

Forfeiting the Criminal Guarantee by a Legitimate Act: A Comparative Jurisprudential Study

Muhammad Ali Gibran Al Zuraib¹

Abstract

This study basically investigated the ruling on the killing of a passerby while passing in front of a praying person and the praying person pushes them away through fighting, after a gradual process of lesser offenses. The research also investigated the ruling on the wasted blood resulting from an act authorized by the Shari'a as the marriage of a healthy person to someone who knows that he has a deadly infectious disease. The researcher analyzed the Quoranic verses, prophetic hadiths and the sayings of the scholars in the basic schools of thoughts. The researcher highlighted the following rulings on the previous two issues: It is permissible to waste the blood of the passerby who was trampled away except by fighting. Furthermore, the researcher agreed with the opinion that a spouse who is infected with a deadly contagious disease is responsible, and the transmitter of illness is considered a killer; the consent and permission of the healthy spouse to marry the infected person do not have any effect on dropping the retaliation or blood-money.

Keywords: Blood-money, fatal disease, guarantee, legitimate act, loss, transmission, waste.

Introduction

Allah's mercy is evident in His command to preserve the five essential elements, i.e., religion, life, mind, offspring, and property, for sustaining life. Wise individuals from various religions also recognize the significance of safeguarding these necessities. Among them, the soul holds great importance as Allah has deemed it sacred, permitting its taking only when essential for the preservation of another necessity within the five things (Al-Shatibi, 2020). The Islamic Sharia has preserved the sanctity of human life. Therefore, the wasted blood are limited to a narrow scope. By defining this limited scope, we can understand the vastness of the immune souls beyond it as things are identified by their opposites. This research aims to highlight this narrow scope by addressing the issue of "the fall of criminal liability due to legitimate act." This jurisprudential, medical and criminal study is an attempt to clarify this aspect that has been preserved by the Islamic Sharia. We ask Allah for success and assistance.

Research significances and aims

A. The significance of this research lies in its connection to the sanctity of human life and its alignment with Islamic Sharia law, which emphasizes the sanctity of blood,

¹ Department of Sharia, College Sharia and Fundamentals Of Religion, Najran University, Najran, Saudi Arabia, mazurib@nu.edu.sa

B. This topic becomes even more crucial in light of the increasing tendencies towards extremism, where judgments of bloodshed are either excessively harsh or completely disregarded,

C. The issue of wasted blood holds great importance in the criminal aspect of Islam and is a crucial aspect of Islamic jurisprudence,

D. The researcher's intention to highlight the tolerance of Islam and its protection of lives from all perspectives is evident in clarifying the specific parameters of wasted lives, which sets it apart from opposing viewpoints.

Research questions

1. What is the impact of criminal jurisprudence in setting limits and controls for what blood is considered wasteful and what is not wasteful?
2. What are the forms of wasted blood that have emerged at the present time due to the rapid medical development, especially in the treatment of infectious diseases?
3. What is the extent of the influence of each of the legal permission and the personal permission in forfeiting the right and wasting the guarantee?

This study runs into two sections along the introduction and conclusion. In the first section, the researcher explored the potential harm caused by a passerby in front of a praying person. This has been explained under two demands: The first focused on ruling on passing in front of a praying person and the permissibility of the praying person to turn them away. The second demand explore the ruling on the harm caused to the passerby in front of the praying person if the passerby is only repelled by fighting. The seond section investigated the ruling of the marriage of a healthy person who knows to a spause who has a contagious and deadly disease, under three demands: The first demand demonstrated what is meant by a contagious and deadly disease. The second explores ruling on the marriage of a healthy person with his full knowledge that the spause is infected with a contagious and deadly disease. The third demand examined the ruling on the death of the healthy person who willingly married someone infected with a contagious and deadly disease, and the extent of responsibility of the carrier.

1. The death resulted form fighting the passer-by in while passing in the hands of the praying person

a) Ruling on passing in front of praying person, and the legitimacy of turn them away

Muslim jurists agreed on the prohibition of passing in front of a praying person without a valid reason (Al-Mazari, 2008; Al-Nawawi, 2000; Al-Qarafi, 1994; Ibn Abidin, 1992; Ibn Qudamah, 1968, 1994; Ibn Rajab, 1996) due to the Prophet's saying: " When one of you prays facing something which conceals him from people and someone wishes to pass in front of him, he should turn away; but if he refuses to go, he should turn him away forcibly, for he is only a devil," (Sahih Al-Bukhari, 509). Also, the Prophet said: "If the one who passes in front of a person who is praying knew what (burden of sin) there is on him, standing for forty would be better for him than passing in front of him," (Sahih Al-Bukhari, 510). While there is no disagreement among Mulsim jurists regarding the permissibility of turning away someone passing in front of a praying person (Al-Mazari, 2008; Al-Nawawi, 2000; Al-Qarafi, 1994; Ibn Abidin, 1992; Ibn Qudamah, 1968, 1994; Ibn Rajab, 1996), they differ on the extent of this defense and whether it reaches the level of fighting. There are two opinions on this issue:

The first opinion: it is permissible to reach the level of fighting in self-defense. This is the opinion of the majority of scholars, including the Maliki (Al-Mazari, 2008; Al-Qarafi, A1994), Shafi'I (Al-Nawawi, 2000), and Hanbali schools (Ibn Qudamah, 1994, 1968). Their argument is based on the apparent meaning of fighting as in the Prophet's saying in

the previous hadith: " if he refuses to go, he should turn him away forcibly" (Sahih Al-Bukhari, 509).

The second opinion: the defense should be limited to a gesture or grabbing the edge of one's garment. The defense should be restricted to a situation where there is no movement or treatment involved. These jurists do not allow fighting in self-defense, and this is the opinion of the Hanafi school (Al-Kasani, 1986; Al-Zayla'i, 2015; Ibn Abidin, 1992). Their argument is based on the Prophet's saying: "Verily, during the prayer one is preoccupied" (Sahih Al-Bukhari, 3875; Sahih Muslim, 538). They also interpreted the hadith about fighting someone passing in front of a praying person as abrogated. Fighting was allowed at a time when movement during prayer was permissible (Ibn Abidin, 1992). However, it can be argued against the Hanafi evidence that there is no evidence of abrogation. Furthermore, there is no known precedent for forbidding movement or action during prayer. As for the hadith "Verily, during the prayer one is preoccupied," defending oneself against someone passing in front of a praying person is part of the occupation of the prayer.

Giving preference (Tarjīh)

It appears -Allah knows best- that there is a leaning towards the possibility that defense reached the fighting level, based on the explicitness of the text.

b) The death of the passer-by in front of the praying person

Muslim jurists agreed that it is not permissible to turn away the passer-by in front of the praying person except for a few acts that do not divert the worshiper from performing his/her prayer to other things, and a praying person does not distract from prayer, such as the amount that is permitted for the need to scratch the body, expulse fleas and kill scorpions (Ibn Abd Al-Barr, 1967, 2000).

Muslim jurists agreed that the praying person should not fight the passer-by with sword nor fight in a way that spoils his/her prayer (Ibn Abdel Barr, 2000; Ibn Qudamah, 1968). The defence should be gradual beginning with the simple like, glorification, reciting with high voice, pointing or soft stopping. If the passerby does not stop, the praying person may pull him stronger than the previous one (Al-Buhuti, 2000; Al-Nawawi, 2000; Al-San'ani, 2020; Ibn Qudamah, 1968). If the praying person turned away the passerby as mentioned above and if such acts caused the death of the passerby, muslim jurists have differed in the liability of the praying person to pay blood-money towards the passerby (Iyad, 1998). There are two opinions:

The first saying: the blood of the passerby who was only fought back in self-defense is considered wasted, and there is no guarantee for the praying person. This is the opinion of the majority, including the Maliki (Al-Dardir, 2013; Al-Tarabulsi, 1992; Ibn Abdel Bar, 2000), Shafi'i, (Al-Haytami, 1995; Al-Nawawi, 2000; Al-Qalyoubi & Amira, 1997; Al-Shirbini, 1994), and Hanbali schools of thought (Al-Buhuti, 1993, 2000; Al-Dimashqi, 1994). They base their argument on the following:

1. That Allah allowed the praying person to fight - as mentioned in the hadiths mentioned previously, and the permissible fighter is not guaranteed, so permission voids the guarantee (Al-Dimashqi, 1994; Al-Shirbini, 1994; Al-Zurqā, 1989; Ibn Hajar, 1379 AH).
2. The second argument is that the praying person in case of pushing the passerby is obligated to provide a guarantee, so the passerby passing in front of the praying person and defending himself does not drop the blood-money, and this is the Hanafi school of thought (Al-Kasani, 1986; Al-Zayla'i, 2015; Ibn Abidin, 1992).

Their argument for this is:

Fighting the passerby is not permitted(). So if the fighting leads to the death of the passerby, it would be a crime, and the praying person would be obligated to provide compensation, i.e., blood-money. However, this opinion can be argued that fighting the passerby is permitted if it is the only means of defense, as mentioned in the evidence of the majority of muslim jurists on the legitimacy of turning away the passerby and fighting them.

Giving perference (Tarjīh)

The most probable opinion - Allah knows best - is the opinion of the majority of muslim jurists regarding waisting the blood of the passerby who was trunted away except by fighting. This is due to the strength of their evidence and the clarity of their response to the arguments of the second opinion.

2. A healthy person's marriage to a couple with fatal infectious disease

a) Fatal infectious disease

The word "disease" linguistically means deficiency, so a sick body is deficient in strength, and a sick heart is deficient in faith. When someone says "so-and-so's illness is in my favor," it means that their movement is restricted in it (Al-Azhari, 2001). A disease refers to sickness or any deviation from the state of health due to illness or deficiency in some matter (Al-Jawhari, 1987; Ibn Farris, 1986). The scope of this topic is limited by two aspects - as in the title:

A) The disease is infectious; it can be transmitted to others through contact or mixing. People have become infected when this disease spreads through infection or when some people die as a result of others (Al-Jawhari, 1987).

B) The disease is fatal; a disease that is likely to cause death and is considered a cause of death. It is a disease that leads to death gradually, so that it becomes the last stage of the disease. Examples of diseases that are both contagious and deadly include the plague (Al-Haytami, 1995; Abu Sadi, 1988), and AIDS (Al-Baar & Saffi, 1407 AH; Al-Mahdi, 1993). In the following sections, we discuss the impact of such diseases on the ruling of marriage and the potential criminal liability that may result from transmitting the disease to the healthy spouse and causing their death.

B) The ruling on the marriage of a healthy spouse to a couple with fatal infectious disease

When the jurists discussed deadly infectious diseases such as plague and leprosy, they addressed their effects on matters such as sales, inheritance, and other related issues related to the frightening disease. Additionally, they examined the legitimacy of the healthy spouse's right to dissolve the marriage from the infected spouse.

Regarding the initiation of a new marriage between two parties, one of whom is infected with such deadly infectious diseases, I have not come across any legal rulings on this matter. This is because at earlier time, many of these diseases had not yet been discovered. With significant scientific progress, many other diseases with similar deadly transmissible characteristics have been discovered. However, people differ in their ability to coexist naturally with the sickness, the delayed appearance of symptoms, and delayed death in many cases, such as AIDS.

Do these modern circumstances of coexistence and modern prevention methods have an impact on the ruling regarding such marriages? It is clear to anyone who contemplates the texts that the Sharia encourages avoiding the causes that lead to the transmission of epidemics and the spread of diseases and to take preventive measures. Regarding the plague, there is a saying attributed to the Prophet (PBUH) that states: "If you hear that it (plague) has broken out in a land, do not go to it; but if it breaks out in a land where you are present, do not go out escaping from it, " (Sahih Al-Bukhari, 5729). This emphasizes

the importance of taking preventive measures to avoid the spread of the disease. This is the quarantine in today's language.

The Prophet (PBUH) also said, "A man with sick camels should not let them graze or drink alongside healthy ones" (Sahih Al-Bukhari, 5771). He also said, "Flee from a leper as you would flee from a lion" (Sahih Al-Bukhari, 5707). There is a story that a man with leprosy was part of the delegation from Thaqif, so the Prophet (PBUH) sent him a message saying, "We have pledged allegiance to you, so return" (Sahih Muslim, 2231).

This is an explicit evidence about avoiding dealing with a patient infected with a contagious disease since the act of pledging allegiance was done through physical touch by placing one hand on top of the other. It is also clear that sexual intercourse between a healthy person and an infected person is a means of transmitting the disease, which is agreed upon by doctors (Abu Lisan, 2019). Therefore, the jurists have differed in their opinion regarding the ruling on the marriage between a healthy person and a infected person with a deadly infectious disease. Jurists are of two opinions:

The first opinion: most contemporary Muslim scholars prohibit the marriage between a healthy person and a person infected with a deadly infectious disease (Al-Ashqar et al., 2001; Al-Mousa, 2019; Qararat wa Tawsiyat Majma' al-Fiqh al-Islami, 1995). They base their opinion on the following:

1- Evdieces that encourage avoiding lepers and those infected with the plague, which were mentioned earlier, in addition to general texts that prohibit harming oneself, such as the verse: " And do not kill 'each other or' yourselves. Surely Allah is ever Merciful to you.." (Quran 4:29) and the verse: " do not let your own hands throw you into destruction 'by withholding'. And do good, for Allah certainly loves the good-doers." (Quran 2:195).

2- This marriage is a means of killing oneself, and it is known that accepting suicide is not permissible (Abu Lisan, 2019).

The second opinion: some later Muslim scholars permit the marriage between a healthy person and a person infected with a deadly infectious disease, with the knowledge and consent of the healthy person, if the infected person adheres to the use of protective measures to prevent the transmission of the disease.

Their justification is that the ruling depends on its cause, so if the reason for the prohibition is infection and disease transmission, then this is eliminated if the infected person adheres to modern preventive measures (Abu Harbaid, 2006; Khayyat & Wadhan, 2019). However, this saying can be argued that the reason for the prohibition is not completely eliminated. There is still a high risk of disease transmission even with the use of modern preventive measures. To mention some, the possibility of error or negligence that may occur from one of the parties in using preventive measures due to the long duration and frequent contact. For example, the male condom (the sheath or cap) may have a manufacturing defect, such as being punctured or too thin to the point that it tears during intercourse. In addition, some doctors suggest that many deadly viruses can be transmitted through saliva.

Giving perference (Tarjīh)

The most accurate opinion, in accordance with Islamic teachings, is that it is not permissible for a healthy person to marry someone infected with deadly infectious diseases. This is due to the potential risk to their own life and the danger of exposing themselves to death. Islam emphasizes the importance of protecting oneself and avoiding disease-prone situations. However, this does not mean that marriage is completely prohibited for the infected person. They can still marry someone who is also infected, as it poses less risk compared to a healthy person marrying an infected individual.

c) The ruling on the death of a healthy person who consents to marry someone infected with a deadly infectious disease

Given that the disease is both contagious and potentially fatal, and medical experts have acknowledged that sexual intercourse between a healthy individual and an infected patient can transmit the disease, it is evident that agreeing to marry the patient implies consent to the potential consequences, including the risk of harm or even death. Consequently, granting consent to marry an infected person could be perceived as giving consent to actions that may result in harm or loss of life.

This is where the disagreement among scholars arises regarding the ruling on consent to murder and the permission given by the victim to the killer, and the extent to which this permission and consent affect the punishment or guarantee. There are three opinions:

The first opinion: the victim's consent and permission have no effect on dropping the death penalty, but rather the victim's heirs - even if the victim gave his consent - have the right to seek (Qisas) retaliation. This is the most widely held opinion among the Maliki scholars (Al-Kharshi, 1317A H; Al-Mawaq, 1994; Al-Tarabulsi, 1992; Ibn Rushd, 1981).

They justified that:

1. The human soul is sacred, even to its owner; it is not permissible for a person to take off their own life. Therefore, their permission is not considered valid since they are giving permission for something they do not own (Al-Kharshi, 1317A. H; Al-Mawaq, 1994; Al-Tarabulsi, 1992; Ibn Rushd, 1981). The victim's forgiveness was given in a place and time that did not match the crime of murder, as it was given before the crime was committed. Therefore, it is not considered valid forgiveness from this aspect as well, because the permission did not occur in the appropriate place and time. Yet, it is invalid (Al-Kharshi, 1317A. H; Al-Mawaq, 1994; Al-Tarabulsi, 1992; Ibn Rushd, 1981).

The second opinion: the killer must pay blood-money (diyah), and the death penalty is dropped. This is the view of the Hanafi school of thought (Al-Kasani, 1986; Al-Sarakhsi, 1993; Ibn Abidin, 1992), and is also held by some Maliki scholars (Al-Tarabulsi, 1992).

Their evidence for issue is that this killing is considered guaranteed, therefore the death penalty has been dropped due to the suspicion of consent and permission. Therefore, the guarantee remains with the payment of blood-money (Al-Kasani, 1986; Ibn Abidin, 1992). It can be argued that the effective suspicion in repelling the punishment is the strong possible suspicion, not absolute suspicion. The suspicion of consent and permission is weak and not strong enough to dissolve the guarantee, as previously mentioned in the evidence of scholars who hold the first opinion.

The third opinion: the blood of the victim - who asked someone else to kill them or gave permission for it - is wasted. The killer in this case is not obligated to pay blood-money (diyah) or seek retaliation (Qisas). This is the view of the Shafi'i (Al-Ghazali, 1417 AH; Al-Nawawi, 2000; Al-Nawawi, 1412 AH) and Hanbali schools of thought (Al-Buhuti, 1993; Ibn Muflih, 1997, 2003; Ibn Taymiyyah, 1984). Their argument is that the victim is the rightful owner and has waived their right and given permission to be destroyed. This is similar to saying "kill my slave" or "destroy my property" (Al-Buhuti, 1993; Al-Ghazali, 1417 AH). However, this argument can be refuted by what was used as evidence by the Maliki scholars who hold the first opinion. They considered this permission and waiver are not valid because:

A. The permission is by a person does not own it.

B. The permission was not given at the appropriate time and place.

Therefore, it is clear that comparing the validity of permission to destroy property to its validity in destroying a life is not valid due to the differences in the two aforementioned points.

Giving perference (Tarjih)

The most accurate opinion - and Allah knows best - is the first (Maliki scholars) opinion due to the strength of its evidence and its immunity from opposition. The first opinion maintains the sanctity of blood. Based on what has been discussed, it can be concluded that the spouse who is infected with a deadly contagious disease is responsible, and the transmitter is considered a killer. The consent and permission of the healthy party to the marriage does not have any effect on dropping the retaliation or blood-money.

Conclusion

In this research, I addressed two prominent aspects of dropping the gauranty and wasting blood, which are related to the non-criminalization of an act i.e., initiation and crime. I concluded some of the most prominent results, including:

- The default ruling regarding blood is prohibition, and blood wasting is a limited case that is exempted by evidence that supports this default ruling.
- Muslim scholars express that the dissolving guarantee of compensation for wasted blood, which means there is no blood-money or retaliation for it.

There is no guarantee for someone who acts within the limits of custom and tradition in a justifiable way, even if it resulted in someone else's death, as long as there was no intention to harm.

- Wasting the blood of the passerby in front of the praying person, if the praying person only pushed the passerby away through fighting, after a gradual process of lesser offenses.
- It is not permissible for a healthy person to marry someone who is infected with a deadly contagious disease, and the consent and approval of the healthy couple to the marriage does not relieve the infected party of responsibility and gurantee.

Acknowledgment: The author is thankful to Deanship of Scientific Research and under the supervision of the Centre for Sharia, Educational and Humanities Research, Najran, Saudi Research centers Funding program grant code (NU/RCP/SEHRC/12/8).

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