

# The Falling of Criminal Liability by Dropping the Inviolability of Self A Comparative Jurisprudential Study

Mohammad Ali G. Zuraib<sup>1</sup>

## **Abstract**

*This study focuses on examining the legal rulings regarding the occurrence of a crime when it is applied to those deserving it, particularly when the victim is not considered to have the sanctity or inviolability of their blood. This includes cases such as murderers, apostates, and married adulterers, even though their blood is not guaranteed immunity. Acknowledging that the killing of these individuals is considered a crime, despite the lack of guaranteed immunity for their blood, is based on the premise that the study will delve into the execution of the judgment on them occurring without the knowledge or consent of the ruler and before the judgment of the judge. This research is structured into an introduction, two main sections, and a conclusion, as follows: The research commenced with an introductory section that provided a definition, encompassing the significance of the study, its objectives, and a review of previous studies. The first section discussed the entitlements of the relatives of the victim to seek retribution from the perpetrator prior to the issuance of a judicial verdict. The second section addressed the killing of an apostate and an adulterer who is married, before the issuance of a judicial verdict, through the application of punishment. Finally, the conclusion and findings reached by the researcher were presented, accompanied by an appendix containing the sources and references used.*

**Keywords:** Guarantee, Crime, Apostate, Killer

## **INTRODUCTION**

These issues are among the subjects that Islamic jurists have delved into, given the presence of rulings that resemble precedents susceptible to analogical reasoning and emulation. Their importance lies in their connection to applied jurisprudence.

Furthermore, these issues enhance the skillful aspect of legal expertise for the jurist, in addition to the cognitive aspect related to acquiring knowledge of the researched issues and rulings. The importance of this research can also be highlighted in addressing the following problematic aspects:

Addressing these judicial applications serves as a means of cultivating the skills required by the jurist and fostering deductive abilities, understanding how scholars arrived at legal rulings from their evidence, and why they differed in their perspectives.

Contributing to the regulation of the process of implementing retribution and corporal punishments by highlighting the central authority of the ruler and emphasizing the impermissibility of issuing fatwas for their execution. Although the sanctity of the intentional murderer, apostate, and the adulterer is lifted, it is not permissible to execute the punishment on them except by a judicial order.

The potential to utilize Sharia texts in addressing contemporary issues to confront emerging challenges.

## **RESEARCH METHODOLOGY**

In writing this paper, I relied on the inductive and analytical methods:

**The Inductive Method:** In gathering the scientific material, I adopted the approach of induction, examining foundational books and extracting relevant content, attributing the texts to their sources. When quoting verbatim, I enclosed the text within quotation marks "...". I referenced hadiths from their reliable sources, attributing them accordingly. If a hadith was from the two Sahihs or either of them, I cited it as such; otherwise,

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<sup>1</sup> Ph. D in Sharia, Associate Professor of Jurisprudence, Sharia Department, College of Sharia and Fundamentals of Religion, Najran University, Najran, Saudi Arabia. E-mail: [mazurib@nu.edu.sa](mailto:mazurib@nu.edu.sa), ORCID: <https://orcid.org/0009-0003-0859-2127>

I extracted it from the reliable books, mentioning the page, volume, chapter, and hadith number if numbered, clarifying its authenticity or weakness.

The Analytical Method: I analyzed the collected texts related to the issue, and through this method, the reasons that influenced the matter became apparent.

## LITERATURE REVIEW

In my review of previous studies, I have not found an original study that focused on the aspect of the cause of disagreement in this issue and compiled it in a single framework.

Section One: Retribution for the Relatives of the Deceased from the Killer, comprising two demands:

### **First Demand: Limiting the Retribution for Intentional Homicide to The Immediate Heirs of The Victim and Preserving the Killer's Immunity from Others.**

It is well-known that deliberately shedding blood aggressively is condemned. However, it is essential to note that the wastage of the blood of an intentional aggressor is limited to the immediate relatives of the victim after the ruler's decree. Therefore, scholars generally agree that assaulting the rights of the relatives of the deceased – by having someone other than them carry out the killing of the initial aggressor – warrants retaliation against the second killer. This is because they have committed the act of killing against a sanctified soul within their rights, even if that soul was violated in relation to someone else. (Al-Marghinani, 2020)

The disagreement among them lies in the consequences for the relatives of the first victim regarding the second killer, the one who killed their adversary. Some argue that the second killer is liable for retaliation, and the heirs of the first victim are entitled to blood money from the immediate relatives of the first killer (who is the second victim). This is because the right of the relatives of the first victim was in the killing of the second victim. If this right is missed, then the obligation shifts to seeking compensation (diya) as an alternative. (Al-Sindi, 1986)

Meanwhile, others argue that the second killer should be executed, nullifying the blood of the first victim. According to this perspective, the relatives of the first victim have no right over the relatives of the second killer. This is because the right of the heirs of the first victim is solely tied to the second victim (who is the first killer), and if an outsider kills him, the right of the heirs is forfeited, similar to the situation if the killer dies before compensation is fulfilled. (Al-Kharshi, 1317A H)

### **Second Demand: The Intentional Killing of The Murderer by The Immediate Heirs Before the Judgment of The Ruler.**

The implementation of many legal rulings in Islamic jurisprudence is contingent upon the judgment of the ruler. This is done to cut off the causes of chaos and conflict. It is a prerequisite for fulfilling the right of retaliation (qisas) that it be preceded by the judgment of a judge. This is because the ruling of retaliation requires legal reasoning (ijtihad), given the differences among scholars regarding the conditions for the obligation of retaliation and its fulfillment. Additionally, it does not ensure the occurrence of injustice beyond the prescribed limits during the process of retaliation, and it serves as a preventive measure against the potential for discord. (Al-Shawkani, 1414 AH)

Based on the aforementioned, the relatives of the victim are not entitled to fulfill retaliation against the killer of their relative except through the judgment and order of the ruler. If they bypass the judicial authority and proceed with retaliation, killing the perpetrator before the ruling of the ruler, the jurists have stated that the blood of the victim is considered spilled, and the fulfiller is not obligated to provide compensation.

Because the second victim is not considered to have sanctified blood in relation to the fulfiller, and the killing took place outside its rightful legal context, they have stated that the fulfiller, who acted before the ruling of the ruler, should be disciplined for encroaching upon the authority of the judiciary. (Al-Mawaq, 1994)

Section Two: Killing the Apostate and the Adulterer Without the Permission of the Ruler, consisting of two demands:

### **The First Demand: The Killing of a Muslim Who Has Renounced Islam (Apostate) And the Adulterer Who Is Married, Prior To Obtaining the Ruler's Permission.**

Indeed, the institution of retaliation (qisas) was legislated to safeguard sanctified lives and as a deterrent against the destruction of souls that are meant to be preserved, as evident in verse 179 of Surah Al-Baqarah. Retaliation is considered a means of preserving life according to the apparent meaning of the verse. (Al-Kasani, 1986).

The intended purpose of enacting retaliation is considered void in the case of non-innocent individuals, such as an apostate or an adulterer who is married. Therefore, jurists have explicitly stated that there is no retaliation, blood money, or expiation if a Muslim kills an apostate or a married adulterer before the ruling of the ruler or without his permission. This is because their blood is deemed permissible, and their killing is justified, making the act of killing coincide with its proper legal context. While there is no guarantee, it is essential that the perpetrator be disciplined for encroaching upon the authority of the judiciary. (Al-Qarafi, 1994)

### **The Second Demand: The Killing of a Dhimmi (Non-Muslim Living Under Islamic Protection) Who Has Renounced Islam (Apostate) And the Adulterer Who Is Married, Prior To Obtaining the Ruler's Permission.**

The apostate and the adulterer have forfeited their blood, and they do not have inviolability for themselves. Therefore, their killer is not obliged to pay blood money (Diya) or perform expiation before the ruling of the ruler, neither through blood money nor atonement, if the killer is a Muslim - as mentioned in the previous discussion. However, if the killer is non-Muslim, before the ruling of the ruler, there are two opinions on this matter: The majority opinion is that the blood of the apostate and the adulterer has no inviolability, Therefore, there is no retaliation required, but the perpetrator is reprimanded and disciplined for exceeding the ruler's authority. Their argument in this regard is that the forfeiture of the blood of the apostate and the adulterer and its permissibility came without any restrictions, similar to the blood of a pig. Hence, killing them is deemed inevitable, and since what the Muslim does not guarantee, the non-Muslim does not guarantee, there is no justification for differentiation. (Al-Buhuti, 2000)

Some argue that the apostate and the adulterer are immune from bloodshed concerning the dhimmi (non-Muslim living under Muslim protection). According to this perspective, the dhimmi is not exempt from retaliation or blood money when they kill a Muslim apostate or adulterer. Their rationale is that the killing of a Muslim apostate or adulterer is a religiously prescribed legal punishment (hudud), and non-Muslims are not considered worthy of the execution of religious legal punishments on others. (Al-Haytami, 1995)

## **RESULTS**

After addressing the previous issues and examining the opinions of the jurists, we can draw several observations and conclusions from this research, among the most prominent of which are the following:

The centralization of authority in the execution of punishments prohibits encroachment upon the judicial institution in implementing judgments. Here, we find that despite the gravity of the crimes, such as intentional murder, apostasy, and adultery, the punishment may not be carried out except by the order of the ruler.

It is crucial to distinguish between the religious legal impermissibility of executing a punishment and its procedural validity. The absence of judicial authorization for execution entails sin only. However, there is no guarantee for the individual who undergoes execution before the issuance of a judicial verdict.

The necessity of training in the practical and skillful aspects is underscored through the investigation of these issues, as it constitutes an exercise in correlating emerging crimes with the criminal provisions outlined in the jurisprudence of the predecessors.

The necessity to explain the divergence among jurists, to justify it, and to provide clarification that it is based on valid reasons stemming from conflicts in evidence and perspectives, rather than arbitrary or whimsical decisions.

## **RECOMMENDATIONS**

In light of the findings of the current research, the researchers conclude with several recommendations:

The necessity of conducting deeper studies on this issue, encompassing broader criminal applications.

Conduct deeper studies to define jurisprudence and knowledge in Islamic jurisprudence, specifying the concepts and terminologies used according to foundational, linguistic, and jurisprudential perspectives.

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