

Permanent Impediments To The Death Penalty For Premeditated

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Abstract

Islam is dedicated on the lives of persons in society as well as the applied law, as it considers aggression against the life of an individual without right, is aggression against the whole society because it is dedicated on the value of human blood and social fair, and that revenge by retribution from the perpetrator is a revival of society considering that the crime of intentional murder is the most serious and important among other crimes in terms of responsibility and penalty because it represents the right of human to live, and the intent to kill is the basic basis of the crime and hence the importance of studying and researching it and studying the death penalty and the obstacles to ruling in it or the obstacles to its implementation emanated, and there is no doubt that the psychological or moral element causing the implementing of the crime is much more difficult than the material element in it because proving the crime becomes more difficult if it is related to the psychological element compared to the material element. Since premeditated murder is the termination of a human life by another human being intentionally or unjustly, the reason for criminalization is represented by the attacking on the human right to life or from this standpoint, it is necessary to state the importance of studying premeditated murder in Imami jurisprudence and the Iraqi penal law in comparison with other Islamic doctrines and comparative laws and the obstacles to the death penalty in premeditated murder in addition to the obstacles to its implementation. The main research question was: What are the legal and legislative bases for the obstacles to the death penalty in the crime of premeditated murder in Imami jurisprudence and the Iraqi Penal law? , while the main hypothesis: The research assumed that there are legislations and texts approved to prevent the death penalty in what was stated in Imami jurisprudence and the Iraqi Penal law.

Keywords: Permanent impediment, premeditated murder penalty, execution, Imami jurisprudence, Iraqi Penal law.

INTRODUCTION

Praise the Lord Almighty, and prayers and peace upon the best of creation, the prophet Mohammad, and his pure and good relatives, then :

Crime is a social and dangerous phenomenon linked to human nature, and it has a direct impact on human societies. The methods of fighting it in society have been limited to imposing penalties on its perpetrators and the criminals, without diminishing the reasons behind committing it. Whereas the duty of the state is to provide the necessary protection for its citizens and their safety, this has been done through penal legislation by issuing and determining deterrent penalties and punishments to be imposed on anyone who commits a crime against people in society, considering that the punishment is the pain that must be inflicted on the perpetrator as a punishment for his violation of the orders that are prohibited by Sharia and the law in accordance with the mandatory legal rules that regulate its penal resources. This pain is caused on the perpetrator and affects him in his body, money or his rights, and the acceptance of these penalties in human societies depends on the extent of preventing the evil that may occur from the perpetrator and its repetition in the future.

Clarification of the issue

The purely intentional murder without any other circumstances if it was an aggression that requires retaliation in Islamic jurisprudence, but retaliation can be dropped by the pardon of the blood guardian and limited to blood money, and he can excuses the blood money and other penalties remain in place. Hence, the difference between Islamic jurisprudence and law is clear, as the law sees that the penalty in this case is decided by the public right when the claimant of the personal right waives the perpetrator, and since Islam prohibits the implementation of the death penalty in some cases in Imami jurisprudence and some other Islamic schools of thought with the difference between the opinions of jurists, the need to legislate this in Iraqi law and other comparative penal laws has emerged.

Original question of research : What are the permanent impediments to the death penalty in the crime of deliberate killing in Imami jurisprudence and the Iraqi Penal law ?

Original hypothesis: The research assumed that there are permanent legislations and texts to prevent the death penalty in what was stated in Imami jurisprudence and the Iraqi Penal law.

Previous studies : There is no previous studies in Permanent Impediments to the Death Penalty for Premeditated Murder Between Islamic law and Iraqi law but it came implicit in some sources and jurisprudence books in Imami doctrine and other Islamic doctrines also in some sources that pertains Iraqi penalties law and comparing laws like : Jawahr Alkalam – Limits and attributes for Sheik Mohammed Alnajafi. Alrawdah Albahiyah in explaining the Damascus Lamaa for Mohammed Alamili.

Section One

The Concept of Impediments to Punishment and Execution
First Requirement

Definition of Impediments to Punishment

First Section: Linguistic Concept

Linguistically, the impediment is the barrier between two things, it is an active participle of the verb to prevent , abstention is the refraining from something, the impediment is a common term among Muslim scholars of the principles of jurisprudence. It is one of the sections of the positive ruling and one of the two sections of the legal rulings. Its definition is: A clear, precise description whose existence necessitates the absence of the ruling or the absence of the cause. Its reality is: It is what its existence necessitates absence and its absence does not necessitate existence or absence in and of itself. Examples of this include: The presence of impurity on the body or clothing of the worshipper, which necessitates the invalidity of the prayer. ⁽¹⁾

Second Section: The Term Concept

1 - The Concept of Impediments to Punishment in Imami Jurisprudence.

What prevents the execution of the ruling if there is a reason for killing is an impediment to inheritance even if there is a lineage (as Jurisprudence) ,the impediment (term) from preventing something, several impediments prevent you from what you want. (Jurisprudence), the deterrent: (verb) prevented, so it is opposed, and the passive participle is the deterrent and prevented him from his right, and prevented him from it, prevented him from something, disputed with him with it. Certificate of no objection: a certificate that allows its holder to enter the country that issued it. The deterrent: (noun) The deterrent: an active participle of prevention. The believer: (noun) plural of the deterrents and the preventers, and the prohibitions are noun. ⁽²⁾

The objective of prevented. The deterrent: the cheap who carries the deterrent that which prevents the occurrence of the thing, and it is contrary to what is required. The deterrent: what obstructs the course of work and what prevents the achievement or realization of the thing. The deterrent: the law) a legal deterrent that prevents the contract. The deterrent is the opposite of the condition; because its existence requires the non-existence, and its non-existence does not require existence or non-existence, and the condition requires the non-existence of its existence, and its existence does not require existence or non-existence, and the deterrent is also the opposite of the cause; because the existence of the cause requires the existence of the cause, and its non-existence requires its non-existence. As for the obstacle, its existence necessitates non-existence, and its non-existence does not necessitate existence or non-existence.

It is one of the sections of the positive ruling, which the jurists defined as: the legal speech related to making something a reason for the action of the obligor, or a condition for it, or a deterrent, or valid, or invalid, or a license or intention. Thus, the positive ruling is linking one thing to another thing.

(1) Ibn Mandhur, Lisan al-Arab, Dar Al-Turath Al-Arabi, Lebanon, 1994, 30/232.

(2) al-Fayruzabadi, Al-Qamus Al-Muhit, Dar al-Fikr, Lebanon, 1995, 1/128.

In terminology, the deterrent can be defined as an apparent, precise description whose existence necessitates the absence of a ruling or the absence of a cause, or, it is that which necessitates absence from its existence and does not necessitate presence or absence in and of itself. **The deterrent is a known, specific meaning that prevents the existence of a ruling, or prevents the realization of a cause.** This is because if the legal cause exists and its condition is fulfilled, then the effect does not follow from it unless the obstacle is absent, because the obstacle prevents the ruling from following the cause. It has been reported from the Imams, the relatives of the Prophet, peace be upon them, that it is strictly forbidden to use opinion in religion, and there are many narrations on this including from him, from his father,

from Ahmad bin Abdullah Al-Aqili, from Isa bin Abdullah Al-Qurashi, who said (Abu Hanifa entered upon Abu Abdullah, peace be upon him, and said to him: O Abu Hanifa ! I have been informed that you make comparison? He said: Yes. He said: Do not make comparison, for the first one to make comparison was Satan ⁽¹⁾ and from it: On the authority of Muhammad bin Ismail, on the authority of Al-Fadl bin Shadhan, on the authority of Safwan bin Yahya, on the authority of Abdul Rahman bin Al-Hajjaj, on the authority of Abaan bin Taghlib, on the authority of Abu Abdullah (peace be upon him), who said: The Sunnah cannot be compared. Do not you see that a woman makes up her fast, but does not make up her prayer?⁽²⁾ O Abaan, if the Sunnah is compared, religion is obliterated, and from it: He said: Abu Jaafar (peace be upon him) said: Whoever gives fatwas to people according to his opinion has judged God with what he does not know, and whoever judges God with what he does not know has opposed God where he has permitted and forbidden in what he does not know.⁽³⁾ And from it: On the authority of his father, on the authority of Abdullah bin Al-Mughirah, and Muhammad bin Sinan, all of them, on the authority of Talhah bin Zaid, on the authority of Abu Abdullah⁽⁴⁾ (peace be upon him), on the authority of his father (peace be upon him), he said: The Commander of the Faithful (peace be upon him) said: There is no opinion in religion.⁽⁵⁾ And from it: On the authority of his father, on the authority of Harun bin al-Jahm, on the authority of Muhammad bin Muslim, he said: I was with Abu Abdullah (peace upon him) in Mina when Abu Hanifa came on his donkey, and when he sat down he said: I want to compare you, so Abu Abdullah (peace on him) said: There is no comparison in the religion of Allah. ⁽⁶⁾ The Imams (peace be upon them) have proven the invalidity of comparison and the use of opinion with conclusive evidence, we mention in this regard one narration: Ahmed bin Ali bin Abi Talib al-Tabarsi in (al-Ihtijaj on the authority of Abu Abdullah (peace be upon him) that he said to Abu Hanifa in his argument with him in invalidating comparison: Which is greater in the sight of Allah? Murder, or adultery? He said: Rather, murder, so he (peace be upon him) said) How is it that he was satisfied with two witnesses in murder, and was not satisfied with four in adultery?! Then he said to him: Is prayer better or fasting? He said: Rather, the prayer

(1) Ibn Faris, Dictionary of Language Standards, Dar Sadir, Beirut, 2000, 210

(2) Muhsin al-Amin al-Amili, Wasa'il al-Shi'a, Volume: 27, Publisher: Aal al-Bayt Foundation, 3rd ed. P(39)

(3) Al-Amili, Wasa'il al-Shi'a: 41

(4) Al-Amili, Wasa'il al-Shi'a: 42.41

(5) Al-Amili, Wasa'il al-Shi'a: 51

(6) al-Amili, Wasa'il al-Shi'a 52

He said, peace be upon him, it is obligatory. According to what you said, the menstruating woman must make up for the prayers she missed during her menstruation, but not for fasting. God has made it obligatory for her to make up for the fast, but not for the prayers. Then he said to him: Is urine dirtier, or semen? He said: Urine is dirtier. He said: According to what you said, it is obligatory to perform ritual ablution after urine, but not semen. God Almighty has made ritual ablution after semen, but not urine. Until he said (peace be upon him). You claim that you issue fatwas based on the Quran, and you are not one of its inheritors, and you claim that you are a man of comparison, and the first to make analogies was Satan, and the religion of Allah was not built on analogy, and you claim that you are a man of opinion, and the opinion of the Messenger (may Allah's prayers and peace be upon him and his family) was correct, and of others it was wrong, because Allah the Almighty said: (So judge between them by what Allah has revealed and He did not say that to anyone else. Hadith.⁽¹⁾

2-The concept of impediments to punishment in Iraqi law

The purposes of punishment are divided into two types: moral, which is achieving justice, and utilitarian, which is deterrence in its general and specific types.⁽²⁾

A - Achieving the justice: The German philosopher (Kant) drew attention to the importance of considering justice as a moral purpose of punishment, as he explained that justice is the goal that punishment seeks to achieve. A crime is an unjust aggressive act in which the victim is deprived of his right. In doing so, it shocks the feeling of justice that is established in the conscience of individuals. If this feeling is ignored, this encourages individual revenge. If the crime represents Assault on justice as a social value, the punishment aims to erase this assault by restoring social respect for justice as a value due to the pain it causes to the criminal's soul, money or freedom, and this would restore the prestige of the law and the respect of the authority for it. The punishment also satisfies the feelings and emotions of

individuals aroused by the crime and restores reassurance to their souls, and expresses society's hatred for the criminal.

B- General deterrence: General deterrence means warning the offender and all people by threatening punishment of the bad consequences of crime so that they avoid it. The idea of general deterrence is based on the fact that there are criminal motives in most people, these motives create latent crime in society that may turn into actual crime, and the threat of punishment is the barrier to turning latent crime into actual crime, and accordingly, punishment has a fundamental social role from this aspect.⁽³⁾

C- Special deterrence: It means treating the criminal danger latent in the criminal's person and preventing him from returning to crime in the future. Therefore, special deterrence has an individual character because it is directed at a specific person to change the features of his personality and achieve harmony between it and the prevailing social values in society. This is in contrast to general deterrence, which

(1) Al-Amili, Wasa'il Al-Shi'a: 48.49

(2) Dr. Adour Ghali al-Dhahabi, Explanation of the Penal Law, previous source, p. 453

(3) The same source, p. 454

He faces a big danger from all people who are feared to imitate the criminal. Therefore, special deterrence takes into account the future behavior of the criminal and aims to diminish the possibility of him committing a subsequent crime.⁽¹⁾

Second requirement: The concept of execution

First section: The linguistic concept

Execution linguistically: It is a word derived from the word (nothing) and means: to erase and remove :- With one meaning, which is the loss of something and its disappearance and the poor: the poor who has no money⁽²⁾, and Al-Razi said: nothing.

Poverty and also nothing, the man became poor, he became destitute, and he is destitute⁽³⁾

Second section: The technical concept.

1- The concept of execution in Imami jurisprudence

With regard to the position of Islamic law on defining the death penalty, it is noted that the noble Sharia did not define this punishment by this name, as the word (nothing) that we referred to did not appear in the linguistic meaning of this punishment nor any of its previous derivatives in the Holy Quran.

If this is the case, then Islamic law has mentioned what corresponds to it in word, such as retaliation, mentioned in holy Quran : ((O you who believe! Retaliation is prescribed for you))⁽⁴⁾ and His saying: ((And in retaliation there is life for you, O people of understanding))⁽⁵⁾, and also in the word killing mentioned in the holy Quran: ((The only reward of those who wage war against Allah and His Messenger and strive to cause corruption in the land is that they should be killed..))⁽⁶⁾ . or killing mentioned in the saying of the Prophet (may Allah's prayers and peace be upon him and his family): ((Whoever changes his religion, kill him))⁽⁷⁾ After this presentation of the meaning of execution in language and terminology, the following is noted regarding the definition provided by the Iraqi legislator for the death penalty:

(1) Dr. Akram Nashat Ibrahim, General Provisions in the Iraqi Penal law, Asaad Press, Baghdad, 1962, p. 121

(2) Abu Al-Fadl Jamal al-Din Muhammad bin Makram Ibn Manzur, Lisan Al-Arab, volume 1, previous source, p. 392-

(3) Muhammad bin Abi Bakr bin Abdul Qadir al-Razi, Mukhtar al-Sihah, Dar al-Kitab al-Arabi, Beirut, Lebanon, 1st ed., 1979, p. 418.

(4) Surat al-Baqarah, verse [178].

(5) Surat al-Baqarah, verse [179].

(6) Surat al-Ma'idah, verse [33].

(7) See Dr. Ahmed Fathi Bahnasi, Criminal Responsibility in Islamic Jurisprudence, Dar al-Shorouk, 4th edition., 1988, p. 115.

A- This definition is dominated by the formal aspect represented by "hanging" over the objective aspect represented by "taking a soul", which is the essence of the death penalty.

B. The inclusion of the method of hanging exclusively to implement the death sentence blocks the way for any attempt to implement this punishment by other means that may be less painful, such as electric shock, or the use of toxic substances.

C. Hanging does not represent the only means of implementing the death sentence in Iraqi legislation, as this punishment is implemented by firing squad for military personnel ⁽¹⁾

To avoid all of this, we see that the appropriate definition of the death penalty is the one that combines the essential elements of this punishment, which are taking a life and a final judgment, and the least painful means, and the suggested definition is the following:-

The death penalty is: "Taking the life of the convict in a merciful manner determined by law after the judgment issued against him has become final".

2- The concept of execution in Iraqi law.

Punishment in the technical sense: - It is a penalty imposed in the name of society, in implementation of a judicial ruling against someone proven responsible for the crime. It is also a penalty that involves pain for the criminal in return for his violation of the prohibition or order of the law .⁽²⁾

To understand the technical meaning of the death penalty, we must differentiate between the concept of this word in jurisprudence, legislation and judiciary. In jurisprudence, there are multiple definitions of the death penalty. Dr. Mahmoud Najib Hosni defined it as ((taking the life of the convict)) ⁽³⁾ , and Dr. Maher Abdul Shweish defined it as ((taking the life of the convict by a means determined by law)).⁽⁴⁾

Dr. Muhammad Shalal Habib and teacher Ali Hassan Muhammad Tawalbeh defined it as ((taking the life of the convict against whom a ruling was issued by a competent court for committing a serious crime stipulated in)) ⁽⁵⁾ .

It is noted that the previous definitions are compatible with the objective aspect of the death penalty, which is ((taking the life of the person who is sentenced with this penalty))).

(1) Article [17] of the Iraqi Military Penal Code No. 30 of 1940 as amended.

(2) Dr. Ali Hassan Al-Khalaf and Dr. Sultan Al-Shawi, General Principles of the Penal Code, Al-Risala Printing Press, Kuwait, 1982. Page 405 .

(3) Dr. Mahmoud Najib Hosni, Explanation of the Penal Code, General Section, Dar Al-Nahda Al-Arabiya, Taha, 1982, p. 690.

(4) Dr. Maher Abdul Shweesh General Provisions in the Penal Code, University of Mosul, 1st ed., p. 463.

(5) Dr. Muhammad Shalal Habib, and Lecturer Ali Hassan Muhammad Talaba Criminology and Punishment Dar Al-Masirah for Publishing, Distribution and Printing, Amman - Jordan, 1st ed., 1998, p. 223.

As for the position of legislation on the concept of execution, the Iraqi legislator defined the death penalty in article (86) of the penal law No. 111 of 1969, as amended, as: ((Hanging the convicted until death). As for the position of Arab laws on setting a specific definition for this punishment, it was found that some of them followed the Iraqi law in defining the death penalty, such as the Jordanian Penal Code, which defined it in Article (1/17) as: "Hanging the convict." Some others indicated that: "Every person sentenced to death shall be hanged, which is the opinion of the Egyptian Penal Code [Article 13] and the Libyan Penal Code [Article 19]. As for other Arab laws, they did not set a specific definition for the death penalty and were satisfied with indicating its position among the types of punishments, and this is what the Moroccan Penal Codes followed [Article 16], the Algerian [Article 5], the Omani [Article 39], the Tunisian [Article 7], and the Qatari [Article 34]. As for the position of the judiciary on setting a specific definition for the punishment Death penalty, we did not find a ruling or decision indicating the adoption of a specific definition of this penalty.

The death penalty has a long history that has been used by most peoples and in all ages, with methods of applying this penalty and reasons for imposing it. Death sentences varied between beheading, burning, flaying, dismemberment, impalement, bullets, hanging, and others. Crimes punishable by death range from premeditated murder, treason, witchcraft, rape, blasphemy, and others. Historical records indicate that the death penalty has existed since the beginning of history, and was part of the justice systems followed by primitive peoples and tribes, noting that tribal societies tended to apply other penalties such as blood money, exile, or corporal punishment. The death penalty was also mentioned in ancient laws, as the Torah stipulated it in crimes of murder, witchcraft, kidnapping, sexual crimes, blasphemy, mockery of God and His religion, and violation of the Sabbath.⁽¹⁾

(1) Dr. Fawziah Abdel Sattar, Principles of Criminology and Penology, Dar Al Nahda Al Arabiya, Cairo, 1985, p. 238.

Section Two

Permanent impediments to the death penalty for premeditated murder according to Imami jurisprudence and Iraqi law

The death penalty is considered one of the physical punishments mentioned by Islamic law under the name (retaliation), which means retribution against the perpetrator, and not every crime against the soul requires retribution according to Islamic law.

The first requirement

Permanent impediments to the death penalty for premeditated murder in Imami jurisprudence

Impediments to retaliation: The apostate from Islam is killed if his apostasy was from the nature of Islam, according to the saying of the prophet Mohammed , “Whoever changes his religion, kill him” ⁽¹⁾ and from Muhammad bin Muslim from Imam Muhammad al-Baqir (peace be upon him) ((There is no ruling for the apostasy of a boy, a madman, or someone forced to do so. The boy and the madman are disciplined, and the drunkard is considered to be in the same category as the madman, as he is not considered an apostate by uttering the word of disbelief while drunk, and his Islam is not ruled by the word of Islam if he is a disbeliever, and it does not require him to be included with the sober in the obligation to perform acts of worship, and the repentance of the apostate from disbelief is accepted, provided that the period of repentance is three days, according to the narration. This came from Imam al-Sadiq (peace be upon him) through a weak chain of transmission, and he is killed after despairing of him. ⁽²⁾ As for the apostate woman, she is not killed if her apostasy was from the nature of Islam, and from Imam Al-Hussein (peace be upon him) ((The woman is given the opportunity to repent if she repents, otherwise she is imprisoned or beaten)), and the one who has gone mad is not killed after his apostasy from the religion as long as he is insane because his killing is conditional upon his refusal to repent. ⁽³⁾ Retribution is not obligatory for someone who was in a position of defending himself, his money, or his women. When Islam came, it considered the crime of killing a human being a major crime and an aggression not only against the victim but against all of humanity as Allah the Almighty said: ((Whoever kills a soul unless for a soul or for corruption done in the land - it is as if he had killed mankind entirely)) and because of the hideousness of this crime from the Islamic perspective, Allah the Almighty decided an afterlife punishment, as He the Almighty said: ((And whoever kills a believer intentionally - his recompense is Hell, wherein he will abide eternally, and the wrath and the curse of Allah are upon him and a great punishment is prepared for him)) (Surat An-Nisa: 93). When searching for the reason for the revelation of this verse, we find that Al-Muqays bin Dabbabah Al-Kinani had found the killer of his brother Hisham bin Dabbabah in a neighborhood called the neighborhood of Bani Al-Najjar ⁽⁴⁾. He came to the Messenger of Allah (may Allah bless him and his family and grant them peace) and informed him of the matter. The latter was present in the aforementioned neighborhood, so he (may Allah bless him and his family and grant them peace) sent him with Qais bin Hilal Al-Fihri to the leaders of the Banu Al-Najjar tribe, ordering them to hand over the killer of Hisham to his brother Al-Muqays, and if they did not know about him or his whereabouts, they were required to pay blood money to his brother.

(1) Muhammad Jamal Al-Din Makki Al-Amili, Al-Rawdah Al-Bahiyyah fi Sharh Al-Lum'ah Al-Dimashqiyyah, p. 335, Hilali Abdul-Ilah Ahmad, Principles of Islamic Criminal Legislation, Dar Al-Nahda Al-Arabiya, Cairo, 1995, pp. 221-224.

(2) Muhammad Jamal Al-Din Makki Al-Amili, the same source, p. 336.

(3) Muhammad Jamal Al-Din Makki Al-Amili, the same source, p. 338

(4) Ali Abdullah Al-Khatib, Punishment for Crime in Islamic Law, Library of the Holy Husseini Garden, p. 26.

Almuqais is based on the killing of his brother Hisham, in accordance with the hadith that says: “The blood of a Muslim does not go in vain.” ⁽¹⁾ this means that the blood money is not dropped in the case of a killing in which the killer is not identified and the killer cannot be identified, as the blood money is due to his brother. From this it becomes clear that paying the blood money to the guardian of the person

who was intentionally killed does not require retaliation in Islamic law. The crime of killing an innocent person has been proven in the Holy Quran and the Sunnah of His prophet Mohammed, may God bless him and his family and grant them peace, as indicated by the Almighty's saying: **((Because of that, We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption in the land - it is as if he had killed all of mankind. And whoever saves a life - it is as if he had saved all of mankind, and indeed Our messengers came to them with clear proofs; then indeed many of them, after that, were transgressors upon the earth))** (Surat Al-Ma'idah: (32)), as for practicing magic, it has been mentioned in some noble narrations that it is considered one of the examples of apostasy and the magician is sentenced to death for his apostasy from the religion. However, the Islamic schools of thought, including the Imami school of jurisprudence, have agreed that learning and teaching magic is forbidden by Sharia and that permitting it is disbelief and apostasy. However, the jurists differed regarding killing. Some of them have said that he should be given a chance to repent and that whoever refuses to repent should be killed ⁽²⁾. The jurists have agreed that the ruling on the Muslim magician is killing, while the ruling on the infidel magician is not to be killed, but rather he should be executed. This has been mentioned unanimously ⁽³⁾. Among the narrations that indicate this is the narration of al-Sakuni on the authority of Imam Abu Abdullah Al-Hussein, who said: The Messenger of God, may God bless him and his family and grant them peace, said: (The Muslim magician is killed, but the infidel magician is not killed, but is punished.) ⁽⁴⁾ It was said, O Messenger of God, why is the infidel magician not killed? He, may God bless him and his family and grant them peace, said: (Because disbelief is greater than magic, and because magic and polytheism are linked) ⁽⁵⁾. This is because the Imamis said that if someone abandons his religion to another religion, it will not be accepted from him, nor will he be accepted to return to his religion again, just as nothing is accepted from him except Islam, otherwise he will be killed. This is the opinion of the Imamis, who claimed that there is consensus on the necessity of not accepting someone who has converted to the religion of Islam and not approving of him, which is more appropriate for them ⁽⁶⁾.

They based this ruling on the following evidence:

The first evidence: The saying of God Almighty: **((And whoever desires other than Islam as religion - never will it be accepted from him, and he, in the Hereafter, will be among the losers))** (Surat Al-Imran (79)). As for the second evidence: What was narrated from the Messenger of God, may God bless him and his family and grant them peace: **((Whoever changes his religion, kill him))** ⁽⁷⁾. The third evidence: That by his apostasy from his religion, acknowledging its invalidity, with the knowledge of the invalidity of other religions, except the religion of Islam, he becomes like the apostate from Islam, which is not accepted from anyone else or he is killed ⁽⁸⁾.

(1). Muhammad Kadhimi Al-Mustafawi, The Jurisprudential Principles, Islamic Publishing Foundation, Qom, p. 129.

(2) The foundations of the completion of the curriculum, Al-Khoei, 323/2.

(3) Al-Tabataba'i, Riyad Al-Masa'il, 538/13, Ibn Al-Barraj, Al-Muhadhdhab, 552/2.

(4) Al-Muhaqqiq Al-Hilli, Al-Mukhtasar Al-Nafi', p. 160.

(5) Al-Amili Al-Hurr, Wasa'il Al-Shi'a, 576/18

(6) Muhammad Hasan Al-Najfi, Jawahir Al-Kalam.

(7) Al-Nuri Al-Muhaddith, Mustadrak Al-Wasa'il, from the chapters of the punishment of the apostate,

(8) Muhammad Hasan Al-Najfi, Jawahir Al-Kalam, 179/21

As for the one who converts from Judaism to Christianity and his family confirms it, there are two opinions: The first opinion is that it is accepted from him because disbelief is one religion, and the second opinion is that it is not accepted from him, or some of the jurists have said that it is not accepted from him as a necessity requiring the non-acceptance of his first religion, which is Judaism, followed by the non-acceptance of his other religion, Christianity as well ⁽¹⁾. The chosen opinion is that nothing is accepted from him except Islam, based on the evidence of the noble verse and the narration mentioned above, and on the authority of Sahih Ali bin Jaafar on the authority of his brother Abu al-Hasan (peace be upon him): **((I asked him about a Muslim who converted to Christianity? He said: He is killed and he is not given a chance to repent. I said: What about a Christian who converted to Islam and then apostatized from Islam? He said: He is given a chance to repent and if he returns, otherwise he is killed))** ⁽²⁾. As for the apostate who was a follower of one of the religions of disbelief and entered Islam and then apostatized from it, if the apostate was forced to convert to Islam, he is not judged to be a Muslim and the title of

apostate is not applied to him. As for the one who entered Islam voluntarily and of his own will, or his entry into Islam was forced and his religion is not confirmed for him and he was forced to convert to Islam, he is judged to be a Muslim. The rulings of the apostate apply to both cases. The apostate who is a Muslim must be given repentance and not killed. If he refuses to return to Islam, he is killed ⁽³⁾. However, if he becomes insane, he is not sentenced to death because his killing is conditional on his refusal to repent, since there is no ruling on the refusal of the insane person ⁽⁴⁾. Among the narrations that indicate that there is no ruling on the refusal of the insane person is what was narrated from the agent of the Commander of the Faithful, Ali ibn Abi Talib (peace be upon him), that he wrote to him (I found some Muslims to be heretics and some Christians to be heretics. So he (peace be upon him) wrote to him: (As for the one who was born with the nature and then became a heretic, strike his neck and do not give him repentance. As for the one who was not born with the nature, then give him repentance if he repents, otherwise strike his neck. As for the Christians, what they are doing is worse than heresy) ⁽⁵⁾. And what was narrated from Ali ibn Ja'far from his brother (peace be upon him), a Christian who converted to Islam and then apostatized from Islam? He said: He is given repentance and is not killed ⁽⁶⁾. And if the apostasy and repentance are repeated, the ruling is to kill him by consensus ⁽⁷⁾. The Imami jurists have held that the apostate is only the religious one because the natural apostate is ruled to be killed without repentance, and the ruling on repentance according to them is that it is obligatory for those who require repentance, and the Malikis have held this view. Regarding the period of repentance, it is three days if he does not return to Islam ⁽⁸⁾, and killing is on the fourth day upon repentance ⁽¹⁰⁾. This is what Masma' bin Abdul Malik narrated on the authority of Abu Abdullah Al-Hussein (peace be upon him) that the Commander of the Faithful Ali bin Abi Talib (peace be upon him) said: **(The apostate is separated from his wife, and his slaughtered animal is not eaten, and he is given three days to repent if he repents, otherwise he is killed on the fourth day)** ⁽¹¹⁾.

- (1) The same source
- (2) Al-Tusi, Tahdhib Al-Ahkam, 159/1
- (3) Al-Muhaqqiq Al-Hilli, Shara'i' Al-Islam, 427/2. Al-Tusi Al-Muhaqqiq Al-Hilli, Shara'i' Al-Islam, 428/2.
- (4) Al-Khilaf, 353/5; Al-Tusi, Al-Mabsut, 416/5.
- (5) Al-Amili al-Hurr, Wasa'il al-Shi'a, from the chapters on the punishment of the apostate, H: 6.
- (6) The same source.
- (7) The same source p(52).
- (8) Al-Muhaqqiq al-Hilli, Shara'i' al-Islam, 427/2 Al-Muhaqqiq al-Hilli, Shara'i' al-Islam, 426/2.
- (9) Ibn Sa'id, al-Jami' al-Shara'i', p. 240) Al-Amili
- (10) Wasa'il al-Shi'a, Chapter 3, from the chapters on the punishment of the apostate, H: 5

The Hanbalis and Malikis said: They must both be killed because they are partners here in the matter and that action. The evidence for that is that both of them intended to kill and that this is more protective of blood and that coercion does not make blood permissible. Close to this is the statement of Al-Shafi'i. There is a second statement that retaliation is for the one who forced, not the one who carried it out. This is the statement of Abu Hanifa and Muhammad. The coercion in which the blood of the one who was forced is permissible is the coercion of refuge that is similar to killing because that type of coercion makes the one who was forced (with the opening of the letter ra') like a tool in the hands of the one who forced him, where his will and consent are nullified and his choice is corrupted and the absolute will is for the one who was forced. **As for al-Shafi'i, he has another opinion, which is that the one who directly committed the crime is the one who is required to be killed**, as was said, like the opinion of the Hanbalis and Malikis, that is, they are partners from whom retaliation is to be taken together. Abu Yusuf said: There is no retaliation for the murderer or for the one who forced him, because the murderer lost his consent and his choice was corrupted, and there is no responsibility without complete choice, firm consent, and intent for the results. This is what he intended to kill, but rather intended to save himself. There is no retaliation for the one who was forced, because he did not directly commit the murder, even though he caused it, and accordingly blood money is required ⁽¹⁾. Other conditions that prevent the death penalty, which are the conditions in which the offender is not punished for all crimes, are:

1- Young age: The majority of jurists have prohibited the death penalty when the offender is a discerning boy, who is under seven years old, but he is required to pay blood money from his money. Jurists have differed in determining the maximum age for a discerning boy, which is at least fifteen years

old, and at most it is under nineteen years old. Here, he is not sentenced to death, but blood money is required from him ⁽²⁾. Because his mental awareness is not complete, as well as what came in Sahih al-Bukhari and Sunan Ibn Majah, which indicates that the pen is lifted from the insane person until he recovers, from the boy until he realizes, and from the sleeper until he wakes up.

2- The state of insanity: If the insane person commits a crime that requires the death penalty or retaliation, then he is prevented from being sentenced to that penalty if it is proven that he is insane, according to the saying of the Messenger of God, may God bless him and his family and grant them peace: **((The pen is lifted from three: the sleeper until he returns, the child until he grows, and the insane person until he wakes up))** ⁽³⁾, as insanity affects a person and leads to a defect in discrimination between good and bad, the person is like a child, and all his actions and deeds are void and not taken into account by Sharia or law, even if he is asked about his money. ⁽⁴⁾

3- Sleep: Sleep is a reason for the death penalty in Islamic jurisprudence as long as the perpetrator is asleep and deep in his sleep. If he is killed while he is asleep, he is not punished by killing. Among them, if a woman inserts a man's penis into her vagina, the punishment is not carried out on him even if he is married because he is asleep and he is considered an absent-minded person who has lost his mind, so he is not held accountable for what he does. ⁽⁵⁾ It was narrated on the authority of Omar bin Al-Khattab that he did not apply the punishment of adultery and killing to a woman who was killed.

(1) Imam Muhammad Abu Zahra, previous source, p. 437.

(2) Abdul Qader Awda, Islamic Criminal Legislation Compared to applied Law, 1st edition., Dar Nashr Al-Thaqafa, Alexandria, Egypt, 1949, p. 602,)

(3) The same source, pp. 583-584

(4) Shahata Muhammad Ahmad, Execution in the Balance of Sharia, Law and Judicial Rulings, Alexandria University, 2007, p. 47. 4)

(5) Shams Al-Din Al-Maqdisi, Al-Sharh Al-Kabir ala Matn Al-Muqni', Al-Manar Edition, Egypt, 1st ed., Vol. 10, p. 170.

4- Drunkenness: The majority of jurists have said that if a drunkard was drunk by choice, the punishment for drunkenness and whatever actions he did while drunk, such as adultery, theft or murder, is imposed on him, because he has lost his mind by himself. If he committed a crime while he was in a state of intoxication and was forced to do so, or if he drank alcohol without knowing that he was intoxicated and committed a murder or committed adultery while he was married, then in this case the death sentence is dropped, but he is liable for blood money, since the reason for lifting the punishment from him is the loss of his mind. In the first case, if the drunk was by choice and committed the murder or adultery while he was married, then he bears the consequences of his action because he lost his mind by his will. As for the second case, if he was forced or did not know that what he consumed was intoxicating and lost his mind without his will, then the punishment is lifted from him ⁽¹⁾. Another group said that even if the offender committed an act and was in a state of intoxication, he is only liable for the punishment of drunkenness because he committed the act of drunkenness while he was sane, so the punishment is binding on him. However, he did not commit the other crime while he had the right to choose, but rather he was out of his mind and insane, so no punishment from the prescribed punishments or anything else is binding on him because of the other crimes. ⁽²⁾

There is another group that has gone so far as to say that if the drunkard has consumed the intoxicant voluntarily, then the punishment is not dropped ⁽³⁾. Likewise, if he was forced to drink and did not know that he was intoxicated, then the punishment of drunkenness is binding on him along with the rest of the prescribed punishments and penalties. ⁽³⁾ The opinion is with the majority of jurists because the drunkard has chosen to be drunk himself and he is fully aware that alcohol is usually what is on his mind and he may commit acts that require the prescribed punishment, retaliation or discretionary punishment, which makes it impossible to escape from the prescribed punishments or penalties or circumvent them, so the offender is required to be punished for drunkenness, and so that whoever wants to commit a heinous crime or kill someone does not go to drink alcohol or intoxicants in order to escape punishment, and this is what the most hardened criminals are accustomed to before committing their crimes, thinking that they will escape punishment, and this matter is forbidden by Islamic law because of the corruption of society on earth in it.

Second requirement

Permanent impediments to the death penalty for premeditated murder in the Iraqi Penal Law

There are many personal reasons in the Iraqi penal code lead to abolition of penal responsibilities of the criminal in premeditated murder penalty, these personal reasons limited to the character of the actor but doesn't affect the event of crime, some of these impediments are:-

- (1) Abdul Qader Awda, previous source, pp. 282-283.
- (2) The same source.
- (3) Ibn Qudamah, The Great Commentary on the Text of Al-Mughni, Vol. 10, p. 170.

1- **Loss of realization and will.**

The criminal can't be charged criminally unless being wise and aware, that is stated in item (60) of the Iraqi penal code 111 in 1969 modified, for a criminal to be held responsible for committing a crime, two basic conditions must be met:- awareness and freedom of choice, this applies to both intentional and unintentional crimes, even if the individual has good faith, this is because punishment can only be imposed on a person of sound mind who commits the prohibited and infringing act of their own free will.

That error relates to the sinful will that violates the orders and prohibitions established by the Shari'a, according to Iraqi law, a person is considered to be of sound mind upon reaching the age of seven, which is the age of realization.

As for will or freedom of choice, it means the free will of the person who commits an act that constitutes a crime of their own free will and volition. Criminal liability does not arise if the person is coerced, whether physically or morally. It is worth noting that the Iraqi legislator in the Penal Code has adopted the doctrine of freedom of choice, as does most other penal legislation.

The loss of awareness and will sometimes results from insanity or mental disability, while in the second case, it results from the use of intoxicants or drugs.

While in case of insanity that abolish the responsibility is a medical condition that infect the mind of a person and lead to stop the realization feature permanently or temporary ⁽¹⁾, the penal responsibility is holt in the insane human.

To be exempted from criminal liability due to insanity or mental impairment, the insanity or mental impairment must result in a loss of awareness, meaning that the faculty of reason is completely impaired and consciousness and choice are completely absent. The second condition for the exemption of criminal liability for the perpetrator is that the perpetrator was suffering from insanity or mental impairment at the time of committing the crime, criminal responsibility is exempted if the insanity is present.

If a person commits the crime by voluntarily taking intoxicants while knowing that they are intoxicating, the offender is not exempt from criminal liability and will be punished in accordance with the law.⁽²⁾

2- **Coercion :-**

1) New Iraqi penal code , part 1, Crime and penal liability , Almaarif Press, Baghdad 1970.

2) See : statement of item 61 of Iraqi penal law ref.(111) year 1969 modified.

The coercion where no penal liability is on two types, they are materialistic coercion and moral coercion, that what item 62 of Iraqi penal code refers to.

Materialistic coercion is a pressure exerted on a person's will that cannot be resisted by that person and leads to the loss of his freedom of will to choose. The coercive force here in physical coercion is a physical force, an example of which is when a person carries another person and throws him on a third person, injuring him. Thus, his responsibility for what he did is negated due to his lack of will, and the responsibility falls on the coerced person. As for moral coercion, which is the case of pressure on a person's will by threatening him with evil, an example of which is when a criminal threatens a married woman that he will kill her son if she does not receive him, and she submits to committing the crime of adultery with him, in this case, this is considered coercion and this coercion is moral coercion, in this case, the coerced person is not criminally liable because he did not commit the criminal act of his own free will.

3-**Case of necessity:**

Necessity is considered an impeding reason for the penal liability that was considered by the jurisprudence as a reason of accepting, item 63 of Iraqi penal code stated that not to condemn who commit a crime to defend himself against a risk provided that he did that unintentionally and he couldn't prevent it by anyway.

Case of necessity here is a dangerous materialistic situation whereas he can commit illegal action in order to protect high benefit or equal to the benefit that the above mentioned act lead to sacrifice with. ⁽¹⁾

4-Minority.

Young age is considered a precluded factor in criminal liability. Young age occurs when a person is under seven years of age at the time of committing a crime. This is due to the lack of perception (realization) and willpower. The perpetrator is considered responsible for his actions upon reaching the age of seven. This liability is considered the responsibility of juveniles up to the age of eighteen. Article 64 of the Iraqi Penal Code stipulates that criminal proceedings may not be brought against anyone who was under seven years of age at the time of committing the crime.

1) Hameed Alsaady, status of necessity in the comparing law, Ph.D thesis, Paris, 1962, p 283

CONCLUSION

The topic of crime and punishments, with a focus on the death penalty as a means of combating crime and maintaining community security. The text highlights several key points related to the death penalty, its causes, and its impact on Islamic societies, in addition to the role of Islamic law in determining such punishments.

RESULTS.

1- The death penalty was not controversial in ancient legislation, as it was applied without any opposition. However, in the modern era, controversy arose about its legitimacy, as many writers and philosophers appeared calling for the abolition of this penalty, considering it illegal and dangerous, as it is unavoidable to make mistakes, as it is unfair and illogical, and does not achieve deterrence or reprimand, while another group appeared calling for its retention because it is necessary and only applies to serious crimes, as it is a deterrent, and a confirmation, and this trend has been supported by the fact that the death penalty is legitimate in Islamic law, which revealed it, and God Almighty is the one who knows what is good for our conditions and what harms them.

2- Many countries responded to the calls for abolition and abolished the penalty from their legislation, while some countries kept it in their legislation but abolished it in practice, as they do not apply it practically. Some countries abolished it in ordinary crimes, and kept it in extraordinary crimes, while some countries kept it in ordinary and extraordinary crimes.

Recommendations :

1- We suggest to the Iraqi judiciary and the public prosecution in general and to the Ministry of Justice to expedite and not be lenient and to be patient in the matter of implementing the death sentence in the serious crimes that our wounded country is witnessing, unfortunately, and which have claimed the lives of thousands of our Iraqi people, which prompted me to write on this topic, as a basic reason. Unfortunately, it is noted that a large number of those sentenced to death, who are considered dangerous criminals and terrorists hired by other countries, remain alive and the sentence is not carried out on them for many years, despite the issuance of the death sentence decision and their being caught red-handed and evidence against them. There are those who are arrested at the crime scene with the criminal evidence when they attempt to plant explosive devices or kill innocent people or carry out booby-trapping operations.

2- We suggest that the retrial in cases sentenced to death, as stipulated in Article (270-4) of the Iraqi Code of Criminal Procedure, should include facts and documents that were unknown at the time of the trial, and which appear after the ruling as logical and convincing evidence to prove the innocence of the convicted person, based on criminal trials.

REFERENCES:

- 1-Ibn Manzur, Lisan al-Arab, Dar al-Turath al-Arabi, Lebanon, 1994, 30 232.
- 2- Al-Fayruzabadi, Al-Qamos Al-Muheet, Dar al-Fikr, Lebanon, 1995, 1/128.
- 3-Ibn Faris, Mu'jam Maqayis al-Lughah, Dar Sadir, Beirut, 2000, 210.
- 4-Muhsin al-Amin al-Amili, Wasa'il al-Shi'a, Volume: 27, Publisher: Al-Bayt Foundation for the Revival of Heritage/ Edition: 3, p. 39.
- 5-Dr. Adour Ghali al-Dhahabi, Explanation of the Penal Code.
- 6-Akram Nashat Ibrahim, General Provisions in the Iraqi Penal Code, Asaad Press, Baghdad, 1962, p. 121.
- 7- Muhammad bin Abi Bakr bin Abdul Qadir al-Razi, Mukhtar al-Sihah, Dar al-Kitab al-Arabi, Beirut, Lebanon, 1st ed., 1979.
- 8- Dr. Ali Hassan al-Khalaf, and Dr. Sultan Al-Shawi, General Principles of Penal Law, Al-Risala Press, Kuwait, 1982

- 9- Dr. Muhammad Subhi Najm, Introduction to Criminology and Punishment, Dar Al-Thaqafa Library for Publishing and Distribution, Amman - Jordan, 1998, p. 070
- 10- Dr. Mahmoud Najib Hosni, Explanation of the Penal Code, General Section, Dar Al-Nahda Al-Arabiya, Taha, 1982, p. 690.
11. Dr. Maher Abdul Shweesh, General Provisions in the Penal Code, University of Mosul, 1st ed., p. 463.
12. Dr. Muhammad Shalal Habib, and the teacher Ali Hassan Muhammad Talaba, Criminology and Punishment, Dar Al-Masirah for Publishing, Distribution and Printing, Amman - Jordan, 1st ed., 1998.
13. Dr. Fawzia Abdul Sattar, Principles of Criminology and Punishment, Dar Al-Nahda Al-Arabiya, Cairo, 1985, p. 238
14. Dr. Hatem Musa Bakkar, The Authority of the Criminal Judge in Estimating Punishment and Precautionary Measures, Mansha'at Al-Maaref, Alexandria,
- 15-Muhammad Jamal Al-Din Makki Al-Amili, Al-Rawdah Al-Bahiyyah in Explaining Al-Lum'ah Al-Dimashqiyyah, p. 335, Hilali Abdul-Ilah Ahmad, Principles of Islamic Criminal Legislation, Dar Al-Nahda Al-Arabiya, Cairo, 1995, pp. 221-224.
- 16-Ali Abdullah Al-Khatib, Punishment for Crime in Islamic Law, Library of Al-Rawdah Al-Hussainiya Al-Muqaddasah, p. 26.
- 17- Muhammad Kazim Al-Mustafawi, Jurisprudential Rules, Islamic Publishing Foundation, Qom
- 18-Imam Muhammad Abu Zahra, Crime and Punishment in Islamic Jurisprudence, Dar Al-Fikr Al-Arabi, Cairo, p. 405.
- 19-Shahata Muhammad Ahmad, Execution in the Balance of Sharia, Law and Judicial Rulings, Modern University Office, 2007
- 20-Abdul Qader Awda, Islamic Criminal Legislation Compared to Positive Law, 1st ed., Dar Al-Thaqafa Publishing House, Alexandria, Egypt, 1949, p. 602, item 432.
21. Shahata Muhammad Ahmad, Execution in the Balance of Sharia, Law and Judicial Rulings, Alexandria University, 2007.
22. Shams Al-Din Al-Maqdisi, The Great Commentary on the Text of Al-Muqni', Al-Manar Edition, Egypt, 1st edition Vol. 10, p. 170.
23. Al-Khatib Muhammad Al-Sharbini, Mughni Al-Muhtaj by Al-Nawawi, Arab History and Revival of Arab Heritage Foundation, Beirut