

The Capital Punishment

By Dr. Azizah Yahia Muhammad Toufiq al-Hibri, Professor
University of Richmond School of Law

Capital punishment is imposed in the United States for a limited number of reasons, such as treason and murder. Recently, all executions have been related to crimes of intentional murder, the most notable example being the approaching execution of Timothy McVeigh, who caused the death of hundreds of Americans in Oklahoma City by blowing up a federal building. The basic arguments in support of capital punishment derive from two concepts: retribution and deterrence. In discussing the Islamic view of capital punishment, we shall therefore focus on the crime of intentional murder.

The Qur'an states that killing a single soul unjustly is tantamount to killing the whole of humanity, and that an unjust killing deserves qisas (a form of retributive punishment). (5: 32). Abu Zahrah, the modern Egyptian jurist, argues that the purpose of qisas is the preservation of life. In developing this argument, he relies on the Qur'anic verse which addresses uly al-albab (those who understand), saying that "there is life in qisas." (2:179). Abu Zahrah understands this verse the same way many Muslim jurists have understood it, namely, that the murderer's execution has the long-term effect of preserving the life of the community. Thus, in principle, capital punishment is not prohibited in Islam.

Capital punishment in Islamic law, however, has its own dhawabit (checks and balances). For one, this punishment is not imposed unless due process has been observed in a fair trial, and extenuating circumstances were fully considered. Furthermore, the power of imposing capital punishment is not a state power. The state has only the power of execution. This is an important distinction which we shall return to, but to understand it, we need to briefly describe the Islamic perspective on capital punishment which undergirds these matters.

When a person commits a murder, he violates three separate rights: (1) haqq al-'abd (the right of the victim and his family), (2) haqq al-mujtama' (the right of society to peace, safety and tranquility), and (3) haqq al-lah (the right of God). We can only address the first two rights, the third is beyond our domain. God may mete out qisas or forgive the murderer regardless of how we may feel about the matter. We simply do not know, for the Qur'an says: "God does not forgive shirk (polytheism), but he forgives anything else to whom he pleases." (4:48).

The victim's family, who suffers the painful and egregious effects of the murder, has the most at stake. For this reason, Islamic law gives the family the right to seek qisas against the murderer in court. It alone has that standing. If it does not seek qisas in court, then under the majority view the state cannot do so on its own initiative. The state, however, may pursue other avenues to protect the public maslahah, such as confinement and exile (which have a lesser retributive effect, but have also a deterrent effect). This restriction on the state is very important. Because the judiciary is a branch of the state, it becomes very important to limit the state's ability to deny life to its citizens. After all, the state may be oppressive and authoritarian, the judiciary may be biased, or the state may exercise undue influence over the judiciary. Thus, this restriction is one more element in the Islamic system of checks and balances.

Furthermore, while God gave the victim's family the right to demand qisas, he urged them to move forward and forgive. (2:178; 42:40). Forgiveness is described in the Qur'an as better than revenge or punishment, and its virtues are extolled repeatedly in other contexts as well. (e.g., 42:40; 5:45; 2:237; 24:22; 2: 109). Indeed those who forgive earn a reward from God. (42:40; 5:45). Also, God gave the family the right to ask for diyyah (monetary damages) instead of capital punishment. This alternative can help the family mitigate some of the economic damage resulting from the murder. It also gives a genuinely repentant murderer the possibility of reparations. Finally, under Islamic jurisprudence, the forgiveness of one member of the family, binds all the others.

In Saudi Arabia, where Islamic criminal law is in force, victim's families often forgive the murderer, understanding that such forgiveness would help their beloved one in the afterlife, and help their souls as well. The very process of reaching the decision to forgive is immensely healing insofar as it allows the family to work out its pain and accept God's qada'. In the United States, some victims' families working through legal networks committed to restorative justice have requested meetings with the murderer of their loved one. They engaged him in dialogue to help them understand his actions and help him understand their pain. Having worked out their feelings in this fashion, they were often able to forgive the murderer in the end. In this way, the damage of the murder is contained and the family was able to move forward and lead a more normal life.

None of these ameliorating options are available when the impersonal and powerful arm of the state replaces the family. Furthermore, it is an established fact that the burden of capital punishment in the United States falls disproportionately on minorities. As a former member of the Virginia State Advisory Committee to the United States Commission on Civil Rights, I participated in hearings that made the criminal system's bias against minorities very clear. This bias is not only racial, but economic as well. It is not recent; much of it is historical. Under these circumstances, one cannot but remember the story of Khalifah Omar who suspended the hadd of theft in a year of famine.

In other words, the Islamic capital punishment cannot be instituted without its many dhawabit. In a country where the state exercises that right leaving no room for individual forgiveness (other than the occasional forgiveness by a governor who may be beholden to certain voting constituencies), and where the criminal system is riddled with racial, economic and other biases, one would be inclined to take the position of Khalifah Omar. After all, it is a well-established Islamic juristic principle that, where there is doubt, the jurist must err on the side of forgoing punishment. (Idra'u al-hudud bi al-shubuhahat). Of course, some crimes are so heinous as to rally all of society in favor of capital punishment. One would imagine in such cases, that even the family of the victim would not have forgiven the murderer in an Islamic society. That may be true; but again, it is a principle of Islamic jurisprudence that rules are formulated in light of the general situation and not the exceptions. The general situation in the United States today is not conducive to the fair and proper implementation of capital punishment for the reasons detailed above.

1. M. Abu Zahrah, *Al-Uqubah*, pp. 368-69, 453-54 (Cairo, n.d.); A. Awdah, *Al-Tashri' al-Jina'i al-Islami*, p. 82 (Cairo, n.d.); A. Bahnasi, *Sharh wa Ta'liq 'ala Risalat al-Marhoum al-Sheikh Mahmoud Shaltut fi al-Mas'uliyah al-Jina'iyyah*, pp. 107-11 (Cairo, 1987).

2. See also A. al-Jaziri's discussion of forgiveness in *Kitab al-Fiqh 'Ala al-Mathahib al-Arba'ah*, pp. 258-59 (Beirut, 1986)

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