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MASTER'S THESIS

**ETHICAL EVALUATION OF CAPITAL PUNISHMENT
IN CULTURAL PERSPECTIVE
THE ISLAMIC CASE OF APOSTASY**

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YILDIZ TEKNİK ÜNİVERSİTESİ
SOSYAL BİLİMLER ENSTİTÜSÜ
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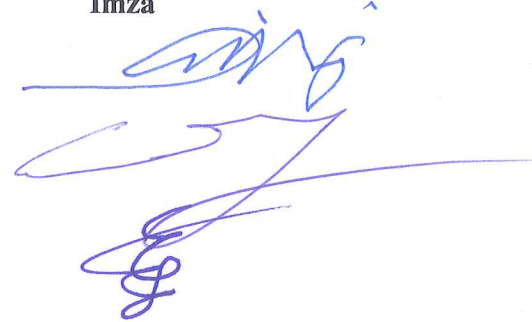
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ABSTRACT

ETHICAL EVALUATION OF CAPITAL PUNISHMENT IN CULTURAL PERSPECTIVE

THE ISLAMIC CASE OF APOSTASY

Ali Abdullah Açıkgenç

June, 2019

Capital punishment has begun to be dealt with in ethics as a general moral problem. In this study, we will try to make a philosophical, moral and legal evaluation in order to deal with the morality of this punishment from a cultural point of view. As it is known, we face two important concepts in capital punishment: life and death. These two phenomena should be examined in relation to the death penalty. For this reason, the nature and meaning of life and death will be analyzed philosophically and the morality of a punishment in the sense of ending life will be analyzed. If a problem is moral, the two most important moral concepts are undoubtedly the concepts of good and evil. The death penalty will be examined in terms of these concepts and the philosophers, especially Kant and Hegel, who give important opinions on this subject will be discussed in detail. The views of Cesare Beccaria, who for the first time philosophically advocated the abolition of the death penalty and proposed a legal system based on it, will be examined in this context. The thesis will be concluded by examining a sample case of Islamic law that deals with the subject from a cultural perspective. Our case is apostasy which is interpreted that as not a creedal crime but a danger that threatens the state and society. In Islamic law, it is not possible to abolish capital punishment as the Qur'an imposes the death penalty for premeditated murder. Although the Qur'an imposed this punishment to only one crime, it still advises to forgive. So it can be said that in this case, even if the death penalty is not abolished it is restricted by Islamic law. As a result, it would be appropriate to state that it is very difficult to solve this problem both legally and morally.

Key Words: Capital punishment, death penalty, value of life, meaning of death, meaning of life, biological perspective in death penalty, good, evil, apostasy

ÖZ

ÖLÜM CEZASININ KÜLTÜREL AÇIDAN AHLAKİ DEĞERLENDİRMESİ İSLAM DÜŞÜNÇESİNDE İRTİDAT ÖRNEĞİ

Ali Abdullah Açıkgenç

Haziran, 2019

Ölüm cezası genel ahlak sorunu olarak etik içerisinde ele alınmaya başlamıştır. Bu cezanın ahlakiliğini kültürel açıdan ele alan bu çalışmamızda felsefi, ahlaki ve hukuki değerlendirme yapmaya çalışılacaktır. Bilindiği gibi ölüm cezasında iki önemli kavramla karşılaşmaktayız: hayat ve ölüm. Bu iki olgunun ölüm cezasına olan ilgisi açısından incelenmesi gerekir. Onun için hayatın ve ölümün mahiyeti ve anlamı felsefi olarak incelenerek hayatın sonlandırılması anlamında olan bir cezanın ahlakiliği tahlil edilecektir. Bir sorun ahlaki ise ahlaken en önemli incelenen iki kavram şüphesiz ki iyi ve kötü kavramlarıdır. Ölüm cezası bu kavramlar açısından incelenecek ve bu konuda önemli görüş belirten filozoflar, özellikle Kant ve Hegel ayrıntılı olarak tartışılacaktır. Ölüm cezasının kaldırılmasını ilk defa ahlaki gerekçelerle felsefi olarak savunan ve buna dayalı hukuk sistemi öneren Cesare Beccaria'nın görüşleri bu bağlamda incelenecektir. Tez, konuyu kültürel açıdan ele alan İslam hukukundan bir örneğin incelenmesi ile sonuca kavuşturulacaktır. Örnek konumuz ise irtidat suçuna verilen ölüm cezasıdır. Bu konu incelendiğinde irtidatın, itikadi bir suç olmadığını aksine devlet ve toplumu tehdit eden bir durum olarak yorumlanmıştır. Kültürel açıdan İslam ele alındığında Kur'an'da ölüm cezasının olmasından dolayı tamamen kaldırılmasının mümkün olmadığı görülmektedir. Ancak Kur'an'da ölüm cezası verilen sadece bir suç (amden katil için) olduğu halde buna dahi tavsiyesi affetmektir. O halde bu durumda denebilir ki, ölüm cezası kaldırılmasa dahi sınırlandırılmıştır. Sonuçta hukuki ve ahlaki açıdan bu sorunun çözümlenmesinin çok zor olduğunu belirtmek yerinde olur.

Anahtar Kelimeler: Ölüm cezası, hayatın anlamı, hayatın değeri, ölüm, ölümün anlamı, ölüm cezasına biyolojik yaklaşım, iyi, kötü, irtidat

PREFACE

This thesis evolved gradually through my undergraduate education. When I studied biology I noticed certain issues that were of a philosophical nature. As a result, I decided to take some philosophy courses although I was in the biology department. In the course of my studies I came across moral philosophy which attracted my attention and I decided to study ethics and more particularly issues related to my major in biology became more appealing. With the encouragement of my professors I decided to study bioethics. In some of my courses that I took in ethics I wrote papers on and did research in related issues such as euthanasia and genetic engineering. This work is one of such an enterprise in capital punishment. In the meantime, Turkey also abolished capital punishment in 2006 in an attempt to enter the EU.

In the course of my study I received much help from my professors in the philosophy department at Yıldız Technical University. I need to thank them all. But a special mention goes to Professor Niyazi Kahveci whose constant encouragement gave me extra energy to concentrate on my work. I would like to express also my gratitude to professors who helped and gave me advice in my work, particularly Professor Osman Caner Taslaman and Professor Ali aksu.

I need to express my unfailing respect and gratitude for my family, my mother and father for giving constant help and support to maintain my studies. I must mention also my aunt Sundus Aıkge who always called me and asked how my work was improving. All my immediate family members my grandmother especially encouraged constantly to finish my work. I need to express my indebtedness to all those that are mentioned and many others who are not mentioned in this brief note. Thanks and with my sincere respect to you all.

Istanbul; June, 2019

Ali Abdullah Aıkge

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1. INTRODUCTION

Ethical issues are related to human nature in a fundamental way. They are not like other philosophical issues because many times we are able to come to a conclusion in these issues as related to being, for example, essence, matter, causation and even knowledge. But when it comes to ethical issues we seem to hesitate about our decisions. We always think that there might be a better solution for the problem at hand. This thesis is a study of such an issue in bioethics which has recently emerged as a sub-branch of general ethics. I am going to take up the subject of capital punishment which is also expressed in legal terms as death. This concept makes it clear that this application of “killing” or “ending a life” is executed as a punishment. For only certain crimes. Therefore, legally speaking the only justification given for this punishment is the crime itself. For a long time many thinkers and activists opposed this type of punishment for reasons based primarily on their understanding of humanity.¹ We can consider these arguments as being humanitarian. On the other hand, there are also moral arguments levelled both against and for defending capital punishment. Can we justify these arguments that are developed both from humanitarian and moral perspectives?

Just to mention a few, I may refer for the first work which will be discussed below in the relevant section of this thesis is *On Crimes and Punishments* by the well-known Italian jurist-lawyer Cesare Beccaria. In this work Beccaria not only examines the whole punishment system as penology but also the moral aspect of capital punishment and he defends the thesis that it should be abolished. Many subsequent thinkers are influenced by him. Even Hegel refers to him in his famous book which is in fact a philosophy of law although the title may be otherwise: *Philosophy of Right*.² We can also mention among the classic discussions of this topic the essay by Jeremy Bentham, entitled *An Introduction to the Principles of Morals and*

¹ For a brief list of these works one may consult the bibliography at the end of this work.

² George Wilhelm Friedrich Hegel, **Hegel's Philosophy of Right**, trans. by T.M. Knox (Oxford: University Press, 1971), 70.

Legislation.³ Most of these early books discuss the issue from the legal point of view and there is little emphasis on the moral aspect of the issue. Later literature especially the recent ones that are primarily consulted in this study pay more attention to the moral aspect of capital punishment.

It is the purpose of this thesis to examine the issue of capital punishment mainly from the moral perspective. But we should also remember that morality in some traditions is based on religion. One example is our own culture which belongs to Islamic civilization. I will identify this approach as “cultural perspective” which develops arguments concerning capital punishment from the religious perspective.

As it seems capital punishment is surrounded by many other moral and cultural issues which should be addressed in this study. Since it will exceed the limit of this thesis to introduce all problems surrounding the issue of capital punishment, in that case I will try to limit my discussion into two main subjects which are also at the heart of the moral and philosophical discussions on capital punishment. Each one of those subjects will be treated in separate chapters as:

1. The Ethics of Capital Punishment;
2. The Nature and Meaning of Life and Death: Ethico-Theological Considerations in Capital Punishment;
3. Capital Punishment in Islam in the Case of Apostasy.

Before discussing how these chapters will be organized, I must try to clarify in this context the main problem concerning capital punishment in related issues. The first introductory problem is the concept of punishment which is analyzed basically with two theories: the first of which is utilitarian theory, which is also called consequentialist theory and the second of which is retributive theory. There are some other theories which are a mixture of these doctrines. We must understand that all these theories are actually explanations of how to justify punishment for an act that is considered prohibited or illegal. Therefore, these theories are not concerned with the nature of punishment itself as in any case both these theories try to justify punishment as a kind of retribution which is supposed to discipline the offender and deter other potential offenders.⁴ Our study, on the other hand, is mainly concerned

³ Jeremy Bentham, **An Introduction to the Principles of Morals and Legislation** (Kitchener, Ontario, Canada: Batoche Books, 2000).

⁴ See for example Zachery Hoskins, “Collateral Restrictions” in C. Flanders and Z. Hoskins, **The New Pilosophy of Law** (New York and London: Rowman and Littlefeld, 2016), 249-65.

with the nature of punishment and this is, I think, the moral aspect of legal injunctions. This is the problem with capital punishment as a bioethical issue.

When we come back to the theories of punishment, the consequentialist theory claims that there must be public criteria, such as general welfare and the common good of the people or society at large, which are identified as the end of punishment that is the justification of legal punishments. This theory then tries to justify punishment on the basis of its consequences.⁵ The second theory namely the retributivist view justifies punishment on the basis of the act committed by a perpetrator who acts freely and maybe even voluntarily. Therefore, such a perpetrator deserves to be punished and suffer as a result of this bad action.⁶

Discussions concerning the justification of punishment in general is diverse, one such theory is known as “abolitionism” defended by Victor Tadros. In his book Tadros argues from a wider perspective in order to explain how to justify punishment and analyzes all of the theories given for such justifications.⁷ Finally he reaches the conclusion that the aim of punishment should be to abolish punishment, because in all justifications we see that “the value of punishment is completely instrumental”.⁸ Zaibert, on the other hand, criticizes Tadros arguing that “justification of punishment offered by someone (Tadros) whose ultimate goal is to abolish punishment, is really not much of a justification”.⁹

It seems that among these theories of punishment it is the retributionist theory that has the stronger stand. Most legal philosophers such as Kant, Hegel, Bentham and Sidgwick, to give some examples, seem to defend this theory because it offers both a definition and a justification for punishment whether these are accepted by all or not. The work of Leo Zaibert discusses this theory in detail and he also refers to those who defend his theory.¹⁰ We also need to address the issue of who should inflict punishment. Of course it is mainly the state which is the instrument for punishing but

⁵ This theory is defended by James Q. Wilson, **Thinking About Crime**, revised edition (New York: Basic Books, 2013), see especially chapters 7 and 8. Also similarly the theory is defended by Nigel Walker, **Why Punish?** (Oxford: Oxford University Press, 1991).

⁶ C.L. Ten, “Crime and Punishment” in **A Companion to Ethics**, ed. Peter Singer (Oxford: Blackwell Publishing, 2005), 366.

⁷ Victor Tadros, **The Ends of Harm: The Moral Foundations of Criminal Law** (Oxford: University press, 2011), see chapters in Part I.

⁸ *Ibid*, 39.

⁹ L. Zaibert, “The Instruments of Abolition, or Why Retributivism is The Only Real Justification of Punishment”, **Law and Philosophy**, 32 (1) (2012), 35.

¹⁰ Leo Zaibert, **Punishment and Retribution** (Burlington, VT: Ashgate Publishing Company, 2006).

other institutions may also be instrumental in this. However, capital punishment is only given by the state so we are not concerned with many details involved in theory of punishment. We need to discuss primarily the moral aspect of this punishment and try to see how it can morally and not legally be justified; if it can be justified at all.

In all these discussions the main concept is punishment which needs to be defined also. A theory of punishment should include an explanation of the nature of punishment which is in fact a definition as well as justification of punishment. But Zaibert makes a distinction between a theory of punishment which is concerned with the definition of it and the theory concerning the justification of punishment.¹¹ However, we may combine both of these theories as a comprehensive theory. Hart provides a definition of punishment based on five elements: 1. Pain or a consequence perceived as unpleasant to the offender; 2. It must be for an offence against the law; 3. There must be an offender; 4. It must be administered by human beings intentionally other than the offender; 5. An authority constituted by a legal system against which the offence is committed.¹² From a general treatment of punishment before we enter into discussing the specific aspect of it as capital punishment or “death penalty” let us consider a cultural aspect of this phenomenon: concept of punishment and also death penalty in Islamic legal philosophy. Law and all other related subject matter of a science in Islamic civilization is called “fiqh” (*‘ilm al-fiqh*, namely the science of understanding). We may say that fiqh in general deals with human conduct in relation to rights and responsibilities. On this basis the famous fiqh concordance known as *Mejelle*, composed in the second half of the nineteenth century, states that the science of fiqh deals “with the ceremonial part of religion” called *ibadat* (religious duties) and with worldly matters. “In so far as it deals with worldly matters it is again divided into three parts:

1. Marriage, or in general family law;
2. Dealings between people and their relations with and conduct towards one another, called “*mu’amalât*”;
3. Punishments (*uqubât*)”.¹³

¹¹ Ibid, 7-8.

¹² H. L. A. Hart, “Prolegomenon to the Principles of Punishment”, **Proceedings of the Aristotelian Society, New Series**, 60 (1959-1960), 1-26, 4.

¹³ C.R. Tyser, D.G. Demetriades and Ismail Haqqi Effendi, translators, **The Mejelle: Being an English Translation of Majallah el-Ahkâm al-Âdliyya** (Kuala Lumpur: The Other Press, 2001), 2-3.

After this classification we do not see a detailed definition of punishment like the one given by H.L.A. Hart but the word “*jazâ*” used for punishment may also mean “reward”. In that case whatever recompensation given for an action depending on whether the action is approved or disapproved by law is *jazâ*; If it inflicts suffering then it is punishment. This means that if the recompensation is pleasing then it is a reward. It seems that in Islamic law reward and punishment are twin practices concerning actions. But in penal law called “*uqubât*” we are concerned only with punishment and thus it is justified in relation with reward. In other words, if good actions are rewarded then bad actions must be penalized. However, we need to ask about the authority behind most of these practices. We can explain this on the basis of the sources of law as discussed in classical fiqh literature.¹⁴ Usually four sources are cited in the classical sources: Qur’an as the revealed source; Sunnah as the Prophetic tradition, consensus of the scholars and finally analogy by the jurists. If we notice the first two sources, we can see that their origin is divine. For, the Qur’an is revealed and the Prophet is a divinely chosen messenger. The other two sources, namely consensus (*ijmâ’*) and jurists’ analogy (*qiyas fuqahâ’*), depend upon the jurists which imply that their origin is human. On the other hand, we must realize that in the application of these principles jurists rely on the first two sources which means the ultimate origin of these legal foundations is also divine.

This discussion of Islamic law shows that punishment in Islamic legal theory is justified divinely. In this case we may add this as a different theory of punishment which offers a definition for punishment and provides a justification for it on the basis of religion. Since this approach has human elements in it also I called it “cultural approach”. According to this religious perspective the moral justification of capital punishment is also based on religion. Since it is the main subject of this thesis to study capital punishment as an ethical problem we can now concentrate on this issue and try to evaluate how our discussion is going to be handled.

Since capital punishment is a problem included under the issue of punishment in general, approaches to punishment determine the approaches to capital punishment

¹⁴ I will give as an example the following books that are published in English and one may find references in these books to the original Arabic sources also. Wael B. Hallaq, **A History of Islamic Legal Theories** (Cambridge: University Press, 1997). Imran Ahsan Khan Nyazee, **Theories of Islamic Law** (Islamabad: Islamic Research Institute, 2009). Sobhi Rajab Mahmassani, **The Philosophy of Jurisprudence in Islam**, trans. By Farhat J. Ziadeh (Kuala Lumpur: Penerbitan Hizbi, 1987).

also. As we have seen all approaches to punishment have two main perspectives: first is the philosophical perspective which is purely rational; second is the religious perspective which is based on theological sources. As I will take in this study Islam as a religious approach. I take the view in this religion that is expressed as “revealed sources” in my thesis I will try to investigate the rational approach by philosophers and try to understand their perspectives on capital punishment. If a philosopher defends this kind of a penal code, we need to analyze his argument; and in a similar way if a philosopher argues against this kind of a punishment then we need to analyze his arguments also. All these arguments are based on certain moral principles. This means that the first chapter of this thesis will be devoted to the ethics of capital punishment concentrating on philosophical controversies surrounding this issue.

We can give Hegel’s philosophy of punishment in his legal philosophy as the best example for rational theory of capital punishment. We will see how he proceeds on the basis of three moral concepts: will, freedom and right.¹⁵ Freedom is expressed as ownership which transfers to property. In its modifications property is alienated and thus will in property recognize other property owners. Therefore concludes Hegel “reason makes it as necessary for men to enter into contractual relationships” and in this way social contract is formed to avoid “wrong”.¹⁶ Rights are recognized by contracts but interrelationships are organized by law. The basic element here is the concept of right. Violations of rights are settled by law where we come up with the concept of punishment and if this violation is committed against the state the offence is capital; so the punishment is also capital. Hegel argues that the transition from a general and abstract concept of right must be made to morality where we reach the ethics of capital punishment. We must understand that this is a purely rational analysis of punishment in general and capital punishment in particular, which will be discussed in the third section.

We may ask at this point the following question: why is capital punishment a moral issue? In ethical discussions two questions come to the fore: human dignity and value of (human) life. This means that our discussion must pay attention to these points also. To discuss life requires a discussion of its opposite: death. In the third section

¹⁵ Hegel, **Hegel’s Philosophy of Right**, op. cit., 38ff.

¹⁶ Ibid, 57 and 64ff.

we will discuss the nature and meaning of life because capital punishment puts an end to a life in order to evaluate also the ethical implications of this. This is crucial especially for the philosophical approach because human will manifested in the legal sphere falls short of the moral will. For, “the standpoint of morality is the standpoint of the will which is infinite not merely in itself but for itself”.¹⁷ Therefore, he concludes:

“Ethical life is the Idea of freedom in that on the one hand it is the good become alive... while on the other hand, self-consciousness has in the ethical realm its absolute foundation and the end which actuates its effort. Thus ethical life is the concept of freedom developed into the existing world and the nature of self-consciousness.”¹⁸

The other related topic in this subject is human dignity which may be defended morally in both ways either for or against. For example Thomas Long states that “it is not unusual to find appeals to ‘elemental concepts of decency’, the dignity of man, and so on”.¹⁹ It is possible to use the same dignity argument to defend capital punishment because if there is a violation of human dignity by ending one’s life the dignity of the murdered person must also be protected. As far as the issue of life is concerned capital punishment has similar problems to euthanasia which is also a procedure of ending life.

We need to consider the religious perspective also and if we take it in a general sense this approach is considered as “conservative persuasion”. Steven Horrobin thus argues that this approach arises from religious tradition which “focuses on such concepts as the sanctity of life, or the intrinsic value of life particularly to humans as a distinct and arguably unique category and condition of being”.²⁰ However I need to examine this issue from a religion that is Islam as our cultural case. I am thinking that this will prepare the ground for my discussion in the third and final section of this thesis.

The last section will examine a specific case of capital punishment in Islam in the case of a specific case of action which is considered a crime for capital punishment. This is the case called “apostasy” which is defined as “giving up or rejecting of Islam after becoming Muslim or having been Muslim by birth”. The Arabic word used for

¹⁷ Hegel, **Philosophy of Right**, op. cit., 75.

¹⁸ Ibid, 105.

¹⁹ Thomas A. Long, “Capital Punishment: Cruel and Unusual?” **Ethics**, 83:3, (1973), 217.

²⁰ Steven Horrobin, “Immortality, human nature, the value of life and the value of life extension”, **Bioethics**, 2016 (2006), 280.

this is “*irtidâd*” and the person who committed apostasy is called “*murtadd*” (apostate).²¹ This case will be examined from both legal and ethical perspectives from which we shall try to see what kind of relevant issues can be drawn for our discussion of capital punishment. Usually apostasy is interpreted as a case of religious commitment involving disbelief (*kufir*). However, Professor Kahveci shows that this is in fact renouncing the social, legal and political authority and thus it is not a crime committed against religion but against the state.²² I am hoping that this wider approach from both philosophical and cultural (religious) perspectives will offer a coherent background to analyze all problems, moral, legal and religious, related to the issue of capital punishment.



²¹ See for an example Rudolf Peters, **Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century** (Cambridge: University Press, 2005), 38.

²² Niyazi Kahveci, “Apostasy (*Irtidâd*) in Islamic Jurisprudence: Is it a Creedal or a Political Crime: Ibn Humâm (d.861/1457)”, **Journal of History, Culture and Art Research**, 6:2 (2017), 2ff.

2. CAPITAL PUNISHMENT: ETHICAL EVALUATION AND PERSPECTIVES

In discussing the ethics of capital punishment we should ask certain questions concerning the nature of morality. In this case these two questions concern us: What is it that makes something (or an act) moral? What is it that makes something (or an act) immoral? These questions obviously require a criterion (or criteria) on the basis of which something (or an act) may be rendered moral, or immoral. We should follow a logical way and adopt a practical logic to provide a criterion (criteria) for only one side of this contrary positions. So, if there is a criterion (criteria) for morality it will also be the criterion (criteria) for immorality by lacking it (them). For, if something (or an act) satisfies this criterion (criteria) then it is moral; in the contrary case, it is immoral. We can express this as the ethics of capital punishment and try to provide an ethical evaluation by examining some major philosophers. However, we first need to discuss the nature of capital punishment and then try to evaluate it ethically. There is a number of issues involved in our discussion. In the first place we need to reach a general understanding of capital punishment. For this reason, our discussion will begin with this issue concentrating also on bioethical problems surrounding capital punishment. Since this kind of punishment involves in taking one's life we need to discuss the nature of life and death also. As we are trying to introduce an ethical evaluation in this chapter our subject requires a value perspective of life. For this reason, our next topic of discussion shall concentrate on the value of life. The next major heading of this chapter will be ethical evaluations.

In order to evaluate capital punishment ethically with its surrounding problems we need to reach a general understanding of morality and ethics. However, we know from the history of philosophy that there have been always two general perspectives on this issue: one is ethical subjectivity which introduces a relative understanding of morality; the other is objectivity which introduces an absolute understanding of morality. Therefore, we need to address this issue before we go on to treat the nature

of morality. Once we develop a sufficient perspective on this issue we will be ready to discuss life as a moral source. I am hoping that the above topics will provide a general background and a perspective to reach a final evaluation of capital punishment in the ethical sense.

2.1. The History of Capital Punishment

When we look at capital punishment historically we see that it is a kind of penalty practiced by many societies since the beginning of human history. In this study we do not consider illegal ways of punishments such as personal killings as part of blood feuds and any kind of social practices.²³ We take the beginning of capital punishment as a legal practice which was in the beginning thought to be a way of fulfilling justice. The oldest legal document which prescribes death penalty as a rule of justice is the code of Hammurabi.²⁴ Hammurabi was the ruler of Babylon which is the oldest metropolis in human history during his rule between 1792 and 1750 B.C.E. Some of the crimes in the law of Hammurabi which were penalized by death are homicide, false allegation, theft from a temple, undocumented sales, kidnapping a child, kidnapping a slave from the palace, robbery and looting. Some ways of executing the death penalty were; burning in a fire, drowning in water and hanging.²⁵ After Hammurabi we also find the death penalty in fourteenth century B.C.E. Hittite code. The same penalty was found in seventh century B.C.E. Draconian code of Athens and fifth century B.C.E. Roman law. In these legal systems executions were carried out by way of crucifixion, drowning in water, beating to death, burning in fire, boiling in water, and impalement.²⁶

As these cruel practices of punishment continued there emerged religious legal injunctions to protect the criminal from excessive or unjust retaliation by the

²³ Our purpose in this study is not to give a history of capital punishment. However, a very brief survey would provide a good background for my thesis. For this reason, I include this history very briefly in order to show the development of statutory implementation of this practice. For a good history of punishment, the following work may be consulted: Mitchel P. Roth, **An Eye For An Eye: A Global History of Crime and Punishment** (London: Reaktion Books Ltd., 2014).

²⁴ M. E. J. Richardson, ed. and trans., **Hammurabi's Laws: Text, Translation and Glossary** (London and New York: T&T Clark International, A Continuum Imprint, 2000).

²⁵ Ibid, 41-135.

²⁶ "Death Penalty Information Center", <https://deathpenaltyinfo.org/part-i-history-death-penalty#intro>, retrieved on March 17, 2018.

aggrieved.²⁷ Warren Stearns, evaluating this development, refers to the Old Testament, Deuteronomy, Chapter 22 to show the religious criminal code which provides for its administration. He states that “It is interesting to note the forms of punishment: death by hanging, by stoning, and whipping. The number of stripes is fixed in Chapter 25, as follows: ‘Forty stripes he may give him, and not to exceed: lest, if he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee.’ I am not certain whether ‘thy brother’ refers to the whipper or the one being whipped. Interesting interpretations may be made either way.”²⁸ I will briefly examine this development.

2.1.1. Punishment and Death Penalty in Religious Codes

We can give two examples of religions that provide a legal stand for punishment in general and death penalty in particular. The first religion is the Hebrew religion which developed a religious code called “Mosaic Law”. In the Old Testament the capital punishment is expressed to equalize the punishment and the crime in the following statement: “And thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.”²⁹

The next legal system we find is in early Islamic Civilization which bases itself on the scripture, the Qur’an, and the practices of the early community of Muslims under the leadership of Prophet Muhammed. Although there is only one verse in the Qur’an which prescribes capital punishment for premeditated murder Muslim jurists later on derived more death penalty for such crimes as apostasy for example. The verse 178 of chapter 2 (*Surah al-Baqara*) states this punishment as follows:

O you who believe! The law of equality (*qisas*) is prescribed to you in cases of murder. The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.³⁰

We will examine this in a subsequent section as the theology of capital punishment exemplified with a case of apostasy. But the methodology to derive a law of capital punishment for apostasy will be discussed and also evaluated in the final chapter.

²⁷ A. Warren Stearns, “Evolution of Punishment”, *Journal of Criminal Law and Criminology*, 27: 2 (1936), 221.

²⁸ Ibid, 222.

²⁹ The Old Testament quotation is taken from A. Warren Stearns, Ibid, 221-222.

³⁰ Translations of the Qur’an in this study are taken from Abdullah Yusuf Ali, *The Holy Qur’an: Text, Translation and Commentary* (Brentwood, Maryland: Amana Corp., 1983), 71.

This section is devoted primarily to the ethics of capital punishment. As outlined above, death penalty was instituted as law in order to achieve justice. This is clearly stated in the first ever system of law established by Hammurabi as “And so when Marduk urged me to direct the people of the land to adopt correct behavior, I made the land speak with justice and truth, and improved the welfare of the people.”³¹ As we can see the justification of in fact any punishment given to crimes is justice and public welfare. We may interpret the second as social stability also. But the ethics of this kind of a punishment was never questioned. As far as I found out the first questioning came during the Enlightenment, as we have evaluated in the Introduction, by Montesquieu. This next development in human history may be examined as rational legal codification based on morality. It is at this stage that the question of ethics of capital punishment comes into the picture. This can be examined in two directions: Islamic civilization which is although basically religious codification yet in its later development it also shows characteristics of rational codification concerning the ethics of capital punishment. In this way Muslim jurists developed rational methods also to apply the religious law which needed a sophisticated level of interpretation to provide an applicable backdrop for this law. However, as we pointed out, this topic will be detailed in or discussion of the case of apostasy and legal justification for the religious law expressed as *ratio legis*.

2.1.2. Punishment and Death Penalty in Rational Codes

Thinkers defending the abolishment of capital punishment like Montesquieu, such as Voltaire and Bentham defended their position philosophically arguing that this form of punishment is inhumane. But others such as English Quaker theologian John Bellers (d. 1725) tried to defend the sacredness of human life from a religious point of view.³² According to this view capital punishment is desecration of human life and thus can never be allowed. All these ideas are branded as the “Abolitionist position” which does not approach this issue from an ethical perspective but rather from religious perspective. However, for the defenders of this position morality and religion are identical; especially with regard to the issue of human life in case of

³¹ Richardson, op. cit., 41.

³² See John Bellers, **Essays about the Poor, Manufactures, Trade, Plantations, & Immorality** (Proquest, Eebo Editions 2011, first edition London, 1699); see also David P. Gushee, **The Sacredness of Human Life** (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2013).

death penalty sacredness determines ethics, and hence there cannot be a distinction between moral and ethical perspectives.

The thinker who treated this subject for the first time from almost all perspectives in a comprehensive way is Cesare Beccaria, Italian criminologist, jurist, philosopher and politician (d. 1794).³³ He is very influential for the subsequent discussions of this issue. For example, in France, Voltaire “often attached philosophical reflection to this political advocacy, such as when he facilitated a French translation of Cesare Beccaria’s treatise on humanitarian justice and penal reform and then prefaced the work with his own essay on justice and religious toleration.”³⁴ In many Western countries discussions began to abolish death penalty. Almost in all of them the arguments are based on Beccaria’s treatise. For this reason, I would like to take this to the center of my discussion in this context.

2.2. Moral Value of Capital Punishment³⁵

Since the classical approach concerning the issue of capital punishment is based on Aristotelian philosophy although I have not found in his *Politics* death penalty as punishment his system is clearly open for that. As Frederick Copleston states “we regret that Aristotle canonized the contemporary institution of slavery, but this canonization is largely a historical accident”.³⁶ In fact, Aristotle also states that “from the hour of their birth, some are marked out for subjection (namely to become slaves), others for rule”.³⁷ This natural position of each person in the society is assigned by nature and preserved by the state. Aristotle is also very strict on this because he claims that “the preservation of the state depends on its laws”.³⁸ But the execution of the law should also be maintained according to the status of a person. The same law is not equally applied to a citizen and a slave and a woman. Although justice is a cardinal virtue in Aristotle’s ethics the application of law in accordance

³³ Cesare Beccaria, **On Crimes and Punishments and Other Writings**, trans. by Richard Davies, Virginia Cox and Richard Bellamy, ed. Richard Bellamy (Cambridge: University Press, 2000).

³⁴ J. B. Shank. “Voltaire”, **The Stanford Encyclopedia of Philosophy** (Fall 2015 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/fall2015/entries/voltaire/>>.

³⁵ This section of my study is taken from my article published as a requirement form my thesis by the Institute of Social Sciences in **Üsküdar University Journal of Social Sciences**, 4: 6 (2018), 116-121.

³⁶ Frederick Copleston, **A History of Philosophy** (New York, London: Image Books, Doubleday, 1994), vol. 1, 352.

³⁷ Aristotle. **Politics**, 1254 a 23-4. The explanation in parenthesis is my addition.

³⁸ Aristotle. **Rhetoric**, 1360 a 30.

with the status of a person is not considered injustice. Taylor also explains this in the following way:

Non-Greeks, “barbarians” do not really possess the capacity for being their own masters or for living either the life of a civilized man of affairs or that of the student. They attain the highest mental and moral development of which they are capable, not when left in their native “barbarism” but when they occupy the position of servants in a civilized Greek society. A Thracian who is the slave of a decent and kindly Greek master is living a worthier life than a Thracian who runs wild on his “native heath”.³⁹

In western discussions of punishment what is striking is that there is emphasis only on justifying punishment. We do not see any stress on justice. This emphasis is, as we have seen, an Islamic approach. The reason for this is that the law must also try to protect the rights of the victim. This fact is missing in philosophical discussions. The same is valid in case of the death penalty: those who defend abolishing capital punishment are thinking only of the offender but not of the victim or victims. If life is valuable it is equally valuable for all. For this reason, philosophers introduce the idea of social hygiene in order to prevent crime in the society so that punishment of any kind could be minimized or eradicated completely. Therefore, they defend alternative methods of crime control.⁴⁰

When we come to punishment in the forms of death execution then somehow it becomes controversial. This is because if a criminal is punished with a suffering or an injury whatever it may be, including death is inflicted upon the person is something similar. It seems that we are trying to prevent something with exactly the same thing. This is more visible in capital punishment. As Dolinko states punishment by death, “involves subjecting those persons to treatment we ordinarily believe wrongs people or violates their moral rights.”⁴¹ Therefore, in order to justify the death penalty one must somehow show why it is morally permissible, legitimate or unobjectionable to apply such a severe penalty. Therefore, they argue that a defender of capital punishment must justify this punitive action by proving that it does not wrong the criminal and hence it does not violate his or her moral rights. In this case a moral right is expressed as not being inflicted with any harm of injury and any form of serious suffering. As we can see the defense and arguments of capital punishment

³⁹ A. E. Taylor, **Aristotle** (New York: Dover Publications, 1955), 102-103.

⁴⁰ For example, Francis A. Allen, **The Decline of the Rehabilitative Ideal** (New Haven: Yale University Press, 1981). Also Angela Y. Davis, **Are Prisons Obsolete** (New York: Seven Stories Press, 2003).

⁴¹ David Dolinko, “State Punishment and Death Penalty”, **A Companion to Applied Ethics**, ed. R. G. Frey and Christopher heath Wellman (Oxford: Blackwell Publishing Ltd., 2003), 75.

is not much different from the arguments of general punishment or any other punitive application. We already discussed these theories of punishments as being utilitarianism which is also called by Dolinko “consequentialism” since it justifies the punishment with respect to the consequences, namely preventing the same wrong action; and the other being retributive theory.⁴²

We can see that both of these theories are based on an understanding of life and death in materialistic terms. Hence, they try to show that in the future it may be possible to prevent crimes by developing certain methods in order to “treat criminals” with less costly and more humane (!) procedures, such as psychotherapy, drugs, electroshock, brain surgery or any combination of these treatments.⁴³ According to the defenders of this theory these procedures are more effective in preventing them from re-offending the same crime; or to this effect it may be a set example for those with criminal inclinations and if applied to them also they may not be inclined to commit the same offense. As we can see, criminal behavior is seen as a result of only something chemical in the body of a person which compels him or her to do a specific action. That is why they try to offer a material solution for preventing these persons from committing a crime. Actually what they are doing is not raising these criminal persons morally to a higher state so that by becoming a virtuous person they stay away from wrongdoing; but rather they inflict another physical pain in order to force them not to repeat their offensive behavior of course in doing so they also neglect the moral rights of their victim.

H. L. A. Hart offered a better solution for capital punishment because he defended the idea that we should not look into punishment as solely inflicting pain which can be negligible with regard to its consequences. In other words, he defended the consequentialist punishment but added one more dimension by arguing that we should also look into the consequence for the beneficial results of such punishments.⁴⁴ The main objection to Hart is that “treatment that would otherwise grievously wrong a person becomes morally legitimate if it is part of a practice with sufficiently beneficial consequences overall. And how can one endorse that position yet nevertheless insists that certain ways of treating people are categorically

⁴² Ibid, 76.

⁴³ These methods are mentioned by Dolinko, see Ibid.

⁴⁴ H. L. A. Hart, **Punishment and Responsibility: Essays in the Philosophy of Law** (Oxford: Oxford University Press, 2008), 4-7.

forbidden no matter how beneficial the consequences of a punishment system that incorporated those practices would be?”⁴⁵

The most outspoken and influential proponents of capital punishment are known as “retentionists”, who rely on the consequentialist and retributive arguments in order to defend their position.⁴⁶ From the consequentialist argument they take the claim that death is a superior deterrent to all other forms of punishment. Next to this is life imprisonment which is too costly and creates much more problems, such as escape from prison and creating problems in prison with other inmates and so on. Therefore, the death penalty is preferable according to the retentionist position. Then they take the retributive argument as holding the death penalty as the only punishment “severe enough to be appropriate for the very worst, most heinous offences.”⁴⁷ The arguments against this position is exactly the same as those given against the consequentialist and retributive approaches.

We have finally only a few thinkers who try to develop arguments to prevent crime by educating the criminally inclined persons. Since we may not be able to know these persons it is better to develop the education system in human societies in such a way that people are morally trained and made conscious of the consequences of their actions are very harmful for society as well as others that live with them. Even after someone commits a wrong action it is not a better attitude to punish a person but rather we should employ procedures aimed at healing the effects of that wrong action. This way the wrong doer will realize the evil results of his or her action which will deter them from such actions in the future.⁴⁸ There is no doubt this theory is close to virtue ethics but it was not as influential as the other theories.

In conclusion I have reached the idea that all these debates are endless and they seem to repeat each other without resolving the problem whether there should be the death penalty or not. In any case there are still many countries where capital punishment is applied nevertheless there are many other countries in which the death penalty has already been lifted and replaced with life imprisonment. I can see that we can give all

⁴⁵ Dolinko, 80.

⁴⁶ Ibid, 81.

⁴⁷ Ibid.

⁴⁸ Some defenders of this position and their works are as follows: H. Bianchi, “Abolition: Assensus and Sanctuary”, **A Reader on Punishment**, ed. R. Duff and D. Garland (Oxford: Oxford University Press, 1994); N. Christie, **Limits to Pain** (Oxford: Martin Robertson, 1982); H. Morris, “A Paternalistic Theory of Punishment”, **American Philosophical Quarterly**, 18 (1981).

the same arguments which they produced against capital punishment also against life imprisonment. Do we give enough attention to the meaning of life and in fact meaning of death as we tried to expose at the beginning of this study?

2.3. Religious Perspectives in Capital Punishment

In this context I will first try to examine the general religious approach which claims sacredness of human life and that capital punishment violates this sacredness. This is mainly the approach of Christian theologians but it is offered as a general theory of abolishing death penalty. In the above discussion I also made a reference to Islamic injunction concerning death penalty. However, we should pay attention to the fact that although in early Islam this was taken only as a religious duty, in its application it was later on systematized and developed as a full penal law. Therefore, the later period that is beginning with the second century of Islam (namely about CE 750's) Muslim jurists developed a complete legal system with a proper jurisprudence (*usûl al-fiqh*). That is why it is adequate to study this legal philosophy in relation to capital punishment and its attending moral issues.

2.3.1. The Christian Perspective: Life is Sacred

There are many theologians defending the moral aspect of punishment on the basis of the sacredness of life. However, this is a two-way sword because sacredness can be taken in the sense of a murdered person and defend his rights on this basis, in that case we will argue that in order to defend sacredness of the life of the murdered person we must demand a punishment of a kind for the murderer. In most cases this argument would demand capital punishment. However, the purpose of the argument is not this consequence. The best argument against capital punishment in this respect, as it seems, is produced by David P. Gushee in his book entitled *The Sacredness of Life*.⁴⁹ Let us ask at this moment this question: Supposing that human life is sacred, then how is this connected to morality? We need to establish this connection in order to prove that to take one's life is a violation of the sacred. Gushee argues that the sacredness of human life is an aspect of divine revelation. "It is therefore a moral

⁴⁹ David P. Gushee, **The Sacredness of Human Life** (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2013).

reality that God has declared and demonstrated.”⁵⁰ In this case again morality is intimately connected with God who makes life sacred and its inviolability a moral conduct.

Gushee refers also to Jewish theologian and rabbi Irving Greenberg who is also defending the same position based on the idea of the sacredness of life. In Islamic tradition we do not find this idea, however, the idea of human dignity as related to morality on the authority of God is a similar case. Hence, “dignity” replaces “sacredness”.⁵¹ Now we need to ask another question and try to see how Gushee is trying to answer: Sacredness is related to morality is proven, but what is the proof for the sacredness itself? In other words, how do we know that human life is sacred?

Gushee argues that “the sacredness of human life is a revealed moral reality and about treating human life accordingly as a human moral task.” Therefore, the sacredness of human life is a divine gift, and treating life as sacred becomes a divine command.⁵² As one can see, the moral and the religious obligation coincide in this command. That is in fact the only moral argument one can produce concerning capital punishment from religious perspective. Of course we still need to defend the right of the murdered person and try to explain how this sacredness not violated. The only argument that is produced in this respect is religious consciousness that is given to the individuals and this way they realize their utter responsibility not to violate this divine command, and they will thus remember that doing this would be “*desecration* of human life, as wickedness reigned — especially in the form of bloodshed and violence (Gen. 6:5-8).”⁵³

2.3.2. The Islamic Law and Capital Punishment⁵⁴

Since religion plays an important role in human life it cannot be neglected in discussions regarding the ethics of capital punishment which we shall now try to examine. In capital punishment we have indicated that there is a death incidence

⁵⁰ Ibid, 13. My summary is based on this book and I will not refer to the book unless I make direct quotations.

⁵¹ See, for example, Mohammad Hashim Kamali, **The Dignity of Man: An Islamic Perspective** (Kuala Lumpur: Ilmiah Publishers, 2002).

⁵² Gushee, **The Sacredness of Human Life**, op. cit., 13.

⁵³ Ibid, 14.

⁵⁴ This section of my study is taken from my article published as a requirement form my thesis by the Institute of Social Sciences in **Üsküdar University Journal of Social Sciences**, 4: 6 (2018), 110-114.

which involves the loss of life, again we need to understand the meaning of life and death in cultural perspectives as represented by religion. I would like to bring in a case from Islamic legal practice.

When a judge (*qâdî*) showed signs of anger while cutting off the hand of a thief, the ruler who chanced to observe him dismissed the judge from his post. For if he had cut the hand in the name of the Law (*shari'a*) he would have felt pity in his heart for the victim; he would have cut it off in a manner devoid of both anger and mercy. Since inclinations of his soul had had some share in his deed, he did not perform the act with justice.⁵⁵

It is possible to deduce the Islamic conception of punishment from Nursi's interpretation based on this incident. First of all, the punishment is justified on the basis of justice; namely what is right to do in an incident involving an offence committed against both a person and society. In the second place, there is another point here and that is a wrongdoing against the command of God, because the offence is prohibited by Him. Of course we may argue rationally that stealing is wrong; however, in this case there is also a religious injunction. We must also see that when a punishment is commanded by God the question of whether to implement that punishment is morally right or wrong becomes totally irrelevant. As capital punishment is also in the Qur'an given as a divine command I believe that it cannot be discussed philosophically. As we can see in the following verse:

O you who believe! The law of equality (*qisas*) is prescribed to you in cases of murder. The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty. (Qur'an, Al-Baqara, Chapter II, verse 178)

Since this is a legal issue I need to refer to the opinion of the experts. According to Abdullah Yusuf Ali capital punishment in Islam is given only to cases of murder. I would like to quote his entire interpretation:

Note first that this verse and the next make it clear that Islam has much mitigated the horrors of pre-Islamic custom of retaliation. In order to meet the strict claims of justice, equality is prescribed, with a strong recommendation, for mercy and forgiveness. To translate *qisas*, therefore, by retaliation, is I think incorrect. The Latin legal term *Lex Talionis* may come near it but even that is modified here. In any case it is best to avoid technical terms for things that are very different. "Retaliation" in English has a wider meaning, equivalent almost to returning evil for evil, and would more fitly apply to the blood feuds of the days of ignorance. Islam says if you must take a life for a life, at least there should be some measure of equality in it; the killing of the slave of a tribe should not involve a blood feud where many free men would be killed; but the law of mercy, where it can be obtained by consent, with reasonable compensation, would be better.

⁵⁵ Bediuzzaman Said Nursi, **Letters**, trans. Şükran Vahide (Istanbul: Sözlük Yayinevi, 1998), 318.

Our law of equality only takes account of three conditions in civil society; free for free, slave for slave, woman for woman. Among free men or women, all are equal: you cannot ask that because a wealthy or highborn, or influential man is killed, his life is equal to two or three lives among the poor or the lowly. Nor, in cases of murder, can you go into the value or abilities of slave. A woman is mentioned separately because her position as a mother or an economic worker is different. She does not form a third class but a division in the other two classes. One life having being lost, do not lose many lives in retaliation: at most, let the Law take one life under strictly prescribed conditions, and shut the door to private vengeance or tribal retaliation. But if the aggrieved party consents (and this conditions of consent is laid down to prevent worse evils), forgiveness and brotherly love is better, and the door of mercy is kept open. In western law, no felony can be compounded.

The jurors have carefully laid down that the law of qisas refers to murder only. Qisas is not applicable to manslaughter due to a mistake or an accident. There, there would be no capital punishment.

The brother: the term is perfectly general; all men are brothers in Islam. In this, and in all questions of inheritance, females have similar rights to males and therefore the masculine gender imports both sexes. Here we are considering the rights of the heirs in the light of the larger brotherhood. In ii. 178-79 we have the rights of the heirs to life (as it were): in ii. 180-82 we proceed to the heirs to property.

The demands should be such as can be met by the party concerned, i.e., within his means, and reasonable according to justice and good conscience. For example, a demand could not be made affecting the honor of a woman or a man. The whole penalty can be remitted if the aggrieved party agrees out of brotherly love. In meeting that demand the culprit or his friends should equally be generous and recognize the goodwill of the other side. There should be no subterfuges, no bribes, and no unseemly bye-play: otherwise the whole intention of mercy and peace is lost.⁵⁶

A contemporary Muslim thinker and a great scholar Fazlur Rahman, discusses this issue on the basis of the same verse and criticizes the traditional interpretation of Muslim lawyers. He argues that the traditional approach does not take into account the complete Quranic hermeneutics. A judge in his verdict for the death penalty must consider other verses also. He explains his critique in the following statement:

On the question of murder, the Qur'an essentially confirms the pre-Islamic Arab forms of settlement either by blood money or by "life for life," adding that forgiveness is better. From this, all our lawyers deduced the principle that murder is a private crime against the bereaved family which has therefore to decide whether the murderer will be forgiven, whether he should pay for the murder in money, or whether he should be killed in revenge. However, the Qur'an also enunciates a more general principle stating that "whoever kills a person unrightfully or without a mischief [i.e., a war] on the earth, it is as though he has killed all humanity; while he who saves one person, it is as though he has saved all humanity" (5:32), which obviously makes murder a crime against society rather than a private crime against a family. But our lawyers never brought this verse to bear on the issue of murder.⁵⁷

⁵⁶ On the above verse, Abdullah Yusuf Ali, **The Holy Qur'an: Text, Translation and Commentary** (Brentwood, Maryland: Amana Corp., 1983), footnotes 182, 183, 184 and 185 on page 70.

⁵⁷ Fazlur Rahman, **Islam and Modernity: Transformation of an Intellectual Tradition** (Chicago and London: University of Chicago Press, 1982), 144.

As it is clear in this explanation capital punishment is not forcefully imposed on the believers. For if the heirs the victim forgive the murderer then the death penalty is not forced however he is asked for compensations and perhaps some other form of state requital. However, the most important point here is the fact that in Islamic law punishment is seen as good in and of itself just like the Western theory of retributive punishment. The following verse is a good example for this conclusion:

In the law of capital punishment (*qisas*) there is saving of life for you, O you man of understanding that you may restrain yourself. (al-Baqara, 2/179)

Now in this verse there is also an agreement with the utilitarian theory that punishment, or the death penalty is introduced as a measure of prevention of similar acts. The phrase in the end of the verse indicates this: “so you may restrain yourself (from doing a similar offence)”. If we accept this, then Islamic understanding of both punishment and the death penalty in case of only murder combines both western theories and adds one more dimension: the divine law. We may now return again to our philosophical discussion of capital punishment. However, again Fazlur Rahman expresses different interpretation of practices in Islamic law which favor capital punishment. He rather refers to traditional scholars as follows:

There are many other instances where Muslim jurists and thinkers tried to break a new trail. ‘Izz al-Din Ibn ‘Abd al-Sulami (thirteenth century C.E.), for example, rejected the ban on interest that had been almost unanimously pronounced by Muslim lawyers, as he rejected stoning to death as punishment for adultery and roundly declared the entire traditional material on the issue to be unreliable.⁵⁸

We may conclude then, that in case of Islamic law, morality is united with religion and the application of the law is done in the name of God, who is the supreme authority in legislation. In that case all Islam wants to prescribe is justice that is good and not harsh on people. The good of society however, must be built on morality not on law which is applied in cases of severe violations. Perhaps this is the only moral code that can be maintained on this issue. However, in the last section we shall take up a specific case in order to examine this moral aspect of capital punishment in the case of apostasy.

⁵⁸ Ibid, 30.

3. THE ETHICS OF CAPITAL PUNISHMENT IN THE PHILOSOPHY OF LIFE AND DEATH

Our discussion of capital punishment from a moral perspective depends on what we understand from life and its absence, namely death. In philosophy there are many attempts to define life and death.⁵⁹ To start with, when we look into the classical philosophy we see that the approach is more on the side of life. However, before we go on the discuss this as the philosophy of life and death we should discuss the problem of how we should discuss capital punishment ethically as we evaluated this problem in the previous section. But in this section we will try to find a criterion for an ethical discussion. As it is well known the main ethical criterion is the distinction between good and evil. There are many discussions in the history of philosophy concerning good and evil. I will try to briefly discuss this issue in order to see which definition of good and evil would be an adequate point of departure for our discussion in capital punishment. Then in the second part of this section I will try to present the philosophy of life and death again from an ethical perspective in order to see if these will provide a suitable ground to solve this legal issue of capital punishment.

3.1. The Ethics of Capital Punishment: Good and Evil

Philosophers approached good and evil in their moral philosophy from very diversified perspectives. It will surpass the scope of this thesis to go into a detailed discussion of this cumbersome issue. We should rather concentrate on a simple criterion type of solution which can be used as working perspective in our evaluation of capital punishment which is also a legal problem. If we do not go into details of all theories concerning good and evil, we may consider two broad categories of good and evil concepts: one is the relativist conception and the other is the absolute

⁵⁹ Some of my thesis work was published as required by Yıldız Technical University, Institute of Social Sciences. Therefore, many materials in this section as well as some passages in other sections were taken from my article as follows: Ali Abdullah Açıkgenç, "The Ethics of Capital Punishment", *Üsküdar University Journal of Social Sciences (JOSOC)*, 4: 6 (2018), 101-124.

conception of good and evil. Todd Calder, for example distinguishes between a broad concept and a narrow concept of evil. “The broad concept picks out any bad state of affairs, wrongful action, or character flaw. The suffering of a toothache is evil in the broad sense as is a white lie. Evil in the broad sense has been divided into two categories: natural evil and moral evil. Natural evils are bad states of affairs which do not result from the intentions or negligence of moral agents. Hurricanes and toothaches are examples of natural evils. By contrast, moral evils do result from the intentions or negligence of moral agents. Murder and lying are examples of moral evils.” On the other hand, he continues:

“Evil in the broad sense, which includes all natural and moral evils, tends to be the sort of evil referenced in theological contexts, such as in discussions of the problem of evil. The problem of evil is the problem of accounting for evil in a world created by an all-powerful, all-knowing, all-good God. It seems that if the creator has these attributes, there would be no evil in the world. But there is evil in the world. Thus, there is reason to believe that an all-powerful, all-knowing, all-good creator does not exist.”⁶⁰

According to Kant, humans have an innate predisposition for evil and it is because of this that their character becomes corrupt.⁶¹ Human moral agents thus fail to observe the moral law which he develops rationally in his second *Critiques*. According to Kant’s moral theory the rightness or wrongness of actions does not depend on their consequences but on whether the duty is fulfilled or not. This kind of moral theory is known as deontological. He argued that certain actions are unethical in the absolute sense, such as, murder, theft and lying. “So whenever we decide to act we must ask the following question: Can I rationally will that everyone act as I propose to act? If the answer is no, then we must not perform the action.”⁶² In that case, there must be a supreme principle of morality which Kant called “The Categorical Imperative. He formulates this as the moral law in the following way: “So act that the maxim of your will could always hold at the same time as a principle of a universal legislation.”⁶³

An imperative is a command and if it is absolute then it is unconditional; that is to say, “categorical imperative.” Such as, “Pay your taxes!” But it is hypothetical if it

⁶⁰ Todd Calder, “The Concept of Evil”, **The Stanford Encyclopedia of Philosophy** (Fall 2018 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/fall2018/entries/concept-evil/>>. Accessed on May 15, 2019.

⁶¹ Manfred Kuehn. “Kant’s Jesus” in **Kant’s Religion within the Boundaries of Mere Reason: A Critical Guide**, ed. with an Introduction by Gordon E. Michalson (Cambridge: University Press, 2014), 172.

⁶² Taken from the ethics course notes of Dan Gaskill, California State University Sacramento, at <https://www.csus.edu/indiv/g/gaskilld/ethics/kantian%20ethics.htm>, accessed on May 5, 2019.

⁶³ Immanuel Kant. **Critique of Practical Reason**, trans. Werner S. Pluhar (Indianapolis, Cambridge: Hackett Publishing Company, Inc., 2002). 45.

commands with certain conditions, such as, “If you want to get a good grade, then study hard.” A maxim, on the other hand, is the rule or principle on which one acts. For example, I can make it my maxim to give in charity every week as I spend on eating out, or I might make it my maxim to help my friend. Kant argues that morality should not be based on maxims; but rather it must be based on the categorical imperative because morality is commands absolutely. Therefore, you cannot claim that it does not apply to you. This is because categorical imperative determines what our moral duties are. But humans cannot always follow this imperative because of the principle of evil. Erik Hanson explains this well in the following manner:

“Because this propensity corrupts an agent’s character as a whole, and is the innate “source” of every other evil deed, it may be considered “radical.” However, this propensity can be overcome through a single and unalterable “revolution” in the mode of thought (*Revolution für die Denkungsart*), which is simultaneously the basis for a gradual reform of character in the mode of sense (*für die Sinnesart*); for without the former, there is no basis for the latter. This reformation of character ultimately serves as the ground for moral agents within an ethical commonwealth, which, when understood eschatologically, is the Kingdom of God on Earth.”⁶⁴

Kant is mainly concerned with how a moral agent can fulfill the moral law. In performing a moral action, the agent must be free but also choose the act intentionally as required by his reason (pure practical reason). Kant discusses evil in detail and also in relation to good in his famous book on religion: *Religion within the Boundaries of Mere Reason and Other Writings*.⁶⁵ In this book he is not elaborating the nature of evil in order to come up with a definition of evil. All I understand is that he considers evil as something which is not to be done morally. He posits that there is a “battle of the good against the evil principle for dominion over the human being”.⁶⁶ This means that good is the opposite of the evil principle. In that case we can reach the idea that for Kant good is that which is to be done morally. But in the *Critique of Practical Reason*, he states that good and evil are “the sole objects of a practical reason”. Good, in this sense, is “a necessary object of the faculty of desire; and evil is a necessary object of aversion, both according to a principle of reason.”⁶⁷

Now what concerns us here is the question what if a moral agent fails to observe the moral law and thus does something evil? Should he be punished or not? Does he

⁶⁴ Erik M. Hanson. “Immanuel Kant: Radical Evil”, *Internet Encyclopedia of Philosophy*, available at <https://www.iep.utm.edu/rad-evil/>, accessed on April 2, 2019.

⁶⁵ Immanuel Kant. **Religion within the Boundaries of Mere Reason and Other Writings**, trans. by Allen Wood and George Di Giovanni (Cambridge: University Press, 1998).

⁶⁶ *Ibid*, 77.

⁶⁷ Kant, *Critique of Practical Reason*, op. cit., 78.

deserve morally to be punished and what about punishing with the death penalty? He argues that “the right to punish contained in the penal law is the right that the magistrate has to inflict pain on a subject on account of his having committed a crime.”⁶⁸ On this basis Kant defends the retributive punishment. He argues that punishment is inflicted not for the purpose of producing good result in the agent but rather it is given because he is committed a crime only. Moreover, this punishment must not be violent and it should not exceed the degree of the crime. He says that “only the Law of retribution (*ius talionis*) can determine exactly the kind and degree of punishment.”⁶⁹ He also clearly states that:

“If, however, he has committed a murder, he must die. In this case, there is no substitute that will satisfy the requirements of legal justice. There is sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and retribution unless the criminal is judicially condemned and put to death. But the death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the Person suffering it.”⁷⁰

As we mentioned, the issue of capital punishment is a multi-disciplinary topic and as such it involves the area of philosophy, ethics, law and religion in the theological sense. Kant is discussing this issue in relation to his conception of religion, ethics and philosophy of law. We showed it above in his discussion of justice. Kant sees philosophy of law as the exposition of human rights and for this reason he refers to it as the science of right.⁷¹ We can say that Hegel is justifying punishment, including the death penalty, on the basis of a dialectical evolution of human history. But, as I understand his philosophy, he is also defending the idea that the moral standpoint of punishment as actualized in the State representing the ethical point may also be overcome by a higher standpoint in world history. We can see this in his statements as follows:

“The element in which the universal mind exists in art is intuition and imagery [this represents the lowest stage in human history]; in religion [the mind exists in the elements of] feeling and representative thinking [this is the second stage]; in philosophy pure freedom of thought [which is the third and final stage that leads to the universal world history]. World history is a court of judgement... Since the mind (*Geist*) is implicitly and actually reason, and reason is explicit to itself in mind as knowledge, world history is the necessary development, out of the concept of minds freedom alone, of the moments of reason and so of the self-consciousness

⁶⁸ Immanuel Kant. **Metaphysical Elements of Justice**, trans. by John Ladd (Indianapolis, Cambridge: Hackett Publishing Company Inc., 1999), 137.

⁶⁹ *Ibid*, 138.

⁷⁰ *Ibid*, 139-140.

⁷¹ See the title of his work as **The Philosophy of Right: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right**, trans. by W. Hastie (Edinburgh: T. & T. Clark, 1887).

and freedom of mind. This development is the interpretation and actualization of the universal mind.⁷²

The process of thought Hegel follows, in order to reach the above conclusion, reveals also his legal philosophy as well as his understanding of the ethics of capital punishment. I can now briefly summarize this and try to analyze how he solves the issue of capital punishment.

According to Hegel philosophy of law is based upon the concept of right. But if we consider this concept in isolation from its practice it is merely an abstract concept. Hegel evaluates this concept from different perspectives, such as if right is recognized as a valid case then it is a positive right; but when “it acquires a positive element in its context” it becomes actualized.⁷³ Then he makes a statement at which he brings the next stage: “the basis of right is mind but its precise place and point origin is the will”.⁷⁴ I am not going to discuss his evaluation of will in relation to right. I am going to follow Hegel’s footsteps until he reaches the concept of punishment.

Then Hegel argues that the will resolves itself by positing itself as the will of an actual person, but on the other hand realizing itself in relation to another individual. But at this stage, the will encounters impulses. Now the will is left by itself to use “intelligence to calculate which impulse will give most satisfaction in accordance with any other optional consideration” so that it can decide what to choose to do.⁷⁵ If the will chooses the correct satisfaction it has chosen “an existent of any sort embodying the free will” which is for Hegel “right”.⁷⁶ Therefore, “right is freedom as idea”. These details are not related to my topic but without referring to them Hegel’s evaluation of the ethics of capital punishment remains vague. That is why I need to mention also his division of right into stages of development on the basis of his analysis of human will. According to this argument the will in its immediate is “abstract right”; but as “reflected from its external embodiment into itself” the will reaches “morality”.⁷⁷ Then Hegel reaches his famous formulation: the will with the “unity and truth of both these abstract moments apprehends the Idea of the good in thought. This is the Idea in its absolutely universal existence” which is the “Ethical

⁷² Ibid, 216. The statements in brackets are added by me.

⁷³ **Hegel’s Philosophy of Right**, op. cit., 16.

⁷⁴ Ibid, 20.

⁷⁵ Ibid, 28.

⁷⁶ Ibid, 33.

⁷⁷ Ibid, 33.

Life”. The ethical substance is realized in three stages which we find as institutions: family, civil society and the final stage as the State.⁷⁸

Then Hegel thinks that right in the first abstract stage appears as possession which gives the individual the right of property or ownership. But at this stage of practicing the right of property there will be disagreements which can be resolved by contracts. If contracts are violated then wrongdoing arises and this is called in the legal sense “crime”.⁷⁹ In this context Hegel goes on to discuss the legal evaluation of crimes in Roman Law. But what concerns my topic is his modification of property in three stages: then the first is taking possession then the second is to use it, and finally third is alienation of the will from the thing possessed back to itself.⁸⁰ The first one is positive judgement, the second is negative and the third is infinite judgement. It is this development which leads to contract which he explains as follows:

“Contract is the process in which there is revealed and mediated the contradiction that I am and remain the independent owner of something from which I exclude the will of another only insofar in identifying my will with the will of another I cease to be an owner.”⁸¹

Then Hegel goes on to a detailed analysis of contracts which I do not need to discuss in my topic. However, his analysis of nullifying contracts is important because this leads to the concept of morally “wrong”. For, the practice concerning contracts may lead, if not followed by the will with reason, to either a civil offence or fraud or a crime.⁸² It is at this point that the state enters into the issue between individuals and the concept of punishment arises necessarily. Depending on the extent of the crime the state can impose the death penalty. Hegel criticizes Beccaria who thinks that the state does not have the right to give capital punishment. However, Hegel clearly states that “punishment is regarded as containing the criminal’s right and hence by being punished he is honored as a rational being.”⁸³

Now we can say that for Hegel both punishment in general and capital punishment is to recognize the criminal as a moral and rational being who exercises his will. Moreover, he says that the “state is not a contract at all” and therefore, it has by its very nature the authority to impose punishment but in a just way according to the law which is accepted by all rational beings as contract. But he expresses this stage as the

⁷⁸ Ibid.

⁷⁹ Ibid, 38-39.

⁸⁰ Ibid, 46.

⁸¹ Ibid, 58.

⁸² Ibid, 64.

⁸³ Ibid, 71.

moral will, which is supposed to represent the purpose of the subjective will; and the welfare of the individual as reflected in the Good “with the opposition in the sphere of reflection, of subjective universality, which is now wickedness and now conscience”.⁸⁴ The purpose leads to responsibility and its recognition to the welfare but the resolution of these brings us to the Good and conscience.⁸⁵ I think he wants to say that justice is achieved as a result of these concepts. This way transition from morality to ethical life is reached. He defines this stage as “the identity of the good with the subjective will, an identity which therefore is concrete and the truth of them both, is Ethical Life”.⁸⁶

Ethical Life according to Hegel is reflected at the first stage in family life which includes marriage, family possessions, and the education of children. All of these are represented as the right of individuals. We should also remember that through education individuals are endowed with the Ethical Life. As a result, family is resolved into a civil society. Hegel continues to argue that civil society contains three moments: the system of needs; administration of justice and finally the police and the corporation.⁸⁷ A society that achieves these moments deserves to be called a “civil society”. The needs are the daily needs of both individuals and their society which include everything from livelihood to finance and education. Administration of justice begins by realizing the right as Law and continues at the court of justice where all the things expressed in the progress of these stages so far. This way the ethical Idea is actualized as the State.⁸⁸ Hegel’s analysis of the state is his political philosophy which falls outside the topic of my discussion. But his conclusion that the emergence of the state leads to world history is already explained at the beginning of Hegel’s philosophy of capital punishment above.⁸⁹ All we should say in finalizing his ethics of capital punishment is that punishment is a necessary moral development that determines our existence. In this sense its ethical nature cannot be questioned. As we have seen, he does not discuss the nature of good and evil in the traditional way as discussed by other philosophers. Therefore, good remains as moral ideal, in this dialectical process.

⁸⁴ Ibid, 79.

⁸⁵ Ibid, 79-86.

⁸⁶ Ibid, 103.

⁸⁷ Ibid, 126.

⁸⁸ Ibid, 155.

⁸⁹ Ibid, 216-223.

What concerns us here is what we understand from the notion of the relative good and radical evil. On the basis of these concepts we find certain philosophers defending the fact that there is no universal concept of good and evil which is accepted by all humans and cultures. If we accept this understanding, then it will be very difficult to come up with an ethic of capital punishment. The absolute understanding on the other hand defends the view that good and evil is a universal value which cannot change from place to place and from culture to culture. When this is accepted then we can try to find out what is the good of capital punishment; and/or what is the evil of this practice. This way we can come up with an ethic of capital punishment which is a very difficult task. The only way we can defend this is on the basis of the value of life, which is taken to be good in itself. In that case the ethics of capital punishment depends on a large scale on our understanding of life and death. I shall now try to investigate this as a philosophy of life and death.

3.2. The Philosophy of Life and Death⁹⁰

Aristotle defines life on the basis of a physical body having a soul. This means that for him soul is the criterion of life. We can see this in Aristotle's definition of soul as "entelechy of a natural body endowed with life".⁹¹ In other words, according to him any physical body that has a soul is a living being. Although Aristotle does not give a specific definition of death we can infer it from his definition of life. For on the basis of this definition we can understand that death is a natural body which has no soul or has lost its soul. On the other hand, according to him there are higher and lower forms of life. The lowest form of life is plant life which is represented by the vegetative soul. The highest form of life is human life represented by the rational soul. The former has no consciousness which arises in the middle form of life represented by the animal soul. In this way these three forms of life, plants, animals and human beings reflect life at different levels. In the moral sense according to Aristotle human life has a value and perhaps we need to evaluate legal penalties including capital punishment rationally in this form of life.

In modern philosophy the approach to both of these issues as we shall see now is totally different from the classical approach as represented by Aristotle. In the

⁹⁰ This section of my study is taken from my article published as a requirement form my thesis by the Institute of Social Sciences in **Üsküdar University Journal of Social Sciences**, 4: 6 (2018), 103-108.

⁹¹ Aristotle, **De Anima**, 412 a 27-28; also see 412 b 11ff.

modern period the significant theories concerning the nature of life can be separated into three: Aristotle's view which we discussed above; the mechanic view of life which was theorized by Descartes; Kant's definition as life as "organization" which is known and maybe later on developed by philosophers; and perhaps we can add the Darwinian theory of life changing and evolving.⁹² The relevance of all these discussions concerning life to the ethics of capital punishment makes sense. This is because if life is defined in a certain way it may not have a meaning. Therefore, taking a life or ending a life by killing someone depends on the meaning we attach to life also because then if life has no meaning then why should death have any meaning. Even according to Bruce Weber nowadays life is defined in biology textbooks.⁹³ But as we have seen Aristotle investigated life in his psychology according to these modern biologists, life is something having certain distinctive properties which "distinguish living systems from non-living". According to Aristotle biology is not the science which can define life because it is a science which studies only living beings but not the nature of life. Psychology studies the nature of life because it is the soul which is the principle of life.

I think Descartes is a little closer to Aristotle because he also sees soul a principle of life but he prefers to use the word "mind" instead of soul. He does not consider the principle of life in plants and animals because according to Descartes the primary function of mind "thinking" which includes also consciousness. That is perhaps why he neglected the biology of living beings. And he, therefore, established a mechanical relationship between body and mind harmoniously to produce life. So his conception concerning the nature of life is called "mechanical".

In Kant's definition of life as an organization we see a being which is organized in such a way that it exhibits complex structures which carry out the life functions such as consciousness, sensation, responding to different situations and so on.⁹⁴ We understand from Kant's critical philosophy that a metaphysical investigation into the nature of life is not possible although he accepts "soul" as an existing being as a

⁹² Bruce Weber, "Life", **The Stanford Encyclopedia of Philosophy** (spring 2015 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/spr2015/entries/life/>>.

⁹³ Ibid. For mechanical perception of nature and life consult, e.g., Isaac Newton, **The System of the World**, Kindle Edition. Text and images extracted from **Newton's Principia, the Mathematical Principles of Natural Philosophy**, 1st American ed., carefully rev. and corr. / with a life of the author, by N.W. Chittenden. **Sir Isaac Newton**, translated into English by Andrew Motte; to which is added Newton's system of the world. Published by Daniel Adee, New York, 1846.

⁹⁴ Ibid.

postulate for his ethics. We can say that Kant also reduces life to a material level. But in his ethics he takes life and the preservation of as something valuable but only in the moral sense. Therefore, his position also becomes relevant, for the discussion of morality in capital punishment.

The biological approach of Darwin and later evolutionary biologists is also materialist. Since Darwin is searching for the origin of life then his explanation will give the nature of life as well. According to this theory, then, life is the emerging quality of a being which has evolved from single celled organisms through stages. At each stage there is a form of life fitting to that level. We are not concerned with the details with this theory but with the outcome with this theory that attaches a kind of meaning and value to this kind of life.

According to Bruce Weber in the twentieth century with the development of biochemistry and molecular biology a new understanding of life emerged and this is called the “biochemical conception of life” this conception defines life on the basis of cell biology. This is clear in their analysis of a living organism which is composed of “cells”. Each cell can be analyzed into biochemical activities and reactions. The totality of these events in a body constitutes its characteristic of life.

In all these discussions we are not concerned with exact definitions with life. Since we are concerned with what meaning and value of life will emerge from these conceptions so that we can utilize it in our ethical studies of “death” in capital punishment. In that case when we analyze all these life theories then we reach two understanding of death: one represented by Aristotle and Descartes as well as all philosophers who agrees with them; the other is the conceptions held by Kant, Darwin and the modern biochemists as well as all other philosophers who follow their views with certain variations.

The first group is perhaps spiritualist; but their position is called “vitalist conception of life”. We can include Muslim philosophers in this category also. Vitalism is explained as a philosophy of life which holds that “living organisms are fundamentally different from non-living entities because they contain some non-physical element” such as soul; or “they are governed by different principles than are

inanimate beings”.⁹⁵ The second group of life theories are all materialist theories.⁹⁶ In both groups it is possible to attach some meaning to life. But the meaning of life in materialist conception of life does not come from the living being itself but only we can attach a meaning to it. Therefore, the question of meaning is external, not inherent to the living being. I think this can be the case for the vitalist theories also; however, there is an element such as “soul” non-material which has a value in of itself. Therefore, there can be a meaning of life inherent to these theories. We can further argue from this that if life has a significant meaning then we will try to preserve it. This may bring a problem to capital punishment. Before we begin to discuss this we need to understand the nature of death also. How can we define death? This will bring us closer to analyze capital punishment also from a moral perspective.

The definition of death is not a problem for those philosophers who defend the conception of life on the basis of the idea of “soul”. If life is possible with soul then without it life is impossible. On the basis of this argument death is defined as the separation of the body and soul. But the problem in this definition is how do we know that the soul has left the body; in other words, if we see a body lying in front of us motionless how can we know that that body is without a soul, i.e. “soulless”? Doctors usually listen to the heart beats and if there is no heartbeat in the body than we say all life functions ended therefore, the soul must have left the body as we can see we need to supplement this definition of death by some physical activities of the body which manifests life in the body.

If we avoid the first part of this definition the second part is accepted by the second group of philosophers and scientists but I think expressed only with different terminology. Let us take this definition; “death is the irreversible cessation of organismic functioning”.⁹⁷ But in this case they also add one more explanation as “in a human’s case death is the irreversible loss of personhood”.⁹⁸ But even in this there

⁹⁵ William Bechtel and Robert C. Richardson, “Vitalism”, Routledge Encyclopedia of Philosophy, ed. Edward Craig, (London; New York: Routledge, 1998), CD Version: 8890- 8893.

⁹⁶ See, for example, the work by the British biologist Lancelot Hogben (d. 1975), **The Nature of Living Matter** (London: Kegan Paul, Trench, Trubner & Co. Ltd., 1930). Also see H. Charlton Bastian, **The Nature and Origin of Living Matter** (London: T. Fisher Unwin, 1905).

⁹⁷ David DeGrazia, “The Definition of Death”, *The Stanford Encyclopedia of Philosophy* (spring 2017 Edition), Edward N. Zalta (ed.), forthcoming URL = <https://plato.stanford.edu/archives/spr2017/entries/death-definition/>; accessed on February 17th 2018.

⁹⁸ *Ibid.*

is a need to “determine that death has occurred and specific clinical tests to show whether the standard has been met in a given case”.⁹⁹ The biologists in this case often offer two standards; firstly, the cardiopulmonary standard; secondly the whole brain standard. We are not concerned with the details of both the nature of death and the clinical standards. But we would like to raise a question just as we raised it in case of life; what is the meaning of death? In other words, what meaning can we attach to death?

This is a difficult question to answer but if we attach a significant meaning to death then our conception concerning the ethics of capital punishment may also change. I am not sure if we can morally assign any meaning to life. Even if we do everyone will express a different meaning. The only way death becomes meaningful is when there is another life after death. But now we have to be careful here because there is a second life whose nature is unknown. Maybe the same as this life or it may be different. But what is interesting here is the fact that this conception of death gives meaning to life also. Based on this argument we can say that death gives ultimate meaning to life. Obviously we cannot defend this approach philosophically but we need to look into religion in order to defend it. This also brings us to the conclusion that the issue of capital punishment cannot be evaluated solely from an ethical perspective.

⁹⁹ Ibid.

4. CAPITAL PUNISHMENT IN ISLAM IN THE CASE OF APOSTASY

The study of capital punishment in Islamic civilization is done in the discipline called “*fiqh*” which we already mentioned in our previous discussion. Since the purpose of this thesis is a philosophical study of capital punishment from the ethical perspective we need to examine two things with respect to the discipline of *fiqh*: Is the study of capital punishment in *fiqh* philosophical or just religious? Moreover, if this is a philosophical study then is it from a moral or religious perspective? These two questions are important to my study because if capital punishment is examined in *fiqh* discipline only from a religious perspective this will only be a theological issue. However, in ethics we pay attention to the moral aspect of capital punishment.

We need to analyze the mode of our approach to the study of capital punishment further because even the ethical investigation of this issue we cannot isolate ourselves from its related areas such as the legal aspect of capital punishment and even its philosophical aspect which we discussed as the nature and meaning of life and death. Of course, this study is primarily an ethical study with a philosophical methodology. In that case we need to raise certain questions with regard to the *fiqh* studies. I am not going to discuss an issue that is properly studied in philosophy of science, that is the question of whether *fiqh* is a science or not. I take it for granted that in Islamic civilization all scholars refer to this as the science of *fiqh* (*‘ilm al-fiqh*).¹⁰⁰

Now that we consider *fiqh* as a science then we may ask another question. Whether its method is philosophical or theological. We must try to answer this question in relation to the subject of this thesis that is the philosophical approach in the study of capital punishment is whether it is carried out with a moral concern or simply religious concern. The answer to be given to all these questions that can be taken as

¹⁰⁰ There are many sources with regards to this and among the classical sources we can give just one example by the great Ottoman scholar Molla Hüsrev, **Mirqât al-Wusûl**, ed. and translated into Turkish by Haydar Sadıkoğlu (Istanbul: Özgü Yayıncılık, 2nd ed., 2014).

objections also must be answered on the basis of what we understand from fiqh. Therefore, this is the first topic that I need to address in this section.

Next I would like to take a case study in fiqh which is related to capital punishment and see how it is handled. This way I will try to understand whether capital punishment is a moral issue in fiqh or not. In this respect I need to choose a case which is also controversial among the Muslim lawyers because in this way the legal case will be similar to the case of capital punishment. In deciding I can use the main source of fiqh rulings, the Qur'an. As far as I did my search in the Qur'an there is only one case in which it is clearly given the verdict of capital punishment. This is the case we examined in the previous section where the verse is quoted as follows:

“O you who believe! The law of equality (*qisas*) is prescribed to you in cases of murder. The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limit shall be in grave penalty.”¹⁰¹

This verse is very clear. Moreover, justification is also given but although this is a religious text it is rationally justified whether one may accept it or not. For, it is the case that something given rationally is not always accepted universally by all rational beings. Moreover, the morality is also given in this case as a justification. Since forgiveness is brought out as mercy obviously capital punishment is not favorably recommended. This text gives the impression that killing is not always a good way of punishing. As our quotation from Fazlur Rahman in the previous section showed there is another verse in the Qur'an which condemns ending the life of a living being as the following verse indicates:

“Whoever kills a person unrightfully or without a mischief [i.e., a war] on the earth, it is as though he has killed all humanity; while he who saves one person, it is as though he has saved all humanity”¹⁰²

This first makes it clear that capital punishment is not preferred by the Qur'an for the moral value of life and therefore the concern for us is ethical. However, seeing the unavoidable facts of life the Qur'an does not completely abolish capital punishment. This is because there will be persons in human society to retaliate in case where his relative is murdered. That is why rationally it is argued that capital punishment will prevent such personal cases of retaliation which may in some cases be very violent

¹⁰¹ The Qur'an, al-Baqara, the 2nd chapter, verse 178.

¹⁰² Ibid, al-Mâ'idah, 5th chapter, verse 32.

and may involve killings of other innocent people as well. This will cause chaos in society. Therefore, it is impossible to avoid capital punishment especially if the people are not well educated about the exact nature and morality of the death penalty. Considering these circumstances, we need to bring up another issue which also involves capital punishment in the Qur'an. This is the case of apostasy for which most Muslim jurists argue that the penalty is capital punishment.¹⁰³ There is the concept of '*illah* (reason) for a legal injunction in Islamic law and this is expressed in Roman law as *ratio legis* which may be interpreted as legal rationale behind a law. In that case we need to look for such a reason to understand why Muslim lawyers instituted capital punishment in case of apostasy. We will examine this from two perspectives: one is legal in order to find out the ratio legis of this institution; and the other is moral in order to evaluate apostasy as a case of capital punishment from an ethical perspective. I need to give my justification for choosing this case and not the previous one in a clear premeditated murder case. Apostasy is mentioned in the Qur'an but no punishment is clearly given for it; although for the murder case it was clearly mentioned as quoted above.¹⁰⁴ Therefore, this case of apostasy is a good example to evaluate morally and try to see how it is justified. However, as I indicated above the fiqh methodology and its nature must first be examined and then we will proceed to the moral problems of apostasy as an ethical issue of capital punishment.

4.1. Fiqh as a Comprehensive Science of Morals and Religion

Why is fiqh a comprehensive science?¹⁰⁵ In order to understand this structure of fiqh we need to examine books written in fiqh throughout the history of Islamic civilization. However, I do not have to go through each and every book in fiqh

¹⁰³ I have used a comprehensive fiqh source for this issue rather than consulting many classical sources which would be a legal study. For my purpose it is sufficient to provide evidence from a fiqh source. For this reason, I consulted the well-known scholar from the Hanafi school of thought Muhammad Amin Ibn 'Âbidîn (d.1836) whose comprehensive fiqh book **Radd al-Mukhtar** which is a comparative legal system among all schools of law. I used the Turkish translation by Ahmet Davutoğlu (Istanbul: Şamil Yayınevi, 1982-1988).

¹⁰⁴ Nihat Dalgın also clearly indicates that no injunction is given for apostasy in the Qur'an, see "İrtidat ve Cezası, **Kur'an Mesajı İlmî Araştırmalar Dergisi**, 10, 11, 12 (1998), 176. This is in fact affirmed by all other scholars, see Rudolph Peters and Get J. J. De Vries, "Apostasy in Islam", **Die Welt des Islam's**, 17 (1976), 5. See also A. S. Rahman, **Punishment of Apostasy in Islam** (Lahore: Institute of Islamic Culture, 1972), 144. Another authoritative source by a Turkish scholar Ömer Nasuhi Bilmen, **Hukuk-i İslamiyye ve İstılahatı Fıkhiyye Kamusu** (Istanbul: İstanbul Üniversitesi Hukuk Fakültesi, 1949-1952), 6 volumes. See vol. 3, pp. 47-502.

¹⁰⁵ See for this approach Alparslan Açıkgenç, **Islamic Scientific Tradition in History** (Kuala Lumpur: Penerbit IKIM, 2014), 313 ff.

because nowadays there are books written in summary of all the topics discussed in fiqh books discussed throughout its history. One such a book is the *İlmihal* published by the Islamic Research Center (ISAM) belonging to the Department of Religious Affairs' Foundation. This book is mainly a manual of Islam for practical purposes and it is thus a kind of catechism; on the other hand, it is composed by the scholars of fiqh.¹⁰⁶ Therefore, its contents will give us good information about the confirmation of the subjects discussed in the science of fiqh. The book in two volumes contains twenty chapters all of which contain many sub-chapters. Here are the topics discussed in this general practical fiqh book:

1. Religion with six sub-chapters;
2. Islam with two sub-chapters including also schools of thought;
3. Creed with chapters;
4. Fiqh of religion with four chapters, also discussing the sources and methodology of fiqh;
5. Purity and principles of cleanliness with six chapters;
- 6-9. Religious duties such as worship and fasting;
10. The biography of the Prophet;
- 11-13. Minor Religious duties;
14. Things and Actions that are lawful or unlawful;
15. Family Life;
16. Political thought in life;
- 17-18. Labor Law and Legal System;
19. Social Life and Society;
20. Morality in Islam.

All these diversified topics can be classified under three general headings; Religion, ethics and law. The first division of fiqh may include theological issues which are usually called “creed” in fiqh. The second division is ethics, which is represented by the last chapter of the book as “morality in Islam”, directly related to the topic of my thesis. At least now I am able to justify my approach from the fiqh perspective. My

¹⁰⁶ Hayrettin Karaman, Ali Bardakoğlu and H. Yunus Apaydın, editors. Authors of the chapters include M. Akif Aydın, Mustafa Çağrı, Hüseyin Algül, İbrahim Kafı Dönmez, Ömer Faruk Harman, Süleyman Uludağ, A. Saim Kılavuz, Mehmet Erkal and İrfan Yücel, **İlmihal**, 2 vols. (Istanbul: İSAM, 2000).

study of a fiqh issue of apostasy in relation to the morality of capital punishment is, therefore, relevant. But now I need to find out if I can study this with a philosophical method. In other words, what we need to ask is this question: Is the philosophical method suitable in fiqh studies? Before, trying to find an answer to this question we need to look at the third division of fiqh which we identified as law.

It is a fact that most recent studies seem to reduce fiqh to law and perhaps for this reason the word fiqh is translated into English as “Islamic Law”.¹⁰⁷ In any case, since capital punishment is given by the law this branch of fiqh is also related to our discussion. This means that two of the branches of subjects discussed in fiqh are directly related to the theme of my study: Morality and Law. Now I can try to explain if the philosophical approach is applicable in fiqh.

The earliest definition of fiqh is given by the founder of the Hanefi School, Abu Hanifa (d. 767) as “knowing what is useful and harmful for oneself”.¹⁰⁸ Useful and harmful things can be theoretical and practical; the former is called greater fiqh and thus distinguished from the practical fiqh. The first division mainly dealing with philosophical issues later on became an independent philosophical enterprise called kalam.¹⁰⁹

Now even with this separation there still remained two distinct issues in fiqh subjects to deal with: One is the problem of methodology which is called “*usul al-fiqh*” and the other is still the same practical issues with the traditional divisions of religion, ethics and law. Usul al-fiqh has also all or most subjects discussed in the philosophy of law. This means that the practical applications in fiqh are using a rational approach. However, in theoretical issues it is using only understanding. This way these issues are based only on revelation and it is this aspect of fiqh which remains only as religion and ethics in theory. On the basis of this understanding the fiqh scholars tried to explain the foundation of religion, ethics and law by referring to the main sources of revelation and identified them as only the Qur’an and the Prophetic Tradition (*Sunah*). But these sources refer to all issues of the fiqh whether theoretical

¹⁰⁷ It will be good enough to cite only a few as follows: N. J. Coulson, **A History of Islamic Law** (Edinburgh: University Press, 1964). Yasin Dutton, **The Origins of Islamic Law** (Richmond, Surrey, UK: Curzon Press, 1999). And finally Joseph Schacht, **An Introduction to Islamic Law** (Oxford: At The Clarendon Press, 1964).

¹⁰⁸ Cited in Molla Hüsrev, **Mirqât al-Wusul**, op. cit., 61.

¹⁰⁹ A. J. Wensinck, **The Muslim Creed**, (Cambridge: At the University Press, 1932), 102 where there is a translation of the **Fiqh Akbar** (The Greater Fiqh).

or practical. However, when practical issues are also considered scholars faced certain problems and therefore, they developed two more methods for fiqh. This is because some new situations arose and they were not able to find answers for these practical issues in the two sources. On the other hand, they were able to find similar cases in previous applications and thus they developed the method of legal analogy called *qiyas* (or *qiyas fuqahâ*).¹¹⁰

Legal analogy of the jurists is in fact a rational method which uses analogical argument known in logic. This is a rational method because it is logical argumentation. What if one makes a mistake in the analogical argument? We need another foundation which will be a checkpoint also for the application of *qiyas*. This new method was called *ijmâ*, “consensus” (of the community). This means that a community among whom there are scholars also cannot agree on a wrong idea.¹¹¹ Fazlur Rahman defines *qiyas* as “analogical reasoning which is concluding from a given principle embodied in a precedent that a new case falls under this principle or is similar to this precedent on the strength of a common essential feature called ‘reason’ (*illah*).¹¹² With regards to the fact that consensus is used as a checking procedure he also states:

“In this early period, the interaction between *qiyas* and *ijmâ*’ was regarded not as a static principle but as a natural dynamic process of assimilation, interpretation and adaptation.”¹¹³

When a new idea was introduced according to Fazlur Rahman, this was original thinking which was called *ijtihad* and this was “carried on through systematic reasoning”.¹¹⁴ The application of analogical reasoning is based upon a reason (*illah*) as mentioned above. According to Hashim Kamali it is defined as follows:

“*Illah* or the effective cause is an attribute of the *asl* (namely a precedent original case taken as the basis of similarity) which is constant and evident and bears a proper relationship to the law of the text (*hukm*). It may be a fact, a circumstance, or a consideration which the lawgiver has contemplated in issuing a *hukm* (judgement).”¹¹⁵

Now the *illah* of a judgement is different from the wisdom (*hikmah*) behind it. For example, “according to the rules of pre-emption, the adjacent neighbor as the owner

¹¹⁰ Muhsin Koçak, Nihat Dalgın and Osman Şahin, **Fıkıh Usulü** (Istanbul: Ensar Neşriyat, 2017), 87-100.

¹¹¹ Ibid, 68-86.

¹¹² Fazlur Rahman, **İslam** (Chicago and London: The University of Chicago Press, 2nd edition, 1979), 71.

¹¹³ Ibid, 73.

¹¹⁴ Ibid, 75.

¹¹⁵ Mohammad Hashim Kamali, **Principles of Islamic Jurisprudence** (Kuala Lumpur: Islamic Texts Society, revised edition, 2005), 189.

of a real property has priority in buying the property whenever his neighbor wishes to sell. The reason (*'illah*) in this pre-emption is joint ownership; whereas the wisdom (or *hikmah*) of this rule is to protect the neighbor against possible harm that may arise from a sale to a third party".¹¹⁶ Based on this notion of *'illah* moral evaluation of a legal injunction including capital punishment can be evaluated. There are more principles developed in the Islamic philosophy of law that can be perhaps brought in to explain morality of capital punishment including in our case study concerning apostasy.

4.2. The Case of Apostasy in the Ethics of Capital Punishment

Apostasy is defined by Ibn Abidin as “turning away from Islam”,¹¹⁷ which means “severing the ties with Islam”.¹¹⁸ Therefore, renouncing Islam is expressed as “irtidād” and the person who does this is called “murtadd” (apostate). Ibn ‘Abidin gives three conditions for the actualization of apostasy: Mental health capacity; adulthood and free choice.¹¹⁹ This means an adult with good mental capacity without having any course of measures and so with his/her free choice renounces Islam and thus becomes an apostate. However, jurists give more cases of apostasy besides these conditions stipulated for apostasy. Scholars also discuss in burdensome cases that may make someone apostate either unconsciously or intentionally. In the former case namely unconsciously if someone claims something that violates one article of the faith no punishment is given but that person is supposed to express his/her regret and immediately repent from this action. However, if this is done intentionally then capital punishment is laid down for the apostate. Now we need to evaluate this judgement (*hukm*) from the perspective of Islamic legal methodology. The first principle of Islamic jurisprudence is that this should be based on either the Qur’an or the Prophetic tradition (Sunnah). We have seen that no punishment is prescribed for apostasy in the Qur’an although it is condemned and a great chastisement in the hereafter is said to be given:

“Say to the desert Arabs who lagged behind: “you shall be summoned to fight against a people given to vehement war then shall you fight, or they shall submit. Then if you show obedience,

¹¹⁶ Ibid.

¹¹⁷ Ibn ‘Abidin, **Radd al-Mukhtar**, op. cit., Davutoğlu translation, vol. 9, p. 9. This English translation is from Peters and De Vries, “Apostasy in Islam”, op. cit., 2.

¹¹⁸ Peters and De Vries, Ibid.

¹¹⁹ Ibid.

God will grant you a goodly reward; but if you turn back as you did before, He will punish you with a grievous penalty”.¹²⁰

A well-known jurist al-Sarakhsi (d. 1097) argued that the people against whom believers are invited to fight referred to the Banu Hanîfe tribe who gave up Islam after accepting it. Therefore, the verse is indeed prescribing the death penalty for those who renounce the religion.¹²¹ The problem with this interpretation is that it overlooks the verse concerning the value of human life as quoted above, which was an argument developed by Fazlur Rahman. Moreover, other jurists, according to Nihat Dalgın, object to this interpretation arguing that the desert Arabs called to fight them were not present when this verse was revealed. In that case the best possible interpretation is the one suggested by Niyazi Kahveci who argues that the reason (*'illah*) for the capital punishment is not because they gave up their religion but rather they presented a threat to the state.¹²² Therefore, the reason was the possibility of the fact that those who renounce the new religion may take up an armed resistance against the new weak state. Professor Kahveci expresses this as follows:

“The reason the apostate is liable with death penalty corroborates our presumption. By taking over *ratio legis* (*'illah*) in persecution of the apostate, that is to prevent his harm to the Muslim state and its community, I can construe that this school’s doctrine insinuated that if his assumed harm could be prevented without killing him, his life can be spared”.¹²³

Now in order to evaluate capital punishment in a moral perspective we can raise two issues here: the first one is the question whether capital punishment is good or not. The objection raised by Fazlur Rahman on the basis of the fifth chapter (al-Maidah) and verse 32, shows that any kind of killing that is not justified for a reason, such as self-defense and the protection of innocent people, is evil. In fact, such a way of killing is as if one has annihilated the whole of humanity. Moreover, saving the life of a person is as if the life of all humanity is saved. This is the moral principle on the basis of which we can evaluate capital punishment of the apostate. The second issue is whether the judgement (*hukm*) concerning apostasy is legitimate on the basis of the legal methodology. Of course, it must be the experts to judge on this issue but based on our brief discussion above this decision is not conforming to the methodology of jurisprudence. We need to evaluate this injunction one by one according to first *qiyas*, legal analogy; then according to the principle of *ijmâ'*, consensus. I have just

¹²⁰ The Qur'an, al-Fath, 48th chapter, verse, 16.

¹²¹ Nihat Dalgın, “Irtidâd ve Cezası”, op. cit., 176.

¹²² Niyazi Kahveci, “Apostasy (Irtidâd) in Islamic Jurisprudence; is it a Creedal or Political Crime: Ibn Humâm (d. 861/1457), **Journal of History and Art Research**, 6:2 (2017), 2.

¹²³ Ibid.

presented a long analysis with the principle of *'illah* but we need further investigation.



5. CONCLUSION

Bioethics is a relatively new discipline with a growing set of issues. As technology further develops the list of problems in bioethics is expanding. It is a multi-disciplinary study that involves many disciplines from social sciences to exact sciences such as medicine, biology, chemistry up until engineering disciplines. Capital punishment in the host of these disciplines remains somewhat at the edge of the bioethical issue. It is an ethical issue, no doubt, but whether it is related to biosciences is a question. In any case we study it in relation with bioethical issues but more in relation to legal studies.

As this thesis is a study of capital punishment it has been discovered that this problem combines law with ethics.¹²⁴ I tried to evaluate this point in the second section of the thesis. However, my general approach to the subject has been from the perspective of the value of human life. I tried to show in this section that the ethics of capital punishment is grounded in the understanding of human nature and the value we attach to human life. A life which is taken away cannot return anymore. In that case we need to ask whether it is worth to take away one's life because the person has committed evil. We then reply to evil with another evil.

Ethical issues are continually debated issues where a concrete decision is hardly reached. Among these myriad of issues, I examined capital punishment or the death penalty. I handled the subject in three main headings: firstly, the ethics of capital punishment; where I explained what capital punishment is and also the general arguments for and against it. Secondly, the problem of good and evil as well as the nature and meaning of life and death; where I analyzed the nature and meaning of life in order to get a better foundation where I tried to find out the morality of capital

¹²⁴ On this issue there is a good study by Fazlur Rahman, "Law and Ethics in Islam", in **Ethics in Islam: Ninth Giorgio Levi Della Vida Biennial Conference**, ed. Richard G. Houannisian (Malibu, California: Undena Publications, 1985), 3-15.

punishment. Thirdly, capital punishment in Islam in the case of apostasy; where I examined a specific case study of the death penalty in the case of apostasy in Islam.

In the second chapter I tried to present an ethical evaluation of capital punishment. In order to do this, I need to understand the nature of this injunction and for this purpose I provided a brief history of the death penalty.

In human history the first known legal codes used in a justice system were codified by the Babylonian ruler Hammurabi during his rule between 1792-1750 B.C.E. In the code of Hammurabi the death penalty was given to homicide, false allegation, theft from a temple, child kidnapping, robbery and looting. Most of the methods for executions would be considered cruel by today's standards. Some of these methods were burning alive, drowning alive and hanging. We observe capital punishment in also Greek and Roman laws. It was also practiced in Islamic law. However, in the Qur'an in verse 178 chapter 2 (*al-Baqara*) the death penalty was only prescribed to pre-meditated murder in modern times. This law of capital punishment continues until our time. However, some lawyers and philosophers criticized capital punishment and they introduced laws to abolish the death penalty. Among these the Italian Cesare Baccaria (d.1794) defended this abolitionist position very systematically and argued with a philosophical perspective. As a result, capital punishment became a moral issue. There are also theologians defending the abolitionist view on the basis of the sacredness of human life. One example is the English Quaker theologian John Bellers (d.1725) who argued that the death penalty desecralizes human life.

We may find a basis in the Qur'an also from which one can defend punishment against the death penalty. This is the verse 70 of chapter 17 (*al-Isra*) where it I said that "we dignified the children of Adam, provided them with transport on land and sea, given them sustenance things good and pure; and conferred on them special favors above many of our creations". We also find philosophers defending abolishment of the death penalty on the basis of the dignity of man, such as Thomas Long.¹²⁵ On the opposite side we find philosophers who defend the death penalty can be put in two general groups. The first being the consequentialists and the second as the retributivists. The consequentialists build their case on the basis that the death penalty will produce better consequences overall. The retributivists argue that the

¹²⁵ Thomas A. Long, "Capital Punishment: Cruel and Unusual?" *Ethics*, 83:3, (1973), 217.

criminals who commit crimes severe enough can only be punished by the death penalty to pay for their crimes. Therefore they deserve the punishment given to them which makes capital punishment morally permissible.¹²⁶ H.L.A Hart, for example, argues that punishment is justified because it is good in and of itself.¹²⁷

Harts formulation of the retributionist argument is interesting. He asserts that this theory primarily claims three things: “first, that a person may be punished, and only if, he has voluntarily done something morally wrong; secondly, that his punishment must in some way match, or be the equivalent of, the wickedness of this offence; thirdly, that the justification for punishing men under such conditions is that the return of suffering for moral evil voluntarily done, is itself just or morally good.”¹²⁸ According to him, these three requirements give retributive answers to these three questions respectively: “what sort of conduct may be punished? How severely? And what is the justification for the punishment?”¹²⁹ There are more versions of retributivism but in all of these there is a common assertion that punishment is morally justified only if it is proportional to the crime.¹³⁰ Some of them relying on Kant’s legal theory and Rawls’ theory of justice argued that the criminal already consents to or in fact chooses his own punishment.

According to our presentation, therefore, there are two perspectives with regards to the ethical evaluation. The first perspective is religious or theological. This perspective establishes the ethical evaluation of punishment in general on a divine foundation. If the divine foundation of morality is not approved this perspective and ethical evaluation will collapse. The second perspective is the rational argumentation which develops an ethical evaluation philosophically by either abolishing or defending the death penalty. We have given Baccaria as an example for the former and consequentialism and retributivism for the latter.

One argument developed for the ethical evaluation of capital punishment is derived in the third section of the thesis of the philosophy of life and death. This discussion is concerned with mainly the nature and meaning of life which is defined in many different ways. The meaning of life depends on the conception of its nature. If life is

¹²⁶ David Dolinko. “State Punishment and Death Penalty”, op. cit., 78.

¹²⁷ H. L. A. Hart, **Punishment and Responsibility: Essays in the Philosophy of Law**, op. cit., 231.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ David Dolinko. “State Punishment and Death Penalty”, op. cit., 79.

something precious, then it is very important to protect it as much as possible. Does this make it a moral responsibility to protect it and not to lose it? However, capital punishment is something that destroys it so how can it be defended on the basis of punishing the wrongdoer. There is only one possibility to justify it morally: if someone destroys a life intentionally then he may be held responsible to compensate for that life. As we have seen even in such cases some philosophers do not see it as morally good to destroy a life for another life. I have tried to summarize the background of this philosophy of life and death in order to show how capital punishment depends on the conception of these phenomenon.

In ancient times life is explained as the basis of a concept called “soul”. In a way, for example, for Aristotle and his followers, if something had a soul then it is endowed with life; otherwise it is considered non-living or “dead”. As I illustrated, according to this view life is the perfection of matter. In this conception of life, it is expressed as a perfection which shows the “value” attached to life. Therefore, life is something important and also valuable. In a sense life is the highest way of existing. Can we say then on this conception that capital punishment is taking away that perfection from something? Maybe the understanding of nature justifies capital punishment in this philosophy of life because according to this natural philosophy nothing can preserve its life forever. That means a living being will lose its life anyway. Then why shouldn't he pay for the evil he committed?

The later developments in biology and chemistry lead different conceptions in life and death. Life is explained on the basis of material mixtures with chemical compositions and so on. This is the materialistic philosophy of life. One may think that since this conception is based on materialistic understandings of the human body then they can defend capital punishment. However, the reply can be in both ways either defending capital punishment being morally right on the basis of legal right of the innocent person suffered at the hands of a culprit. Or one may also defend the abolishment of capital punishment merely on the value and ethics of human life.

There is also a religious understanding of life and death which defends the value of life. For example, in some sacred books it is clearly expressed that life is created by God.¹³¹ In this case, if He gives life then only He can take it away. On this judgement

¹³¹ See, for example, the Qur'an, chapter 67 verse 2 (al-Mulk) which says that both life and death are created for a special purpose.

we can say it is up to God to decide and give the final judgment on capital punishment. In fact, we have seen that in the Qur'an the only offence given the death penalty is pre-meditated murder. We examine this issue in relation to another offence called "apostasy" for which also the capital punishment is given. I will come back to this issue therefore, in this context I shall talk about one more related problem which is seeing the ethics of capital punishment from the perspective of good and evil.

I discussed this in relation to Kant's concept of ethics and religion, because he developed the most influential philosophy which affected the initial thought of the twenty first century.¹³² As it is known Kant developed an epistemology which rejects metaphysics as a science. On the other hand, in his second critique he argued that we need an absolute understanding of ethics which is grounded in only a moral metaphysics. That is why in his *Groundwork for the Metaphysics of Morals* he argued for a universal moral law which does not depend on the proof of God's existence. This moral law rather depends on reason. However, he was not convinced or sufficed with this conclusion and therefore, he said that this is not totally detached from the belief in God. In fact in a later work he finally declared that morality "inevitable leads to religion".¹³³

I found the most comprehensive discussion of the ethics of capital punishment in Hegel who presents his philosophy of punishment in his legal philosophy as the best example for rational theory of capital punishment. As I tried to outline, he proceeds on the basis of three moral concepts: will, freedom and right. Freedom is expressed as ownership because if we are free then in a civil society we must express this as "owning something", which the will transfers this to property. Hegel means that if we are free then we must have the right for property. In its modifications property is alienated and thus will in property recognizes other property owners. As far as I understand, "modifications" mean "everyday dealings with other persons; and alienation means doing wrong with the property rights. Therefore, concludes Hegel "reason makes it as necessary for men to enter into contractual relationships" and in this way social contract is formed to avoid "wrong".¹³⁴ Rights are recognized by contracts but interrelationships are organized by law. The basic element here is the

¹³² This is claimed by Eric M. Hanson, "Immanuel Kant: Radical Evil", **Internet Encyclopedia of Philosophy**, <https://www.iep.utm.edu/rad-evil/>. Accessed on May 12 2019.

¹³³ Immanuel Kant. **Religion within the boundaries of Mere Reason**, trans. and edited by Allen Wood and George Di Giovanni (Cambridge: University Press, 1998), 35.

¹³⁴ Hegel, **Hegel's Philosophy of Right**, op. cit., 38ff.

concept of right. Violations of rights are settled by law where we come up with the concept of punishment and if this violation is committed against the state the offence is capital; so the punishment is also capital. Hegel argues that the transition from a general and abstract concept of right must be made to morality where we reach the ethics of capital punishment. I understand this as a purely rational analysis of punishment in general and capital punishment in particular.

In the final section we tried to investigate a case study in a cultural perspective which concerns Islamic law. This case study is represented by the capital punishment given to apostasy. My research framework for this case study proceeds from a brief exposition of Islamic philosophy of law which is traditionally discussed in books called *usul al-fiqh*, and this is usually translated as Principles of Islamic Jurisprudence. First I tried to show if this discipline is adequate for studying the ethics of capital punishment. Traditionally subjects as the present one and similar ones are studied in this discipline and its applied companion called *furu' al-fiqh*. Considering the fact that philosophical issues are discussed in jurisprudence which was also the case with Kant and Hegel, the methodology of this discipline is relevant for our subject in this study also. Moreover, I also analyzed the subjects dealt with in this discipline and we saw that moral issues also fall within its subject matter. In that case we can study capital punishment in cultural perspective in the example of Islamic case of apostasy.

When we examine it we saw that this punishment is not prescribed in the main source of Islamic jurisprudence, the Qur'an. The death penalty is given only in case of pre-meditated murder and even in this case there is a recommendation for the relatives of the deceased to forgive the wrongdoer who is then required to pay blood money in compensation. The only source for this legal punishment is the tradition which was seeing the apostate as a danger to the state. When this is considered then we reach a conclusion that apostasy is perceived in Islamic law as a political crime and not a creedal offence as this was proved by Niyazi Kahveci.¹³⁵

But we may ask, what is the theoretical framework for such a conclusion? In Islamic legal philosophy there is a legal principle which is also found in Roman law *ratio legis*, and it is expressed as *'illah*, this means "reason" referring to the intent of the law. Usually reason is perceived as the command of God and therefore, some jurists

¹³⁵ See footnote 122 above.

considered the divine ordinance as the reason for instituting a specific law. However, as we have seen, there is no such command in the Qur'an. In that case the reason namely the *'illah* of apostasy is to be searched in the social and political spheres or in similar phenomenon. In this case, Kahveci finds it in a political sphere which we also took as the point of departure in explaining capital punishment for the apostate. Based on this conclusion we can say that this legal injunction is not based on any moral considerations, unless one may argue like Hegel that the state has the right to come up with such a punishment because its subjects are rational beings endowed with ethical will. But the state is not perceived in this way in Islamic jurisprudence. Therefore, we need to evaluate this issue afresh today from a moral perspective; which brings us back to the beginning. Of course, there is a solution which is offered by Kahveci that since the ratio legis of this injunction is no longer existent then it can be annulled.

As we have seen there are counter arguments against the moral argument developed in the final sections of the thesis. I may summarize the results reached in my study as; first, it is a difficult problem to solve; second, in the Islamic case the state can restrict capital punishment, but since it is expressed in the Qur'an it cannot be totally uplifted. Third, however, as professor Niyazi Kahveci says, it can be abolished for cases of apostasy in our days. Finally, philosophically the abolitionist position can be defended morally. I am hoping that this humble work will raise a point from our cultural perspective.

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