffering to objection inflexibility punishment that leveled to classical criminal justice. For example, observance of rule of retaliation in cases where the implementation of this penalty is facing the ethical barrier does not accept and provides special adaptive responses. Variety of combatant penalty in verse 33 of Surah Maeda, punishment of theft in verse 38 of Sura Maeda and the punishment of adultery in verse 3 of Surah Noor represents the wisdom of the Qur'an.

4.2- restorative justice in the criminal policies governing penalties

May be due to the mentality that there is rejection of society from penalties; assume Islamic criminal policy in this area so rough, strict and inflexible that any modifications not accept. The view that unfortunately, has went beyond from level

populace formed the dominant thought of many experts almost converted a popular belief, have various reasons. Some of these reasons, the nature of humiliating and eerie these punishments that their conception spontaneously is scary; , But what more than all the reasons for this regard was effective is lack of attention and consideration legislators and enforcers of criminal policy to all aspects of the penalties, in Legislative, advertising and implementation. Mind of our today's society such become conditional that with hearing charges of adultery to one person, it will come to the mind of the listener that certainly whip him or half of body dig in a hole and stone to and or arresting accuser to robbery cut off his hands and punish for acts.

4-3 restorative justice in the criminal policy governing retaliation

From the standpoint of jurisprudence, forgiveness of victim in crimes "infra-self" is penetrating and he can retaliate or forgiven and compromise on the amount of legal atonement or less and more of it. In deliberate manslaughter also heirs of the victim (and from perspective restorative justice subdominant or secondary victimization) are that have flow quarrel in hand and play their effective and important role in the process of investigation, to the point that Survive or no survival of criminal will depend on them decision. However, the Supremes as martyr of first and second believe that if the victim before death is forgiven the offender and retribution is canceled and the victim's parents do not have the right to demand retribution. And the legislator also has accepted this view Islamic Penal Code.

4-4- restorative justice in criminal policy governing the wergilds

Addition to cases about retribution, about conversion of retribution to the wergild was said (lack of possibility retribution or reconciliation both sides), there are other cases that just its penalty are wergild Hence, are fully operative.

Here it is necessary to mention a drawback that about lack of reconstructive absence of cases that originally determined wergild for them or by the impossibility of nemesis, them punishment convert to wergild. Some (Bahrehmand, 2004: 72) believe that in such cases can not talk about restorative justice because the traditional criminal justice system imposes these penalties on criminal and the payment of wergild is not "the result of" a" restorative process" until foot of restorative justice open to issue.

4-5- restorative justice in criminal policy governing the Suspended

Suspended that category of penalties are that not prescribed framework and criterion for them in religion. The only issues proposed in this field, a

case, it is that apart from cases falling under, are nemesis and wergild and another it is that if we consider their punishment whip should be vital. The totality principle of it also was not agreed and accepted by all experts and are fixed in own place that the narratives documented this rule is facing problems of implication also. With this interpretation, the basis of our judgment about the relationship between restorative justice and suspended would be this: the fate of this type of crimes and penalties at all stages is with Islamic governor and he is that can prescribe crimes and considers for them appropriate punishment (not necessarily whip) have the right of forgiveness from punishment and for cassation to crimes can considers the process and mechanism appropriate to requirements of the day.

5. Conclusion

Justice is in category of concepts that have a lifetime as old as life with rationalism of human, a concept that always has been as the desired ultimate ideal and desired and targeted and its search. However, so far has not been able to get the unit concept of it. . This lack of unity of concept has been result and product the birth of the thoughts and proliferation of ideas during modernism and postmodernism especially in various colors and has been an escape from this reality of thought to date and methinks will not be in the future. Due to the lack of unity of aforementioned concept about justice, naturally get concept of moral justice and criminal justice also if not impossible, is difficult. However, the a way that modern man in the valley of "relativity" and the "relativity ideational" gait, in spite of all the variety, can achieve with respect to diverse conceptions of justice, them amidst to a kind relative sense and with resorting it giving new flaunt to its idealism way. From same way, providing unique relative concept of criminal justice within the framework of flaunt of moral justice, would be a possible affair. Obviously, with increasing level of crime and consequently inflation of criminal population, the use of restorative mechanisms can help to reduce the prisoners.

On the other hand, as dealt within it in discussions of this article, Islamic jurisprudence has a great capacity and potential for the use of recommended mechanisms of restorative justice theory. Islamic holy lawgiver -contrary to the current dominant image- not has great desire to launch quarrel an conflicts between people on the path official hearing and the use of legal levers and this later, will be heavily participatory and society. Because both recommendation and order to peace and compromise modification interpersonal - in extent recommendation generally and in the extent

incumbency in some of the provisions- and also allow to his followers that their disagreement take unto another person that have conditions of judge, but not be appointed Imam and have not dependence on the government. There is opulent capacity for using mechanisms recommended by the theory of restorative justice in Islam criminal policy. Islamic holy legislator not have so willing to sending people to the formal judicial system for traverse cutting quarrel and end of hostility. In contrast, the contents of revelation on the modification interpersonal, modifications and corrections, the exception being intimidation and doping retribution, exacerbation of conditions proving offenses worthy severe punishment and generally leniency strategies and installations are stressed frequently. In criminal policy of the Holy Quran, the principle of exclusivity of reference penal responsiveness to crime and to the contrary, the generalizability responses of non-penal, civil reparative and in Participatory criminal policy has emphasized comprehensive. However, retribution as an intellectual feature of reactions and one of the goals related to philosophy of punishment is reduced. In fact, religious model of restoration and restorative justice before the judicial formal criminal justice is emphasized, although should not be neglected that the Islamic pattern of criminal policy denies criminal justice and official judicial. We conclude that the feature of Islamic law - with a focus on the logic governing criminal policy of the Qur'an -is not a mere criminal justice or general and unquestioned restorative justice, but in multifaceted strategic with combinatorial proposition axis restoration and the retribution axis show off.

The dominant thinking on our country's legal system about guarantee of implementation so does not show restorative. The rules governing the implementation of guarantee of penal implementation, also Well necessary capacity for the use of restorative mechanisms not used. For example, forgivable offenses that provide the best possible for use of this mechanism, include limited crimes and are suggested legislator in reckon of this kind of crimes revise and crimes in them actually private aspect of offense is dominant, exclaim forgivable. The use of governor forgiveness governing and repentance offenders so much are not corrected and in field of performance, much executive capability is not fined. As regards one of the important policies introduced by the justice system politics remove imprisonment and the use of alternatives of imprisonment poverty; using guarantee of restorative performance sanctions resulting from restorative processes can be very effective in the implementation of this policy. Attention to the victim's rights and compensation damage, still has not found their special place in our

criminal law and in this case it must be said that even in some cases also we have seen a kind of regression.

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