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**FACTORS WHICH PREVENT THE EXECUTION
OF QISAS IN ISLAM**

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INTRODUCTION

Amongst the many things that an egalitarian religion like Islam seeks to uphold is social justice. Thus, that means treating all those who profess the religion equally as they are all the Khalifahs of Allah on earth - And that can be by making all people accountable to the prevailing laws without any exemptions or segregations.

However, Islam also considers situational factors. And as such this paper shall lay preponderent stress on factors that prevent the execution of qisas. Hence, it will be studied from various perspectives, mainly from the aspect of murder, the murdered and the murderer. The paper is also aiming to prove that Islamic law (Sharia) is a well thought and organised system. And not animous and haphazard as claimed by orientalist.

No doubt this work is an output of direct contact with the original Islamic jurisprudence sources which is rich with the vast opinions of Muslim jurists and scholars. And futhermore the paper also tries to dig out and ascertain the basis of the views of the various scholars as well as making preferences to the most convincing view.

And hereby, in Chapter One, we shall discuss issues related to quasi-intentional and unintentional killings, killings resulting from self-defence, property-defence; family honour-defence and promotion of good, and prevention of evil. Chapter two shall look at factors that can prevent implementation of qisas which are related to the murdered eg. blood relationship, is the person a freeman or a slave, gender differences and group murders.

On the other hand chapter three shall look at factors that are related to the murderer eg. is he matured, sane or insane, is it out of his choice or he was compelled and what happens if the victim assented to the act (murder).

While chapter four shall study the implications of pardoning and reconciliation in the implementation of qisas.

CHAPTER ONE

FACTORS PERTINENT TO MURDER

1.1 QUASI INTENTIONAL KILLING :

Whether quasi intentional killing do exist is a point of difference between Muslim jurists.

Imam Malik as one of these jurists says that only intentional and unintentional killings do exist.¹ And as such there is no kind of killing between the two. He bases his argument on the following quranic verses which mentions the two types of murder.

"Never should a Believer kill a Believer, except by mistake, And whoever kills a Believer by mistake it is ordained that he should free a believing slave and pay blood money to the deceased's family..."²

قال الله تعالى: «وما كان لمؤمن أن يقتل مؤمناً إلا خطأ، ومن قتل مؤمناً خطأ فتحرير رقبة مؤمنة ودية مسلمة إلا أهله...»³

And again the quran mentions that:

" If a man kills a Believer intentionally his recompense is hell, to abide there in for ever and the wrath and the curse of Allah are upon him, and a dreadful chastisement is prepared for him."³

« ومن يقتل مؤمنا متعمدا فجزاؤه جهنم خالدا فيها وغضب الله عليه ولعنه وأعد له عذابا عظيما ».

In the above verses two kinds of murder are mentioned namely; intentional and unintentional murder. And since quasi intentional killing is no where to be mentioned. Thus making Imam Malik to inevitably refute the existence of quasi intentional murder. And he therefore argues that, a recognition of a third type of murder amounts to addition to the Quran what does not exist.⁴

Conversely, Abu Hanifa, Shafi and Ahmad Ibn Hambali establish the fact that quasi intentional killing is considered as a type of murder.⁵ And their opinion is based on the prophetic hadith narrated by Abdullah Ibn Amr that the prophet said; "The bloodwit for unintentional murder which resembles intentional one, such as that with a whip or a stick is one hundred camels, forty of which are pregnant."⁶

« ألا دية الخطأ شبيه العمد ما كان بالسوط والعصا مائة من الإبل منها أربعون في بطونها أولادها ».

And again it has been reported that Umar (R), Uthman (R), Ali (R), Zaid Ibn Thabit (R), Abu Musa al Ashari and Mughira Ibn Shuaib, to have agreed with the existence of quasi intentional killing, and that non of the companion raised objections to their opinion.⁷

However a person's intention is known to none other than himself and Allah The All Knowing. Nonetheless, inference of one's intention can be made from the type of weapon or instrument that he uses to commit a crime. For instance if the instrument used is fatal to humans or not, then we can conclude accordingly.

Basically, the major difference between Imam Malik who denies the existence of quasi intentional killing and the majority who accept quasi intentional murder is that, to Imam Malik the act of killing is the same (crime) unless proved that the act was mistakenly committed or was as a corrective measure by a person of authority, who has the responsibility and power to do so.⁸

The other jurists namely, Hanafi, Shafi and Hambali maintain that murder can be intentional, quasi intentional or unintentional and that the sole differentiating factor is the intention.⁹

And by studying all the arguments and their basis as advanced by the scholars, we can safely say that Imam Malik's view is weak and cannot be readily accepted as it contradicts sunnah and the practices of the companions (sahabat) who were in a better position to understand the Islamic teachings.

Nevertheless, some scholars who belong to Malik's school of thought do accept quasi intentional murder as a type of killing.

Amongst these scholars is a famous scholar Al-Qurtubi who recognizes the authenticity of the hadith with regard to quasi intentional killing.¹⁰

But even the scholars who accept quasi intentional killing have differed on its definition.

Abu Hanifa says that any murder committed intentionally with something which is not a sharp weapon or which does not amount to a fatal weapon eg. a stick, a stone or strangling etc. are all classified as quasi intentional killing. Hereby, we can readily see that he gave much consideration the type of weapon used.¹¹

On the other hand, those of Shafi and Hambali gave great consideration to both the intention and the instrument used for the purpose. And therefore, according to them (shafi and Hambali) if the instrument used normally causes death, and the offender committed the offense intentionally, then the act is considered as an intentional murder and the perpetrator is liable to capital punishment (qisas) eg. if the offender used a big/large stone or a big stick or throw the victim into a river knowingly that he doesn't know how to swim and so on.¹² But as we had seen earlier on that Abu Hanifa had considered all these means/instruments as those that lead to quasi intentional murder thus basing their opinion on a hadith reported by Jabir al Juifi and Qaiys Ibn Rabi-i

that the prophet said that; " Any murder committed by any thing other than sword amounts to unintentional murder."¹³

And infact the narration of this hadith has been dismissed as weak and unreliable.¹⁴ While the majority of the jurists (Shafi and Hambali) base their view on a hadith narrated by Anas Ibn Malik that; "A Jew crushed the head of a girl between two stones. Then she (the girl) was asked as to who had done that to her? Is it so and so? Till the name of the Jew was mentioned and she nodded her head in agreement. And the Jew was brought to the prophet and he (Jew) confessed. Then the prophet ordered his head to be crushed as well in between those stones."¹⁵

عن أنس بن مالك أن يهوديا رضى رأس حارية بين حجرين فقبل لها من فعل بك هذا : أفلان ؟ أفلان ؟ حتى سمي اليهودي ، فأومات برأسها ، فجيء باليهودي فاعترف فأمر النبي - صلى الله عليه وسلم - فرض رأسه بالحجارة .

Apparently, we can see that things such as stones can be used for fatal purposes. And as a result of that the prophet ordered qisas punishment to be imposed on the Jew. And even the Hanafi's acknowledge and recognize the authenticity of this hadith but then, they argue that the Jew was a habitual killer who deserved death penalty regardless of the instrument that he had used for the murder.¹⁶

After all these discussions, I comfortably say that the opinion of Shafi and Hambali are most preferable to me. The reasons for my preference is that, it seems irrational to consider all killings by instruments that do not always cause death as unintentional even if the offender kills deliberately.

1.1.1 Punishments For Quasi Intentional Killing:

Muslim jurists from the Hanafi, Shafi, and Hanbali schols of thought consider quasi intentional killing as a type of homicide, meaning that it is a crime that is punishable by payment of diyah (blood money) and not qisas. And this opinion is based on the prophetic saying that, "As for quasi intentional homicide, the blood money is stringent like intentional killing and the offender should not be killed..."¹⁷

عن عمر بن شعيب عن أبيه عن جده أن النبي - صلى الله عليه وسلم - قال: « عقل شبه العمد مغلظ مثل عقل العمد، ولا يقتل صاحبه، وذلك أن ينزوالشيطان بين الناس فتكون دماء في غير صفيئة ولا حمل سلاح».

It is very clear from the above mentioned hadith that qisas is not applicable in the case of quasi intentional killing. The motive behind this judgement is basically that the offender did not intend

to cause death for the victim. As such it won't be fair to prescribe death penalty for such an offense as Islam is an egalitarian religion that calls for justice.

Apart from the prophetic tradition , it is also apparent from the practices of the companions of that they did not apply qisas punishment in the case of quasi intentional killing, but what they did was in conformity with the prophets tradition thus imposing diyah. Mujahid reported that Umar Ibn Khatab gave judgement that bloodwit for quasi intentional punishment should be thirty she camels in their fourth year, thirty she camels in their fifth year and forty pregnant she camels in their sixth year up to the ninth year.¹⁸

عن مجاهد قال : « قضى عمر في شبه العمد ثلاثين حقة، وثلاثين جذعة، وأربعين خلفه، مابين ثنية إلى بازل عامها. »

Abdullah Ibn Masud is quoted as saying that, "The bloodwit for unintentional murder which resembles intentional murder is twenty five she camels which are in their fourth year, twenty five she

camels in their fifth year, twenty five she camels in their third year, and twenty five she camels which are in their second year.¹⁹

عن عبد الله ابن مسعود قال: قال رسول الله - صلى الله عليه وسلم -: « في دية الخطأ عشرون حقة، وعشرون جذعة، وعشرون بني مخاض ذكورا ».

Similarly, Ali Ibn Talib was quoted as saying that, "The bloodwit of quasi intentional killing should be divided into three categories; thirty three she camels in their fourth year, thirty she camels in their fifth year, and thirty four pregnant she camels in their sixth year up to the ninth."²⁰

عن علي أنه قال: « في شبه العمدة أثلاثا، ثلاث وثلاثون حقة، وثلاث وثلاثون جذعة، وأربع وثلاثون ثنية إلى بازل عامها كلها خلفه ».

It is very clear that these judgements ascertain the fact that diyah is the punishment for quasi intentional killing. Therefore, basing ruling on all these evidences makes the earlier mentioned schools of thought to agree that diyah is the punishment for quasi

intentional killing, but the diyah is a stringent one than the diyah for unintentional killing. As such in the case of the quasi intentional killing out of the one hundred camels for the diyah forty must be pregnant.

1.2 Unintentional Killing

Unintentional killing is defined as an act that inadvertently results in the death of an individual. And it is of two kinds;

- (a) Error in the act.
- (b) Error in the intention

The first type of error (a) is where a person intends a particular act, but another act is thereby occasioned, as when a person shoots at a target and inadvertently (not deliberately) hit a man.

On the other hand the second type of error (b) is when the mistake is not in the act but with respect to the subject, as when a person shoots at a person supposingly that he is the game/animal of target or at a Muslim in a jihad mistaking him for an infidel.²¹

1.2.1 Punishment For Unintentional Killing:

Incase of an unintentional killing the punishment prescribed in the holy Quran is diyah. As such all Muslim jurists had no reason not to agree with the injunction that blood money and penance are the accepted punishments, and therefore no qisas is owed.²² And this has been explicitly emphasized in these verses; "Never should a believer kill a believer unless by mistake. And whoever kills a believer by mistake should free a believing slave and pay compensation to the family of the deceased unless they remit it freely. If the deceased belonged to a people at war with you, And he was a believer, the freeing of a believing slave is enough. If he belonged to a people with whom you have treaty of mutual Alliance, blood money should be paid to his family and a believer be freed. For those who find this beyond their means is prescribed a fast of two months Running by the way of repentance to Allah: For Allah hath all knowledge and all wisdom."²³

قال الله تعالى: «وما كان لمؤمن أن يقتل مؤمناً إلا خطأ، ومن قتل مؤمناً خطأ فتحرير رقبة مؤمنة ودية مسلمة إلا أهله...».

The Quranic verses thus gives alternative punishment for the crime other than qisas. Subsequently, the traditions of the prophet asserted the principles ordained by the Quran as he peace be upon him determined the quantity of the diyah as reported by Abdullah Ibn Masud that the prophet said, "the bloodwit for accidental killing should be twenty she camels which are in their fourth year, twenty she camels which are in their fifth year, twenty she camels which are in their second year, twenty she camels which are in their third year and twenty male camels which are in their second year."²⁴

عن عبد الله ابن مسعود قال: قال رسول الله - صلى الله عليه وسلم -: « في دية الخطأ عشرون حقة، وعشرون جذعة، وعشرون بني مخاض نكورا ».

This hadith clearly indicates that the diyah for unintentional killing is less stringent than that for quasi-intentional killing. The basic logic for the difference in the punishment of the two kinds of killing is that the frequency of unintentional killing is high in societies. and therefore with Allah's mercy a less stringent punishment has been ordained.

1.3 Killing Emanating From Self-Defence

By virtue of Islam as a religion that preaches justice as well as preservation of lives. It therefore require that an individual should have the right to protect himself/herself as warranted. The beauty of Islam is that it gives individuals the right of self-defence and simultaneously requiring them to observe other's right. As such the right of a person for self-defence is warranted such that no harm is inflicted on others, other than that necessary for the purpose and also given that there is no time for recourse to the public authourities. And the right for self-defence has been derived from the following verse,

"If then anyone transgresses the prohibition against you, transgress ye like wise against him."²⁵

قال تعالى: « فَمَنْ أَعْتَدَىٰ عَلَيْكُمْ فَأَعْتَدُوا عَلَيْهِ بِمِثْلِ مَا أَعْتَدَىٰ عَلَيْكُمْ ».

The prophetic tradition also emphasized the right for self-defence as it is reported by Said Ibn Zaid that the prophet said, "He who is killed while protecting his property is a martyr, and he who is killed while defending his family, or his blood or his religion is a martyr."²⁶

عن سعيد بن زيد عن النبي - صلى الله عليه وسلم - قال: « من قتل دون ماله فهو شهيد، ومن قتل دون أهله أو دون دمه أو دون دينه فهو شهيد ».

The hadith is very explicit as it ensures the protection of the five basic essentials namely; religion, life, intellect, progeny and wealth, despite the fact that some of these essentials are not directly mentioned in the hadith.

Conversely, the prophet refused to impose retaliation for a tooth lost by person in a fight with a man because he has transgressed by biting the hand of his opponent whom, in defending himself pulled away his hand and thus, causing the uprooting of the tooth of the transgressor. Hence, the hadith was reported by Safawan Ibn Ya'la on his fathers authourity that, "A servant of mine fought with a man and bit the man's hand and he drew away his hand. One of his front teeth fell out. So he came to the prophet who imposed no retaliation for his tooth, saying that; "Do you intend that he leaves his hand in your mouth so that you crunch it like a male camel."²⁷

عن صفوان بن يعلى عن أبيه قال: قاتل أجير لي رجلا فعض يده فانتزعها فندرت ثنيته فأتى النبي - صلى الله عليه وسلم - فأمدرها وقال أتريد أن يضع يده في فيك يقضمها كالفحل.

As a result of the afore mentioned hadith, Muslim scholars (jurists) have unanimously agreed that all people are entitled to self-defence but the amount of defence used should be proportionate to the aggression. It is therefore unlawful to use excessive force as a means of self-defence for combating an aggression that do not amount to death.²⁸

Consequently, the following conditions should be observed in applying private defence;

- (a) The attack must have occurred.
- (b) The attack cannot be prevented except by using force.
- (c) The defence must be reasonable, that an excessive force should not be used except when circumstances require so.
- (d) The impossibility of relying on the protection of the public at the crucial moments.²⁹

And according to the jurists, it really doesn't matter whether the aggressor is a child, a lunatic or an animal in allowing one to exercise his right of self-defence. And as such no one is liable to any kind of punishment as he or she was performing his/her duty of self protection.³⁰ It is here that only the Hanafi's say that the killer is liable to a civil court and therefore, he has to pay diyah for the child and the lunatic as well as the price of the animal killed.³¹

The Hanafi School base their argument on the fact that a crime committed by a child, a lunatic and an animal cannot be equated to a crime committed by a matured person since the latter has the ability to differentiate between what is good and the former does not possess the capacity to differentiate between what is good and evil.

Muslim scholars also maintain difference of opinion on the issue whether the private-self protection is an optional right which will depend on the victim whether to exercise or not. It therefore means that if the individual chooses not to defend himself, it won't be considered a crime or a sinful act that is punishable. And this opinion is based on the following evidences;

(a) It was related that the prophet said ;

"If anyone goes to a man of my community in order to kill him and he says so. Then the killer will go to hell, and the killed will go to paradise."³²

« من مشى إلى رجل من أمتي ليقتله فليقل هكذا، القاتل في النار والمقتول في الجنة ».

(b) It was reported by Abu Zharr that the Apostle of Allah said to him...., How will you do when there will be death of people and a house will reach the value of a slave (meaning that a

grave will be sold for a slave_). I replied that Allah and His apostle know best or he said ; what Allah and His Apostle chooses for me. He said you must go to those who are like minded with you. I asked: should I not take my swords and put it on my shoulders? He replied: You must, than associate yourself with the people. I then asked: What do you order me to do ? He replied: You must keep to your house. I asked what should I do if people enter my house and reach me. He replied: If you are afraid, the gealm of the sword may dazzle you, put the end of your garment over your face inorder that the one who kills you may bear the punishment of your sins and his.³³

عن أبي زر قال : قال لي رسول الله - صلى الله عليه وسلم - « يا أبا زر ، قلت لبيك يا رسول الله وسعديك ، كيف إذا أصاب الناس موت يكون البيت فيه بالوصيف - يعني القبر - قال: قلت الله ورسوله أعلم أو قال ماخار الله لي ورسوله ، قال عليك بالصبر أو قال تصبر ثم قال لي: يا أبا زر ، قلت لبيك وسعديك ، قال: كيف أنت إذا رأيت أحجار الزيت قد غرقت بالدم ؟ قلت ما خار الله لي ورسوله : قال: عليك بما أنت منه ، قال قلت يا رسول الله ، أفلا أأخذ سيفي فأضعه على عاتقي ؟ قال شاركت القوم إذا ، قال قلت: فما تأمرني ؟ قال تلزم بيتك ، قال قلت: فإذا دخل على بيتي؟ قال فإن خشيت أن يبهرك شعاع السيف فألق ثوبك على وجهك يَبوء بإثمك وإثمه».

Based on this hadith the majority of scholars maintain that it is not obligatory to exercise private self-defence. Moreover, they

cite the position of the third Khalifah Uthman Ibn Affan as supportive of their opinion since he did not decide to fight the rebellious remnants that had surrounded his house inspite of the fact that he had the ability to inflict on them heavy casualties as the companions were ready to fight for his cause.³⁴

However, Al-Jasas one of the famous Hanafi scholars is of the opinion that self-defence is an obligation on every person attacked by an enemy aiming at killing him.³⁵ He base his opinion on the following evidences;

- (a) Al-Quran says, " If two parties among the believers fall into a fight, make ye peace between them: but if one of them transgressors beyond bounds against the other, Then fight ye all against one that transgressors until it complies with the command of the Allah(s.w.t).³⁶

«وإن طائفتان من المؤمنين اقتتلوا فأصلحوا بينهما فإن بقت إحداهما على الأخرى فقاتلوا التي تبغي حتى تفيء إلا أمر الله» .

The argument is that here Allah commands to fight a party that transgressors and similarly the argument applies to a person who offends an individuals.³⁷

(b) Another Quranic verse says that,

"In the law of equality there is saving of life to you..."³⁸

«ولكم في القصاص حياة يا أولي الألباب لعلكم تتقون».

The point being emphasized is that if the transgressors are not combatted it will lead to much shedding of blood and it will also mean the violation of the rule established by Quranic injunctions. As such qisas is basically meant to preserve lives.³⁹

(c) The prophet equated those killed in the cause of self defence to those killed in battles against infidels.⁴⁰ And this really reflects the importance of self-defence, thus making the majority of scholars to consider self-defence as something obligatory.

With due respect to the opinion of the majority of the scholars and its weighage, I would personally prefer Al-Jasas' view to that of the majority of scholars. Nevertheless it can also be possible to reconcile between the prophetic tradition which ordered the victim to refrain from fighting and defending himself, and the other which considers he who is killed in the cause of self-defence as a martyr.