

The Islamic Position on Capital Punishment: A Restorative Justice Model Which Aligns with International Law, and Inspires Reasoning for Prison Industrial Complex Abolition in the U.S.

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INTRODUCTION

The Islamic teaching on capital punishment for murder, or *qisas*,

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offers a restorative justice model.¹ Restorative justice models repair harm by encouraging interactions between the offender, victim, community, and government alike to determine what justice looks like after a crime occurs.² *Qisas* encourages the family of the victim to either forgive the defendant completely or to accept reparation money from the defendant, instead of using capital punishment.³ While the duty to execute lies with the state, the option to forgive lies with the heirs of the victim.⁴ By encouraging compassionate interactions between the defendant and the victims' heirs, the Islamic teaching on capital punishment embodies a restorative justice model.⁵

This restorative justice model for capital punishment aligns with international law. The International Covenant on Civil and Political Rights (ICCPR) does not prohibit capital punishment.⁶ Though Article 6 of the ICCPR indicates a preference towards abolition of the death penalty, it nonetheless provides guidelines for its just implementation.⁷ The Article requires that the death penalty only be imposed "for the most serious crimes in accordance with the law," and that it not run contrary to the ICCPR or the Convention on the Prevention and Punishment of the Crime of Genocide.⁸ It further clarifies that anyone sentenced to death has the right to seek pardon or commutation of their sentence, and prohibits the execution of any person under 18 years of age, or pregnant.⁹ *Qisas* aligns with Article 6 of the ICCPR due to its limited scope to murder, constraint on the consideration of social characteristics of the offender by the government, and promotion of a restorative justice model which provides

1. Susan C. Hascall, *Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?*, 4 BERKELEY J. MIDDLE E. & ISLAMIC L. 35, 35-38 (2011). *Qisas* is the Arabic word used in Chapter 2 verse 179 of the Holy Quran to describe the Islamic teaching of capital punishment for murder. THE HOLY QURAN WITH ENGLISH TRANSLATION AND COMMENTARY VOLUME 1 283 (1988). It means "retaliation," by slaying for slaying, wounding for wounding, etc. *Id.*

2. CLIFFORD K. DORNE, RESTORATIVE JUSTICE IN THE UNITED STATES: AN INTRODUCTION 3-4 (Pearson Prentice Hall, 2008).

3. THE HOLY QURAN WITH ENGLISH TRANSLATION AND COMMENTARY VOLUME 1, *supra* note 1, at 283-286

4. *Id.*

5. Hascall, *supra* note 1, at 73-76.

6. International Covenant on Civil and Political Rights, December 19, 1966, 999 U.N.T.S. 171.

7. *Id.*

8. *Id.*

9. *Id.*

the victims' heirs discretion to forgive the offenders.¹⁰

Despite the restorative justice nature of *qisas* and its compliance with international law, it is not the solution to the prejudices plaguing the implementation of the death penalty in the U.S. Many scholars agree that Islamic law cannot be implemented absent the social security scheme envisioned by Islam.¹¹ If the state is not providing its citizens with basic socioeconomic welfare, how can it punish them for crimes which are the result of this lack of basic resources?¹² This logic regarding the injustice of the state implementing criminal legal penalties without providing its people basic economic justice can be applied beyond Islamic law. It can be applied to the United States (U.S.) criminal legal system, and not only to corporal punishment in the form of the death penalty, but also to incarceration. Furthermore, in the U.S., this lack of economic justice is compounded by a lack of racial justice.¹³ The current U.S. criminal legal system is by design a continuation of historic, systemic discrimination against African Americans by the state.¹⁴ Applying the logic which is often used to explain why Islamic law cannot be implemented in modern society to the U.S. criminal legal system provides a powerful argument for prison industrial complex (PIC) abolition.¹⁵ The hypocrisy of the wealthiest nation on earth enforcing criminal legal penalties for crimes that are the result of conditions it has the duty to ameliorate in the first place is overwhelming. There is no reason this logic should be limited to corporal punishment such as the death penalty when the effects of incarceration are

10. See THE HOLY QURAN WITH ENGLISH TRANSLATION AND COMMENTARY VOLUME 1, *supra* note 1, at 283-286. This article rejects the notion of a dichotomy between Islam and international human rights law. Rather it adheres to the notion, as explained by scholars like Abdullahi A. An-Na'im, that "Despite their clearly Western origins, human rights must also be legitimated in the context of different religious traditions because of the importance of those perspectives for the vast majority of people around the world." See Abdullahi A. An-Na'im, *Islam and Human Rights: Beyond the Universality Debate*, 94 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC'Y INT'L LAW) 95, 100 (2000); see also MUHAMMAD ZAFRULLA KHAN, *ISLAM & HUMAN RIGHTS* 201-210 (1967) (arguing that the Universal Declaration of Human Rights and Islam are in accord in spirit, and furthermore that Islam recognizes human rights beyond those articulated in the Declaration).

11. See Safia M. Safwat, *Offences and Penalties in Islamic Law*, 26 ISLAMIC Q. 149, 162-163 (1982).

12. See *Id.*

13. See JESSICA SEMEGA, MELISSA KOLLAS, EMILY A. SHRIDER, & JOHN F. CREAMER, *INCOME AND POVERTY IN THE UNITED STATES* 1 (2020); DENNY LEBEOUF, *IF GERMANY HAD THE DEATH PENALTY: A THOUGHT EXPERIMENT* (2012).

14. See ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 22-39 (Greg Ruggiero ed., 2003).

15. See Robert Postawko, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J. ISLAMIC & NEAR E. L. 269, 288 (2002); Safwat, *supra* note 11, at 162-163.

equally inhumane.¹⁶

I. TEXTUAL BASIS

The Holy Quran says, “O ye who believe! equitable retaliation in the matter of the slain is prescribed for you: the free man for the free man, and the slave for the slave, and the female for the female. But if one is granted any remission by one’s brother, then pursuing the matter for the realization of the blood money shall be done with fairness and the murderer shall pay him the blood money in a handsome manner. This is an alleviation from your Lord and a mercy. And whoso transgresses thereafter, for him there shall be a grievous punishment.”¹⁷

The word *qisas* means “retaliation,” by slaying for slaying, wounding for wounding, etc.¹⁸ The words *kutb alaykum* mean “is prescribed for you,” demonstrating that retaliation for the slain is obligatory.¹⁹ *Alaykum* is a plural expression of “for you,” signifying that the duty of punishment lies with the relevant authorities.²⁰ The singular expression of *akheeh*, meaning “one’s brother,” signifies that the option to forgive the perpetrator lies with the heirs of the murdered person.²¹

The law of retaliation is confined to the clause “equitable retaliation in the matter of the slain is prescribed for you,” which forms a complete sentence in itself.²² The following expression “the freeman for the freeman and the slave for the slave and the female for the female” is what is known in Arabic grammar as a *jumlah musta’nafah*, meaning, a phrase introduced to answer a question suggested by the preceding clause, to which it is added without an intervening conjunction.²³ Such phrases are used to answer a question that is often misunderstood and not expressed.²⁴ In this case, the phrase is repudiating the Arab custom at the time of discriminating in matters of retaliation.²⁵ At the time, it was common for

16. See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 3-8 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

17. *Al-Baqarah* 2:179.

18. THE HOLY QURAN WITH ENGLISH TRANSLATION AND COMMENTARY VOLUME 1, *supra* note 1, at 283.

19. *Id.* at 284.

20. *Id.*

21. *Id.*

22. *Id.* at 285.

23. *Id.*

24. THE HOLY QURAN WITH ENGLISH TRANSLATION AND COMMENTARY VOLUME 1, *supra* note 1, at 285.

25. *Id.*

social status to be taken into account in matters of retaliation.²⁶ For example, if a man of high social status killed a man of a lower social status, the authorities showed leniency in punishment due to prejudice.²⁷ The construction of this phrase does not mean that, for example, someone cannot be subject to the law of retaliation for killing a member of the opposite sex.²⁸ Rather, it seeks to clarify that no regard should be paid to the social status of the murderer in matters of retaliation.²⁹

Though the law makes clear that the state has the duty of retaliation in cases of murder, it makes it equally clear that the heirs of the victim have the right to forgive the offender.³⁰ The victims' heirs can either take blood money from the offender or grant the offender full pardon without any compensation.³¹ It is notable that where the verse in question speaks of forgiveness, it uses the word "brother" rather than "heir of the murdered person."³² This is meant to encourage the heirs of the victim to empathize with the offender, and choose forgiveness.³³

To summarize, this teaching aims to provide proportionate punishment without distinction between offenders, while providing for forgiveness by the victims' heirs. The language "the free man for the free man, and the slave for the slave, and the female for the female" is not stating that, say, a man should not be executed for killing a woman or vice versa. Rather, it is stating that the social position of an offender should not be considered when determining when to apply the death penalty. The grammatical construction, which may confuse some readers, refers to a custom in Arabia at the time, where they took into account factors like sex and social status of the offender when determining whether to execute them. This method led to discrimination often based on social status and was hence barred by the above verse. It is also noteworthy that the word "one's brother" was used as opposed to "heir of the victim," stating that the heir of the victim should attempt to feel fraternity with the offender, rather than vengeance.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. THE HOLY QURAN WITH ENGLISH TRANSLATION AND COMMENTARY VOLUME 1, *supra* note 1, at 286.

31. *Id.*

32. *Id.* at 284.

33. *Id.*

A. *Competing Interpretations of when Islam Permits Capital Punishment*

The Holy Quran is accepted as the “primary revealed source of Islam and of Islamic law, or ‘*sharia*.’”³⁴ Therefore, the law of *qisas*, which explicitly and unambiguously prescribes capital punishment for murder in the text of the Holy Quran, is not the subject of dispute in the Muslim world.³⁵ However, many in the Muslim world will disagree with this article’s contention that Islam only unequivocally prescribes capital punishment for murder.

Islamic law categorizes three types of crimes: *hudud*, *qisas*, and *ta’zir*.³⁶ *Hudud* crimes concern the rights of God.³⁷ Some Muslim scholars have interpreted four out of seven *hudud* offenses as meriting capital punishment, namely, *zina* (adultery), *riddah* (apostasy), *hirabah* (armed robbery), and *baghy* (rebellion).³⁸ The justifications regarding imposing capital punishment for these crimes are weak compared to the teaching of capital punishment for murder through *qisas*.³⁹ There is also less consensus regarding the punishment for these four crimes than there is for murder through *qisas*.⁴⁰ This is not to mention that the standards of proof required for *hudud* crimes are so high as to intentionally make the application of *hudud* penalties extremely rare.⁴¹ Additionally, some scholars argue that *hudud* punishments cannot be implemented without the establishment of a true Islamic society, in which basic human needs are met.⁴² This section will now briefly discuss the justifications some Muslim scholars use to consider each of the four *hudud* offenses listed above capital eligible.

Those who interpret the crime of *zina*, or adultery, in Islam as being capital eligible rely on a *hadith*.⁴³ *Hadith*, or the collected traditions of Prophet Muhammad (peace be upon him), are a secondary source of

34. Patrick Sookhdeo, *Issues of Interpreting the Koran and Hadith*, 5 CONNECTIONS: THE QUARTERLY J. 57, 57-58 (2006).

35. See THE HOLY QURAN WITH ENGLISH TRANSLATION AND COMMENTARY VOLUME 1, *supra* note 1, at 283-286.

36. Postawko, *supra* note 15, at 285.

37. *Id.* at 287.

38. *Id.*

39. *See Id.*

40. *See Id.*

41. *See Id.*

42. Postawko, *supra* note 15, at 288.

43. *Id.*

Islamic law.⁴⁴ *Hadith* are meant to expound upon the Quran.⁴⁵ The Quran itself makes no mention of death as punishment for adultery.⁴⁶ The relevant verse states, “The adulteress and the adulterer—flog each one of them with a hundred stripes” (24:3).⁴⁷ Though the punishment in the text of the Holy Quran for adultery is corporal and substantial, it is not capital.⁴⁸ It is worth noting that this punishment is likely intended for its deterrent effect, given “the near impossibility of meeting the legally-required standards of proof,” namely, four eye-witnesses.⁴⁹ However, many Muslim scholars insist that a hadith in which Prophet Muhammad (peace be upon him) apparently called for the stoning to death of adulterers supersedes the Quran in this case.⁵⁰ This view privileges *hadith*, which are a secondary revelatory source, over the Holy Quran, the primary revealed source of Islam, which has notably never been modified.⁵¹ The same cannot be said regarding *hadith*, which are narrations of the Prophet Muhammad (peace be upon him)’s words, and have often passed through multiple narrators.⁵² If one thing is certain regarding adultery in Islam, it is that there is a lack of consensus among different schools of Islamic thought regarding its punishment, even among those who agree that the punishment should be death.⁵³

Riddah, or apostasy, is the second *hudud* crime that some Muslim scholars argue is capital eligible.⁵⁴ The Holy Quran does not specify any earthly punishment for apostasy.⁵⁵ As was the case with adultery, Muslim schools that consider apostasy capital eligible are relying on hadith.⁵⁶ The Quran only points to consequences in the afterlife of apostasy.⁵⁷ The interpretation of the phrase “forsaking one’s religion” in the hadith used to justify death for apostasy in Islam is disputed, even by Muslim scholars

44. Sookhdeo, *supra* note 34, at 57-58.

45. *Id.*

46. *See An-Nur* 24:3.

47. *Id.*

48. *Id.*

49. Postawko, *supra* note 15, at 290.

50. *Id.*

51. *See* Sookhdeo, *supra* note 34, at 57-58.

52. *See Id.*

53. *See* Postawko, *supra* note 15, at 290.

54. *Id.*

55. *Id.* at 290-291.

56. *Id.* at 291-292.

57. *Id.*

who agree that apostasy is capital eligible.⁵⁸ Furthermore, the Prophet Muhammad (peace be upon him) never ordered capital punishment for apostasy for anyone in his lifetime.⁵⁹

Muslim scholars who argue that *hirabah*, armed robbery, is a capital offense are relying on the following verse: “The only reward of those, who wage war against Allah and His Messenger and strive to create disorder in the land, is that they be slain or crucified or their hands and feet be cut off on account of their enmity, or they be expelled from the land” (5:34).⁶⁰ Other scholars argue that this verse is not referring to ordinary robbers, but to those waging offensive war against the state.⁶¹ Even among scholars who agree that armed robbery is capital eligible, there is no consensus as to which cases merit which of the list of punishments listed in the relevant verse.⁶²

Muslim scholars who argue *baghy*, or rebellion, is capital eligible rely on the following verse of the Quran: “And if two parties of believers fight each other, make peace between them; then if after that one of them transgresses against the other, fight the party that transgresses until it returns to the command of Allah. Then if it returns, make peace between them with equity, and act justly.”⁶³ Other scholars interpret this verse as laying out a framework for an Islamic “United Nations,” which would settle disputes between states that threaten world peace.⁶⁴ There is little consensus among scholars who argue that this verse makes rebellion capital eligible as to the elements of the offense.⁶⁵

It is curious that most scholars in the Muslim world have looked to *sunnah* in the cases of *zina* and *riddah* to make them capital eligible, and have interpreted the Quran as described above in the cases of *hirabah* and *baghy* to make them capital eligible, despite the lack of clear injunctions in the Quran to do so.⁶⁶ Furthermore, it is reasonable to interpret the punishments for *hudud* crimes to be made for their deterrent effect, “as a signal to the believer of the gravity of the crimes due to their dire, if

58. *Id.* at 291.

59. *Id.* at 292.

60. *Al-Ma'idah* 5:34.

61. THE HOLY QURAN ENGLISH WITH SHORT COMMENTARY 344-345 (2016).

62. Postawko, *supra* note 15, at 295.

63. *Al-Hujurat* 49:10.

64. THE HOLY QURAN WITH ENGLISH TRANSLATION AND COMMENTARY VOLUME 5 2961 (1988).

65. *See* Postawko, *supra* note 15, at 298-299.

66. *Id.* at 300.

theoretical, consequences.”⁶⁷ Most Islamic schools of thought agree that capital punishment is not legitimate for *ta'zir* crimes, therefore this article will not include a discussion of them.⁶⁸ *Qisas* inspires consensus in the Muslim world because it unambiguously prescribes a specific system of punishment in cases of murder, which includes the option for capital punishment.⁶⁹

Yet, what about the fact that many Muslim countries do prescribe capital punishment for crimes other than murder, particularly the *hudud* offenses described above? As Robert Postawko argued in his piece “Towards an Islamic Critique of Capital Punishment” through a case study of Iranian and Pakistani laws mandating capital punishment, these countries’ laws are “best characterized as manifestations of the will of Muslim [s]tates, not the commands of Islamic law.”⁷⁰ He clarifies further that Muslim states that authorize capital punishment for a myriad of offenses are engaging in a “willful disavowal of Islam’s legal history,” and “a perversion of the values of their faith.”⁷¹ He is not the only legal scholar to point out that Muslim countries’ practice of the death penalty is inconsistent with the limited role of the death penalty actually prescribed by Islam. Other scholars have pointed out that Muslim countries’ opposition to capital punishment abolitionist tendencies in international law is not in the spirit of Islam’s actual teachings on capital punishment.⁷² Muslim countries use religion as a “pretext to justify a resort to harsh penalties that is driven by backward and repressive attitudes in the area of criminal law,” not by Islam itself.⁷³

II.A RESTORATIVE JUSTICE MODEL

The Islamic teaching on capital punishment for murder, like all such

67. *Id.*

68. *Ta'zir* comes from the verb *azar*, meaning “to prevent, to respect, and to reform.” *Id.* *Ta'zir* has been defined as a “discretionary punishment to be inflicted for transgression against God, against an individual, for which there is neither fixed punishment nor penance.” *Id.* at 301. It has further been characterized as “a disciplinary, reformative, and deterrent punishment.” *Id.* at 307. Some jurists argue that *ta'zir* punishments “must be less severe than *hudud* punishments in proportion to the crime.” *Id.* Most jurists agree that capital punishment would not serve the purposes of *ta'zir*. *Id.*

69. See THE HOLY QURAN WITH ENGLISH TRANSLATION AND COMMENTARY VOLUME 1, *supra* note 1, at 283-286.

70. Postawko, *supra* note 15, at 318.

71. *Id.* at 320.

72. William A. Schabas, *Islam and the Death Penalty*, 9 WM & MARY BILL RTS. J. 223, 234-236 (2000).

73. *Id.* at 236.

teachings, entails both utilitarian and retributive rationales, with the former justifying execution due to its deterrence potential, and the latter justifying execution due to the moral wrongness of violating the sanctity of human life.⁷⁴ However, it also contains an element of restorative justice, which is considered a “new movement” to U.S. criminal legal scholars.⁷⁵

Restorative justice models repair the harm caused by crimes through cooperation between all stakeholders.⁷⁶ Restorative justice emphasizes interactions between the offender, victim, community, and government in determining what justice looks like for any particular crime.⁷⁷ In many ways, restorative justice is a direct criticism of common and civil law traditions in which the community and victims are not involved in criminal sentencing.⁷⁸ By involving stakeholders, restorative justice models aim to humanize offenders and victims alike.⁷⁹

This model is based on the fundamental principle that the status quo of the criminal justice system disregards the humanity of the offender, the victim, and the community.⁸⁰ This is in stark opposition to the U.S. criminal justice system, in which criminal prosecutors represent the state, and are punishing the offender not for the sake of the victim but for the abstract concept of harm done to society.⁸¹ Some concrete examples of efforts to integrate restorative justice into the U.S. criminal justice system include “[s]entencing circles, victim-offender reconciliation programs, family group conferencing, and community reparative boards.”⁸² These initiatives are a radical circumvention of the state’s monopoly on crime.⁸³

What distinguishes the Islamic position on capital punishment for murder is the option, given to the family of the victim, to forgive the murderer. While the power to execute lies with the state, the option to either completely forgive the defendant their life, or to accept from them reparation money lies with the heirs of the murdered individual. By

74. See ISSN 2161-0002 Internet Encyclopedia of Philosophy *Capital Punishment*.

75. See *What is Restorative Justice?* 1 (Centre for Justice & Reconciliation at Prison Fellowship International, 2005).

76. *Id.*

77. DORNE, *supra* note 2, at 3-4.

78. Hascall, *supra* note 1, at 36.

79. *Id.*

80. *Id.* at 40.

81. *Id.*

82. See generally MARGARITA ZERNOVA, RESTORATIVE JUSTICE: IDEALS AND REALITIES 7-30 (Ashgate 2007) (describing several methods used by various jurisdictions to integrate restorative justice principles into their criminal process).

83. Hascall, *supra* note 1, at 40.

granting this critical role to the family of the victim, this teaching embodies a restorative justice model, rather than a traditional adversarial model which would only implicate the government and the offender in the prosecution of the murder. The law of *qisas*' emphasis on forgiveness and inclusion of the victims and community in the prosecution and sentencing of murders warrant its classification as a form of restorative justice.⁸⁴

Howard Zehr is one of the founders of the modern restorative justice movement.⁸⁵ He created a typology of criminal justice systems "based on a continuum from purely retributive systems to those imbued with restorative justice characteristics."⁸⁶ Hascall uses this typology to argue that *qisas* is a form of restorative justice.⁸⁷ She argues in her piece on *qisas* as restorative justice that "most of the seventeen attributes of restorative justice theory" asserted by Zehr "are compatible with the Islamic jurisprudence regarding *qisas*."⁸⁸ The one attribute which may seem incompatible is the attribute that claims punishment of crime has no utility.⁸⁹ However, Hascall argues that *qisas* still fits under this attribute because, although it recognizes the human impulse to be vengeful, it also discourages it.⁹⁰ This piece agrees with Hascall's argument that *qisas* is a form of restorative justice. It furthermore argues that *qisas* aligns with international law, and provides a unique lens to argue for PIC abolition in the U.S. The restorative justice model embodied by the Islamic teaching on capital punishment could "contribute to the international standards of restorative justice," though it has not been adopted or considered by the international community outside of Muslim majority countries thus far.⁹¹

III.CONTEXTUALIZING *QISAS* WITHIN THE GENERAL CONCEPT OF JUSTICE IN ISLAMIC LAW

As described earlier, the text of the Islamic teaching on capital punishment encourages the heirs of the victim to choose forgiveness, whether through complete forgiveness or compensation. Forgiveness is also encouraged at a broader level in the Islamic conception of justice.

84. *Id.* at 74.

85. *Id.* at 39.

86. *Id.* at 73.

87. *Id.* at 73.

88. *Id.* at 73.

89. *Id.* at 74.

90. *Id.*

91. Mutaz M. Qafisheh, *Restorative Justice in the Islamic Penal Law: A Contribution to the Global System*, 7 INT'L J. CRIM. JUST. SCI. 487, 503 (2012).

Mapping the three options provided by the Islamic teaching of capital punishment on to the three levels of justice outlined in the Quran demonstrates that this teaching aims to encourage forgiveness, while still validating the human desire for revenge in cases where the heirs of the victim choose not to forgive.

To clarify, the three options provided by the Islamic teaching on capital punishment are: 1) the option to let the state retaliate by taking the offender's life, 2) the option for the heirs of the victim to take compensatory blood money, and 3) the option for the heirs of the victim to completely forgive the offender. These three options correspond with the three levels of justice outlined in the Holy Quran, namely, *adl*, meaning absolute justice, *ihsan*, meaning kindness, and *ita'i dhil-qurba*, meaning kinship.⁹²

This section will explain each of these levels of justice as described by Islamic scholar and spiritual leader Hadhrat Mirza Tahir Ahmad and will go on to describe how the levels correspond with the three options provided by the Islamic teaching on capital punishment. This will demonstrate that the goal of the teaching is to encourage forgiveness whenever possible, while still providing a legitimized space for the human desire for vengeance when appropriate.

A. Three Levels of Justice Outlined in the Holy Quran

The three stages of human relations according to the Holy Quran are set out in verse 16:91. It reads, "Indeed Allah requires you to abide by justice, to treat with grace and to give like the giving of kin to kin."⁹³ Islam commands Muslims to, at a minimum, exercise *adl*, meaning absolute justice.⁹⁴ Yet it further encourages its followers to voluntarily practice *ihsan*, meaning kindness or benevolence, and to even progress to the final stage of *ita'i dhil qurba*, or kinship like the spontaneous expression of love between a mother and her child.⁹⁵

Adl, the first level of justice, means absolute justice.⁹⁶ The first option provided by the Islamic teaching on capital punishment, namely, the option to let the state retaliate by taking the offender's life, embodies absolute justice. If the victims' heirs do not object, the state exercises its

92. MIRZA TAHIR AHMAD, ABSOLUTE JUSTICE, KINDNESS, AND KINSHIP: THE THREE CREATIVE PRINCIPLES 11 (2008).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

duty to retaliate against an offender who committed murder by taking said offender's life. This provides for justice in a literal, retaliatory sense of the word. Though the victims' heirs have the option to and are encouraged to forgive, Islam leaves the avenue for retaliation open by handing this duty to the state. This paper will argue that though the Islamic teaching emphasizes forgiveness, there are reasons for which it leaves this undesirable option for retaliation on the table. For example, it may be useful for cases in which the victims' heirs would seek revenge regardless, or for undisputed cases of serial killers. Even countries that have abolished the death penalty and life sentences have had to make exceptions to sentence length for certain capital offenders, which may be the ones to which this first option should apply.⁹⁷

Ihsan, the second level of justice, means kindness or granting someone more than their due.⁹⁸ The second option provided by the Islamic teaching on capital punishment, namely, the option for the heirs of the victim to take compensatory blood money, embodies *ihsan*. The victims' heirs can pardon the offender their life, while still receiving compensation for the harm done to them.

Ita'i Dhil-Qurba, the third level of justice, means kinship or treating others with such benevolence as one would one's kindred.⁹⁹ The third option provided by the Islamic teaching on capital punishment, namely, the option for the heirs of the victim to completely forgive the offender, embodies kinship. By taking this option, the victims' heirs are embracing the call in the verse describing the law of *qisas*, to treat the offender like "one's brother."

In summary, Islam encourages Muslims to use their discretion to determine when each level is appropriate, though it simultaneously notes the beauty of exercising the second or third levels whenever possible.

IV. COMPARISON TO INTERNATIONAL STANDARDS

Qisas offers a restorative justice model for capital punishment. But does this restorative justice model align with international law? This paper argues that *qisas* aligns with Article 6 of the ICCPR due to its limited scope to murder, constraint on the consideration of social characteristics of the offender by the government, and promotion of a restorative justice model which provides the victims' heirs discretion to forgive the

97. See THE REEVES LAW GROUP, FACT OR FICTION: NOT ALL "LIFE SENTENCES" AROUND THE WORLD ARE ACTUALLY FOR LIFE.

98. AHMAD, *supra* note 92, at 11.

99. *Id.*

offenders.

Article 6 of the ICCPR requires that the death penalty only be imposed “for the most serious crimes in accordance with the law.”¹⁰⁰ Accordingly, the Holy Quran only explicitly and unambiguously prescribes capital punishment for murder.

The Article also states that the death penalty is not permitted if it runs contrary to the ICCPR or the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁰¹ A comprehensive analysis of either treaty is outside the scope of this paper. Yet with regards to the former, the analysis in this section demonstrates the Islamic teaching’s conformity with Article 6 of the ICCPR, which explicitly governs the death penalty. With regards to the latter, which aims to prevent the death penalty from being used as a tool for genocide, the relevant verse of the Holy Quran is designed to prevent social factors from being taken into account when determining whether to execute someone, as described in a previous section.

Article 6 further clarifies that anyone sentenced to death has the right to seek pardon or commutation of their sentence.¹⁰² The Islamic teaching for capital punishment gives this right to the heirs of the victim. It is conceivable that the offender would feel more comfortable seeking pardon or commutation from the heirs of the victim than from the government, as there would likely be less procedure and less asymmetry of power between the two parties in the former case.

Lastly, the Article prohibits the execution of any person under 18 years of age, or pregnant.¹⁰³ The Islamic teaching does not explicitly forbid the execution of these two groups. However, by giving the victims’ heirs the right to forgive the offender and urging the former to view the latter as their “brother,” the Holy Quran insists upon forgiveness where the victims feel it is merited. One of the purposes of the restorative justice model promoted by this teaching is to promote sympathy from the victims’ heirs towards the offender. This sympathy would encompass not only young or pregnant offenders but any offender for which the victims’ heirs feel forgiving.

100. International Covenant on Civil and Political Rights, *supra* note 6.

101. *Id.*

102. *Id.*

103. *Id.*

V. COMPARISON TO DEATH PENALTY ABOLITION IN THE U.S.

Despite the inspiring nature of the restorative justice model embodied by the Islamic teaching on capital punishment and its compliance with international law, this article will not argue that *qisas* can solve the prejudices plaguing death penalty implementation in the U.S. Rather, it will argue that there is no contradiction between believing in the theoretical ideal of *qisas* while accepting that currently, the only solution to the prejudices of death penalty implementation in the U.S. is abolition. Furthermore, death penalty abolition alone in the U.S. is meaningless for furthering criminal justice and racial justice, if not accompanied by abolition of the PIC as a whole.

Some Islamic scholars argue that Islamic law cannot be implemented without the establishment of a true Islamic society that meets basic human needs, including “the provision of adequate food, shelter, medical care, and employment.”¹⁰⁴ For example, scholar Muhammad Asad explained that the severe punishment of hand amputation for theft must be viewed “against the background of [the] social security scheme envisaged by Islam.”¹⁰⁵ If a society “is unable to fulfill its duties” towards its citizens, “it has no right to invoke the full sanction of crime at law against the individual transgressor.”¹⁰⁶

Though this scholar was speaking of theft, a *hudud* crime, the same logic can be applied to *qisas*.¹⁰⁷ The state’s duty to implement the extreme penalty of death upon someone who has committed murder is moot if the state has not fulfilled its most basic duties towards its citizens. These duties include ensuring basic economic welfare. This reasoning often arises among Islamic scholars, due to criticism from the West of the apparently harsh nature of corporal punishments in Islamic law.¹⁰⁸ It has been used by scholars to explain why it would be un-Islamic to literally implement Islamic law in modern societies.

This powerful logic can be extended to criminal law more generally. It may be that this reasoning has typically been limited to Islamic law due to the modern movement away from corporal punishment and towards incarceration, the former being more common in Islamic law.¹⁰⁹ Here, this paper will apply this logic to the U.S. criminal legal system, and not only

104. Postawko, *supra* note 15, at 288.

105. Safwat, *supra* note 11, at 162-163.

106. *Id.*

107. *See Id.*

108. *See Id.*

109. *See DAVIS, supra* note 14 at 22-39.

to corporal punishment in the form of the death penalty, but also to incarceration.

In the U.S., the state has similarly not fulfilled its duty of providing for the basic economic rights of all of its citizens.¹¹⁰ Therefore, absent fulfillment of this duty towards its populace, the U.S. has similarly vanquished its right to enforce harsh criminal penalties on its citizens. This includes not only the death penalty but all criminal legal penalties. This is a powerful argument for the abolition of the PIC in the U.S., as it holds that without fulfilling the duty of providing basic social welfare for its citizens, the state has no right to enforce harsh criminal penalties against said citizens. It is the conditions of the lack of social welfare that lead citizens to commit crimes, therefore, the state is at fault for not fixing these conditions in the first place. It would be hypocritical of the state to enforce criminal legal penalties for crimes that are the result of conditions that the state has a duty to ameliorate. There is no reason this logic should be limited to corporal punishment when the effects of incarceration are equally inhumane.¹¹¹

The lack of economic rights in the U.S., such as food, shelter, healthcare, and employment, is evident.¹¹² In the wealthiest nation on earth, approximately 34 million people live in poverty.¹¹³ It is critical to note that in the U.S., this lack of economic justice is compounded by a lack of racial justice. In particular, this lack of racial justice is rooted in a history of systemic discrimination against African Americans. In the U.S., the death penalty has been undeniably “applied disproportionately on the basis of race, ethnicity and social status.”¹¹⁴ Bryan Stevenson illustrates the gross injustice of the U.S., with its particular history of racial injustice, implementing the death penalty through the following thought experiment.¹¹⁵ Imagine that Germany reinstates the death penalty in 1976, claiming that it is far from the Germany of the Nazi party. Now imagine that thirty years later, “Jewish citizens disproportionately get the death penalty; crimes by Jews against Christians are more likely to be selected for a capital prosecution; Jews are routinely excluded from jury service. Further imagine that prosecutors defend all this by saying that Jews shouldn’t sit on capital juries because they are mistrustful of German

110. See SEMEGA, *supra* note 13.

111. See FOUCAULT, *supra* note 16 at 3-8.

112. See SEMEGA, *supra* note 13.

113. *Id.*

114. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: KILLING WITH PREJUDICE: RACE AND DEATH PENALTY IN THE USA, 2 (1999).

115. See LEBEOUF, *supra* note 13.

authorities, and that the German high court has ruled that statistical evidence of discrimination against Jews is inadmissible in a death penalty case.”¹¹⁶ Of course, this is not the case in Germany. But this is literally the case in the U.S. regarding discrimination against African Americans in the criminal legal system.

All matters of criminal justice in the U.S., not just the death penalty, are rooted in racism.¹¹⁷ Slavery, lynching, segregation, and now prisons, are racist institutions that have passed each other the mantle of legitimizing oppression of African Americans and other people of color in the U.S.¹¹⁸ Patterns of racial discrimination in all sentencing, including capital sentencing, persist and are enabled by prosecutorial discretion, ineffective counsel, and jury selection issues.¹¹⁹ The likelihood of receiving a death sentence is approximately four times higher if the defendant is Black than if the defendant is White.¹²⁰

In the U.S., 22 states have abolished the death penalty.¹²¹ However, death penalty abolition in the U.S. has merely led to the rise of life without parole (LWOP) sentences, which are equally governed by racist sentencing practices.¹²² The unlikely pairing of death penalty abolitionists and pro-incarceration activists is a driving factor of why many states in the U.S. have effectively abolished the death penalty.¹²³ Apart from being equally racially discriminatory as the death penalty, it is also debatable whether LWOP is even a humane alternative to the death penalty. The absence of heightened review of LWOP sentences, the mandatory application of LWOP, and extreme racial disparity in LWOP sentencing make it questionable as a “humane” alternative to the death penalty, scholar Ashley Nellis explains.¹²⁴ Scholars have even concluded that LWOP “strips life of its most valuable existential character.”¹²⁵ Foucault

116. *Id.*

117. *See* DAVIS, *supra* note 14 at 22-39.

118. *Id.*

119. ACLU DEATH PENALTY CAMPAIGN FACTSHEET, CAPITAL PUNISHMENT PROJECT.

120. *Id.*

121. THE DEATH PENALTY INFORMATION CENTER, STATE BY STATE (2020).

122. Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 11 U. MIAMI L. REV. 439, 453-454 (2013).

123. The Harvard Law Review Association, *A Matter of Life and Death: The Effect of Life-without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1838-1839 (2006).

124. Nellis, *supra* note 122, at 448.

125. Michelle Miao, *Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States*, 15 NW. J. L. & SOC. POL’Y. 173, 173 (2020).

described the movement away from punishment of the body towards imprisonment of the body as a movement towards a more heinous form of punishment: the punishment of the soul.¹²⁶ He argued that prisons abolish the very humanity of their inhabitants.¹²⁷

Though some death penalty abolitionists in the U.S. tout LWOP as a “humane” alternative to the death penalty, others recognize that LWOP must only be seen as a “first step” to reform extreme sentencing altogether.¹²⁸ Neither the death penalty as practiced in the U.S. nor LWOP are fair sentences that “keep the public safe, apply a reasonable amount of punishment, and attempt to reform the offender.”¹²⁹ The ICCPR states that the purpose of the prison system should be “reformation and social rehabilitation,” a goal not being fulfilled by LWOP sentences.¹³⁰ Given this bleak state of contemporary punishment options for individuals indicted for murder in the U.S., what could an alternative system look like?

One option is the adoption of the restorative justice model for capital punishment for murder described in the Holy Quran. However, the clear lack of basic economic justice in the U.S. combined with the nation’s gross history of racial injustice make it a bad candidate for the implementation of *qisas*. Perhaps the U.S., due to its historic, systemic, and ongoing discrimination against African Americans, has forgone its right to exercise the duty that *qisas* assigns to the state, namely, the duty to kill a person who commits a murder in cases where the heirs of the victim do not forgive said person. Though forgiveness would ideally prevail in most cases, the U.S. is not in a position to rightfully exercise the duty of retaliation in the first place. It is important to note here that this propensity for forgiveness is not merely a wish, but a fundamental part of the Islamic teaching on the death penalty itself. Islamic thought is deeply committed to forgiveness in its texts, medieval ethics, traditional jurisprudence, and contemporary ethics.¹³¹

Another option for the U.S. would be to look to countries that have abolished both the death penalty and LWOP sentences. In many countries, life sentences entail between 15-25 years, with parole eligibility available after time served. However, even in these countries, the law often includes

126. Hascall, *supra* note 1, at 35.

127. *Id.* at 36.

128. Vaidya Gullapalli, *The Death Penalty is Part of a Larger System of Punishment*, THE APPEAL, Jan. 31, 2020.

129. Nellis, *supra* note 122, at 457.

130. See International Covenant on Civil and Political Rights, *supra* note 6.

131. Russel Powell, *Forgiveness in Islamic Ethics and Jurisprudence*, 4 BERKELEY J. MIDDLE E. & ISLAMIC L. 17, 17-18 (2011).

a cutout to keep prisoners that “pose a threat to public safety” incarcerated indefinitely.¹³²

Scholars have explored whether abolition of the death penalty would be unfaithful to the message of Islam. Along with the argument put forth by this paper that not implementing *qisas* is Islamic absent the social security scheme envisioned by Islam, scholars have agreed that modern death penalty abolition is consistent with Islam on other grounds. Some argue that abolition is not in contradiction with the spirit of the law of *qisas*, due to the law of *qisas*’ preference for forgiveness.¹³³ This preference is evidenced not only by the text of the rule as described above but also by Islam’s general indication that forgiveness is preferred.¹³⁴

A. The ICESCR¹³⁵ Bolsters the Islamic Law Argument for PIC Abolition

The section above used Islamic law to argue that the U.S. has the duty to provide basic social welfare to its populace before it has the right to enforce harsh criminal penalties upon them. This abolitionist argument can be bolstered through international human rights frameworks, which similarly maintain that states have an affirmative duty to provide economic and social rights.¹³⁶ While the ICCPR, discussed in previous sections, regards civil and political rights, the ICESCR (International Covenant on Economic, Social, and Cultural Rights) regards economic, social, and cultural rights.¹³⁷ The U.S. has signed and ratified the ICCPR, while it has only signed but not ratified the ICESCR.¹³⁸ Nevertheless, the ICESCR’s commitment to economic and social rights provides a framework beneficial to prison abolitionist arguments in the U.S.

132. THE REEVES LAW GROUP, *supra* note 97.

133. MICHAEL MUMISA, SHARIA LAW AND THE DEATH PENALTY: WOULD ABOLITION OF THE DEATH PENALTY BE UNFAITHFUL TO THE MESSAGE OF ISLAM? 33-34 (Mohammad Habbash, Taghreed Jaber, Jacqueline Macalesher eds., 2015).

134. *Id.*

135. International Covenant on Economic, Social, and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3.

136. *See Id.*; International Covenant on Civil and Political Rights, *supra* note 6.

137. It is worth noting that, regarding capital punishment in the ICCPR, the U.S. has listed the following reservation: “That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.” *See* UNITED NATIONS, STATUS OF TREATIES: 4. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS; *See Id.*

138. UNITED NATIONS, STATUS OF RATIFICATION INTERACTIVE DASHBOARD.

The ICESCR urges states to take steps to ensure the economic and social rights of their citizens.¹³⁹ Prison abolition similarly maintains that a state without prisons is one in which the state provides its people with economic and social rights. Abolitionists argue that prisons should not be replaced with prisonlike structures, but rather with transformative institutions that will themselves prevent harm from occurring, such as demilitarized schools and accessible healthcare.¹⁴⁰ These social institutions can then be accompanied by a justice system based on reconciliation rather than retribution.¹⁴¹ Prison abolitionists argue that no “amount of imprisonment, policing, or surveillance will ultimately make our communities safer,” and that the true solution to reducing harm lies in access to “basic necessities like food, shelter, meaningful work and freedom as well as alternative systems of accountability.”¹⁴² The ICESCR’s framework requiring states to provide their people with economic rights bolsters prison abolitionists’ vision for a state which has moved beyond prisons. In summary, through the ICESCR, international law offers a complementary argument to the Islamic law argument for PIC abolition. Both international law and Islamic law’s focus on economic and social rights could be beneficial to prison abolitionists in the U.S.

CONCLUSION

The Islamic teaching of capital punishment for murder lays out a restorative justice model, by giving the heirs of the victim the option to forgive the perpetrator.¹⁴³ This model aligns with international standards for capital punishment, as described by Article 6 of the ICCPR.¹⁴⁴ Like all Islamic criminal legal penalties, this teaching cannot be rightfully implemented unless the state first implements the basic social security scheme envisioned by Islam.¹⁴⁵ The U.S. should similarly consider whether it has the right to enforce criminal legal penalties on its populace, without first providing them with basic economic justice.¹⁴⁶ This includes not only corporal punishment in the form of the death penalty but also

139. International Covenant on Economic, Social, and Cultural Rights, *supra* note 135.

140. See DAVIS, *supra* note 14 at 107.

141. *Id.*

142. Julia Sudbury, *Reform or Abolition? Using Popular Mobilizations to Dismantle the Prison Industrial Complex* 77 CRIM. J. MATTERS (2009).

143. Hascall, *supra* note 1, at 35-38.

144. See International Covenant on Civil and Political Rights, *supra* note 6.

145. See Postawko, *supra* note 15, at 318; Safwat, *supra* note 11, at 162-163.

146. See SEMEGA, *supra* note 13.

incarceration, which scholars have argued is equally inhumane.¹⁴⁷ It would be hypocritical for the U.S. to enforce criminal legal penalties for crimes that are the result of conditions it has the duty to ameliorate in the first place. Furthermore, it is an abomination for a nation whose criminal legal system was designed to oppress African Americans to continue implementing criminal legal penalties which disproportionately impact them and other racial minorities.¹⁴⁸

147. See Nellis, *supra* note 122, at 448.

148. See DAVIS, *supra* note 14 at 22-39; LEBEOUF, *supra* note 13; AMNESTY INTERNATIONAL, *supra* note 114; Nellis, *supra* note 122, at 453-454.