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PARTICIPATION IN MURDER: HOW DID IMAM MALIK AND IMAM AL-SHAFI'I DECIDE ON PUNISHMENT?

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Abstract This article aims to explain the cause of the difference of opinion between Imam Malik and Imam al-Shafi'i about the punishment for the perpetrator of participating in the act of murder. The research method used is qualitative research with a tarjih analysis approach, which describes how the legal status of istibdal waqf by comparing two scholarly opinions, namely Imam Ibn Taimiyah and Imam an-Nawawi, then choosing which opinion is the strongest. The data sources used are secondary data sources, namely Kitab Majmu' Fatawa by Imam Ibn Taimiyah and Kitab Raudhatul Thalibin by Imam an-Nawawi as well as books and articles based on OJS (Open Journal System). Data processing techniques are carried out by processing library materials (library research). Techniques in analyzing data analyzed by exploratory descriptive analysis using reduction, display, and verification techniques. The results of this study found that: First; The evidence used by Imam Malik is Qs. al-Baqarah: 178, Qs. al-Isra': 33, Qs. an-Nisa: 93, and Hadith was narrated by Imam Malik, Hadith was narrated by Abu Daud, and Hadith was narrated by al-Bukhari and Muslims. As for Imam al-Shafi'i using the arguments of Qs. al-Baqarah: 178 and Qs. al-Maidah: 45, Hadith narrated by Ibn Majah, Hadith narrated by Darul Quthni, and Hadith narrated by Ahmad. Second, the causes of the differences in opinion between the two Imams are in terms of their arguments and their understanding of and use of hadith. Third, after an in-depth analysis, the strong and relevant opinion applied in Indonesia is that of Imam al-Shafi'i

Keywords: *Imam al-Shafi'i, Imam Malik, Participation Murder*

INTRODUCTION

In this increasingly complex world, we are often faced with criminal cases that not only involve the main perpetrator, but also many parties involved, either as planners, supporters, or even as parties who only provide small assistance but have major implications for the crime (Luaha, 2024). In today's fragmented societies, with the rise of organized crime networks, we often hear about murders that have been carefully planned - but it is not only the killer who is punished, but also those who were behind the scenes, planning or providing support The question then is, is it fair that those who

played a minor role are punished in the same way as the main perpetrators who executed the crime? Or, is it more appropriate to look at the level of a person's involvement in the crime and give proportional punishment based on their role? Imam Malik's opinion provides a firm and uncompromising answer. For Imam Malik, the justice that must be upheld is absolute justice, which does not distinguish anyone involved in a crime, no matter how small their role. Imam Malik explains his opinion in the Book of al-Muwattha' (Anas, 1998):

قال مالك في الرجل يمسك الرجل للرجل يضربه فيموت مكانه : أنه، إنما أمسكه، وهو يرى أنه يريد قتله قتلا به جميعا.

"In the case of a man who holds someone back for another person, then the other person hits the victim so that the victim dies on the spot, and the one who held back knew that the victim was about to be hit to death, then the one who killed and held back the victim is punished with qishash"

Imam Malik was of the opinion that in the case of intentional murder, both those who directly commit the murder and those who merely assist or participate in the act, both should receive an equal punishment, namely qishash (Anas, 1998). This opinion is based on his understanding that all perpetrators who play a role in causing the loss of life of a person whose blood is protected-whether they directly commit the murder or are involved in other stages-should be considered equal in legal responsibility (Dzajuli, 2000).

Imam Malik considers that anyone who participates, even in the form of indirect assistance or role, participates in causing death (Az-Zuhaili, 2007). While there may be differences in the type of role played-whether the main actor or a mere helper-the result, i.e. the loss of a life that should have been safeguarded and protected, is the same. In his view, this kind of collaborative action, which causes the destruction of a person's right to life, requires the perpetrator to receive the appropriate punishment (Anas, 1998).

The application of qishash punishment, in this context, is not only aimed at those who directly ended the victim's life, but also at those who contributed to the killing process (Aksoy, 2024). Therefore, both those who provide assistance or support in the execution of the murder as well as those who commit the direct act, should be faced with the same punishment, namely qishash, as a form of justice for the loss of life that has occurred (Tusakdia et al., 2024). In his view, involvement in planning or assisting a crime, even if it does not involve direct action, is still considered an equally large contribution to the spilling of blood (Anas, 1998).

When an individual is involved in a murder, be it as the main perpetrator or as one who merely plans, supports, or assists, then they should still be held accountable

with a punishment proportionate to their actions. With this principle, Imam Malik asserted that all parties involved, even if only in a supporting capacity, should face the same severe consequences, namely the death penalty. His view reflects a concept of justice that recognizes no compromises or exceptions, where all parties who cause or contribute to the commission of a crime must bear the consequences equally (Mubiin et al., 2024).

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However, Imam Malik's view was not necessarily accepted by all, especially by Imam al-Shafi'i who had a more moderate view. Imam al-Shafi'i, with his more considered and cautious approach, believed that the death penalty should only be imposed on the main perpetrators - those who directly commit the act of murder. He explains his opinion in Kitab al-Umm (Al-Syafi'i, 1987):

قال الشافعي قال : وإذا حبس الرجل للرجل رجلا ، أي حبس ما كان ، بكتاف ، أو ربط / اليدين ، أو إمساكهما ، أو اضجاعه له ورفع لحيته عن حلقه ، فقتله الآخر قتل به القاتل ، ولا قتل على الذي حبسه، ولا عقل ويعزر ويحبس ؛ لأن هذا لم يقتل ، وإنما يحكم بالقتل على القاتلين وهذا غير قاتل

"Imam al-Shafi'i (may Allah be pleased with him) said: If a man restrains someone for another person, i.e., restrains him with something or holds his hands or raises his neck from his chin, then the perpetrator kills him. The one who kills is punished with qishash; the one who does not kill, but only holds the body of the victim, is not punished with qishash and no fine is imposed on him, rather he is punished with ta'zir and imprisoned. This is because he is not a murderer in this case, and if two murderers were to be convicted of murder, then this person would not be labeled a murderer"

Imam al-Shafi'i has a different view from Imam Malik regarding the punishment

for perpetrators who participate in cases of intentional murder. For Imam al-Shafi'i, perpetrators who only assist or participate in murder do not deserve the death penalty like the main perpetrator. He argues that those involved in planning or providing support for murder, although punishable, should receive a lighter punishment, namely ta'zir punishment (a law that is more proportional and adjusted to the level of involvement), as well as imprisonment (Djalaluddin et al., 2023).

According to Imam al-Shafi'i, although the perpetrators participate in the act of murder, such as holding the victim's body or assisting in various other ways, they do not directly cause the death of the victim (Al-Syafi'i, 1987). Therefore, the punishment should not be as severe as the death penalty but should be more proportionate to their role in the crime. This shows a significant difference in principle with Imam Malik, who was more inclined to impose the qishash (death penalty) on all perpetrators who played a role in the murder, whether they directly killed or merely assisted (Sánchez, 2021).

Imam al-Shafi'i emphasized the importance of balancing law and humanity in applying punishment. He argues that only those who directly commit murder, such as those who actually draw a sharp weapon or directly cause death, deserve the death penalty. Whereas those who are only involved in a supporting role, such as holding the victim's body without hitting or only providing assistance in the execution, are sufficiently punished with ta'zir, which is considered more appropriate and just (Al-Syafi'i, 1987).

With this view, Imam al-Shafi'i prioritizes proportional justice, where each individual is punished according to his role in the crime without exceeding reasonable limits. Ta'zir punishments and detention imposed on participating perpetrators are considered more balanced and reflect the principle of justice that is not excessive (Rofiq et al., 2021). The sharp distinction between these two views, one favouring harsh and uncompromising justice and the other emphasizing balance and proportionality of punishment reflects two major views in Islamic law that have a significant social

impact. In the real world, we see many cases involving various parties in a major crime, such as terrorism networks or premeditated murder, where many people do not directly commit the murder but still contribute equally to the crime. In cases like these, the public often demands appropriate punishment for all those involved, even if they did not directly commit the murder. This raises a big question about how the law should be enforced, whether it should be with the same severe punishment for all involved, or by giving a more proportional punishment based on their involvement (Nuraisyah, 2021).

In reality, this tension is even more pronounced amidst the rise of crimes that involve multiple actors with different roles. For example, in cases of premeditated murder, we often hear that although the main perpetrator who executes the murder is sentenced to death, those who provide support or planning do not always receive the appropriate punishment (Rohman et al., 2020). This raises pros and cons in society: some feel that this is appropriate justice, while others argue that punishment should apply to all involved, without exception. However, can we really say that the death penalty imposed on planners or supporters without direct execution is an appropriate form of justice? Or should we instead favor a balanced justice that not only prioritizes punishment for those who commit physical acts, but also considers the proportions of each involvement?

METHODS

The research method used is qualitative research with a tarjih analysis approach, which describes how the legal status of istibdal waqf by comparing two scholarly opinions, namely Imam Ibn Taimiyah and Imam an-Nawawi, then choosing which opinion is the strongest. The data sources used are secondary data sources, namely Kitab Majmu' Fatawa by Imam Ibn Taimiyah and Kitab Raudhatul Thalibin by Imam an-Nawawi as well as books and articles based on OJS (Open Journal System). Data processing techniques are carried out by processing library materials (library research). Techniques in analyzing data analyzed by exploratory descriptive analysis

using reduction, display, and verification techniques.

DISCUSSION

Causes of Differences of Opinion between Imam Malik and Imam al-Shafi'i on Participation in Murder

1. Dalil

a. Imam Malik

1) Al-Qur'an

a) Qs. al-Baqarah: 178

يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ
أَلْحُرُّ بِأَلْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنثَىٰ بِالْأُنثَىٰ فَمَنْ عُفِيَ
لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبِعْ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ
بِإِحْسَانٍ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ فَمَنْ
أَعْتَدَىٰ بَعْدَ ذَلِكَ فَلَهُ عَذَابٌ أَلِيمٌ ﴿١٧٨﴾

"O you who have believed, the qishaash is obligatory upon you in respect of those who are killed: free man for free man, slave for slave, and woman for woman. So whoever has a brother's forgiveness, let him (the one who forgave) follow in kind, and let him (the one who was forgiven) pay (the compensation) to the one who forgave in kind. Such is a relief from your Lord and a mercy. Whoever transgresses after that, then for him is a very painful punishment"

In this text, there is an explicit obligation to give qishash punishment to the perpetrator of intentional murder, not other punishments, including accidental or wrongful murder. The execution of qishash is carried out by the guardian of the victim, with the rule that emphasizes the principle of equality. This means that a free person is killed for killing a free person, and a slave is killed for killing a slave. Therefore, a free person cannot be put to death for killing a slave, and vice versa. In addition, qishash punishment also applies in the gender category; a woman who kills another woman will be punished with qishash, as well as a man (Khaeruman, 2024).

In addition, if the victim's guardian decides to forgive the perpetrator of the murder by not applying the qishash punishment, then it can be done by giving diyat (ransom). In this case, diyat can be given

in the form of money or goods as a substitute for the qishash punishment, provided that the diyat is paid in a good manner, without delaying or denying it. The murderer who is willing to pay the diyat is obliged to do so in a good and timely manner, without hurting the victim's guardian with bad words.

The granting of forgiveness or diyat is part of Islamic law that aims to ease the burden on believers. Forgiveness can be given freely or by diyat, which provides an opportunity to repair relations and prevent revenge. This concept is linked to the more limited law of the Torah, which only provides for the punishment of qishash with no other alternatives. In Islam, mercy is given with the option of diyat and forgiveness, as a form of leniency that can avoid excessive action (Anas, 1998).

However, if after forgiveness or payment of diyat, a person still transgresses by taking revenge or acting abusively against the murderer, that person will receive a painful punishment in the afterlife. This reflects the aim of Islamic law to avoid the overreach and arbitrariness that occurred during the Jahiliyyah period, where a free man could kill a slave, a man could kill a woman, and even take revenge against an innocent person. Thus, the principles of qishash and diyat in Islam aim to uphold justice without transgressing limits, as well as provide opportunities for forgiveness and reparation

According to Imam Malik, lafaz

أَلْحُرُّ بِأَلْحُرِّ in the context of Islamic law contains

a general meaning and covers various forms of murder. Imam Malik explained that the lafaz does not only refer to murder committed directly by a perpetrator to take life, but also includes cases where someone participates or assists in the murder process. This assistance can be in the form of direct support, provision of means, or any other action that favors the loss of a person's life (Anas, 1998). The context referred to here is the killing of a person whose blood is protected by law, i.e. an individual who has not committed a crime that according to Shari'ah justifies his blood. In Imam Malik's view, both the main perpetrator and the party involved in assisting the murder have equal

responsibility before the law. Therefore, the punishment given to both parties is qisas, which is an appropriate punishment in the form of the death penalty for the perpetrator of intentional murder, as regulated in sharia (Rohman et al., 2020).

Imam Malik's opinion is based on the principle that preserving human life is one of the main objectives of sharia (maqashid sharia). Intentional killing, whether directly or indirectly, is not only a violation of individual rights, but also of God's rights. This is because human life is a gift and a trust from Allah, so anyone who deliberately takes it away is stepping over the will of Allah as the sole determinant of a person's life and death.

In addition, the application of qisas punishment aims to create a sense of security and comfort in society. With this law, it is hoped that no individual will feel able to act arbitrarily towards the lives of others (Nasution, 2007). The qisas punishment is also a reminder to the community that murder is a grave sin that has severe consequences, both in this world and in the hereafter. In Imam Malik's view, murder not only damages the relationship between the perpetrator and the victim, but also has the potential to disrupt social harmony and cause unrest in society (Irfan, 2022).

Overall, Imam Malik's view shows the justice of Islamic law, which is oriented towards the protection of human life, law enforcement, and the creation of social order. This approach not only provides a deterrent effect to criminals, but also a form of preventive protection so that similar actions do not occur in the future (Dzajuli, 2000).

b) Qs. al-Isra': 33

وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ وَمَنْ قُتِلَ
مَظْلُومًا فَقَدْ جَعَلْنَا لَوْلِيَيْهِ سُلْطٰنًا فَلَا يُسْرِفُ فِي
الْقَتْلِ إِنَّهُ كَانَ مَنْصُورًا ﴿٣٣﴾

"And you shall not kill a soul which Allah has forbidden (to kill), except with a just cause[853]. And whoever is unjustly killed, We have given power[854] to his heirs, but let not the heirs transgress the limits in killing. Verily, he is one who is helped"

The act of killing without a clear cause in Islamic law is considered a grave offense,

because the life and death of a person is entirely in the power of Allah SWT. Human life is a highly respected right in Islam, and Allah SWT has decreed the destiny of each individual's life. Therefore, killing without a valid reason and without following the provisions of Shara' is a very serious act and is subject to severe punishment. However, in Islamic law, there are some conditions in which a person's blood can be considered halal, such as people who commit adultery after marriage, apostates, and people who commit murder without a valid reason.

The implementation of qishash, which is the proportionate retribution for intentional killing, is very strictly regulated in Islam. The guardian of the victim, who has the right to demand qishash for the death of his family member, must carry out the punishment in a manner that is in accordance with the provisions of shara'. However, there is a clear restriction that the execution of qishash must not become an outlet for vengeance. For example, if the victim's family demands that the perpetrator be killed in an excessive manner or have his body mutilated, then this is clearly an act of injustice (Absar, 2020).

Islam teaches that qishash should be carried out in a fair and balanced manner, with the aim of upholding justice and preventing overreaching. Qishash is not to take revenge or to punish in an excessively painful way, but rather as a way to provide appropriate retribution. If the execution of qishash is carried out with the intention of torturing or venting anger, then the act becomes invalid and contradicts the principles of Islamic justice, which prioritize the protection of the rights of life and honor of every individual. Thus, although qishash is given as a right to the victim's family, its implementation must remain within the framework of justice and in accordance with the provisions of Sharia, without any element of injustice (Ibrahim, 2023).

c) Qs. an-Nisa: 93

وَمَنْ يَقْتُلْ مُؤْمِنًا مُتَعَمِدًا فَجَزَاؤُهُ جَهَنَّمُ خَالِدًا فِيهَا
وَعَضِبَ اللَّهُ عَلَيْهِ وَلَعَنَهُ وَأَعَدَّ لَهُ عَذَابًا عَظِيمًا ﴿٩٣﴾
"And whoever kills a believer intentionally, his recompense shall be Jahannam, and he shall

abide therein, and Allah shall be angry with him, and curse him, and prepare for him a great punishment"

Killing someone without a legitimate reason based on Shari'ah is a major sin in Islam. Especially if the murder was committed intentionally, either by a single perpetrator or by a number of people who participated in carrying out the act. In this case, Allah SWT explicitly provides a very severe threat to the perpetrator, namely eternal punishment in Jahanam hell, as a reward for the great sin committed. The verse is a strong warning against all forms of murder that are not in accordance with the provisions of shara'.

However, despite the fact that this verse indicates a definite punishment for the perpetrator of murder, scholars differ on the meaning of qishash itself. There is a difference of opinion as to whether qishash functions more as a *zawajir* (punishment aimed at providing a deterrent effect) or as a *jawabir* (punishment aimed at patching up and compensating for the shortcomings of the sin committed).

The majority of scholars are of the view that the qishash, whether undertaken by the perpetrator or by the victim's guardian, serves as expiation for the sin of murder. This means that the punishment can expiate the sin committed by the perpetrator, because according to this view, the had punishment (the punishment prescribed in sharia) functions as an expiation for the perpetrator who served the punishment (Ad-Dimasyiqi, 2004). Thus, even though the perpetrator has committed murder, the punishment imposed can be considered as a penance for him, if the punishment is carried out with patience and submission to Allah's law (Rahman et al., 2018).

In contrast, the Hanafiyah have a different view. They argue that the qishash sentence served by the murderer, or the forgiveness given by the victim's family, cannot erase the sin he has committed. According to them, although the punishment is enforced as a form of justice and protection of society, the sin of murder remains attached to the perpetrator and cannot be erased simply by serving a qishash sentence. In this view, even if the perpetrator is punished or forgiven, he still has to face Allah's

punishment in the afterlife, which can only be erased by sincere repentance and good deeds (Al-Sarkhasi, 1995).

It is true that the victim who has been killed does not benefit directly from the implementation of the qishash punishment, because the main benefit of qishash is to provide a deterrent effect to the living. The main purpose of qishash is to avoid the recurrence of murder, by enforcing clear and firm justice against the perpetrator. This is also to teach people a lesson so that they do not commit the same act, thus protecting the right to life of every individual. This is in line with the words of Allah SWT in Surah Al-Baqarah verse 179

وَلَكُمْ فِي الْقِصَاصِ حَيَوةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ ﴿١٧٩﴾

"And in the qishaash there is life for you, O men of understanding, so that you may fear"

This verse confirms that the main purpose of qishash is to preserve life, not only for the individual victim, but also for society as a whole. By punishing the perpetrators of murder, Allah SWT teaches His people that the right to life must be respected and protected. The qishash punishment, although it cannot provide direct benefits to the deceased victim, provides great benefits to the people who are still alive, because it serves as a warning not to carelessly take the lives of others.

Life in this context refers to the protection of the right to life in general, and qishash as a mechanism to maintain social justice and prevent further crimes. In other words, qishash is a means of creating a healthy fear of committing crimes, with the hope of reducing the rate of violence and maintaining social stability in society

2) Hadis

a) Hadith narrated by Imam Malik

أخبرنا مالك، عن يحيى بن سعيد عن سعيد بن المسيب، أن عمر بن الخطاب رضي الله عنه قتل نفرا خمسة أو سبعة برجل واحد قتلوه غيلة، وقال عمر: لو تمالأ عليه أهل صنعاء لقتلتهم جميعا (رواه المالك)

"Narrated to me Malik from Yahya bin Sa'id from Sa'id bin al-Musaiyab that Umar bin Khattab r.a had killed five or seven people for killing a man by

means of trickery, and Umar r.a said: Had the people of San'a come together to kill the boy, I would have sentenced them all to death" (HR. Imam Malik)

b) Hadith narrated by Abu Daud

عن ابي عبيد قال : قال رسول الله صلى الله عليه و سلم
: و من قتل عمدا فهو قود (رواه أبو داود)

"Ibn Ubaid said, the Messenger of Allah SAW. Said: "and whoever kills intentionally, he is entitled to demand qishash" (HR. Abu Daud).

Imam Malik categorized murder into two main types, namely intentional murder and unintentional (wrongful) murder. In Imam Malik's view, the law applied to these two types of murder has to do with the intention and intent of the perpetrator in taking someone's life. In this case, although there are some perpetrators who only participate or assist in murder, the punishment given is still the same, namely qishash, if their actions have an element of intent in eliminating the lives of people whose blood is protected.

This is in line with the Muslim consensus that qishash is the legal punishment for intentional killing. In terms of legal reasoning and religious texts (nash), the implementation of qishash is not only a form of justice, but also aims to create greater benefits, namely maintaining security and public order. One of the main purposes of qishash is to protect blood, preserve life, and provide a deterrent effect to the perpetrators and the wider community, so that no one else dares to commit similar acts.

In addition, qishash is a means to maintain the principle of justice that emphasizes equality, where the perpetrator of the crime is punished with a punishment that is commensurate with his actions, namely the elimination of life for the elimination of life. Thus, the application of qishash in Islamic law is not only to avenge evil deeds, but also to create security, tranquility, and justice in society. Without the application of a strict punishment such as qishash, many of these societal goals are difficult to achieve.

c) Hadith narrated by al-Bukhari and Muslim

عن أبو هريرة قال : من قتل فهو بخير النظرين لئلا
أن يودي أو يفاد(رواه بخاري و مسلم)

"Abu Hurairah said: Whoever has a murdered person, then he may choose between two options, he may choose diyat, or demand qishash" (HR. Al-Bukhari Muslim).

In the Islamic legal system, the sentencing of perpetrators of intentional homicide does not directly apply the qishash penalty. Instead, Islam allows the victim's family to choose whether they want to demand qishash or forgive the perpetrator and accept diyat instead. This shows that in the case of intentional murder, the victim's family has the right to determine the course of legal settlement, either by demanding an appropriate retribution (qishash) or by forgiving and accepting diyat.

The punishment of qishash is basically an adamic right, which is a right that is directly related between fellow human beings, in this case between the family of the victim and the perpetrator. In this case, the hadith relating to qishash indicates that if the victim's guardian (heir or family) chooses to forgive the perpetrator without demanding qishash, then the diyat is still required to be paid by the perpetrator to the victim's family (Khaeruman, 2024).

This indicates that although there is a right for the victim's family to ask for an appropriate punishment (qishash), they also have the freedom to choose forgiveness as an alternative. Nevertheless, when the victim's family chooses to forgive the perpetrator, diyat remains an obligation for the perpetrator to pay, as a form of compensation for the life that has been taken. In this case, Islam gives freedom to the victim's family to choose a wiser path, either in the form of prosecuting qishash or apologizing with diyat, which in turn teaches tolerance and forgiveness in solving humanitarian problems.

b. Imam al-Syafi'i

1) Al-Qur'an

a) Qs. al-Baqarah: 178

يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ
أَلْحُرُّ بِأَلْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأَنْثَىٰ بِالْأُنْثَىٰ فَمَنْ عُفِيَ
لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتِّبَاعُ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ

يٰۤاِحْسٰنٍ ۙ ذٰلِكَ تَخْفِیْفٌ مِّن رَّبِّكَمْ وَّرَحْمَةٌۭ فَمَنْ
اَعْتَدٰىۙ بَعْدَ ذٰلِكَ فَلَهُۥ عَذَابٌۭ اَلِیْمٌ ﴿۷۸﴾

“O you who have believed, the qishaash is obligatory upon you in respect of those who are killed: free man for free man, slave for slave, and woman for woman. So whoever has a brother’s forgiveness, let him (the one who forgives) follow in kind, and let him (the one who is forgiven) repay the one who forgives in kind. Such is a concession from your Lord and a mercy. Whoever transgresses after that, then for him is a very painful punishment”.

Every action, whether intentional or unintentional, must have legal consequences that arise as a consequence. In terms of the application of punishment, not all criminals should be given the same punishment, especially to create a deterrent effect that is proportional to the act committed. This also applies in the case of intentional killing of a person whose blood is protected, which is stated in the Qur'anic text. Lafazh **اَلْحُرُّ بِالْحُرِّ**

is a lafazh that is clear in the text, that the perpetrators of murder are both free, on the other hand Imam al-Sayfi'i has the view that qishash punishment applies to perpetrators who directly eliminate the lives of people whose blood is protected. Then the lafazh **اَلْحُرُّ** form of isim that is ma'rifah, so the qishash punishment is influenced by the extent to which a person is involved in eliminating the life, if a perpetrator of several people who kill so that directly results in the death of the victim is the one who gets the qishash punishment, while the perpetrators who only participate only get punishment from the judge as a deterrent effect on his actions.

Imam al-Shafi'i, in understanding this verse, argues that the punishment of qishash, which is a punishment commensurate with the act of murder, only applies to the perpetrator who directly causes the death of the victim. In other words, the main perpetrator who commits the direct act of

murder is the one who deserves qishash punishment. Meanwhile, for those who only participate, for example those who help hold the victim's body or provide an opportunity for the main perpetrator to carry out his actions, he will not receive qishash, but a lighter punishment according to the level of his involvement in the crime.

The lafaz used in the Qur'an, which is a ma'rifah isim, emphasizes that this qishash punishment only applies to those who are directly involved in taking someone's life. Therefore, someone who only participates in murder, even if he plays a role in the incident, cannot be equated with the main perpetrator who directly causes the death of the victim. In Imam al-Shafi'i's view, the participant will be sentenced to a lighter punishment, such as ta'zir or imprisonment, which aims to provide a deterrent effect and educate the perpetrator so as not to repeat his actions.

2) Qs. al-Maidah : 45

وَكَتَبْنَا عَلَيْهِمْ فِيهَا اَنَّ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ
وَالْاَنْفَ بِالْاَنْفِ وَالْاُذُنَ بِالْاُذُنِ وَالسِّنَّ بِالسِّنِّ
وَالْجُرُوحَ قِصَاصٌ فَمَنْ تَصَدَّقَ بِهِۦ فَهُوَ كَفٰرَةٌۭ لَّهٗۗ
وَمَنْ لَّمْ يَحْكَمْ بِمَاۤ اَنْزَلَ اللّٰهُ فَاُولٰٓئِكَ هُمُ الظّٰلِمُوْنَ ﴿۴۵﴾

“And We have ordained for them therein (the Torah) that the soul shall be avenged for the soul, the eye for the eye, the nose for the nose, the ear for the ear, the tooth for the tooth, and the wound for the wound. Whoever waives his (right of kisas), then waiving that right (becomes) a penance for him. Whoever does not judge according to what Allah has revealed, then they are the wrongdoers”

The verse above clarifies from the previous argument, that in the discussion of qishash, it is not about life alone, but in the matter of persecution or injury can also be rewarded according to what was done. Someone who injures the victim's eyes so as to cause blindness, then the perpetrator who directly received qishash punishment in

accordance with the level of what has been done

b) Hadith

1) Hadith narrated by Ibn Majah

عن علي رضي الله عنه أنه قضى في رجال قتل رجلا متعمداً، و أمسكه آخر، قال يقتل القاتل، و يحبس الآخر في السجن حتى يموت

"It is narrated from 'Ali r.a that I ('Ali r.a) have decreed against the one who kills intentionally, whose victim is held by someone, that the killer is to be killed, while the one who assists is to be imprisoned until death".

The Hadith narrated by Ibn Majah explains the specificity of the application of the law in the case of intentional murder, which basically refers to the law of qishash as stated in Surah al-Baqarah verse 178. The verse confirms that the original law for the perpetrator of intentional murder is the punishment (qishash), which is to repay the action with a similar action, namely murder. However, the law is still general and universal, not yet regulating in detail about the special circumstances that may occur in a murder case.

Imam al-Shafi'i, in understanding this verse, refers to a hadith narrated by Ibn Majah, which provides further explanation of the application of punishment in cases of intentional murder involving more than one perpetrator. This Hadith specifies that if in an incident of intentional murder there are several people involved, then the perpetrator who directly kills the victim, namely the one who physically kills, is still sentenced to qishash in accordance with the provisions of the Qur'an. Meanwhile, perpetrators who only participate, for example those who help hold the victim's body or provide an opportunity for the main perpetrator to commit murder, will not be sentenced to qishash. Instead, those who are only involved as co-perpetrators will be sentenced to ta'zir, which is a lighter punishment, such as imprisonment for one year.

Thus, this hadith became the basis for Imam al-Shafi'i in developing a more detailed understanding of the application of punishment for the perpetrators of intentional murder involving more than one person. Imam al-Shafi'i concluded that the

qishash punishment only applies to the main perpetrator who directly commits the murder, while the perpetrators who only participate in the murder, despite their role, still receive a lighter punishment according to the level of involvement in the crime.

2) Hadith narrated by Darul Quthni

الحسان بن أحمد بن صالح الكفي، أخبرنا إبراهيم بن محمد بن إبراهيم الصيرفي، أخبرنا عبدة بن عبد الله الصفار، أخبرنا أبو داود الحفري، عن سفيان الثوري، عن إسماعيل بن أمية، عن نافع، عن عمر، عن النبي صلى الله عليه و سلم قال: إذا أمسك الرجال الرجال وقتله الآخر يقتل الذي قتل و يحبس الذي أمسك (رواه در القطني)

"Al-Hasan bin Ahmad bin Shalih al-Kufi narrated to us Abu Daud al-Hafari narrated to us from Sufyan ats-Tsauri, from Ismail bin Umayyah, from Nafi' from Umar, from the Prophet Muhammad SAW said: If one person holds another (victim) and his companion kills him, then the one who kills is sentenced to death, and the one who holds him is imprisoned" (HR. Dar al-quthni)

3) Hadith narrated by Ahmad

إن أعتى الناس على الله من قتل غير قاتله (رواه أحمد)

"Indeed, the most transgressing person in the sight of Allah is the one who kills someone who is not the perpetrator of the murder"

Imam al-Shafi'i agreed that the punishment received by the perpetrator of intentional murder is qishash. However, if the murder is committed by several people together, where each perpetrator participates in assisting in the execution of the murder, then the punishment imposed on each perpetrator is not the same. In such a situation, even though several people were involved, only the main perpetrator who actually committed the act of murder deserves the qishash punishment.

Imam al-Shafi'i explained that if the victim's heirs demanded that the qishash punishment be applied to all perpetrators, including those who only participated in the murder, a judge could not agree to this request. This is because the qishash punishment must be carried out fairly and proportionally, it cannot be applied arbitrarily or excessively. Thus, the heirs' request to sentence all perpetrators to death, including those who only assisted in the

murder, cannot be accepted. Moreover, if the punishment is excessive, such as torture that leads to death, then it is contrary to the principles of justice in Islamic law.

This evidence confirms that the implementation of the qishash punishment must be based on the position of each perpetrator in the act. If one of the perpetrators only assisted in the killing process, such as holding the victim's body or providing other assistance, he cannot be punished with the same qishash punishment as the main perpetrator who directly killed the victim. Lesser ta'zir punishments, such as imprisonment, are more appropriate for perpetrators who only participate, because the qishash punishment is only given to the main perpetrator who directly takes someone's life (Khaeruman, 2024)

2. Istinbath Method

Imam Malik, in determining the punishment for perpetrators who participate in the act of intentional murder, applies several principles of legal istinbath methods, namely mantuq and qiyas. Mantuq is a method that refers directly to the text or nash (evidence) in the Qur'an or Hadith that is relevant to a particular context, while qiyas is a method that uses analogy to draw legal conclusions from similar cases. Imam Malik opted for general propositions in the Shari'ah texts that dealt with murder, even though there were no specific propositions that directly regulated the punishment for perpetrators who only played an indirect or assisting role.

In Imam Malik's view, every verse that describes murder and qishash punishment contains a clear principle regarding the importance of protecting human life whose blood is protected by sharia. Based on the zahir approach to these general verses, Imam Malik concluded that the perpetrators who participated in the murder are also eligible for qishash punishment like the main perpetrator. This is due to the existence of the same illat or reason, namely eliminating someone's life without a shar'i cause, which is a forbidden act in Islam.

Furthermore, Imam Malik strengthened his view by using the concept of sad al-zari'ah, which is the principle of preventing or closing all possibilities that can bring further damage

or harm. In this case, sad al-zari'ah is applied to prevent any loopholes that can be utilized by the perpetrator to avoid qishash punishment. Imam Malik argued that if only the main perpetrator is punished, while those who participate are left without punishment, it will create injustice and provide opportunities for perpetrators to evade their responsibilities.

By using sad al-zari'ah, Imam Malik ensured that the perpetrators involved, both directly and indirectly, were equally punished. This is not only to provide a deterrent effect, but also to maintain social stability and justice. Thus, Imam Malik linked the principle of justice in Islamic law to the need to provide equal punishment for all parties involved in a serious crime such as murder.

Imam al-Shafi'i based his view on the punishment for perpetrators who participate in the act of intentional murder through the method of istinbath law that focuses on mantuq, namely taking the law directly from the text of the Qur'an and Hadith. In his view, the arguments in the Qur'an and Hadith have clearly provided a description of how the punishment for those who act as assistants in the act of murder. In particular, the traditions referenced by Imam al-Shafi'i contain firmness about the form of punishment for those who only play an assisting role without being the main perpetrator.

Thus, Imam al-Shafi'i did not feel the need to use other istidlal methods such as ijma' (agreement of scholars) or qiyas (legal analogy) in dealing with this issue. For him, the evidence from the Qur'an and Hadith is sufficient to explain the position of the perpetrator of participation and the appropriate punishment. Therefore, Imam al-Shafi'i stipulated that the perpetrator who participates in murder but is not the main executor is subject to ta'zir, which is a punishment determined by the authority of the judge, and is detained in prison.

The reason Imam al-Shafi'i bases this punishment on ta'zir is because the participant only assists or supports the act of murder. For example, the perpetrator may only hold the victim's body to make it easier for the main perpetrator to carry out the action or may participate but not carry out fatal actions such as beatings or direct

assaults that cause the victim's death. Thus, although the perpetrator participates in the act, they do not act as the direct executor responsible for the loss of the victim's life.

Analysis of the Opinions of Imam Malik and Imam al-Shafi'i on the Legal Status of Waqf Istibdal

Imam Malik adopted a strict legal approach in cases of intentional homicide, especially for those who played a role in the loss of life, whether as executors or mere co-perpetrators. In his view, everyone who is directly or indirectly involved in intentional killing is considered equally responsible for the death of the victim. This legal approach is based on a deep understanding of the textual meaning (*zahir*) of the Qur'anic verses that condemn acts of murder committed with intent and planning.

According to Imam Malik, since the actions of the perpetrators have equally caused the death of the victim, all parties involved cannot be distinguished in terms of punishment. In this case, actions such as restraining the victim's body, providing tools or opportunities to the main perpetrator, although not directly killing, are still considered as a form of direct contribution to murder. In his view, such actions are sufficient to be considered as a form of full participation. Therefore, according to Imam Malik, all those involved deserve the same punishment, namely *qishash* (retribution for life), because they have violated someone's right to life.

This approach utilizes the legal principle of "*sad al-zari'ah*," which is to close loopholes that could allow co-perpetrators to avoid punishment by arguing that they only had a secondary or indirect role in the murder. In this context, the principle aims to ensure that justice is truly served and that no party involved in a serious criminal act can escape legal responsibility. By applying this principle, Imam Malik argued that Islamic law avoids the possibility of misusing the role of a co-conspirator in murder as an excuse to avoid the punishment of *qishash*, which is reserved for intentional and premeditated murder.

Imam al-Shafi'i, on the other hand, has an approach that focuses more on the *mantuq*

(textual) understanding of the texts of the Qur'an and Hadith, without using additional *istidlal* methods such as *qiyas* (analogy) or *ijma'* (consensus of scholars) in this case. According to him, a clear distinction of roles between executors and co-perpetrators must be recognized in sentencing. In Imam al-Shafi'i's view, co-perpetrators only play a supporting or assisting role in the crime of murder, without actually causing death directly. For example, the role of holding the victim's body or providing other assistance is not an act that causes direct loss of life, so he does not deserve the same punishment as the main perpetrator.

Imam al-Shafi'i argued that the *qishash* punishment should only be given to the main perpetrator who directly committed the murder. For co-perpetrators, the more appropriate punishment is *ta'zir*, which is a punishment whose rate is not fixed by Sharia, but is left to the discretion of the judge. In this case, *ta'zir* can take the form of imprisonment or other punishments aimed at providing a deterrent effect. With this approach, Imam al-Shafi'i emphasizes the importance of justice and proportionality in the administration of punishment, so that each offender receives consequences that are appropriate to the degree of their involvement in the criminal act.

Imam al-Shafi'i's view is considered more fair and appropriate to be applied in determining the punishment for the perpetrator of participation in murder because he clearly distinguishes the role between the main perpetrator and the additional perpetrator in the crime. In Imam al-Shafi'i's perspective, a co-perpetrator who only assists but is not directly involved in the act of murder should not receive the same *qishash* punishment as the main perpetrator who actually takes the victim's life. This distinction is crucial to achieving proportional justice, where each individual receives a punishment proportional to his or her level of involvement in the crime.

This understanding allows the legal system to assess the perpetrator's involvement appropriately. In this regard, Imam al-Shafi'i offers an approach that punishes the participant with a *ta'zir* punishment, such as imprisonment, as a form

of sanction for his actions in assisting the murder without taking a direct part in the murder itself. This method is fairer because it considers the intentions and actions of each party in the case.

Imam al-Shafi'i's approach is also in line with modern criminal principles, which in Indonesian positive law are contained in articles of the Criminal Code. Article 56 of the Criminal Code, for example, emphasizes that those who merely assist in the commission of a crime, such as providing assistance or opportunity, are not subject to the same punishment as the main perpetrator. This shows that there is an element of harmony between Imam al-Shafi'i's teachings and the Indonesian positive legal system, which recognizes that perpetrators with different levels of involvement should receive punishments appropriate to their respective actions.

In addition, Indonesia as the country with the largest adherents of the Syafi'i school of thought in Southeast Asia has a historical attachment to this teaching, as told by Ibn Batutah about Sultan Malik az-Zahir in the kingdom of Samudra Pasai, who practiced the Syafi'i school of thought. The widespread acceptance of this school in Indonesia creates a strong social foundation for the application of Imam al-Shafi'i's views in criminal law matters similar to the principles in the Criminal Code.

Furthermore, this view is also considered to be in accordance with current social conditions and justice needs, where law enforcement often prioritizes the principles of balance and justice for all parties (Muhyidin et al., 2022). Imam al-Shafi'i's view that suggests different punishments for the main perpetrator and additional perpetrators is more appropriate in the context of modern law in Indonesia.

CONCLUSION

Imam Malik based his view on a number of verses in the Qur'an, including Qs. al-Baqarah verse 178, Qs. al-Isra' verse 33, Qs. an-Nisa verse 93. Hadiths narrated by Imam Malik reinforce this view, such as in the story of Umar bin al-Khattab who punished several people who conspired in murder, indicating

that all murderers, including those who participated, deserve qishash.

Like Imam Malik, Imam al-Shafi'i also refers to Qs. al-Baqarah verse 178 and Qs. al-Maidah: 45 in determining the punishment of qishash as well as Hadith narrated by Ibn Majah, Hadith narrated by Darul Quthni and Hadith narrated by Ahmad, but Imam al-Shafi'i's approach gives more leeway to the victim's guardian. The verse indicates that qishash is a right, not an obligation, for the victim's guardian.

Imam Malik in determining the punishment for perpetrators who participate in intentional murder uses a method of legal *istinbath* that focuses on the principles of *mantuq* and *qiyas*. *Mantuq* refers to texts or arguments that explicitly support a law, while *qiyas* is an analogy method to equate new cases with similar cases that already have legal provisions.

In contrast, Imam al-Shafi'i took a different approach. He relied more on the *mantuq* method, which is taking the law directly from the texts of the Qur'an and Hadith, without using other *istinbath* methods such as *ijma'* or *qiyas*. According to him, the evidence in the Qur'an and Hadith is clear enough to regulate the position and punishment for the perpetrators of participation. Imam al-Shafi'i emphasized that those who merely assist in murder, but do not act as the main perpetrator, should be subject to *ta'zir*, which is a punishment that is left to the discretion of the judge and usually takes the form of imprisonment or other lesser punishment.

The researcher analyzes that although both Imam Malik and Imam al-Shafi'i offer a strictly legal approach to the case of intentional murder, the researcher chooses Imam al-Shafi'i's view, which is more appropriate to be applied in the context of modern law, especially in terms of determining the punishment for perpetrators of participation in the crime.

Imam al-Shafi'i's view is also in line with the Indonesian positive legal system, which recognizes differences in the level of involvement of criminals and provides a foundation for the application of this principle in Indonesia, where the majority of the population follows the Shafi'i school of thought. Therefore, Imam al-Shafi'i's opinion

is more suitable to be applied in Indonesia's modern legal and social context, which prioritizes justice that is proportional and in accordance with the social conditions of society.

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