

'Hanging Till Death as the Mode of Execution: A Critical Analysis in the light of Islamic Injunctions

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Abstract

The Quran and the Sunnah prescribe death punishment for various offences, such as qatl-e-'amd, apostasy (including blasphemy by a Muslim), ḥirābah when it involves qatl and zina by a muhsan. Moreover, there are instances of death punishment under the doctrine of fasād fi 'l-ard for habitual offenders or when the offence was committed in a brutal and shocking manner. Muslim jurists divide these various instances of death punishment into three categories on the basis of the applicable legal principles. They are: Qisās, hudud and ta'zīr (also called siyāsah). Although qiṣāṣ and hudud have some differences in legal consequences, yet they also have a few common legal consequences, such as the strict standard of proof, the special relaxations given to the accused (and even to the convict) and the immutable nature of the punishment. As opposed to qiṣāṣ and hudud, the matters related to ta'zīr (or siyāsah) punishment have been left to the Muslim ruler who can prescribe details keeping in view the objectives, and within the constraints of the general principles, of Islamic law. Among these various consequences, the present paper focuses on the mode of execution of death punishment only.¹

Key Words: Qiṣāṣ, mode of execution, transgression

Introduction

For analyzing the Islamic injunctions on the modes of execution of death punishment, the paper has been divided into two parts: part one gives details of the various modes of execution of death punishment from the Qur'an and the *Sunnah*; while part two explains a few general injunctions of the Qur'an and the *Sunnah* which govern this area of law. Finally, the Conclusions have been recorded.

Specific Instances of Death Punishments in the Qur'an and the *Sunnah*

There are several instances of death punishment mentioned in the Qur'an and the *Sunnah*, such as the punishment of *qisas* for *qatl 'amd*² and *rajm* (stoning) for *zina* when the culprit is *muhsan*.³ The Muslim jurists have gone into great details for elaborating the implications of these injunctions of the Qur'an and the *Sunnah*. Some significant aspects of this discourse are analyzed here.

Execution of *qiṣāṣ*

As for as the mode of execution of death punishment by way of *qisas* is concerned, there are two opinions among Muslim jurists: one, that it must be done through the use of sword;⁴ and two, that the murderer may be executed in the same manner in which he committed the murder, unless it involves a prohibited method, such as causing death by burning at stakes.⁵ This difference of opinion is caused by two different sets of traditions on the issue. Thus, one set of traditions makes it obligatory to use sword in executing the punishment of *qiṣāṣ*:

لا قود الا بالسيف.

“No *qiṣāṣ* except through sword.”⁶

On the other hand, some traditions show that the culprits were given the punishment in the same manner in which they had committed the offence. A famous example is that of the people of the 'Uraynah tribe who had brutally killed some of the Companions and had also looted the property. When they were captured, they were blinded, their hands and legs were amputated and then they were left lying in the scathing heat of the desert till they died.⁷ Another instance is that of the Jew whose head was crushed by stones in the

same way as he had done to his victim.⁸ Then, there is the tradition which prescribes such punishment in a general way:

من غرّق، غرّقناه؛ و من حرّق، حرّقناه.

“If a person drowns another, we will drown him; if a person burns another, we will burn him.”⁹

The jurists relying on these traditions also argue from the literal meaning of *qisas* which implies similarity in treatment.¹⁰ They further argue on the basis of texts which prescribe inflicting similar pain to the culprit which he inflicted on the victim:

﴿وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُمْ بِهِ وَلَئِنْ صَبَرْتُمْ لَهُوَ خَيْرٌ لِلصَّابِرِينَ﴾

“If ye punish, then punish with the like of that wherewith ye were afflicted. But if ye endure patiently, verily it is better for the patient.”¹¹

Finally, they highlight that one of the purposes of the punishment of *qisas* is to satisfy the desire for vengeance which is best served if the culprit is given the same punishment.¹²

The counter-arguments forwarded by the first group of jurists are also worth consideration. Thus, they point out that “similar” (*mithl*) treatment is permitted by law only when it does not violate other rules and principles.¹³ For instance, the law does not allow *mithl*, if keeping within the limits of the *mithl* cannot be ensured and there is a possibility that one may exceed those limits because in such situations it will be transgression which is prohibited by the Almighty:

﴿وَقَاتِلُوا فِي سَبِيلِ اللَّهِ الَّذِينَ يُقَاتِلُونَكُمْ وَلَا تَعْتَدُوا إِنَّ اللَّهَ لَا يُحِبُّ الْمُعْتَدِينَ﴾

“Fight in the way of Allah against those who fight against you, but do not transgress. Lo! Allah loveth not, transgressors.”¹⁴

Moreover, they highlight that the verse prescribing *qisas* requires similarity only in the fact that the murderer be killed:

﴿يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأَنْثَىٰ بِالْأُنثَىٰ﴾

“O ye who believe! Retaliation is prescribed for you in the matter of the murdered; the freeman for the freeman, and the slave for the slave, and the female for the female.”¹⁵

The word used here is **الْقَتْلَى** which is the plural of **الْقَتِيل**, the one who has been killed. Hence, the verse only requires that the murderer be killed. It does not necessitate that he be killed in the same manner. In other words, *qisas* does not mean similar punishment: it only means equal punishment.¹⁶

As for the case of the Jew whose head was crushed, these jurists hold, first, that it was not a case of *qatl ‘amd* because the weapon used in killing was not the one specifically manufactured for killing; and two, that the culprit was a habitual offender who was given this punishment by way of *siyasah* to deter others.¹⁷ They hold the same position about the tradition which prescribes the punishment of drowning or burning. They also point out that the Prophet, peace be on him, later prohibited burning a person by way of punishment.¹⁸ Similarly, in their view, the punishment given to the people of ‘Uraynah was neither *hadd* nor *qisas*; rather, it was a *siyasah* punishment.¹⁹ Moreover, these jurists hold that this punishment also involved the element of *muthlah* (mutilation) but the Prophet, peace be on him, later prohibited *muthlah*.²⁰ Hence, even in the *siyasah* punishments, *muthlah* stands prohibited now.

Finally, they hold that decapitation through sword (or some other sharper tool)²¹ is more in consonance with the spirit of Islamic law and the general injunctions which obligate perfection (*ihsān*) and prohibit transgression (*‘udwan*).²²

It is worth noting that even those jurists who permit similar punishment by way of *qisas* put a proviso here: that similar punishment will not be awarded if the mode in which the murder was committed is prohibited *per se*, such as killing by way of burning has been specifically prohibited by the Prophet, peace be on him.²³ Moreover, they hold that the preferred mode for *qisas* is decapitation through sword.²⁴ In other words, in their view, similarity in punishment is only permitted, not preferred.

The net conclusion is that among the jurists there are two approaches about the mode of executing death punishment by way of *qisas*:

- That it must be done through sword (or some other sharper tool); and
- That using sword (or another sharper tool) is preferred but it is also permitted to cause the death of the convict in the same manner in which he murdered the victim, unless it is a mode which has been specifically prohibited.

In our humble view, the former position is more in consonance with the spirit of Islamic law, its general principles and higher objectives. God knows best!

Execution of *Rajm* (Stoning)

The Prophet, peace be on him, prescribed the punishment of stoning for the offence of *zina* if the culprit was *muhsan*.²⁵

الْبِكْرُ بِالْبِكْرِ جَلْدُ مِائَةٍ وَنَفْيُ سَنَةٍ، وَالتَّيِّبُ بِالتَّيِّبِ جَلْدُ مِائَةٍ وَالرَّجْمُ -

“Unmarried (male) with unmarried (female): one-hundred lashes and expulsion for one year; married (male) with married (female): one-hundred lashes and stoning.”²⁶

It is also mentioned in many traditions that he got this punishment enforced on some of the culprits who had made confessions about their guilt. Similarly, there are some instances of the enforcement of this punishment from the practice of the Rightly-guided Caliphs, God be pleased with them. From these various traditions (and other related texts and principles) the jurists derived the mode of execution of this punishment.

An important feature of this mode is that if the offence is proved only by the confession of the accused and he/she retracts from his/her confession even at the time of the execution of the punishment, or even when the punishment has been partly executed, it will become an obstacle in the enforcement of the punishment, or its remaining part. The execution will be stopped there and then and no retrial shall take place because retraction from confession shall be deemed a *shubhah* (doubt) which dissolves the *hadd* punishment. The same rule applies when the convict tries to run away from the spot. The Prophet, peace be on him, is reported to have rebuked his Companions when they

informed him that the convict tried to run away but they still continued to stone him till he died.²⁷

However, if the guilt was proved through testimony of four witnesses,²⁸ he will not be allowed to run away. However, the witnesses are required to start stoning him and if any of them retracts from his testimony, the punishment of stoning will not be executed.²⁹ Even refusal to start stoning him will amount to *shubhah* which will dissolve the punishment of stoning.

In view of all this, it seems really strange that Section 17 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, prescribes that “while stoning is being carried on, he may be shot dead, where upon stoning and shooting shall be stopped.” This provision violates not only the letter of the *shari’ah* but also defeats its purpose.

Execution of *Taslib* (Crucifixion)

Taslib (crucifixion) is one of the punishments of *hirabah* (armed robbery) prescribed by the Qur’an:

﴿إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِّنْ خَلْفٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ﴾

“The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter, theirs will be an awful doom.”³⁰

The jurists have gone into great details elaborating various aspects of this verse, such as the meaning and scope of the offence (*muharabah/hirabah*), the nature of the various punishments and their order and the modes of executing these punishments. We will confine our discussion here to this last issue.

As far as killing is concerned, the jurists generally have the same positions on it as they have on *qisas*.³¹ What about crucifixion? Some of the jurists hold that he will be killed and then his dead body will be displayed on a cross.³² Others hold that he will be crucified alive and then killed by an arrow.³³ It

may be noted that the Hanafi jurists generally hold that crucifixion is not compulsory and that the ruler may opt for killing without crucifixion.³⁴ The law in Pakistan does not provide for crucifixion.³⁵

For Apostasy and Blasphemy

As per Islamic Injunctions, apostasy is also an offence punishable with death, unless the apostate repents. Thus, the Qur'an testifies about the punishment awarded to the apostates among the Bani Isra'il when they worshipped the calf:

﴿وَإِذْ قَالَ مُوسَىٰ لِقَوْمِهِ ۖ يَقَوْمِ ۖ إِنَّكُمْ ظَلَمْتُمْ أَنفُسَكُمْ بِاتِّخَاذِكُمُ الْعِجَلِ فَتُوبُوا إِلَىٰ بَارِيكُمْ فَاقْتُلُوا أَنفُسَكُمْ ۚ ذَٰلِكُمْ خَيْرٌ لَّكُمْ عِنْدَ بَارِيكُمْ فَتَابَ عَلَيْكُمْ ۚ إِنَّهُ هُوَ التَّوَّابُ الرَّحِيمُ﴾

“And when Moses said unto his people: O my people! Ye have wronged yourselves by your choosing of the calf (for worship) so turn in penitence to your Creator, and kill (the guilty) yourselves. That will be best for you with your Creator and He will relent toward you. Lo! He is the Relenting, the Merciful.”³⁶

Similarly, the Qur'an warned Muslims of the serious consequences of apostasy on the Day of Judgment as well as in this world:

﴿مَنْ كَفَرَ بِاللَّهِ مِنْ بَعْدِ إِيمَانِهِ ۖ إِلَّا مَنْ أُكْرِهَ وَقَلْبُهُ مُطْمَئِنٌّ بِالْإِيمَانِ وَلَكِنْ مَنْ شَرَحَ بِالْكُفْرِ صَدْرًا فَعَلَيْهِمْ غَضَبٌ مِنَ اللَّهِ وَلَهُمْ عَذَابٌ عَظِيمٌ﴾

“Whoso disbelieveth in Allah after his belief save him who is forced thereto and whose heart is still content with Faith but whoso findeth ease in disbelief: On them is wrath from Allah. Theirs will be an awful doom.”³⁷

﴿وَمَنْ يَرْتَدِدْ مِنْكُمْ عَن دِينِهِ ۖ فَيَمُتْ وَهُوَ كَافِرٌ فَأُولَٰئِكَ حَبِطَتْ أَعْمَالُهُمْ فِي الدُّنْيَا وَالْآخِرَةِ وَأُولَٰئِكَ أَصْحَابُ النَّارِ ۖ هُمْ فِيهَا خَالِدُونَ﴾

“And whoso becometh a renegade and dieth in his disbelief: such are they whose works have fallen both in the world and the Hereafter. Such are rightful owners of the Fire: they will abide their in.”³⁸

The Prophet, peace be on him, elaborated the meaning of these verses by prescribing death punishment for apostates in the famous tradition:

من بدل دينه فاقتلوه.

“Kill the one who changes his religion.”³⁹

لا يحل دم امرئ مسلم الا باحدى ثلاث: الثيب الزانى والنفس بالنفس والتارك لدينه المفارق للجماعة.

“[Shedding] the blood a Muslim does not become lawful, except by any of the three acts: life for life, the one who commits *zina* when he is *muhsan*, and the one who abandons his religion thereby leaving the community.”⁴⁰

As blasphemy by a Muslim also amounts to apostasy, the Prophet, peace be on him, prescribed the same punishment for such a blasphemer:

من سب نبياً فاقتلوه.

“Kill the one who blasphemes against a Prophet.”⁴¹

There are several instances during the lifetime of the Prophet, peace be on him, when an apostate or a blasphemer was killed, but I could not find a single incident where the punishment was enforced through any mode other than decapitation by a sword. Similarly, during the reign of the First Caliph Abu Bakr, God be pleased with him, the Companions fought a great war against the apostates and killed those who did not repent. The jurists conclude that war (*qitāl*) is obligatory against a community of apostates in much the same way as killing (*qatl*) is obligatory when an individual Muslim apostatizes.

For Rebellion

The Qur’an prescribes war against rebels in the following words:

﴿وَإِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا فَإِنْ بَغَت إِحْدَاهُمَا عَلَى الْأُخْرَى فَقَاتِلُوا الَّتِي تَبْغِي حَتَّى تَفِيءَ إِلَى أَمْرِ اللَّهِ فَإِنْ فَاءَتْ فَأَصْلِحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ﴾

“And if two parties of believers fall to fighting, then make peace between them. And if one party of them doeth wrong to the other, fight ye that which doeth wrong till it returns unto the ordinance of Allah; then, if it returns, make peace between them justly, and act equitably. Lo! Allah loveth the equitable.”⁴²

The jurists hold that the conduct of the Fourth Caliph ‘Ali, God be pleased with him, gives the role model in this regard and he is reported to have said:

“I have been ordered to fight those who went out [of the Muslim community], broke their pledge [of obedience to the ruler] and thereby committed injustice.”⁴³

Some of the jurists included the punishment of rebellion in *hudud*, but others deemed it a *siyasa*h offence because the ruler can pardon the rebels while he does not have the authority to pardon a *hadd* offender.

As far as the mode of punishment is concerned, like apostasy and blasphemy, it was in the form of *qital* (against the rebel group) and *qatl* (against the individual rebel in that group), while *qatl* was always in the form of decapitation through sword.

Some of the later rulers developed the practice of displaying the head of the rebel leader in public places, but the jurists generally disliked it and argued that Caliph ‘Ali, God be pleased with him, did not do this to any of the rebels.⁴⁴ However, some of the jurists deemed it permissible if it was meant to deter the rebels and to compel them to surrender.⁴⁵ It may also be noted that once the head of a Christian commander was brought to Caliph Abu Bakr, God be pleased with him, and he expressed his anger on it. When he was told that this is a common practice of the Romans and the Persians, he replied:

“We neither follow the practice of the Romans, nor that of the Persians. The Book [of Allah] and the Report [of the Prophet’s conduct] suffice us.”

It is also worth noting that the punishment of crucifixion has been used since antiquities for rebels. Thus, as the Qur’an testified, that the Prophet Yusuf, peace be on him, (ca. 1900 BC) told one of his companions in jail that he would be crucified and birds would eat his dead body:

﴿وَأَمَّا الْآخَرُ فَيُصَلَّبُ فَتَأْكُلُ الطَّيْرُ مِنْ رَأْسِهِ﴾

“And as for the other, he will be crucified so that the birds will eat from his head.”⁴⁶

Similarly, the Qur’an reports at several places that when the state-commissioned magicians bowed before Allah and embraced Islam, the

Pharaoh (ca. 1400 BC) threatened them with a punishment that reminds one of the punishment of *hirabah*:

﴿قَالَ ءَامَنْتُمْ لَهُ قَبْلَ أَنْ ءَادَنْ لَكُمْ إِنَّهُ لَكَبِيرُكُمُ الَّذِي عَلَّمَكُمُ السِّحْرَ فَلَأَقْطِئَنَّ
أَيْدِيَكُمْ وَأَرْجُلَكُمْ مِنْ خَلْفٍ وَلَأَصْلَبَنَكُمْ فِي جُدُوعِ النَّخْلِ وَلَتَعْلَمَنَّ أَيُّنَا أَشَدُّ
عَذَابًا وَأَبْقَى﴾

“(Pharaoh) said: Ye put faith in him before I give you leave. Lo! he is your chief who taught you magic. Now surely, I shall cut off your hands and your feet alternately, and I shall crucify you on the trunks of palm trees, and ye shall know for certain which of us hath sterner and more lasting punishment.”⁴⁷

As the Jews also tried to get Prophet ‘Isa, peace be on him, crucified (ca. 30 CE) and this particular punishment was reserved by the Romans for rebels, some of the modern Biblical scholars think that Jesus, as they call him, might have tried to lead a rebellion against the Romans.⁴⁸

It was, therefore, a great achievement by Muslim jurists to confine the offence of *hirabah* to a particular situation of armed robbery and, thus, save ordinary people from the clutches of the despots.⁴⁹ Some of the later rulers, however, started the practice of crucifying the rebels and justified it on the same ground of ‘deterrence.’ Their practice, however, does not make a source of Islamic law. As far as the *Sunnah* of Caliph ‘Ali, God be pleased with him, is concerned, I could not find in it a single instance of crucifixion of a rebel.

For Habitual *Hudud* Offenders

In some traditions of the Prophet, peace be on him, death punishment has been prescribed for those offenders who would habitually commit a *hadd* offence.⁵⁰ The Hanafi jurists hold that this death punishment was not prescribed as *hadd*; rather, it was awarded by way of *siyasa* to rid the society of the evil of that person who could not otherwise mend his ways.

It may be highlighted here that the word *qatl* has been used for death punishment in these traditions and that is why they imply the same mode of decapitation through sword.

For Various Forms of Mischief (*Fasad*)

Similarly, there are traditions in which death punishment was awarded for certain offences which the jurists include neither in *hudud* nor in *qiṣāṣ*. The examples of the punishment given to the people of ‘Uraynah and to a Jew were mentioned earlier.

Another example is that of the punishment for unnatural lust. The Companions disagreed on the punishment for this offence. Abu Bakr, God be pleased with him, is reported to have suggested that the culprits must be burnt alive; ‘Ali, God be pleased with him, was of the opinion that one hundred lashes would be awarded to the convict if he was unmarried and he would be stoned if he was married; ‘Abdullah b. al-‘Abbas, God be pleased with him, suggested that the culprits be thrown from a high place and then stoned; ‘Abdullah b. al-Zubayr, God be pleased with him, was of the opinion that the convicts be detained in a place where they would die from the smell of garbage.⁵¹

Imam Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi (d. 483 AH/1097 CE), the great Hanafi jurist, while commenting on this disagreement of the Companions, comes up with a strong case for Abu Hanifah who considered it a *siyasah* offence:

The Companions agreed on one point: that this act was not covered by the term *zina*, because they were well aware of the text regarding *zina* and even then, they disagreed on the punishment of homosexuality. We cannot say that they exercised *ijtihad* in the presence of the definitive text (*nass*). Hence, their disagreement on the punishment clearly proves that they agreed that the act did not amount to *zina*. As application of the *hadd* of *zina* to an act other than *zina* is not allowed, this act remains an offence for which no specific punishment has been prescribed in the texts. Hence, *ta‘zir* must be awarded in this case. The nature and extent of that punishment is to be determined by the ruler under the doctrine of *siyasah*. If the ruler concludes that a particular form of death

punishment should be given in a case, the *shari'ah* has given him the authority to do so.⁵²

It is on the basis of these principles that the Hanafi jurists bring under the rubric of *siyasah* the death punishment for the one who habitually commits anal intercourse with his wife, habitual thieves, magicians and other offenders who commit widespread *fasad* in society.⁵³

It may, again, be reminded here that while exercising the *siyasah* jurisdiction, the ruler may prescribe death punishment and may adopt a mode of its execution but he has to do so within the constraints of the general principles of Islamic law and he has to ensure the protection of the objectives of Islamic law. It is high time now to turn to some of the general principles of Islamic law applicable to the issue at hand.

General Islamic Injunctions on Execution of Death Punishment

Apart from the specific injunctions on specific instances of offences mentioned in the previous part, there are some general injunctions relevant to the case at bar. These include, *inter alia*, the obligation of perfection and the prohibition of transgression. Following are some details.

The Obligation of Perfection (*Ihsān*)

The following verse of the Qur'an summarizes the whole of Divine law in the form of three obligations and three prohibitions:

﴿إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيتَايَ ذِي الْقُرْبَىٰ وَيَنْهَىٰ عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ﴾

“Lo! Allah enjoineeth justice and kindness, and giving to kinsfolk, and forbiddeth lewdness and abomination and wickedness. He exhorteth you in order that ye may take heed.”⁵⁴

The word *ihsan* from the root *h-s-n* gives the meanings of beauty, improvement, goodness, kindness, charity, favor and – above all – perfection. Thus, another verse mentions three stages through which a believer attains this stage of perfection:

﴿لَيْسَ عَلَى الَّذِينَ ءَامَنُوا وَعَمِلُوا الصَّالِحَاتِ جُنَاحٌ فِيمَا طَعَمُوا إِذَا مَا اتَّقَوْا
وَوَءَامَنُوا وَعَمِلُوا الصَّالِحَاتِ ثُمَّ اتَّقَوْا وَعَءَامَنُوا ثُمَّ اتَّقَوْا وَأَحْسَنُوا وَاللَّهُ يُحِبُّ
الْمُحْسِنِينَ﴾

“There shall be no sin (imputed) unto those who believe and do good works for what they may have eaten (in the past) when they guard themselves from evil and believe and do good works; and again: they guard themselves from evil, and believe; and once again: they guard themselves from evil, and do (good deeds) with perfection. Allah loveth those who do (good deeds) with perfection.”⁵⁵

The Prophet, peace be on him, explained this meaning of *ihsān* when he said after elaborating the meaning of *imān* (faith) and *Islam* (submission):

الاحسان ان تعبد الله كأنك تراه؛ فانك ان لم تكن تراه فانه يراك.

“*ihsān* is when you worship Allah as if you see Him because even if you do not see Him, He still sees you.”⁵⁶

Hence, when a person’s faith (*imān*) leads him to obey the law (*Islam*) and he performs the act with a deep sense of God-consciousness, he is said to have done it with perfection (*ihsān*). It is in this sense that the Prophet, peace be on him, made it obligatory on Muslims to do with *ihsan* even the act of killing:

ان الله كتب الاحسان على كل شيء؛ فاذا قتلتم، فاحسنوا القتل؛ و اذا ذبحتم، فاحسنوا الذبحة؛ وليحدّ احدكم شفرته وليرّح ذبيحته.

“Allah has made perfection obligatory on everything; hence, when you kill, kill in the best manner; and when you slaughter [an animal], slaughter in the best manner; and sharpen your tool so as to give ease to your sacrificial animal.”⁵⁷

He also said that it is an essential part of the Muslim character:

ان اعف الناس قتلة المؤمنون.

“Believers are the most careful among people in the matter of killing.”⁵⁸

As the jurists elaborate, this commandment necessitates adopting those modes of killing which cause minimum pain to the one who is supposed to be killed.

The Prohibition of Transgression (‘Udwan)

This prohibition shows the other side of the coin. Thus, the Qur’an warns the believers that even while fighting the enemy in the cause of Allah they must not transgress limits:

﴿وَقَاتِلُوا فِي سَبِيلِ اللَّهِ الَّذِينَ يُقَاتِلُونَكُمْ وَلَا تَعْتَدُوا إِنَّ اللَّهَ لَا يُحِبُّ الْمُعْتَدِينَ﴾

“Fight in the way of Allah against those who fight against you, but do not transgress. Lo! Allah loveth not, transgressors.”⁵⁹

“Allah loveth not, transgressor” is the exact opposite of “Allah loveth those who do (good deeds) with perfection.” This also shows that *ihsan* necessitates keeping within the limits prescribed by Allah and not transgressing them.

Now, ‘transgression’ includes many things, but for the purpose of the case at bar, two prohibitions are more important. One is the prohibition of causing death by burning a person alive.⁶⁰ The Prophet, peace be on him, is reported to have said:

لا يعذب بالنار الا رب النار-

“Only the Sustainer of fire punishes with fire.”⁶¹

The other significant prohibition relates to mutilation of the dead body. Thus, the Prophet, peace be on him, while dispatching troops for an expedition gave them many instructions which included the prohibition of mutilation:

ولا تمثّلوا-

“And do not mutilate.”⁶²

This instruction was important in the context of wars because the Arabs used to mutilate the bodies of their adversaries.⁶³ We earlier noted that the treatment meted out to the people of ‘Uraynah was very harsh. That is why the Companions report that after this incident the Prophet, peace be on him, would continuously stress on giving charity and would remind them of the prohibition from mutilation.

ما قام فينا رسول الله ﷺ بعد ما مثل بالعربيين الا و يحثنا على الصدقة و ينهانا عن المثلة-

“Whenever the Prophet, peace be on him, would stand to give us a sermon after mutilating the people of ‘Uraynah, he would advise us to give charity and would prohibit us from mutilation.”⁶⁴

When ‘Ali, God be pleased with him, was injured he advised his son Hasan, God be pleased him, that in the event of his death he must not mutilate the murderer and then told him:

نهى رسول الله ﷺ عن المثلة ولو بالكلب العقور.

“The Prophet, peace be on him, prohibited from mutilation even of a mad dog.”⁶⁵

Hence, while adopting a mode for execution of death punishment it must be ensured that these prohibitions are not violated.

Objectives of Death Punishment: Retribution and Deterrence

In part one of this note, we saw that decapitation by sword or some other sharper tool was the most often used mode of death punishment. This mode is also in consonance with the general principles of Islamic law examined in part two of this note. However, in part one we also saw that sometimes harsher modes (such as stoning or crucifixion) were employed. How these modes can be explained in this scheme of the things? This question makes it necessary to have a look at the objective’s punishments in Islamic law.

S. No.	Offence	Mode of Death Punishment
1.	Qiṣāṣ	Sword
2.	<i>Zina by muhsan</i>	Stoning
3.	<i>Hirābah</i> involving murder	Sword and/or Crucifixion
4.	Apostasy, including blasphemy by a Muslim	Sword
5.	Rebellion	Sword
6.	Habitual offenders in <i>hudud</i> cases	Sword
7.	Other serious forms of <i>fasad</i>	Sword/Harsher modes

In Western jurisprudence, various theories of punishments have been forwarded by different scholars. These include, *inter alia*, the theory of retribution, the theory of deterrence, the theory of reformation and the theory of prevention and rehabilitation. The fact remains that no single theory can adequately explain the nature and objectives of punishments in Islamic law.⁶⁶ However, in the context of death punishment, and more specifically for the purpose of *qisās*, generally the theories of retribution and deterrence are forwarded.

‘Retribution’ primarily means that the offender is given his deserts, that is to say, what he rightfully deserves.⁶⁷ Retribution is based on two assumptions: that a crime is essentially a moral wrong; and that punishment should be proportionate to guilt. It is moral blameworthiness which makes *mens rea* an essential element of crime.⁶⁸ The Muslim jurists particularly discuss the moral implications of the offence of *qatl* when they examine if expiation (*kaffarah*) is obligatory or not. The Qur’an makes it obligatory for *qatl khata’* and that is why the Shafi’i jurists deem it *a fortiori* obligatory in case of *qatl ‘amd*. The Hanafi jurists do not consider it obligatory for *qatl ‘amd* but they hold that this offence is so heinous that expiation is not enough to wash the guilt. Imam Sarakhsi explaining this position says:

For the gravity of the offence in murder, our scholars did not uphold expiation for the murderer, because the threat [of punishment hereafter] is explicitly stated in the texts and cannot be alleviated with expiation. The sin in it is too grave to be atoned through expiation. Further, it is the same whether *qisās* has become obligatory in it or not, as in the case of a father killing his son.⁶⁹

As far as proportionality to guilt is concerned, the jurists discuss it in the context of the punishment of *qisas* in the following words:

Qisās expresses the meaning of equality. In its primary usage it means following in the tracks [of someone]. Allah Exalted says: “And she said to the sister of (Moses), ‘Follow him.’ (*qussihī*)” (Qur’an, 28:11) Following in the tracks of someone (or

something) amounts to doing exactly the same thing. It is, therefore, deemed an expression of equality.⁷⁰

The concept of proportionality is closely linked to two other ideas, namely, satisfying the desire of vengeance and consideration of the harm done. These two ideas explain the meaning of justice in the context of *qisās*. Thus, Imam Sarakhsi says: “The law has made *qisās* obligatory by way of vengeance and cleansing of the breast of the *wali* and the rage that he can give vent to.”⁷¹ As for consideration of the harm done, Islamic law has given provisions about *diyat*, *arsh* and *daman*.

However, retribution alone does not adequately explain the nature and purposes of death punishment, particularly *qisās*, unless one also takes into consideration the aspect of deterrence. It may be noted at the outset that deterrence is of two kinds: primary and secondary. Primary deterrence (also called ‘individual’ deterrence) is for the offender himself, while secondary (or ‘general’) deterrence is to deter others from committing the same crime.

The idea of primary deterrence is that the offender should be given such an unpleasant time that, through fear of punishment, he will never repeat his conduct. In general deterrence, the aim of punishment is to discourage others, who are prone to commit crime, by the threat of punishment and the example of the punishment of the offender.⁷²

The Qur’an while prescribing the punishment of *qisas*, gives the following significant dictum about the wisdom of this punishment:

﴿وَلَكُمْ فِي الْقِصَاصِ حَيَاةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ﴾

“And there is life for you in retaliation, o men of understanding, so that ye may restrain.”⁷³

Commenting on this verse, Imam Sarakhsi says:

In this there are two meanings. First, that there is life in it by way of deterrence, because a person who intends to kill his enemy feels deterred when he contemplates that if he kills him he shall be killed in return. This results in life for both of them. Second, there is life in it by way of repelling the cause of

destruction, because one who kills without justification becomes a threat for the *awliya'* of the victim out of fear of death at their hands. He, therefore, intends to destroy them for the eradication of this fear. The law, for this reason, enables them to slay him by way of *qisāṣ* and remove the evil threatening them. This results in the saving of life of those living.⁷⁴

As Nyazee points out, this is secondary deterrence for those contemplating murder or 'the would-be-murderers' because the offender subject to *qisas* will no longer exist.⁷⁵ It is this 'secondary' or 'general' deterrence which may explain the fact that sometimes harsher modes of death punishment were employed by the Prophet, peace be on him, and his Companions, God be pleased with him. Moreover, the purpose of general deterrence was also achieved by enforcing the punishment in public. The Qur'an explicitly requires this for the purpose of the punishment of *zina*:

﴿وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ
وَلِيَشْهَدَ عَدَابُهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ﴾

“And let not pity for the twain withhold you from obedience to Allah, if ye believe in Allah and the Last Day. And let a party of believers witness their punishment.”⁷⁶

The Prophet, peace be on him, enforced other *hudud* punishments as well as *qisas* punishments⁷⁷ in public and that is why the jurists generally hold that it is necessary to enforce these punishments publicly.

Mode of Execution of Death Punishment in Pakistan

In Pakistan, death punishment has been prescribed for various offences.⁷⁸ In the context of the present case, death punishment for *qatl-i-amd* is more important. It is worth noting that death punishment for *qatl-i-amd* can be awarded either as *qisāṣ* under Section 302 (a) or as *ta'zir* under Section 302 (b), PPC. There are certain differences in the legal consequences of these two kinds of death punishment.⁷⁹ However, as far as the mode of executing death punishment is concerned, it remains the same – hanging till death.⁸⁰ The same mode of execution is used for other instances of death punishment and the

only exception – which we could find – is the offence of *zina* for which death punishment is executed in the form of stoning (coupled with shooting).

It was noted above after detailed analysis of the relevant Islamic Injunctions that the proper mode of the execution of *qiṣāṣ* is decapitation through sword (or some other sharper tool). This is obligatory in the opinion of some jurists and preferred mode in the opinion of the other jurists who also allow execution in the same manner in which the crime of murder was committed. Apart from these two modes of execution, we could not find a jurist allowing a third mode of execution of *qiṣāṣ*. Hence, in our humble opinion, at least for the purpose of the execution of *qiṣāṣ* (under Section 302 (a), PPC), the provisions of Section 368, CrPC, prescribing the mode of hanging till death, are repugnant to Islamic Injunctions.

For the purpose of death punishment awarded as *ta'zir* (or *siyasaḥ*), under Section 302 (b), PPC, or other provisions, two principles and an exception were noted above:

- It must cause the least pain (obligation of *ihsān*);
- It must not result in mutilation (prohibition of *'udwan*); and
- Sometimes a harsher mode may be applied for the purpose general deterrence.

Conclusions

Whether or not hanging violates the principle of obligation of perfection (*Ihsān*), particularly when it is compared with other modes of execution, is a matter on which experts in the relevant field, such as scientists and doctors, are in a better position to talk.⁸¹ We will, therefore, leave this issue to them.⁸² However, it is a matter of common observation that hanging more often than not causes mutilation. Hence, the principle of prohibition of transgression (*'udwān*) is most certainly violated. The only justification for hanging can be found in the exception for the purpose of general deterrence. However, it is also an established principle of law that exceptions must not be generalized. Hence, hanging may be allowed only in exceptional situations for the purpose of deterrence, but the way it has been implemented as the only mode of execution in Pakistan certainly violates the spirit of Islamic law. Even for the

purpose of deterrence, we personally consider decapitation to be more appropriate. God knows best!

References

¹ The paper was originally prepared as a note for the Federal Shariat Court in a case about 'hanging' as mode of execution of death punishment in which one of the authors was appointed as *jurisconsult*. The case titled *Gul Wali v Government of Pakistan* (Shariat Petition I/I/2018) was disposed of by the Court on 21st October 2021 on technical ground when the petitioner (a condemned prisoner) requested for withdrawal of his petition.

² Qur'an, 2:178.

³ *Sunan al-Nasa'i*, Kitab Tahrim al-Damm: Bab al-hukm fi al-Murtadd.

⁴ This is the opinion of the Hanafis and some of the Hanbalis. 'Uthman b. Ali al-Zayla'i, *Tabyin al-Haqa'iq Sharh Kanz al-Daqa'iq* (Cairo: al-Matba'at al-Kubra, 1313 A.H.), 6:106; Ibrahim b. Muhammad b. Muflih, *al-Mubdi' Sharh al-Muqni'* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 7:235-236.

⁵ This is the view of Malikis, Shafi'is, Zahiris and some of the Hanbalis. See for details: Muhammad b. Ahmad al-Dasuqi, *Hashiyat al-Dusuqi 'ala al-Sharh al-Kabir* (Beirut: Dar al-Fikr, n.d.), 4:265; Muhammad b. Ahmad b. Khatib al-Shirbini, *Mughni al-Muhtaj 'Ila Ma'rifat Ma'ani Alfaz al-Minhaj* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1994), 5:281-283; 'Ali b. Ahmad b. Hazm al-Zahiri, *al-Muhalla bi 'l-Athar* (Beirut: Dar al-Fikr, n.d.), 10:255-256; and Ibn Muflih, *al-Mubdi' Sharh al-Muqni'*, 7:235-236.

⁶ *Sunan Ibn Majah*, Kitab al-Diyatm Bab La Qawad Illa Bi 'l-Sayf.

⁷ *Sunan Abi Dawud*, Kitab al-Hudud, Bab Ma Ja' fi 'l-Muharabah.

⁸ *Sahih al-Bukhari*, Kitab al-Diyat, bab Idha Aqarra bi 'l-Qatl Marratan Qutala bihi.

⁹ *Sunan al-Bayhaqi*, Kitab al-Juruh, Bab 'Amd al-Qatl bi 'l-Hajar wa Ghayrihi.

¹⁰ Al-Mubarak b. Muhammad b. al-Athir, *al-Nihayah fi Gharib al-Hadith wa 'l-Athar* (Beirut: al-Maktabat al-'Ilmiyyah, 1979), 4:72.

¹¹ Qur'an, 16:126.

¹² Shirbini, *Mughni al-Muhtaj*, 5:281-282.

¹³ For instance, a rapist cannot be raped by way of punishment!

¹⁴ Qur'an, 2:190.

¹⁵ Qur'an, 2:178.

¹⁶ Abu Bakr al-Jassas al-Razi, *Ahkam al-Qur'an* (Beirut: Dar Ihya' al-Turath al-'Arabi, 1992), 1:164-167.

¹⁷ Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *al-Mabsut* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 26:126.

¹⁸ *Sahih al-Bukhari*, Kitab al-Jihad wa 'l-Siyar, Bab al-Tawdi'.

¹⁹ Sarakhsi, *al-Mabsut*, 10:7.

²⁰ Burhan al-Din 'Ali b. Abi Bakr al-Marghinani, *al-Hidayah fi Sharh Bidayat al-Mubtadi* (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.), 2:380.

²¹ It is significant that some of the traditions mentions the word 'iron' generally in place of 'sword.' لا قود الا بحديدة (No *qisas*, except through iron." *Sunan al-Daruqutni*, Kitab al-Hudud wa al-Diyat wa Ghayrihi.

²² See part two below for details.

²³ Shirbini, *Mughni al-Muhtaj*, 5: 281-283.

²⁴ Ibid.

- ²⁵ *Muhsan* is generally translated as “married,” but technically this term necessitates some other features as well. See for details: Muhammad Mushtaq Ahmad, *Expounding the Hanafi Law on Blasphemy* (Islamabad: Shariah Academy, 2020), 296-302.
- ²⁶ *Sahih Muslim*, Kitab al-Hudud: Bab Hadd al-Zina.
- ²⁷ Sarakhsi, *al-Mabsut*, 10:52.
- ²⁸ *Ibid.*
- ²⁹ Though the witnesses may face the charge of *qadhf*.
- ³⁰ Qur’an, 5:33.
- ³¹ However, the death punishment here is by way of *hadd*, not *qisas*. Hence, the heirs of the deceased will not have right to pardon or compromise. Abu Bakr b. Mas’ud al-Kasani, *Bada’i’ al-Sana’i’ fi Tartib al-Shara’i’* (Beirut: Dar al-Kutub al-Ilmiyyah, 2003), 9:368.
- ³² Kasani, 9:370. Among the Hanafis, Imam Karkhi narrates this position and the Hanafis jurists generally accept this as their standard position.
- ³³ *Ibid.* Imam Tahawi narrates this position, but the Hanafis do not generally prefer it.
- ³⁴ Imam Marghinani asserts that this is the standard position (*zahir al-riwayah*) of the Hanafi School. See *al-Hidayah*, 2:376.
- ³⁵ See Section 17 of the Offences against Property Ordinance, 1979.
- ³⁶ Qur’an, 2:54.
- ³⁷ Qur’an, 16:106.
- ³⁸ Qur’an, 2:217.
- ³⁹ *Sahih al-Bukhari*, Kitab Istitabat al-Murtaddin wa al-Mu’anidin wa Qitalihiim, Bab Hukm al-Murtadd wa al-Murtaddah.
- ⁴⁰ *Sahih Muslim*, Kitab al-Qasamah, Bab Ma Yubah bih Dam al-Muslim.
- ⁴¹ See for a detailed discussion on this tradition and the relevant rules of Islamic law: *Expounding the Hanafi Law on Blasphemy*, 99-101.
- ⁴² Qur’an, 49:9.
- ⁴³ Sarakhsi, *al-Mabsut*, 10:132.
- ⁴⁴ *Ibid.*
- ⁴⁵ They argued for its permissibility on the basis of a tradition that the head of Abu Jahl was brought to the Prophet, peace be on him, on eve of Badr and he did not prohibit it. *Ibid.* But Imam Sarakhsi asserts that it happened only once in the lifetime of the Prophet, peace be on him. (Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *Sharh al-Siyar al-Kabir* (Beirut: Dar al-Kutub al-Ilmiyyah, 1997), 1:42.
- ⁴⁶ Qur’an, 12:41.
- ⁴⁷ Qur’an, 20:71.
- ⁴⁸ See, for instance, Kamal Salibi, *Conspiracy in Jerusalem* ().
- ⁴⁹ See for a detailed discussion on this issue: Khaled Abou El Fadl, *Rebellion and Violence in Islam* (Cambridge: Cambridge University Press, 2003).
- ⁵⁰ *Sunan al-Nasa’i*, Kitab Qat’ al-Sariq.
- ⁵¹ Sarakhsi, *al-Mabsut*, 9:90-91.
- ⁵² *Ibid.*, 9:91.
- ⁵³ Marghinani, *al-Hidayah*, 2:346-47.
- ⁵⁴ Qur’an, 16:90.
- ⁵⁵ Qur’an, 5:93.
- ⁵⁶ *Sahih al-Bukhari*, Kitab al-Iman, Bab Su’al Jibril al-Nabiyy.
- ⁵⁷ *Sunan al-Tirmidhi*, Kitab al-Diyat, Bab al-Nahy ‘an al-Muthlah.

- ⁵⁸ *Sunan Abi Dawud*, Kitab al-Jihad, Bab al-Nahy 'an al-Muthlah.
- ⁵⁹ Qur'an 2:190.
- ⁶⁰ It is a well-known historical fact that burning at stakes was one of the most common forms of punishment given in Inquisitions by the Church during the s-called Medieval Period.
- ⁶¹ *Sunan Abi Dawud*, Kitab al-Jihad, Bab Karahiyyat Harq al-'Aduww bi 'l-Nar.
- ⁶² *Sahih Muslim*, Kitab al-Jihad, Bab Ta'mir al-Imam al-Umara'.
- ⁶³ A well-known example is the mutilation of the dead body of Hamzah, God be pleased with him.
- ⁶⁴ Sarakhsi, *al-Mabsut*, 10:7.
- ⁶⁵ *Ibid.*, 10:132.
- ⁶⁶ Professor Imran Ahsan Khan Nyazee (b. 1945), an authority on Islamic law and jurisprudence, in his monumental work on *General Principles of Islamic Law (Western and Islamic)* concludes after analyzing the various theories that none of them adequately explains all the aspects and objectives of various punishments in Islamic law and, therefore, recommends an 'integrative theory' for punishments in Islamic law.
- ⁶⁷ Sir Rupert Cross, *The English Legal System* (London: Butterworths, 1981), 128.
- ⁶⁸ That is why jurists who prefer the theory of retribution criticize assigning strict liability to certain offences. *Ibid.*, 126.
- ⁶⁹ Sarakhsi, *al-Mabsut*, 27:84.
- ⁷⁰ Sarakhsi, *al-Mabsut*, 26:60.
- ⁷¹ *Ibid.*, 26:61.
- ⁷² Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Western and Islamic* (Islamabad: Shariah Academy, 2019), 110.
- ⁷³ Qur'an, 2:179.
- ⁷⁴ Sarakhsi, *al-Mabsut*, 26:60.
- ⁷⁵ Nyazee, *General Principles of Criminal Law*, 114.
- ⁷⁶ Qur'an, 24:2.
- ⁷⁷ Sometimes even *siyasa* punishments were given in public.
- ⁷⁸ See, for instance, Sections 121, 132, 194, 295-C, 302 (a) and (b), 303, 311 and 396 of Pakistan Penal Code, 1860.
- ⁷⁹ *Zahid Rehman v. The State*, PLD 2015 SC 77, is a leading case on this issue.
- ⁸⁰ Section 368, CrPC.
- ⁸¹ Human rights activists across the globe have been criticizing this punishment for being too severe, brutal and inhuman. For a representative view, see the 187th Report of Law Commission in India *On Mode of Execution of Death Sentence and Incidental Matters* (2003).
- ⁸² The Muslim jurists distinguish between *tanqih al-manat*, *takhrij al-manat* and *tahqiq al-manat* and say that the first two are the tasks of the jurist, while the third one is the task of the experts in that particular area. Thus, *tanqih al-manat* means extracting the effective cause of a rule by interpreting the relevant texts of the Qur'an and the *Sunnah*, while *takhrij al-manat* is doing it through rational sources, such as *istihsan*, *maslahah* etc. Once the effective cause is determined by the jurist, experts in the relevant area may decide if that cause is found in the case under observation or not. For instance, the jurists may determine that the effective cause of prohibition of wine is its being intoxicant, but whether a particular liquid is intoxicant or not is to be determined by experts in that area. See for details: Wahbah al-Zuhayli, *Usul al-Fiqh al-Islami* (Beirut: Dar al-Fikr, 1986), I:693-695.