

## **HOMICIDE IN ISLAMIC LAW AND CONVENTIONAL LAW AS APPLIED IN BANGLADESH: A COMPARATIVE ANALYSIS**

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### **ABSTRACT**

*Though the world is largely divided on cultural relativism and law is the most affected phenomenon of that relativity, there is hardly found any society in which the criminality of homicide is debated. Despite this universal abhorrence to this crime, it is the unique feature of Islam that it equates the killing of an innocent human being with the murder of whole mankind. But in and after the Age of 'Enlightenment', the secularists championed the dignity of human life so much so that they stood against any sort of corporal punishment, and some of them overtly opposed capital punishment for murder. As the large majority people of this country are the followers of Islam and at the same time they are governed by secular common law as inherited from the British colonial rule, attempt has been made to show a comparative picture of criminality of homicide and its variant punishments in both systems. This theoretical and comparative research finds that the Laws of Islam have taken the issue of homicide more seriously and provided the heirs with more options to meet their grievances compared with the existing secular form of criminal laws of the country.*

**Keywords: Homicide; Murder; Coercive Authority; Blood-money.**

### **1. INTRODUCTION**

Homicide (*qatl*) is an action causing the detachment of the soul from a human being (Al-Fayyūmī: 187). The Qur'ānic term *qatl* is used for two meanings: (a) the crime of murder and (b) the punishment of execution. Homicide is a crime except done in consequence of just causes. Just causes include killing of a combatant enemy in the battlefield (Qur'ān, 9: 5), renegade from Islam, married adulterer (Bukhārī: 6878) and highway robber (Qur'ān, 5: 33) etc. In both Islamic law and existing penal laws of Bangladesh, homicide is a crime for which both the systems have declared different types of punishments. During the British colonial era, serious allegations were made against the efficacy of Islamic laws. One of those allegations is that Islamic law is ineffective in

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combating crime. Is it so? This research reveals it in the strongest negative form and proves that Islamic law is more humane, more victim-friendly and compatible with the needs of the society.

### **1.2. Objective of the Research/Study**

The prime objective of this research is to show that Islamic law is unique and unparalleled among the legal systems of the world and to emphasize the gravity of this heinous crime, in providing the heirs of the victim, not the head of the state, with absolute power to choose any of the three options: retaliation (*qiṣās*), or blood-money (*diyyah*), or forgiveness (*‘afwun*).

### **1.3. Background of the Study**

Similar issues have been dealt with in different writings of Muslim scholars in the past century. More than sixty years ago, the noted Egyptian jurist ‘Abd al-Qādir ‘Awdah, in his seminal work *Al-Tashrī‘ al-Jinā‘ī al-Islāmī muqārīnan bi ‘l-Qānūn al-Waḍ‘ī* (*The Penal Laws of Islam in comparison with Man-made Laws*), gave a detailed guidelines of how and to what extent criminal laws of Islam differ from man-made laws. Though that work is exhaustive in what it includes, necessity of the present research has been strongly felt, because in the former work Islamic law was compared with continental law (or civil law) of Europe and, on the other hand, the present work concentrates in comparing Islamic law with the British common law as applied in Bangladesh.

## **2. METHODOLOGY**

As this article is basically a comparison between Islamic law and man-made laws as prevalent in Bangladesh, pure textual analysis method has been followed throughout the research. Supreme priority has been given to the verses of the Qur’ān. Sunnah of the Prophet has been used as the living commentary of the Qur’ān. As the Penal Code, 1860 is the major and guiding statute dealing with criminal laws of Bangladesh; utmost emphasis has been laid upon the texts of relevant sections of the Code and their illuminating illustrations.

## **3. ANALYSIS AND FINDINGS**

### **3.1 Origin of Homicide**

History of homicide is as old as the birth of mankind itself. The Qur’ān informs us that two sons of Ādam (Peace Be Upon Him) offered sacrifices before Allāh. Sacrifice of one brother was accepted while that of the other was rejected. The failed and jealous brother, instead of rectifying his deeds, killed his brother whose sacrifice was accepted for his piety. With regards to the beginning of homicide, the Qur’ān informs that each of the two sons of Adam [Abel and Cain] offered a sacrifice to Allāh. It was accepted from the one but not from the other. The latter said to the former: “I will surely kill you” and at last he killed him. (5: 27-30)

### **3.2 Different Phases of Prohibition on Homicide**

#### **First Phase: Raising the Sense of General Accountability in the Hereafter**

As per the general nature of the Qur’ānic legislation, direct prohibition was not imposed upon

homicide at the very outset; rather it primarily attempted to raise the sense of general accountability with regards to homicide in general, and infanticide in particular, in the hereafter. It reminds the people about the Day of Resurrection (81:8-9) and declares that lost are those who kill their children, from folly, without knowledge (6: 140) and presents the pathetic picture of the evil-mongers (16: 58-9). It removes the fear of want – one of the main causes of infanticide – and assures that Allāh will provide sustenance for both (6: 151) and repeats the same assurance in a later phase of Madīna as well (17: 31). In the light of the above instructions, the Prophet (PBUH) reminds “On the Day of Resurrection Allāh - the Blessed and the Most High - will at first adjudicate among the people the cases of homicide”. (Muslim, Chapter: Oaths)

### **Second Phase: Visualizing homicide as the practice of the rebels against Allāh, not that of devoted believers**

At the second stage the Qur’ān depicts homicide as suicidal plan inspired by the devil (6: 137) and informs that, at one time, Pharaoh also took resort to the heinous crimes of homicide and infanticide but the plots of unbelievers (end) in nothing but errors and delusions (40: 25-6) and tells that if they want to be the obedient servants of Allāh, they must refrain themselves from unlawful homicide (25: 63, 68).

### **Third Phase: Forbidding unjust homicide without prescribing any punishment for the perpetrators**

At this stage the Qur’ān addresses the issue of homicide more directly. Now infanticide and homicide are not only generally abhorred, but also brought within the periphery of the activities directly forbidden by Allāh. The Prophet (PBUH) is commanded, “Say: “Come, I will rehearse what Allah has (really) prohibited you from”: ... *kill not your children on a plea of want... take not life, which Allah has made sacred, except by way of justice and law* (6: 151 and 4: 29). Even the killing of a single human being is equated with the killing of whole mankind (5: 32). Though homicide has been declared unlawful, punishments and remedies are yet to be declared.

### **Fourth Phase: Empowering the State (*sulṭān*) to ensure justice to the heir of the victim**

This phase starts after the consolidation of *sulṭān* (i.e. state-authority) in Madīna. At this level the nascent state of Madīna has been vested with the power of adjudication of homicide cases and the heirs of the victim have been assured of state-interference and advised not to cross the limits set by law in punishing the criminals (17: 33). What punishment should be inflicted upon the murderer and what remedies are available for the heirs of the victim have not been given in this phase with sufficient clarity. It is to be noted that the Qur’ānic sentence *faqad ja ‘alnā li waliyyihī sulṭānan* is generally translated as ‘We have given his heir an authority’. In my opinion, this rendering is erroneous, because it gives the impression that punishing the killer is the personal responsibility of the heir without any institutional support. Therefore, its more accurate rendering may be, “We have made for his heir a coercive authority (i.e. the state)”. Besides, the end clause “Certainly he will be helped” also indicates to the institutional support of the state in favor of the heir. My rendering

is further supported by an interpretation given by Ibn Zayd who said, “*faqad ja ‘alnā li waliyyihī sulṭānan yanṣuruhū wa yantaṣifu min ḥaqqihī* i.e. (Allāh says) ‘We have made for his heir an authority’ who shall help him and ensure justice with regards to his claim”. (Al-Ṭabarī, 7: 390)

### **Fifth Phase: Confirming the retributive punishment of homicide as mentioned in the Tawrāt with certain developments**

Before the announcement of punishment for homicide, the Qur’ān mentions the punishment of *qiṣās* as prescribed in the Tawrāt (5: 45). Now the same punishment is prescribed with certain extra options: “O ye who believe! The law of equal punishment (*qiṣās*) is prescribed to you in cases of murder... But if any remission is made by his brother, adhering to it with fairness and payment of the blood money, to the heir should be made in fairness (2: 178-9). According to this verse, the heir of the victim has been given three options: (1) law of equal punishment; or (2) blood-money or (3) forgiveness. These provisions of homicide had been incorporated in the Madīna Charter as well (Art. 21)

### **3.3 Variant Legal Status of Homicide**

Sometimes homicide becomes permissible and sometimes punishable. From that perspective, homicide cases may be categorized into five (Al-Mawsū‘at, 32: 321-2): (1) *wājib*/ duty, e.g. the killing of a *murtadd* (*apostate*)– the renegade from Islam and the death penalty to married adulterers by the court, if his guilt is legally proved; (2) *mandūb*/ recommended, e.g. the killing of a man who insults Allāh or His Prophet; (3) *mubāḥ*/ permitted, e.g. killing in self defence; (4) *makrūh*/ disapproved; and (5) *ḥarām*/ unlawful, e.g. the killing of an innocent person without a just cause (Encyclopedia of Islam, 4: 768).

### **3.4 Classification of Unlawful Homicide**

Unlawful homicide, i.e., the killing of an innocent person without a just cause may take place in three ways: (1) *‘amd* or intentional and direct (Qur’ān, 4: 93); (2) *khaṭa’* or accidental (Qur’ān, 4: 92); and (3) *shibh ‘amd* or quasi-intentional (Abū Dāwūd: 4565), i.e. death as a result of an action not always but sometimes fatal. All these classes are based on the texts of the Qur’ān and the Sunnah and therefore agreed upon by the jurists. However, some jurists have tried to add more classes in homicide: (i) *jārī majrā al-khaṭa’* or equivalent to accident, e.g. someone falls upon another in his sleep and kills him; and (ii) *qatl bi sabab* or indirect killing, e.g. a person digs a well and someone falls into it and dies as a result. As these classes are not based on any divine text, jurists are of divergent views on these issues and, therefore, those rulings do not represent the universal laws of Islam.

### **3.5 Punishments for Homicide**

**Intentional homicide:** In this case the murderer faces several punishments: (1) moral i.e. hell as the dwelling place in the hereafter (Qur’ān, 4: 93), and (2) legal (a) *qiṣās* or equal punishment (unless forgiven by the heirs of the victim for blood-money or for nothing (Qur’ān, 2: 178-9) and

(b) exclusion from inheritance of the victim, if the murderer is the heir of the victim (Bayhaqī, 12372).

### **Accidental Homicide**

Based on the status of the victim, the accused of accidental homicide has to face the following punishments: (a) blood money cum expiation, if the victim is a believer residing in the Islamic state (Qur'ān, 4: 92); (b) mere expiation, if the victim is a believer residing in an enemy territory (ibid); and (c) blood money and expiation, if the victim is a non-believer residing in a state with which the Islamic state has a peace treaty (ibid). The same principle is applicable to the mistaken killing of a non-believer residing in an Islamic state under state-protection (*al-dhimmah*). Close scrutiny of this Quranic verse reveals that the main issue is whether the non-believer has any peace treaty with the Islamic state, either in the form of *al-dhimmah* (intra-state protection of the minorities) or in the shape of *al-mīthāq* (inter-state peace treaty). Hence came the consensus of the jurists that if a believer accidentally kills a nonbeliever in a territory with which the Islamic state has no peace treaty, then neither blood-money nor expiation is legally binding upon the killer. However, if the accused of accidental homicide is unable to perform the obligations (mentioned in a, b and c), he has to fast two consecutive months (ibid).

### **Quasi-intentional Homicide and its Legal Consequences**

Whoever commits quasi-intentional homicide shall be liable to *diyah*, and *qīṣāṣ* shall not be applied upon him. The Prophet (PBUH) is reported to have said, “The blood-money for quasi-intentional killing is severe like that for deliberate killing, but the perpetrator is not to be executed (Abū Dāwūd: 4565)”. Another narration makes it more specific: “The blood-money for quasi-intentional killing with a whip or stick is one hundred camels of which forty should be (she camels) with their young in their wombs. (Nasā'ī: 4795)”

### **3.6 Homicide in Common Law**

In terms of definition of homicide, there is no fundamental difference between Islamic law and common law. In common law, homicide is defined as the killing of a human being by a human being (Stephen: 158). Though Islamic law has divided the legal status of homicide into five categories: obligatory, recommended, permitted, disapproved and unlawful, common law divides it into two broad categories: lawful and unlawful. Homicide is lawful, if it falls within any of the general exceptions as mentioned in Chapter IV of the Penal Code, 1860.

Lawful homicide is further classified as (a) justifiable, and excusable. Justifiable homicide may be committed by (i) a person bound, or by mistake of fact believing himself bound, by law (The Penal Code, 1860, s. 76), (ii) a judge acting judicially (s. 77); (iii) a person acting in good faith and in pursuance of a judgment of a court (s. 78); (iv) a person justified by law (e.g. action by a police upon a person in self-defense thinking him a murderer) (s. 79); (v) a person doing lesser harm in prevention of greater harms (s. 81); or (vi) a person acting in private defence (s. 103). Excusable homicide may occur, where death is caused (i) by accident (s. 80); (ii) by a child (ss.

82-3), or a person of unsound mind (s. 84), or a person intoxicated against his will (s. 85); or (iii) by act done in good faith for the benefit of the person killed (ss. 87-8 & 92).

Islamic law has divided ‘unlawful homicide’ into: (i) intentional; (ii) quasi-intentional; and (iii) accidental. In common law, as applied in Bangladesh, unlawful homicide is classified as: (i) culpable homicide amounting to murder; (ii) culpable homicide not amounting to murder; (iii) abetment of suicide (if suicide occurs) and (iv) homicide by negligent act.

### **3.7 Culpable Homicide Amounting to Murder Equivalent to Intentional Homicide**

Culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death (s. 300). From this perspective it may be likened with ‘intentional homicide’ in Islamic law. The first four illustrations in section 300 of the Penal Code, 1860 are also identical with illustrations of ‘intentional homicide’ found in classic texts of Islamic jurisprudence. In both, intention plays the central role.

### **3.8 Culpable Homicide not Amounting to Murder**

As per exception 1 of section 300, culpable homicide will not amount to murder, if done ‘whilst deprived of the power of self-control by grave and sudden provocation’. Though Islamic law exempts ‘lunatics’ from legal liabilities, it does not accept the excuse of grave anger to escape criminal liability of murder. Therefore, in illustration (z) of exception 1 of section 300, the criminal is exempted from the liability of murder; while in Islamic law both are to be held responsible for intentional murder.

### **3.9 Wrong Target: Accidental Killing or Mere Unlawful Act?**

The Illustration (c) of section 299 reveals that the penal law of Bangladesh does not recognize wrong target as homicide at all. In its eye, it is merely an unlawful act worth of very little punishment. On the other hand, in Islamic law it is accidental killing in which blood-money is obligatory unless forgiven by the heir of the victim. According to exception 4 of section 300, culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender’s having taken undue advantage or acted in a cruel or unusual manner. This illustration may be likened with quasi-intentional killing in Islamic law. Abū Dāwūd (4565) defines quasi-intentional homicide in following words: “When the devil incites people to do evil, and blood is shed blindly, with neither malice aforethought nor bearing weapons.”

### **3.10 Punishments for Homicide**

The above discussion reveals that the penal laws of Bangladesh do not treat the criminality of homicide as seriously as is treated in Islamic law. So many acts have been driven out of the ambit of murder and made into mere unlawful acts. It is all at the definitional level. The lack of seriousness is more evident, when the issue of punishment comes forward. Even culpable homicide amounting to murder is to be punished with “death, or imprisonment for life, and shall also be liable to fine” (ibid, s. 302). Culpable homicide not amounting to murder is lighter than that of murder. If the act

is done with intention of causing death, the punishment is imprisonment for life, or imprisonment for a term which may extend to ten years, and shall also be liable to fine. If the act is done without any intention to cause death, the punishment is imprisonment for a term which may extend to ten years, or fine, or both (ibid, s. 304).

It is the common feature of proponents of secular laws that they portray themselves to champion the dignity of human life. But when the punishment of the criminals – who have showed no respect whatsoever to the dignity of human life – comes forward, they always propose very soft punishment. By taking lenient position in favour of the criminals, they are, in fact degrading human dignity

### **3.11 Prerogative of Mercy of the President**

Another dissimilarity between the criminal law of Islam and that of Bangladesh is that in the former it is the heir of the victim, not the head of the state or anybody else, who is empowered to demand *qiṣāṣ* (equal punishment), or be satisfied with blood-money, or to forgive for nothing; while in the latter the heirs have been deprived from such rights and instead the head of the state has been vested with the power to pardon any criminal without showing any reason whatsoever. Constitutionally, it is known as prerogative of mercy. The law says, “The President shall have power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. (The Constitution, Art. 49)” Moreover, though Islamic law has kept the provision for the heirs of the victim to demand blood-money from the murderer, there is no binding provision in the penal laws of Bangladesh to that effect.

## **4. CONCLUSION & RECOMMENDATIONS**

Both Islamic law and the penal laws of Bangladesh treat homicide as a heinous crime. In punishing the criminal, the former authorizes the heir of the victim, not the state, to choose any of the three options: retaliation (*qiṣāṣ*), or blood-money (*diyyah*), or forgiveness (*‘afw*), while the latter considers it as a crime against state and empowers the head of the state to pardon the criminal at his sweet will with the exclusion of the heirs of the victim. In quasi-intentional homicide, both Islamic law and the criminal law of the country exempt the criminal from death penalty, but the former imposes blood-money in favour of the heirs of the victim (unless the remit) and the latter prescribes imprisonment for different terms.

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