Awarding Death Penalty in Evasion to Judicial Capacity; Conception and Response under the Islamic Criminal Law

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Abstract: The issue, to which the nations of twenty-first century are more conscious that is human rights, violated by the government’s law enforcement agencies disregarding the judicial process, which is commonly termed as extra-judicial killing. This article discussed academically about the position of extra-judicial killing in the Islamic legal system. It also examines the perceptions and responses of such activity in the eye of Islamic criminal law. If these norms would introduced in the traditional criminal laws the risk of such outside killing may be coming to an end and society will have a strong judicial administration where human rights are to be protected for its citizens.

Key Words: Extra-judicial Killing, Judicial Process, Fundamental Rights, Reasonable Opportunities, Judgment.

Introduction
Exercise of fair judicial administration is the common standard of the state of twenty first century with the promoting and preserving the rights of the citizen. In this process, on the one hand, victims are getting their remedies and lawbreakers do not remain unpunished on the other hand. Similarly, in Islam, all citizens of the state are subject to the same law and no one is regarded as being above the law. The Caliph and the beggar stand together for judgment before the law as stated in the Quran, “Neither believing man nor any believing woman should exercise any choice in their affairs once God and His messenger

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have decided upon some matter. Anyone who disobeys God and His Messenger has clearly into error" in order to administer justice and equitably, Islam not only eliminates long procedural intricacies but also makes it simple and expeditious. So that every case has to be adjudicated properly and no one has to be given a sentence unjustly. Despite all the highly accepted norms in the above, states are often engaged in awarding penalty, particularly death penalty using state authority rather judicial administration in various eye-catching covers. Justifications of such killing also shown by the concern authority, with a view to hiding their failure in establishing a fair judicial environment, that they are exercising the principle of Utilitarianism. In this article, we examine the legal attributes and responses under Islamic Law of Crimes.

**Extra-judicial Killing**

The term extrajudicial means the process that is done, given, or affected outside the course of regular judicial proceedings. It refers to actions outside the judicial system. Though there is no legal definition of an extrajudicial killing, if a law enforcement official causes a death without following the legal rules or due judicial process, it may be considered extrajudicial. Extra-judicial killings, however, those that are not committed by the order of a judiciary or court under laws of the land. Killings, which have executed beyond judicial process, where the right to life of the victim is therefore denied, all reasonable, legitimate opportunities, are remained inapplicable to the alleged sufferer. The term includes executions or killings by law-enforcing agencies or death in custody. Any death that is not executed by the order of the judiciary in accordance with the laws is designated as extra-judicial killing. This is a sort of punishment by the state or any other official authority without the permission of a court or legal authority. Extrajudicial killing is defined as a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees, which are recognized as indispensable by civilized peoples. Existence of Extra-judicial punishment exposes the shortcomings of the legal machinery of the government concern to execute sentences properly. Extrajudicial punishment is often a

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1. AL-Qur’an, Al-Ahzab, 33:36,
2. West’s Encyclopedia of American law, edt. 2nd.2008
3. Extra-judicial killings some issues by Barrister Harun Ur Rashid, The daily Star, June 18,2005
feature of politically repressive regimes using death squads for killing opponent and their political gains.

**Traditional Process for Awarding Death Sentence**

General processes, recognize by the civilized state for awarding judicial sentences and execution thereof, contains more or less three laws that is the substantive criminal laws where offences are well defined and the procedural laws where from the institutions of a criminal case to the execution of judgment is clearly prescribed. Not only that but also clearly assigned the jurisdiction of the court to pronounce the sentences particularly death sentences in a criminal proceeding. Eventually the laws of evidence are inevitable to prove a criminal offence beyond reasonable doubt. In both Islamic and traditional legal system, a criminal case is initiated either in police station or direct to the magistrate or Qadi by any of the party. The magistrate therefore issues a warrant to arrest the other and order for investigation to the concern authority. After submitting the charge shit magistrate hearing the parties and their witnesses through examination and cross-examination. Finally, by the corroborating all the evidences produced and examine the statements of all the witnesses, magistrate awarded a sentence which is deemed fit. If it is a death sentences execution of that is subject to the confirmation of the High Court Division in Bangladesh. Beyond the above-mentioned process and authority, any death caused by any individual, government or non-government agencies would be illegal, altra-virous, gross violation of human rights and therefore subject to judicial enquiry and adequate punishment. During the trial period, both parties have given the opportunities to counsel with their legal counselor for their behalf. The accused has not been denied to exercise this right in the ordinary criminal proceedings. If the right is withdrawn unjustly and convict accordingly to a party, injustice will happen inevitably because of illegal suspension of self-defence. So the execution of sentences particularly death sentences must be in the due process of the existence criminal proceedings. Extra-judicial killing however by no means is acceptable in anywhere in the world because the killing is occurred beyond judicial capacity.

**Restrictions under Islamic Constitutional Law**

The conception of Islamic Constitutional law is somehow different from the traditional concept of Constitutional law. Because in traditional sense it is presumed that, the Constitution is the Guarantor of fundamental rights of the citizen. However, experience postulates that the law of the land also does not remain unimpediment by its maker as they make it for their protection and
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As a result, it is found that the fundamental rights are preserved for its maker’s rather victims among the common people. On the other, hand the guardian of fundamental rights in Islamic state is the perpetual dastur or constitution that is holy Quran where, rights are declared and ensured for every human being by the Almighty Himself. These rights are unalterable and irreversible therefore, in Islamic state is stronger to protect these rights of the citizen than those of traditional sovereign states. The holy Quran, in determining the bindingness of the rule making power of the government and conditions for obedience of the common people, declared that “Follow what has been sent down to you from your Lord, and follow not any protector or helper. Little do you remember?” Islamic constitution first guarantees the protection in respect of security and dignity of the citizen. No interference should be made on it without any legal justification therefore; awarding death punishment beyond judicial authority is illegal and undesirable in Islamic judicial administration. Islam makes dignity and security of the people, superior among all other things as declared that the life and property of a person is inviolable like inviolable of the day of pilgrim. The tradition of the Prophet (pubh) authorizes the legal authority to adjudicate the cases where the violation of right to security and dignity of the people is proved, in accordance with the due process of law. Almighty Allah prohibits the killing of those souls, which he forbids to kill unjustly by himself. Islamic criminal law therefore; confines to award death sentences that called “qatl-bi-al-haq” in six aspects and with acceptable judicial machinery. Another significant right that Islamic constitution has ensured that is right to have justice. The aim of Islamic constitution is to establish justice in the society therefore Allah commend to his messenger to say that I have ordained to establish justice. So whoever brought before the court has the right to fair and impartial or unbious trial and there also have the reasonable opportunity to self-defence of the concern parties. The apostle of Allah advice one of his company Hazrat Ali in desponding justice that you must here both of the parties and that would be easier for you to conclude the case justly. Eventually the modern concept of equality before law and equal protection of law are well guaranteed in the universal unchangeable Islamic

6 Salahuddin, Muhammad, Islame Manobadhikar, Adhunik Prokasoni, 2005, pp.51-65
7 AL-Qur’an, Al-A’raf, 7:3
8 Salahuddin, Muhammad, Islame Manobadhikar, Adhunik Prokasoni, 2005, p.219
9 AL-Qur’an, Al-A’raf, 7:29, Al-Maedah, 5:8, 42, An-Nisa, 4:58, Al-AnEm,6:152.
10 Al-Alwani,Shaykh Taha Jabir, Issues in Contemporary Islamic Thought, p.212, See also, Article 16 (4) of the Arab Charter on Human Right, 2004
constitution more than fifteen hundred years ago where, no differentiae between fundamental state policy and fundamental rights enforceable by law rather all the basic rights are enforceable not only by legal rules but also by moral binding obligations.

**Responses under International Islamic Instruments**

Besides the traditional International Human rights instrument such as Universal Declaration of Human Rights, 1948 (UDHR), International Covenant on Civil and Political Right, 1966 (ICCPR), Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 etc. Muslim world have adopted certain other International Human Rights instruments such as The Cairo Declaration on Human Rights in Islam, 1990, (CDHRI) Arab Charter on Human Rights, 2005 (ACHR) etc. These Islamic declarations declared the inviolability of the life and liberty of an individual. The prime focuses of the conventions are summaries herewith. Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation and it is prohibited to take away life except for a Shari‘ah-prescribed reason.11 All men are equal in terms of basic human dignity and basic obligations and responsibilities without any discrimination on any grounds whatsoever.12 Every human being has the right to enjoy his legal capacity in terms of obligation and commitment.13 All individuals are equal before the law, without distinction between the rulers and ruled.14 It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him.15 Moreover, anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.16 Every human being has the inherent right to life and law shall protect such right, and no one shall be arbitrarily deprived of his life.17 Everyone has the right to a fair trial that afford adequate guarantees before a competent independent and impartial court that has been constituted by law to here any criminal charge against him.18 Sentence of death may be imposed only for the

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11 Article 2(a) of the Cairo Declaration on Human Rights in Islam, 1990.
13 Article 8, ibid.
15 Article 20, ibid.
16 Article 14 (6) (7) ibid
17 Article 5(1)(2) ibid.
18 Article 13, ibid.
most serious crimes in accordance with the laws in force at the time of commission of the crime and pursuant to a final judgment rendered by a competent court.\textsuperscript{19}

The spirit of these universal accepted norms that a state would be obliged to maintain rights of the individual particularly the rights of an accused. Under international obligation, a state is responsible for establishing on the one side, fair and impartial judicial process through which no criminal could remain unpunished, on the other side, ensuring the execution of punishment including death sentence not beyond judicial verdict by any means.

**Killing and their Consequences in the Holy Qur\'\n\'{e}n and Sunnah**

Murder is the most heinous and atrocious act in Islam. Therefore, Islamic teaching is, the killing of a person unlawfully is amounts to killing the humanity as a whole and the save the life of a human being is tantamount to save the entire humanity as stated in the holy Quran;

\begin{quote}
"Whoever kills a person for other than retaliation or to spread mischief in the land-it shall be as if he had kill all mankind, and whoever saves the life of one person shall be as if he had saved the life of entire Humanity."\textsuperscript{20}
\end{quote}

The traditions of the prophet postulate the utmost respect to the life, liberty and property of a human being by the other. Destructing these rights are Har\’\'{e}m or prohibited therefore inviolable to all other people as the Messenger of Allah commanded in the last pilgrims at Arafah;

\begin{quote}
"Your blood, your property and your prestige are as sacred as this city (Haram of Makkah) and the day (day of Arafah)\textsuperscript{21}
\end{quote}

A murder that caused intentionally by a person avoiding the due process of law, there would be no recompense except the hell for ever as the almighty Allah reveled that;

\begin{quote}
"If a person kills a believer intentionally, his recompense is Hell, to abide therein (for ever), and the wrath and the curse
\end{quote}

\textsuperscript{19} Article 6, ibid.
\textsuperscript{20} AL-Qur\'\n\'{e}n, Al-Maidah, 5:32
\textsuperscript{21} Hanbal, Imam Ahmad Ibn, Al-Musnad, Vol. III, p.138
of Allah are upon him, and a great punishment is prepared for him."22

In this connection, the prophet (pbuh) declared that a person is at liberty to enjoy the religious affairs until he commit a murder illegally, if he does so he will thrown into custody and suspend his liberty as stated that;

Narrated Ibn Umar Allah’s Messenger said, “A faithful believer remains at liberty regarding his religion unless he kills somebody unlawfully.”23

Again, the holy Qur’an prohibit the shedding of blood without legal process that direct in the shariah as stated in the Qur'an;

“And kill not the life which Allah has made sacred, save in the course of justice. This he has commended you, in order that you may discern.”24

Another place it is stated that no person should be killed without just cause that is the due process of law or it may be in accordance with the verdict of the court and also order for exercising the right to retaliation in the modest way as it is said;

“And slay not the life which Allah has forbidden except for just cause. And whoever is killed wrongfully, we have given his heir the authority (to demand Qisas). But let him not exceed the limits in the matter of taking life. Verily he is helped.”25

Islam expresses its paramount standards concerning the dignity of a human being and establishes an effective legal system where the rights of the litigants are well protected and there is no scope to punish any body without any legal justification. The prophet of Islam in his traditions teaches us the concern matter in the following as;

Narrated 'Abdullah: The Prophet said, "The first cases to be decided among the people (on the Day of Resurrection) will be those of blood-shed."26

22 AL-QurÉn, An-Nisa, 4:93
23 Sahih Al-Bukhari, Vol.9. Book 83, hadÊth No.2
24 AL-Quran, AL-AnÈm,6:151
25 AL-Quran, Al-Isra, 17:33
26 Sahih Al-Bukhari, Volume 9, Book 83, Hadith No 4
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Narrated 'Abdullah: The Prophet said, "No human being is killed unjustly, but a part of responsibility for the crime is laid on the first son of Adam who invented the tradition of killing (murdering) on the earth. (It is said that he was Qabil)." 27

Narrated 'Abdullah bin 'Umar: One of the evil deeds with bad consequence from which there is no escape for the one who is involved in it is to kill someone unlawfully. 28

Narrated Anas Ibn Malik (rta) the prophet said the biggest of Al-Kabair are (1). to join other as partners in worship with Allah, (2). to murder a human being, (3). to be undutiful to one’s parents (4). and to make false statement or said “to give false witness.” 29

Narrated 'Abdullah: Allah's Apostle said, “The blood of a Muslim who confesses that none has the right to be worshipped but Allah and that I am His Apostle, cannot be shed except in three cases: In Qisas for murder, a married person who commits illegal sexual intercourse and the one who reverts from Islam (apostate) and leaves the Muslims.” 30

Narrated Ibn Abbas (rta) the Prophet said, “the most hated person to Allah are three: (1) A person who deviates from the right conduct, i.e., an evil doer in the Haram (2) a person who wants that the traditions of the pre-Islamic period of ignorance should remain in Islam; and (3) a person who seeks to shed somebody’s blood without any right.” 31

Scrutinizing the above-mentioned verses from the holy Quran and the glorious traditions of the Prophet (pbuh) we make a clear conclusion that in Islamic legal system there is no scope for any one to kill any person beyond any legal cause asserted by the shariah and loathed the act of murdering illegally. Any one if, however, do so he will be responsible for severe punishment that is death sentence, moreover this sentence must be in the way of retaliation.

27 Sahih Al-Bukhari ,Volume 9, Book 83, Hadith No 6
28 Sahih Al-Bukhari, Volume 9, Book 83, Hadith No 3
29 Sahih Al-Bukhari, Volume 9, Book 83, Hadith No 10
30 Sahih Al-Bukhari, Volume 9, Book 83, Hadith No 17
31 Sahih Al-Bukhari, Volume 9, Book 83, Hadith No 21
Judicial Directions in Islamic Legal System

The foundation of Islamic legal system is the very text of the verses of the \textit{Quran} and the \textit{Sunnah} of the Prophet (swa) which postulate the paramount ideal of justice for the humanity. The Messenger of Allah himself and his eminent successors, that is the four Chaliphs also experienced of the model at that time which was known as golden age. The society was free from injustice because they were followed the Allah’s commandment and the advice of his messenger, that all human beings are equal before the law and equal right to have legal protection of law, which was established into with the careful hand considering the fear of Allah and the day of resurrection in their mind. Therefore, it was rare to be found that any person was tortured or killed without any legal grounds at that time. From the glorious \textit{Quran} and the Sunnah of the prophet some of the basic directions have discussed in bellow.

The Holy Quran stated, “O you who believe! Stand out firmly for justice, as witness of Allah; even though it be against yourselves or your parents, or your kin, be he rich or poor, Allah is a Better protector to both (than you) are. So follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do.\textsuperscript{32}

It is further stated that: “Therefore, judge among them by what Allah has revealed, and follow not their vain desires, diverging away from the truth that has come to you. To each among you we have prescribed a law and a clear way.”\textsuperscript{33}

Above verses from the \textit{Quran} have made a specific guideline for the judicial administration that the judiciary is arranged by the learned people of high moral status who do not exercise his vain desire in discharging judicial functions and hesitate to pronounce the sentence even if it goes against himself and also keep in mind in the fear of the final day of judgment. In association with the \textit{Quranic} verse, the traditions of the prophet (swa) also made instructions for the impartial and unbiased judicial structure. Some of the traditions of the prophet have given bellow.

Abu Hurairah reported from the Prophet who said: whose seeks to be a judge among the Muslims until he gets it, and

\begin{footnotes}
\footnotetext[32]{AL-Quran, An-Nisa, 4:135}
\footnotetext[33]{AL-Quran, Al-Ma\textit{idah}, 5:48}
\end{footnotes}
then whose justice prevails over his injustice, there is paradise for him; and whose ever’s injustice prevails over his justice, there is fire for him.\footnote{Abu Dawud,}{34}

It is also stated that, Abu Bakar reported: The messenger of Allah said no judgment should be pronounced between two disputant when he (the judge) is annoyed.\footnote{Sahih Al-Bukhari Volume 9, Book 89, Hadith No 272}{35}

Narratetd from Buraidah: The Prophet Swa Said: judges are three types, one class will go to Paradise, and two classes will go to the Hell. The judge who understand the truth and pronounce the judgment accordingly (will go to 
\textit{Jannat}), the judge who understand the truth and do injustice in the judgment, and the judge who adjudicate among the people without knowledge both will go to the 
\textit{Jahannam} or Hell.\footnote{Abu Dawud and Ibn Mazah}{36}

Eventually, after the discussion of the above directions it is apparent that the ensuring justice is the prime aim of the Islamic judicial system therefore no scope to punish, torture or killed without due process of law established by the \textit{Quran} and the practice of the prophet swa.

\textbf{Concluding Remarks}

The well-known principle is that it is better from killing one person with out proving beyond reasonable doubt rather to free ten people. Therefore, no individual, whatever the identity he possesses, or the allegation is available against him he should not be convict and killed by the authority of the government rather existing judicial administration. It is better to give attention to make smooth and strengthen the judicial administration so that every offender must not remain unpunished rather eliminating the criminals by the state force which is not justifiable in any way. Islamic legal system sets such a universal accepted standard where president and beggar stand for justice before the court at the same way and there are no options to kill any body without proving any guilty of the person.
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