

# The Ethics of Capital Punishment

## İdam Cezasının Ahlakiliđi

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### Abstract

*Philosophical problems concerning capital punishment involves the understanding of two more significant issues; life and death. Therefore, in this essay our discussion of capital punishment from a moral perspective will depend on what we understand from these two issues. The significant theories concerning the nature of life in the first place can be separated into three: Aristotle's view of life; the mechanical view of life defended by Descartes; Kant's definition as life as "organization". We can add the Darwinian theory of life also as a new perspective which is still changing and evolving. The biological approach of Darwin and later evolutionary biologists is materialist. Since Darwin is searching for the origin of life, his biological explanations will give as a byproduct the nature of life as well. We shall try to argue that if life has a significant meaning then we will try to preserve it. We also need to explain the nature of death. We shall then try to define death. In the final analysis this will bring us closer to analyze capital punishment also from a moral perspective. We have one more point which I would like to discuss: Since religion plays an important role in human life it cannot be neglected in discussions regarding the ethics of capital punishment and therefore we shall try to examine this issue. I would like to show that all these debates are endless and they seem to repeat each other without resolving the problem whether there should be the death*

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*penalty or not. 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. My discussion will end with a discussion of how Islam in our culture offers a solution to this problem.*

**Key words:** *Capital punishment, death penalty, value of life, meaning of death, meaning of life, biological perspective in death penalty*

### Özet

Ölüm cezası ile ilgili felsefi sorunlar, iki önemli konunun anlaşılmasını içerir; Bu konulardan biri hayat ve diğeri ölümdür. Dolayısıyla, bu yazıda, ahlaki açıdan ölüm cezası konusundaki tartışmamız, bu iki olgudan anladığımız şeylere bağlı olacaktır. Hayatın doğası ile ilgili önemli teoriler ilk etapta üçe ayrılabilir: Aristoteles'in hayat görüşü; Descartes tarafından savunulan mekanik hayat görüşü; Kant'ın hayatı «organizasyon» olarak tanımlaması. Bunlara Darvinci hayat kuramını, halen değişmekte ve gelişmekte olan yeni bir perspektif olarak da ekleyebiliriz. Darwin'in ve daha sonra evrimci biyologların biyolojik yaklaşımı materyalisttir. Darwin yaşamın kökenini araştırdığı için onun biyolojik açıklaması, hayatın doğasını da yan ürün olarak verecektir. Hayatın önemli bir anlamı varsa onu korumaya çalışacağımızı iddia etmeye çalışacağız. Bu ölüm cezası için bir sorun oluşturabilir. Bu noktada, ölümün mahiyetini de açıklamamız gerekir. Daha sonra ölümü tanımlamaya çalışacağız. Nihai analizde bu, ölüm cezasını manevi açıdan incelememizi gerektirecektir. Değınmek istediğim bir başka noktamız daha var: Din, insan hayatında önemli bir rol oynadığından, ölüm cezasının ahlaki olup olmadığı konusundaki tartışmalarda ihmal edilemez ve bu nedenle bu konuyu incelemeye çalışacağız. Bütün bu tartışmaların süregeldiğini ve sorun çözülmeden bu görüşlerin birbirlerini tekrar ettiklerini göstermek isterim. Her halükarda, ölüm cezasının kaldırıldığı ve ömür boyu hapis cezasına çevrildiği birçok ülke olduğu gibi hala ölüm cezası uygulanan birçok ülke de

*bulunmaktadır. Bu çalışmadaki tartışmam, kültürümüzde İslami'in bu soruna nasıl bir çözüm sunduğuna dair bir tartışma ile son bulacaktır.*

**Anahtar Kelimeler:** Ölüm cezası, hayatın anlamı, hayatın değeri, ölüm, ölümün anlamı, ölüm cezasına biyolojik yaklaşım

### Introduction

On January 11, 2017, Dylann Roof a twenty two-year-old high school dropout was sentenced to the death penalty. The verdict by the federal court in Charleston South Carolina was unanimous. The jurors noted that he showed no regret or remorse for his hate crime in a historical civil rights church where parishioners accepted him to join them in the prayer service. None of the victims' relatives asked for the death penalty. They only said they would pray for his soul because they believe in the idea that the real judgement will remain in the afterlife.. The issue of capital punishment, as we can see in this incident, involves the understanding of two more significant issues: one is life and the other is death. Therefore, our discussion of capital punishment from a moral perspective depends on what we understand from these two phenomena. In philosophy there are some attempts to define life and death.

### 1. Definition of Life

#### a. In Philosophy

In classical philosophy the approach is more on the side of life. For example, Aristotle defines life on the basis of a physical body having a soul. In other words, according to him any physical body that has a soul is a living being.<sup>1</sup> 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

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<sup>1</sup> We can see this in Aristotle's definition of soul as "entelechy of a natural body endowed with life". *De Anima*, 412 a 27-28; also see 412 b 11ff.

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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.

### **b. In Modern Philosophy**

In modern philosophy approach to both of these issues as we shall see now is totally different from the classical approach as represented by Aristotle. In the 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.<sup>2</sup> 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 because if life has no meaning then why should death have any meaning. Even according to Bruce Weber nowadays life is defined in biology textbooks.<sup>3</sup> But as we have seen Aristotle

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<sup>2</sup> Bruce Weber, "Life", *The Stanford Encyclopedia of Philosophy* (spring 2015 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/spr2015/entries/life/>>.

<sup>3</sup> 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*, 1<sup>st</sup> American ed., carefully rev. and corr. /with a life of the author, by N.W. Chittenden. Sir Isaac Newton, translated into English

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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.<sup>4</sup> 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 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 it 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,

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by Andrew Motte; to which is added Newton’s system of the world. Published by Daniel Adee, New York, 1846.

<sup>4</sup> Ibid.

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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”.<sup>5</sup> The

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<sup>5</sup> William Bechtel and Robert C. Richardson, “Vitalism”, *Routledge Encyclopedia of Philosophy*, ed. Edward Craig, (London; New York: Routledge, 1998), CD Version: 8890- 8893.

second group of life theories are all materialist theories.<sup>6</sup> 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.

### 2. Definition of Death

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 the 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

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<sup>6</sup> This materialist conception of life is very well seen in the title of this book *The Nature of Living Matter* written by the British biologist Lancelot Hogben (d. 1975) in 1930.

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only with different terminology. Let us take this definition; “death is the irreversible cessation of organismic functioning”.<sup>7</sup> But in this case they also add one more explanation as “in a humans case death is the irreversible loss of personhood”.<sup>8</sup> But even in this there 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”.<sup>9</sup> 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. May be 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.

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<sup>7</sup> 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 17 February 2018.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.



### 3. Death Penalty

#### a. In Philosophy

Since the death penalty is the main punishment in the law of capital punishment philosophers try to offer first their views about the nature of legal punishment. According to C. L. Ten there are primarily two types of theories of punishment. The first type is called utilitarian theory which claims that punishment is justified only in terms of its good consequences.<sup>10</sup> We should not misunderstand this theory as claiming that since punishment produces good consequences it must be good. On the contrary this theory defends the thesis that punishment is not good in and of itself. It is rather that since it produces good consequences it is necessary. Or in other words it is good in so far as the results that we achieve in society are reverting to this method in order to prevent the wrong doer to commit the same reprehensible act. According to this theory punishment will also deter potential offenders from committing similar undesirable crimes. Therefore submitting crime doers to acts that would cause them suffering is permissible because it can lead to the consequence of deterring that person and other people to not commit said crimes in the future.

The second type of punishment theory is called “retributive”. This theory according to C. L. Ten has many versions. However, they all have a common point of contention which justifies punishment on the basis of the fact that an offender commits a wrong act voluntarily. For this reason wrongdoers deserve to be punished and suffer as a result of their bad action. But if we further question the reason for this or the effect of this punishment the answer given is unlike the utilitarian theory; namely they say that without looking at the consequences of punishment whether it

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<sup>10</sup> C.L. Ten, “Crime and Punishment” *A Companion the Ethics*, ed. Peter Singer (Oxford: Blackwell Publishing, 2005), p.366.

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will lead to good results or not and whether it will prevent the potential offenders for wrongdoing or not it should be applied to an offender. Therefore they defend the idea that punishment is good in and of itself.<sup>11</sup>

### **b. In Religion**

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 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. Nursi relates a legal case worth to notice as follows:

*“When a judge (qâdi) 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.”<sup>12</sup>*

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

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<sup>11</sup> Ibid.

<sup>12</sup> Bediuzzaman Said Nursi, *Letters*, trans. Şükran Vahide (Istanbul: Sözler Yayınevi, 1998), p.318.

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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, than 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."*<sup>13</sup>

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 thing 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*

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<sup>13</sup> Al-Baqara, Chapter II, verse 178. Abdullah Yusuf Ali, *The Holy Qur'an: Text, Translation and Commentary* (Brentwood, Maryland: Amana Corp., 1983), 71. Also see Muhammad Marmaduke Pickthall, *The Meaning of The Glorious Qur'an* (Ankara: Arařtırma Yayınları, 2005), 50. The word "qisas" is translated variously by others also as "retaliation". See, for example, A. J. Arberry, *The Koran Interpreted* (New York: Macmillan Publishing, 1976), 51. We may use also the title of this article and translate it as "death penalty" which I have done before.

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can be obtained by consent, with reasonable compensation, would be better. 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."<sup>14</sup>

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<sup>14</sup>Ibid, footnotes 182, 183, 184 and 185 on page 70.

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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.”<sup>15</sup>*

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 “death penalty” (qisas) there is saving of life for you, O you man of understanding that you may restrain yourself.”<sup>16</sup>*

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<sup>15</sup> Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition*, (Chicago and London: University of Chicago Press, 1982), p.144.

<sup>16</sup> Al-Qur’ân, 2/179.

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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.”<sup>17</sup>*

Another contemporary Muslim thinker, as we mentioned above, Said Nursi relates this issue to the concept of justice in Islam. He argues that there are two kinds of justice; one is affirmative, the other is negative. The first one “consists in giving the deserving his right. This form of justice exists throughout the world in the most obvious fashion.”<sup>18</sup> This is because

*“it observably bestows, in accordance with special balances and particular criteria, all the objects of desire requested by everything from its Glorious Creator with the tongue of innate capacity, the language of natural need, the speech of necessity, and all the requirements of life and existence. This variety of justice is, then, as certain as life and existence itself.”<sup>19</sup>*

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<sup>17</sup> Fazlur Rahman, *Islam and Modernity*, op. cit., 30.

<sup>18</sup> Bediuzzaman Said Nursi, *The Words*, trans. Şükran Vahide, (Ankara:Ihlas Nur Neşriyat, 2001), p.99.

<sup>19</sup> Ibid.

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The other kind of justice, which is negative, consists in punishing the unjust; hence:

*“It gives wrongdoers their due by way of requital and punishment. This type of justice is not fully manifest in this world, even though there are countless signs and indications that permit us to sense its true nature. For example, all the chastising blows and punitive lashes that have descended on all rebellious peoples, from the ‘Ad and Thamud to those of the present age, show definitely that an exalted justice dominates the world.”<sup>20</sup>*

Nursi also argues that in punishments what is important is the spirit not the figure of the penalty. In fact “when the punishments are carried out in the name of the Divine commands both the spirit, and the intellect, and the conscience, and man’s innate subtle faculties are affected and influenced.”<sup>21</sup> In this way he argues that one time punishment is preferable to imprisonment and in fact more effective than this. However, the main idea is the fact that “true justice and effective penalties are those which are in accordance with the Divine command and executed in its name. Others can have only a minimal effect.”<sup>22</sup> In order to explain this Nursi sites the following allegorical story:

*“One time in the desert, a man was the guest of a nomad who was one of the people of reality. He saw that the desert dwellers did not concern themselves with guarding their belongings. His host had even left some money openly in the corner of the room. The guest asked him: “Aren’t you frightened of thieves, just throwing your belongings in the corner like that?” His host answered: “We do not have any thieves here.” The guest said: “We put our money in safes and lock them, but it is still frequently stolen.” His host told him: “We cut off the hands of thieves as a Divine command and on account of the justice of the Shari’a.” Whereupon the guest exclaimed: “Then most*

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<sup>20</sup> Ibid.

<sup>21</sup> Bediuzzaman Said Nursi, *The Damascus Sermon*, trans. Şükran Vahide, (Istanbul: Sözlük Neşriyat, 1996), p.69.

<sup>22</sup> Ibid, p.70.

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of you must be lacking a hand!" His host told him: "I am fifty years old, and yet in my whole life I have only seen one person with their hand cut off." The guest was ashamed and said: "Although everyday in my country we put fifty people in prison for theft, it does not have one hundredth of the effectiveness of your justice here." The host said: "You have been unmindful of an important truth and have ignored a strange and powerful fact, as a result of which true justice has escaped you. In place of general good, under an apparent justice, hatred and vicious and partisan currents intervene, destroying the effect of the judgements. The truth is as follows: With us, the moment a thief stretches out his hand to seize another's property, he recalls the punishment of the Shari'a. The command revealed from the Divine Throne comes to his mind. Through the sense of belief and ear of the heart, he as though hears the verse: "As to the thief, male or female, cut off his or her hands" (5/Surah al-Ma'idah, 38) which calls for "the execution of the thief's hand," and his belief and elevated emotions are stirred into action. From around his spirit and the depths of his conscience a state of mind is given rise to which as though attacks the inclination to steal. The inclination, which arises from the instinctual soul and lust, is stifled and recedes; by degrees it is completely extinguished. For not only the mind and imagination, but also the inner faculties, the intellect, heart, and conscience, together attack that desire and emotion. By recalling the punishment of the Shari'a the thief's conscience restrains and prohibits him, confronting that desire and silencing it. Yes, belief places in the heart and mind a permanent 'prohibitor;' when sinful desires emerge from the soul, it repulses them, declaring: "it is forbidden!" Man's actions result from the inclinations of his heart and emotions. They come from the sensibilities of the spirit and its needs. The spirit is stirred into action through the light of belief. If an act is good, he does it; if it is evil, he tries to restrain himself. Blinder emotions will not drive him down the wrong road and defeat him."<sup>23</sup>

### Conclusion

Since the classical approach is based on Aristotelian philosophy although I have not found in his *Politics* death penalty as punishment his

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<sup>23</sup> Ibid, pp.68-9.



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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”.<sup>24</sup> 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”.<sup>25</sup> 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”.<sup>26</sup> 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 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”.*<sup>27</sup>

In western discussions of punishment what is striking is that there is emphasis only on justifying punishment.<sup>28</sup> We do not see any stress on justice. This emphasis is, as we have seen, an Islamic approach. The reason

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<sup>24</sup> Frederick Copleston, *A History of Philosophy* (New York, London: Image Books, Doubleday, 1994), vol. 1, p.352.

<sup>25</sup> Aristotle, *Politics*, 1254 a pp.23-24. The explanation in parenthesis is my addition.

<sup>26</sup> Aristotle, *Rhetoric*, 1360 a 30.

<sup>27</sup> A.E. Taylor, *Aristotle* (New York: Dover Publications, 1955), pp.102-103.

<sup>28</sup> As a good representative in this regard we may cite Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan, (New York: Vintage Books, 1995).

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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.<sup>29</sup> 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.<sup>30</sup>

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.”<sup>31</sup> 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 is not

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<sup>29</sup> For a detailed discussion of this in the context of the Qur’an see Daud Rahbar, *God of Justice: A Study in the Ethical Doctrine of the Qur’an*, (Leiden: E. J. Brill, 1960).

<sup>30</sup> 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).

<sup>31</sup> 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), p.75.

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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.<sup>32</sup>

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.<sup>33</sup> According to the defenders of this theory these procedures are more effective in preventing them from reoffending 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.

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

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<sup>32</sup> Ibid, p.76.

<sup>33</sup> These methods are mentioned by Dolinko, see Ibid.

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consequence for the beneficial results of such punishments.<sup>34</sup> 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 forbidden no matter how beneficial the consequences of a punishment system that incorporated those practices would be?”<sup>35</sup>

The most outspoken and influential proponent of capital punishment is known as “retentionists”, who rely on the consequentialist and retributive arguments in order to defend their position.<sup>36</sup> 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.”<sup>37</sup> 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 that 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

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<sup>34</sup> H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 2008), pp.4-7.

<sup>35</sup> Dolinko, p.80.

<sup>36</sup> Ibid, p.81.

<sup>37</sup> Ibid.

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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.<sup>38</sup> There is no doubt this theory is close to virtue ethics but it was not as influential as the other theories.<sup>39</sup>

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 the same arguments which they produced against capital punishment also against life punishment. 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? Perhaps a look from this perspective combined with the Islamic attention paid to justice may produce good results.<sup>40</sup> This is because as the verses with their interpretation provided by Abdullah Yusuf Ali given above show, Islam does not insist on capital punishment, but on the other hand does not completely neglect it either. This is a milder position, as far as I can see concerning capital punishment. We should I believe further present this position in philosophy circles with philosophical arguments. I hope that Muslim moral philosophers can develop this position in order to solve a dilemma of humanity today.

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<sup>38</sup> 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), pp.263-271.

<sup>39</sup> For virtue ethics consult Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, (Notre Dame, Indiana: University of Notre Dame Press, 1984).

<sup>40</sup> A good example can be found in the book: *Forbidding Wrong in Islam: An Introduction* by Michael Cook, (Cambridge: Cambridge University Press, 2000).

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