THE ORIGINS AND EVOLUTION OF LEX TALIONIS IN THE ABRAHAMIC FAITHS.

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As the legal advisor for a human rights group my work often involves the intersection between international responsibilities and domestic law and the conflict between them. My director a few months ago asked me to write a short paper about lex talionis, or the law of retribution. She wanted it as a response to scholars, for example, in Iran who argued that the harsh criminal punishments in their law are in fact mandated by the Sharia. She wanted to show that perhaps those punishments have more flexible origins than most people have thought about.

As I was doing research for it I thought it would be a short paper. However, it turned out there was not much work - especially in the English language - done on the subject before. Interestingly enough, much of the previous scholarship was in German, due to its great orientalist tradition.

Over the past few decades, the most sustained challenge to the universal conception of human rights has come from the Islamic world. Though regimes throughout the world, and across the political and religious spectrum, routinely violate human rights, most at least pay lip service to the ideals enshrined in the Universal Declaration of Human Rights, for example, and reaffirmed in subsequent international instruments.

However, in 1981, for example, the Iranian representative to the United Nations General Assembly said that the Universal Declaration of Human Rights was “a secular interpretation of the Judeo-Christian tradition.” In 1990, the Organization of the Islamic Conference, the largest and most important umbrella group of Muslim nations, adopted the Cairo Declaration of Human Rights in Islam. It affirmed the Sharia’s role as the sole source of human rights and it substantially limited both women’s rights and religious rights.

This challenge to universal human rights norms is not limited to intellectual or rhetorical arguments. It is part of broader trend of the Islamization of the law. This Islamization has been especially pronounced in the criminal sphere.

Over the past 30 years, Iran, Pakistan, Sudan, and others have treated the enactment of various Sharia criminal punishments as centerpieces of Islamization programs. Most visible has been the application of qisas, or lex talionis, to murder, battery and maiming. This has led to the use of the death penalty, amputations, and even surgical blindings.

Now it is important to note that it is not just the usual suspects, so to speak. Even Egypt, which has had a long secular tradition and has even endured a bloody conflict with the Muslim Brotherhood, has begun to adopt some aspects of

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sharia. Despite the efforts of its proponents to present the adoption of sharia as an organic evolution while casting secular laws as alien and imposed, the reality is more complicated.

The origins and codification of law in the Middle East and North Africa go back to the mid-19th century and was, for the most part, an indigenous process. It was led by the Ottoman Empire in Egypt and it was recognized as an important step in the modernization of the state.

The drive to enact sharia, especially in the criminal sphere, today has been driven mostly by political and ideological forces. Even more problematic for the legitimacy of the legal Islamization program are the numerous doctrinal difficulties it has yet to solve. Though the difficulties are numerous, tonight I am briefly going to touch upon one, which is that many elements of the sharia should be understood within the specific historical context of early Islam.

To illustrate this point, I am going to focus on lex talionis and I do so for two reasons: the first one being as I said before the key role that it still plays in Islamic criminal punishments; and second, because it allows for a comparative study with the other Abrahamic faiths. Despite the significance of lex talionis, both in the popular imagination as “eye for an eye, tooth for a tooth,” and as philosophical justification for the retributivist account of criminal law, it is somewhat odd that its historical basis has been rarely subjected to close scrutiny.

It would be illuminating to accurately outline the development within the social and temporal context of the distinct societies which have both adopted and adapted it. For example, was this a novel concept or did it build on existing norms and customs? Did it emerge in each faith independently, or was it the result of cultural, religious, commercial interactions?

Talionic punishments can be traced back all the way to the code of Hammurabi. One clause, which I think would give certain corporations pause today, states that “if a builder has built a house for a man and his work is not strong and the house he built collapses and kills the owner of the house, that builder shall be put to death. If the son of the owner is killed, they shall kill the builder’s son.” In the latter, note the vicarious aspect of the punishment. The builder himself is not put to death. Instead, his son is condemned to pay for the sins of the father.

The most well known examples of the talionic punishments are found in the Old Testament. Despite links of language, culture, and history, biblical Israeli society was fundamentally different from the cities of ancient Mesopotamia. These variations in the organization of society led to profound disparities in the way that murder was dealt with.

The decentralized kin-based society of the biblical society was reflected in the centrality of the blood feud. The blood feud was the critical mechanism for restricting violence in civil society without police or prosecutors. Therefore the victim’s family was primarily responsible in seeking justice for the slaying. Contrary to contemporary images of uncontrolled blood letting, for example the “Hatfields and McCoys”, a blood feud operated within well-defined
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boundaries. Its purpose was to redress wrongs and limit violence to acceptable levels. In early times there was no requirement that retaliation be limited to the actual perpetrator. All members of the slayer’s kin were held responsible. This accorded with the early Old Testament’s view of the inheritance of guilt.

Gradually, a developing sense of individualism ameliorated some of the collective aspects of the blood feud. First, only the actual culprit was targeted. Additionally, only a specific member of the individual’s family, the blood avenger, could take revenge.

The talionic punishments are found in the first five books of the Old Testament. They first appear in Chapter 21 of Exodus:

“If men are fighting and hit a pregnant woman and she gives birth prematurely but there is no serious injury, the offender must be fined whatever the woman’s husband demands and the court allows. But if there is serious injury you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, and bruise for bruise.”

*Lex talionis* is next found in the book of Leviticus:

“If anyone takes the life of a human being he must be put to death and anyone who takes the life of someone’s animal must make restitution, a life for life. And if anyone injures his neighbor, whatever is done must be done to him, fracture for fracture, eye for eye, tooth for tooth, as he injured the other is to be injured.”

Both examples appear to be classic applications of Old Testament vengeance. A closer examination, however, reveals that vengeance is far from the primary motive. In fact, scholars since the time of Christ have argued that these passages have been taken out of context. Rather than viewing them in isolation they should be seen as part of a complete and organic body of law. According to this view, the driving message in these passages is not vengeance. It’s compensation. Maimonides, the most renowned biblical scholar of the Middle Ages, was never in doubt that *lex talionis* was not to be taken literally and that it was grounded in the principle of monetary compensation.

The text in Leviticus, having been written later, is also as representative of a different society: one in which retaliation is no longer proscribed in cases of simple injuries but only for death and mayhem. More importantly, rather than viewing the law of retribution as a floor on punishment, it was crucially a ceiling on vengeance. A wronged man or woman could take no more than an eye or tooth. An injury could not lead to death.

As one scholar has argued, far from encouraging vengeance, it limited it and stood as a guide for a judge as he fixed a penalty suited to the crime. Thus, the talion cut two ways: it both punished and protected the criminal. Additionally,
biblical *lex talionis* removed the spectator of vicarious punishment. Only the perpetrator was subject to punishment, an improvement over the law of retaliation as it appeared in Hammurabi’s time.

The development of *lex talionis* in Christianity was heavily influenced by the new faith’s attempts to distinguish itself from its Jewish roots. In his famous sermon on the mount, Jesus said “you have heard that it was said that eye for eye and tooth for tooth but I tell you do not resist an evil person, if someone strikes you on the right cheek, turn to him to the other also.”

Jesus’s exhortation seems to be a clear annunciation of the law of retaliation and plays a central role in the discussion about Christianity’s ethic of compassion and mercy. It has been argued that rather than questioning the principle of retaliation, which came directly from God and was therefore immutable, Jesus was attempting to recover the original intent of the law, which had been misused in Israeli society as a justification for private vengeance.

Turning to Islam, despite the long-standing cultural and commercial interactions with the greater Middle East, the dominant feature in pre-Islamic Arabia was Bedouin tribalism. Social order was based on family ties, customs, and traditions. Given the importance of group solidarity for survival in such a harsh environment, the social unit was the group and not the individual.

The most salient aspect of pre-Islamic law, and not surprising given its oral traditions, was its basis in customary law or the Sunnah. This customary law, handed down through generations, formed the basis of relations within a tribe. Criminal law in particular was dominated by ancient tribal custom. Much like in ancient Israel, the blood feud played a central role, with the primary component being a form of self-help based on *lex talionis*. Because the tribal authorities exercised little power, responsibility for making good rested on the injured party. Blood feuds within and between tribes were the primary response to personal injury.

Given deeply ingrained notions of collective responsibility, blood feuds could persist long after the initial act was perpetrated, and involved persons whose connections to the initial act were remote at best. Thus, blood feuds were almost unrestricted in scope and would often lead to outright warfare. In carrying out the blood feud, as in ancient Israel, any member of the wrongdoer’s tribe was a legitimate target.

Aside from its harshness, several aspects bear note. First, retaliation was directly proportional to the relative social position of the tribes. Stronger tribes tended to exact greater vengeance. For example, they would take two victims instead of one, a male instead of a female, a freeman instead of a slave. Additionally, torture often accompanied taking of the talion.

Despite the significance of law to the faith of Islam, only 50 or so of the Quran’s 800 verses deal directly with legal issues. Mohammad’s successors supplemented the Quran with improvised solutions to legal disputes but made no attempt to elaborate the comprehensive code.

A large portion of pre-Islamic Arabian law and customs survived into the
legal structure that was slowly being constructed. This pattern certainly held true for the penal law. Islam’s treatment of criminal law was essentially the same as customary Bedouin law. The principle of lex talionis, along with the payment of blood money, played a central role.

The clearest elucidation of this is found in Verse 45, Surrah 5 of the Quran: “we are ordained therein for them: life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, wounds equal for equal.” The wording, almost identical to that found in the Old Testament, appears to be a classic statement of lex talionis. However, it is subsequently followed by a call for compassion: “but if any one remits to retaliation by a way of charity it is an act of atonement for himself and if any fails to judge by the light of what Allah hath revealed they are no better then the wrongdoers.” This was also supplemented with demands for equality and possibility of compensation in lieu of vengeance: “oh ye who believe the law of equality is proscribed to you in cases of murder, the free for the free, the slave for the slave, the woman for the woman, 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. After this whoever exceeds the limits shall be in grave penalty.”

The insistence on parity in the Quran was a significant step away from customary Arab law. By uniformly evaluating the lives of all men as well as all women and even slaves, the new Islamic ethic was moving toward a principle of social equality, an important and necessary component and for the creation of the modern and just legal system. Social rank and tribal strength were no longer the determinants for punishment or compensation. Additionally, the wording of the Quranic phrase “to grant any reasonable demand” displays a clear preference for compensation instead of retaliation. Contrary to tribal custom, and echoing the evolution found in the Judaic tradition, retaliation was limited only to the wrongdoer. Additionally, Mohammad forbade the use of torture in the talion.

A more detailed analysis of the linguistics characteristics of the Quran reveals that many of the root words were not found in the Arabic language of the time and originated from Jewish roots. This helps show a transmission, so to speak, of the ideas of the law of retribution from ancient Israel to Arabia.

As we discuss the roots of lex talionis in Islam, it is crucial to keep in mind that this is simply not something that came about in isolation. Despite the many differences of time, geography, culture, and social structures, the development of the law of retribution in Judaism, Christianity, and Islam shares certain traits. Most prominently, in none of the faiths was lex talionis an innovative concept introduced by one of the respective prophets.

The law of retribution, rather than being a bequest from Moses or Mohammad, was a deep-rooted component of the traditions and customs of those respective societies. In turn those traditions and customs came about from the particular social and environmental conditions of ancient Israel and the Arabian Peninsula. Folded into the religious teachings of the prophets, lex talionis was designed to mitigate and rationalize criminal punishments. Forgiveness and
recourse to compensation were encouraged. Taken together, this reading of the historical basis for *lex talionis* contradicts contemporary claims that any particular punishment, be it the death penalty, stoning, or amputation, are required.

The early legal manifestations of the three Abrahamic faiths, though concerned with timeless principles of justice, display a pragmatic understanding of the complexities facing society. They eschewed the very same rigid interpretations that are offered today in defense of punishments more wisely left to the past.